

# Federal Preemption of State and Local Regulations of Drones

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## Table of Contents

<b>Introduction</b> .....	2
<b>Overview of Federal Preemption</b> .....	2
<b>FAA and Preemption</b> .....	3
<b>FAA and UAS Regulation</b> .....	5
<b>Analysis of Federal preemption of State and Local Laws and Regulations Related to UAS</b> .....	7
<i>Use of UAS by State and Local Agencies</i> .....	7
<i>Licensing of UAS Operations</i> .....	7
Bans or Flight Restrictions of UAS.....	8
Privacy Concerns Associated with UAS.....	8
<b>Conclusion</b> .....	9

## Introduction

While the Federal Aviation Administration (“FAA”) and Congress have struggled to determine if and how to regulate unmanned aircraft systems (“UAS”), an increasing number of state and local governments have attempted to fill the legal and regulatory void. However, one important question remains open: how many of these state and local laws and regulations will be preempted by the FAA’s authority to regulate the national airspace. The resolution of this issue could have a significant impact on the success of the UAS industry as well as on businesses that wish to operate UAS across multiple states.

The following white paper will discuss federal preemption with respect to state and local laws and regulations that impact UAS operations. It begins with a brief overview of the principle of federal preemption. The second section will discuss how courts have applied the principle to matters related to the FAA. Next, the white paper will outline existing federal laws and regulations related to UAS, particularly with regard to commercial operations. Finally, the white paper will apply the principles of federal preemption to various types of state and local laws and ordinances.

## Overview of Federal Preemption

The Supremacy Clause of the U.S. Constitution provides:

“This Constitution and the laws of the United States which shall be made pursuant thereof . . . shall be the supreme law of the land; and the judges of any state shall be bound by them anything in the Constitution or laws of any State to the contrary notwithstanding.”<sup>1</sup>

Courts have interpreted this to mean states cannot enact laws and regulations that conflict with certain federal laws and regulations. The courts generally recognize three types of federal preemption:

1. “express preemption” – when the language of the federal statute reveals an express congressional intent to preempt state laws;
2. “field preemption” – when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for the state to supplement it; and

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<sup>1</sup> U.S. Const. art. VI, para. 2.

3. “conflict preemption” - when compliance with both federal and state law is impossible or when the state law acts as an obstacle to what Congress intended.<sup>2</sup>

However, while FAA’s authority to preempt is broad, it is not unrestricted. For example, several courts have made it clear that the “historic police powers of the States [are] not superseded by . . . . Federal Act unless that [is] clear and manifest purpose of Congress.”<sup>3</sup> Similarly, courts have stated that “despite the variety of opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state laws.”<sup>4</sup>

## FAA and Preemption

There are a number of instances in which courts have found that federal law preempts a state law that pertains to air safety. For example, in *Banner Advertising v. People of Boulder* the Colorado Supreme Court stated:

“[a]mong the enumerated powers and duties of the Secretary of Transportation under the Federal Aviation Act is ‘[t]he control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both.’ 49 U.S.C.A. App. Section 1303(3) (Supp. 1993). The Secretary is directed by the Act to develop plans for and formulate policy with respect to the use of the navigable airspace; and assigning by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitation as he may deem necessary in order to ensure the safety of aircraft and the utilization of such airspace . . . . The Secretary of Transportation is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace.”<sup>5</sup>

Courts have generally characterized the FAA’s authority as “field preemption” since Congress did not expressly provide for preemption, but that the scope of the FAA’s authority was so broad that Congress

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<sup>2</sup> See e.g., *U.S. Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010).

<sup>3</sup> *Banner Advertising Inc. v. People of Boulder*, 868 P.2d 1077, 1080 (Colo. 1994) (quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 515 (1992)).

<sup>4</sup> *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 366 (3rd Cir. 1999).

