

# Regulation of Drones: Federal Preemption and the Role of the State

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# Agenda

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## >Federal Preemption

## >Application to Various State and Local laws

- Application to Privacy-related laws
- Application to proposed Virginia law

## >Other Considerations

- Common law
- Commerce Clause

## >Another Approach

# Federal Preemption

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- > **Supremacy Clause of the U.S. Constitution** – establishes that the U.S. Constitution and federal law generally has precedence over state law.
- > **Courts recognize three types:**
  - > Express Preemption – when the language of the federal statute reveals an express congressional intent to preempt state laws.
  - > 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.
  - > 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.

# FAA Authority

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## > In General

### > Federal Aviation Act of 1958

- > “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 safety and efficiency”

## > With Regard to Drones

### > FAA Modernization and Reform Act of 2012

- > Directs Secretary of Transportation to safely integrate unmanned aircraft systems into the national airspace by September 2015.

### > Huerta v. Pirker NTSB Order No. EA-5730 (Nov 17, 2014)

- > Recognized drone as aircraft subject to FAA authority.

# Federal Oversight of Drone Operations

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- > **FAA has taken a number of drone-related steps, including:**
  - Developed Section 333 Exemption Process
  - Published Notice of Proposed Rulemaking
  - Created Pathfinder Program
  - Implemented Registration Process for hobbyists
  - Issued FAA Fact Sheet on State and Local Law
- > **Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems**
- > **Several Bills introduced in Congress**

# The Wide Range Of commercial Uses For drones .

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- > **Insurance**
- > **Disaster Response**
- > **Construction**
- > **Real Estate**
- > **Inspection of linear infrastructure**
- > **Media (movie, films)**
- > **Newsgathering**
- > **Real Estate**
- > **Aerial Photography**

# . . . Triggers a Number of Potential Legal Issues

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- > **Prohibitions and Restrictions on Operations**
- > **Use by Law Enforcement and Government Agencies**
- > **Trespass**
- > **Nuisance**
- > **Noise Ordinances**
- > **Liability**
- > **Privacy**
- > **Specific use-regulations**
  - Hunting
  - Food Delivery

# Variety of State Laws Introduced

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- > **Limit Use of UAS by State and Local Agencies**
- > **Requiring Licensing for UAS Operations**
- > **Prohibitions Against Using Drone Hunting**
- > **Prohibitions Against Arming Drones**
- > **Bans on UAS Operations**
- > **Restrictions on Operations**
  - Operational Restrictions
  - Data Collection/Use
  - Privacy? Safety?

# FAA Fact Sheet

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- > **Published December 2015**
- > **State and Local Laws for Which Consultation with the FAA is Recommended**
  - > Operations UAS restrictions on flight altitude, flight paths, operational bans; any regulation of the navigable airspace
- > **State and Local Laws Within State and Local Government “Police” Power –**
  - > Laws related to land use, zoning, privacy, trespass and law enforcement
    - > Requirements for police to obtain a warrant prior to using a UAS for surveillance
    - > Specifying that UAS may not be used for voyeurism
    - > Prohibitions on using UAS for hunting or fishing
    - > Prohibitions on attaching weapons

# Representative Court Cases

- > **French v. Pan Am Express, Inc.** 869 F.2d 1 (1<sup>st</sup> Cir. 1999)
  - First Circuit held that state regulation of drug tests for pilots was preempted.
- > **U.S. Airways Inc. v O'Donnell** 627 F.3d 1318 (10<sup>th</sup> Cir. 2010)
  - Court of Appeals for 10<sup>th</sup> Circuit held that state liquor regulation was implicitly preempted as applied to airline flights.
- > **Martin v. Midwest Express Holdings, Inc.** 555 F.3d 806 (9<sup>th</sup> Cir. 2009)
  - State standards of care for airplane stairs were not preempted because no requirements in Federal Aviation Requirements (FARS).
- > **Skysign International Inc. v. City and County of Honolulu** 276 F.3d 1109 (9<sup>th</sup> Cir. 2002)
  - Local regulation of signage could be applied to banner-towing company.