<sup>5</sup> 868 P.2d 1077, 1082 (Colo. 1994).

must have intended for federal preemption. For example, a number of courts have struck down state and local laws and regulations attempting to limit the frequency, altitude and/or the times of flights.<sup>6</sup>

It is also important to note that courts have broadly interpreted the definition of what constitutes air safety. For example, in *US Airways, Inc. v. O'Donnell*<sup>7</sup> the court found that New Mexico's regulatory scheme for alcoholic beverages as applied to airline passengers, fell within the field of aviation safety and that Congress intended for federal law to exclusively occupy that field. In *Banner Advertising v. People of Boulder*<sup>8</sup> the court found that a local ordinance prohibiting commercial aerial towing of signs was invalid as the activity had been authorized by the FAA.

However, there is not universal agreement among the courts as to the scope of federal preemption on aviation matters. For example as stated above there is a presumption that that a state's "police" powers are not preempted unless that is the "clear and manifest purpose of Congress."<sup>9</sup> Police power concerns the right of the state to regulate and enforce order within its territory for the betterment of health, safety and general welfare of its citizens.<sup>10</sup> As a result, under facts similar to those in *Banner*, the court in *Skysign International Inc. v. City and County of Honolulu*<sup>11</sup> held that the FAA's authority did not preclude enforcement of local ordinances regulating aerial towing. Specifically, the court found that local ordinance was in part intended to protect against "danger that distracting aerial advertising poses to motorists below" and that FAA's authority to protect individuals and property on the ground was not exclusive. In another case, the court in *Riggs v. Burson*<sup>12</sup> found that a state statute which prohibited use of land for a heliport within nine miles of a national park boundary was not preempted by Federal Aviation Act.<sup>13</sup>

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<sup>6</sup> See e.g., *City of Burbank v. Lockheed Air Terminal*, 411 US 624, 637 (1973) (Supreme Court finds city ordinance prohibiting jet aircraft from taking off between 11:00 p.m. and 7:00 a.m. was invalid); *Price v. Charter Tp. of Fenton*, 909 F.Supp. 498 (E.D. Mich. 1995) (Court finds that local ordinance that limited frequency of flights of certain airplanes was preempted by Federal Aviation Act); *Int'l Aerobatics Club Chapter 1 v. City of Morris*, 78 F.Supp.3d. 767, 781 (N.D. Ill. 2014) (Court holds that ordinance allowing city to enforce FAA rules governing flight operations was preempted by Federal Aviation Act.)

<sup>7</sup> 627 F.3d 1318 (10th Cir. 2010).

<sup>8</sup> 868 P.2d 1077, 1081 (Colo. 1994).

<sup>9</sup> *Cipollone v. Liggett Group*, 505 U.S. 504, 515 (1992)

<sup>10</sup> *Sligh v. Korkwood* 237 U.S. 52 (1915).

<sup>11</sup> 276 F.3d 1109, 1116 (9th Cir. 2002).

<sup>12</sup> 941 S.W.2d 44, 49 (Tenn. 1997).

<sup>13</sup> See also *Nat'l Bus. Aviation Ass'n, Inc. v. City of Naples Airport Auth.*, 162 F.Supp.2d 1343 (M.D. Fla. 2001) (Airport authority's ban of certain aircraft due to noise was permitted.)

## FAA and UAS Regulation

The FAA has stated on a number of occasions that UAS are aircraft and therefore operation of a UAS is subject to FAA authority. This position was affirmed by the National Transportation Safety Board (NTSB) in November 2014 in *Huerta v. Pirker*.<sup>14</sup> In addition, the FAA has stated that it is “responsible for the safety of U.S. airspace from the ground up.”<sup>15</sup>

However, despite growing pressure from industry and Congress to become more forward leaning the FAA has been very slow to adopt regulations for commercial use of UAS. As a result, UAS operations for commercial purposes have been effectively prohibited in the U.S. In response, Congress gave the FAA several directives with regard to UAS in the FAA Modernization and Reform Act of 2012. For example, it directed the FAA not to regulate drone use by hobbyists, provided the hobbyists met certain conditions.<sup>16</sup> Congress also directed the FAA to create several UAS test sites across the country.<sup>17</sup> In addition, Congress directed the FAA to develop a plan to provide for the safe integration of UAS into the national airspace by no later than September 2015.<sup>18</sup>

The FAA identified the UAS tests sites pursuant to the Act. As part of the selection process these test sites were required to develop privacy policies. However, in the fall of 2014 it became clear that the FAA was going to miss the September 2015 deadline for UAS integration into the national airspace. As a result, it announced a process by which individuals and companies could request an exemption from several of the most burdensome FAA requirements associated with commercial use of aircraft. These exemptions, referred to as “Section 333” exemptions, contained a number of conditions including those that (i) required the UAS weigh less than 55 lbs. fully loaded; (ii) required the operator of the UAS have a pilot’s license; (iii) restricted how high the UAS could operate; (iv) placed restrictions on operations close to airports; (v) prohibited operations over densely populated areas; and, (v) limited how close a UAS could fly near unprotected persons and property not directly involved in operations. There were no conditions or requirements that were intended to address the perceived privacy concerns associated with UAS.

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<sup>14</sup> NTSB Order No. EA-5730 (November 18, 2014)

<sup>15</sup> See e.g., [Busting Myths about the FAA and Unmanned Aircraft](https://www.faa.gov/news/updates/?newsId=76240), (Mar. 7, 2014, 4:47PM), <https://www.faa.gov/news/updates/?newsId=76240>.

<sup>16</sup> FAA Modernization and Reform Act of 2012 §336.

<sup>17</sup> FAA Modernization and Reform Act of 2012 §332(c)(1).

<sup>18</sup> FAA Modernization and Reform Act §332(a)(3).

In February 2015, the FAA published a Notice of Proposed Rulemaking (NPRM) that would regulate commercial use of small UAS.<sup>19</sup> The NPRM includes many of the conditions included in the Section 333 process, such as the UAS must weigh less than 55 lbs., operational height restrictions and restrictions on flying in proximity of persons and property. However, the NPRM does away with a pilot license requirement and instead contemplates a certification process for UAS operators. The FAA closed the public comment period on the NPRM in April, 2015 and although they have not given a firm date as to when they will publish the final rules, they have suggested that they hope to have them published in the summer of 2016. There were also no conditions or requirements in the NPRM that were intended to address privacy concerns. In fact, the Electronic Privacy Information Center has filed a lawsuit against the FAA for failing to address privacy in the NPRM.<sup>20</sup>

While there are no privacy-related conditions or requirements included in the NPRM, in February, 2015 the White House issued the Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems (the “Executive Memorandum”).<sup>21</sup> The Executive Memorandum had two primary objectives. First, it directed federal agencies to develop privacy policies associated with their use of data collected from UAS. The second objective was to direct the National Telecommunications & Information Administration (NTIA) to create a multi-stakeholder process consisting of interested parties in the private sector to address privacy, civil liberty and civil right concerns associated with commercial and private use of UAS. This effort, which is ongoing, is not intended to develop laws or regulations, or even a “code of conduct”. Instead, the objective is intended to develop a set of “best practices”.<sup>22</sup>

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<sup>19</sup> Federal Aviation Administration, Operation and Certification of Small Unmanned Aircraft Systems, (2015), [https://www.faa.gov/regulations\\_policies/rulemaking/recently\\_published/media/2120-AJ60\\_NPRM\\_2-15-2015\\_joint\\_signature.pdf](https://www.faa.gov/regulations_policies/rulemaking/recently_published/media/2120-AJ60_NPRM_2-15-2015_joint_signature.pdf).

<sup>20</sup> See e.g. EPIC v. FAA: Challenging the FAA’s Failure to Establish Drone Privacy Rules, <https://epic.org/privacy/litigation/apa/faa/drones/>.