# Representative Court Cases

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- > **City of Burbank v. Lockheed Air Terminal Inc.** 411 U.S. 624 (1973)
  - Court held that a municipal noise ordinance was preempted by federal law.
- > **Gilstrap v. United Airlines, Inc.** 709 F.3d 995(9<sup>th</sup> Cir. 2013)
  - State standards of care may be preempted by pervasive federal regulations.
  - State remedies may survive even if the standard of care is preempted.
- > **Lewis v. Lycoming** 957 F. Supp. 2d (E.D. PA 2013)
  - State product liability claims are not preempted on field preemption grounds.

# Representative Court Cases

- > **Command Helicopters, Inc. v. City of Chicago** 691 F. Supp. 1148 (N.D. Ill 1988)
  - Local regulation of helicopter heavy lift operations preempted because it conflicted with FAA regulations on heavy lift operations.
- > **Condor Corp. v. City of St. Paul** 912 F.2d 215 (8<sup>th</sup> Cir. 1990)
  - Eighth Circuit held that denial of a permit for a heliport did not intrude upon exclusive federal power.
- > **Gustafson v. City of Lake Angelus** 76 F.3d 778 (6<sup>th</sup> Cir. 1996)
  - Sixth Circuit held that a local ordinance prohibiting operations of seaplanes on city-owned lake not preempted.

# Application to Current Drone Laws

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## > 1. Requiring a License to Operate a Drone

- Example: North Carolina law requires a drone operator to be at least 17 years old, have a valid driver's license and pass a state knowledge test.
- Likely Result: FAA has clearly addressed the requirements for drone operators and this is within the FAA's mandate so court would find N.C. law to be preempted.

## > 2. Use of Drones by State and Local Government Agencies

- Example: In Virginia, state and local law enforcement and regulatory agencies must obtain a warrant before using a drone, except in defined emergency situations.
- Likely Result: Not preempted by current federal law.

# Application to Current Drone Laws

## > 3. Prohibitions Against Using Drones for Hunting

- Example: New Hampshire Fish and Game Department banned the use of drones for hunting
- Likely Result: Since hunting within traditional state “police” powers and issue is not currently addressed by federal law, court would likely uphold regulation.

## > 4. Complete Bans on Operating Drones

- Example: Celena, Ohio banned drone operations within city limits.
- Likely Result: Likely preempted by FAA permits operations of drones subject to conditions and limitations.

# Drones and State Privacy Laws

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> **Federal Government has been largely silent with regard to drones and privacy**

> **Federal Aviation Administration**

- Required Privacy Policy for test sites.
- Not addressed in Section 333 process or Notice of Proposed Rulemaking (NPRM).
- Being sued by Electronic Freedom Foundation (EFF) for failing to address.

> **Congress**

- A number of bills before Congress, but nothing has passed

> **White House**

- Executive Memorandum imposed requirements on federal agencies but only suggest “Best Practices” for private/commercial use.

# Recent State Drone Privacy Laws

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## **Privacy is considered a state and local “police” power**

- Data Breach laws
- Common law privacy torts

## **Wide range of restrictions that are related (in part or in whole) to privacy concerns, including**

- Altitude Restrictions
- Permission of Property Owners Before Operating Over
- Consent of Individuals Before Collecting Data

# Application Of Recent Privacy-Related State Laws

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> **Likely Result: It Will Depend!**

> **As cases show, decisions will be very fact specific**

> **Important Considerations:**

- Does the intent of the law fall within traditional state “police” powers?
- Has the FAA (or Congress) addressed the intended issue?
- Is there a conflict between the two?
- What jurisdiction?
- In many instances it will depend upon the language of the law/regulation and the success of the lawyers in presenting their respective cases