<sup>21</sup> The White House, Office of the Press Secretary, Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems (Feb. 15, 2015) (<https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua>).

<sup>22</sup> For more details see National Telecommunications and Information Administration, Multistakeholder Process: Unmanned Aircraft Systems, (Nov. 15, 2015) <http://www.ntia.doc.gov/other-publication/2015/multistakeholder-process-unmanned-aircraft-systems>.

## Analysis of Federal preemption of State and Local Laws and Regulations Related to UAS

There are several methods in which states and localities are trying to regulate the use of UAS. Given how courts have analyzed federal preemption with respect to the FAA, it is necessary to separately analyze each method.

### *Use of UAS by State and Local Agencies*

Several states have placed restrictions on use of UAS by state and local government agencies. For example, in Virginia state and local agencies, including law enforcement, may not use an unmanned aircraft for surveillance or to obtain evidence against an individual without a search warrant.<sup>23</sup> In addition, any evidence obtained via an unmanned aircraft without a search warrant is not admissible in any criminal or civil proceeding. However, warrants are not required if state and local agencies are using unmanned aircraft for non-law enforcement purposes including research or development and the assessment of wildlife, floods, or traffic. Similarly, in Nevada legislation limits law enforcement's use of UAS to obtain evidence or information about an individual where the individual has a reasonable expectation of privacy, such as his home.<sup>24</sup> Law enforcement agencies must obtain a warrant before using a UAV to obtain any evidence or information unless the person gives written consent.

These restrictions are often broader than those imposed by the FAA. However, the principle of federal preemption was not intended to prohibit a state from placing limitations on how state or local government agencies can operate. As a result, these types of laws are not likely to be subject to federal preemption, particularly if they include exceptions, such as use during emergencies or Amber Alerts.

### *Licensing of UAS Operations*

At least one state has passed a law that would require an operator in its jurisdiction to obtain a license before operating a UAS. Specifically, North Carolina established a permit requirement for anyone who operates an unmanned aircraft for commercial purposes. An individual must be at least 17

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<sup>23</sup> Va. Code Ann. § 19.2-60.1 (2015).

<sup>24</sup> Nev. Rev. Stat. § 493.20 (2015).



years old, have a valid driver's license from any state or territory, and passed the state's knowledge test for operating an unmanned aircraft.<sup>25</sup>

The FAA has set forth the current requirements to operate a UAS for commercial purposes in the Section 333 process. One of the key requirements is that the operator have a pilot's license. The FAA has also explicitly addressed the issue in the NPRM by including a certification requirement for operators. As a result, it has clearly stated its intent to regulate this matter with respect to UAS. Since any licensing requirement would appear to be directly related to air safety, it is likely that a court would find this type of law to be preempted by federal law.

### Bans or Flight Restrictions of UAS

A number of localities have introduced bans on the use of UAS. For example, the Ocean City, New Jersey city council recently banned the operation of drones within five miles of the local airport. In Celina, Ohio there is a ban on drone operations within the city limits. A similar proposal would ban the use of drones in Chicago over churches, schools, hospitals and city-owned property without consent. At the state level, Nevada recently passed a law that would prohibit operating over a property at less than 250 feet if requested by the property owner, and other states have either considered or adopted altitude restrictions.

The FAA has developed a number of conditions on UAS operations that relate to safety in both the Section 333 process and the NPRM. These include a number of restrictions related to operations over private property. As a result, courts are likely to find the FAA's authority preempts complete bans of UAS operations at the state and local level, absent very unusual circumstances. Laws, statutes and ordinances that contain altitude limitations are also likely to receive close scrutiny by the courts. However, in some jurisdictions such limitations may be considered with the state's "police" authority if enacted in order to protect against trespass or nuisance.