> **Additional Considerations**

- Trespass, Nuisance

## §18.2-386.3. Unlawful creation of image of another by unmanned aircraft system; penalty.

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- > A. It is unlawful for any person, without lawful authority, to use an unmanned aircraft system, as defined in § 19.2-60.1, to enter into the airspace above the private real property of another person and knowingly and intentionally create any videographic or still image by any means whatsoever of any individual located on such real property (i) without the consent of the owner of such property or other person lawfully in charge of such property, (ii) under circumstances in which the individual whose image is created would have a reasonable expectation of privacy, and (iii) with the predominant intent to create an image of the individual depicted in violation of such person's reasonable expectation of privacy. A violation of this section is punishable by a \$250 civil penalty, which shall be paid into the state treasury.**

## §18.2-386.3. Unlawful creation of image of another by unmanned aircraft system; penalty.

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- > **B. This section shall not apply to any person who uses an unmanned aircraft system to create a videographic or still image that depicts an individual on private real property if (i) the violation of the individual's reasonable expectation of privacy is not the predominate purpose for the creation of such image and (ii) the creation of the image is reasonably related to any lawful business, purpose, or activity.**
- > **2. That, prior to July 1, 2019, no locality may regulate the use of a privately owned unmanned aircraft system, as defined in § 19.2-60.1 of the Code of Virginia, within its boundaries.**

# Additional Considerations - Common Law

## > United States v. Causby 328 U.S. 256 (1946)

- “The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as be a direct and immediate interference with the enjoyment and use of the land”

## > **Restatement (Second) of Torts (§159)**

- “In the ordinary case, flight at 500 feet or more above the surface is not within the “immediate reaches”, while flight within 50 feet, which interferes with actual use, clearly is and flight within 150 feet, which also so interferes, may present a question of fact.”

# Additional Considerations - Commerce Clause

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- > **Grants Congress the right to:**
- > “regulate **commerce** with foreign nations, and among the several states, and with the Indian tribes.”
- > Interstate commerce broadly interpreted, to include:
  - Channels of intrastate commerce
  - Instrumentalities . . . Person or things in interstate commerce
  - Those activities . . . That substantially affect interstate commerce
- > Whether regulated activity “substantially affects” interstate commerce?

# Examples

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- > **Raymond Motor Transportation v Rice 434 U.S. 429 (1978)**
  - Supreme Court invalidated a Wisconsin law that limited truck length to 55 feet.
- > **Bibb v Navajo Freight 359 U.S. 520 (1959)**
  - Supreme Court invalidated Illinois law requiring trucks to have contoured rear fender mudguards rather than the straight mud guard flaps.
- > **Pacific Co. v Arizona 325 U.S. 761 (1945)**
  - Supreme Court invalidated Arizona's law prohibiting trains from crossing the state that contained more than 70 freight cars.

# Alternate Approach for Virginia

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- > **Most [all] States and localities are looking at laws and regulations that restrict operations.**
- > **Full operational use of drones will require an extensive review/overhaul of existing legal and regulatory framework.**
- > **People are not thinking about these laws/regulations because focus has been on FAA.**
  - > e.g. Uber, AirBnB,
- > **Lack of legal/regulatory framework helps innovation but hinders adoption, particularly by larger more established entities.**
- > **A favorable legal and regulatory environment will hasten growth of UAS industry in Virginia.**

# Another Approach For Virginia

## > **Types of laws/regulations to consider:**

- > Enter into Pathfinder Program with FAA.
- > Define what constitutes a reasonable expectation of privacy with regard to data collected from drones.
- > Designate times/altitudes when drone overflights are permitted over private property.
- > Include acquisition of drones/drone services in state agency budgets
- > Restrict hobby use in designated locations (i.e. critical infrastructure), to make it easier for commercial use of drones.
- > Restrict ability of localities to develop more restrictive laws.

## > **Recommend a full-scale review of applicable laws and regulations**

- > Any changes to Department of Health regulations required to permit use of drones for food delivery?
- > Definition of an “operator” in various regulations.
- > Insurance pool for liability purposes