### Privacy Concerns Associated with UAS

There are a number of perceived privacy concerns associated with UAS. While there are several bills before Congress intended to address these concerns, none are likely to pass in the near future. As a result, several states have passed laws intended to protect their citizens' privacy.

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<sup>25</sup> N.C. Gen. Stat. § 63-96 (2015).

For example, California laws were recently amended to provide that an operator entering the airspace over an individual's property and taking a picture, sound recording, or any other physical impression meets the standard of an invasion of that person's privacy.<sup>26</sup> As a result, a person no longer has to physically touch or enter another's land to be liable for an invasion of privacy. Similarly, a recent Florida law prevents an individual, state agency, or political subdivision from using a drone to take an image of private property and/or the individual while he or she is on the property if the person has a reasonable expectation of privacy on such property.<sup>27</sup>

State and local laws that purport to address privacy concerns are likely to be the biggest challenge to court from a preemption standpoint. On the one hand, protecting privacy is generally considered within a state's "police" authority. Moreover, other than requiring the Congress-imposed test sites to develop a privacy policy, the FAA has carefully avoided issues associated with protecting privacy. In fact, as described above it was sued because it did not include privacy requirements or conditions in the Section 333 process and/or the NPRM. Moreover, the White House directed NTIA to lead the development of best practices, further supporting the position that the FAA is unable and unwilling to get involved in this important issue. As a result, absent future federal legislation on this matter, it will be difficult for a court to find that Congress or FAA intended to preempt the states' authority in this area.

On the other hand, privacy can be broadly defined and laws to protect privacy can take many forms. Courts may find some laws address, either intentionally or unintentionally, issues of air safety or other areas subject to preemption by the FAA. In those cases, courts may strike down the law in its entirety or strike specific provisions that are particularly burdensome.

## Conclusion

Although there is strong presumption that the FAA's authority trumps state and local laws and regulations, states do have some authority with regard to matters that impact aviation. The state's authority is likely to be even greater given the disruptive nature of UAS. In fact, in a recent talk at a meeting of the American Bar Association, a lawyer from the FAA suggested that the traditional aviation

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<sup>26</sup> Cal. Civ. Code § 1708.8 (2015).

<sup>27</sup> Fla. Stat. § 934.50 (2015).

rules do not easily apply to UAS and the FAA is reconsidering the role of state and local authorities in the process.<sup>28</sup>

It is important to note that while federal preemption of state and local laws is important, there are several other Constitutional issues associated that will become important. For example, some believe that certain state laws could violate First Amendment rights of freedom of speech and freedom of the press, particularly with regard to use of UAS by the media. Others have suggested that the Commerce Clause of the Constitution may preempt certain state laws. The Commerce Clause, which gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes”,<sup>29</sup> has been used by the courts to strike down state laws that impact other transportation industries. For example in *Kassel v. Consolidated Freightways Corporation of Delaware*<sup>30</sup> the Supreme Court held that an Iowa statute which prohibited the use of 65-foot double-trailer trucks within its borders, but allowed the use of 55-foot single-trailer trucks and 60-foot double-trailer trucks, impermissibly burdened interstate commerce as the evidence suggested that the longer trucks were as safe as the shorter trucks.

However, even if courts do apply preemption broadly, there are a number of state common law actions that will likely arise that will not be preempted by federal law. One example is nuisance, generally defined as an unlawful interference with the use and enjoyment of a person's land. Trespass, generally defined as entering the owner's land or property without permission, is another example. In addition, common law principles of negligence and liability will likely apply as well.

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<sup>28</sup> See 5th Annual Review of the Field of National Security Law (Nov. 6, 2015) at [http://www.americanbar.org/news/abanews/aba-news-archives/2015/11/video\\_highlightsse.html](http://www.americanbar.org/news/abanews/aba-news-archives/2015/11/video_highlightsse.html).

<sup>29</sup> U.S. Const. art. I sec 8 cl 3.

<sup>30</sup> 450 U.S. 662, 679 (1981).