

This Summer Is for Flying and Fighting

WHY THE DRONE INDUSTRY NEEDS YOUR HELP

In this article, I am ringing the community alarm bell because, once again, our industry is under attack—but we still have time to contact Congress and demand action. This column will cover the recent court decision overturning the drone hobbyist registration rule of the Federal Aviation Administration (FAA), the 2017 FAA Reauthorization Act, and the 2017 Drone Federalism Act. This summer may be a tipping point regarding whether this industry will soon groan under the weight of not only hobby regulation but also a never-before-seen usurpation of federal airspace jurisdiction by local and state authorities; this effort will be aided by the federal actors themselves: U.S. Senator Dianne Feinstein and her Drone Federalism Act as well as the FAA Administrator himself, Michael Huerta. It takes a lot for me, a seasoned lawyer, to be shocked. But these recent events have gotten my attention; after you read this article, I hope you will also be prompted to take needed action.



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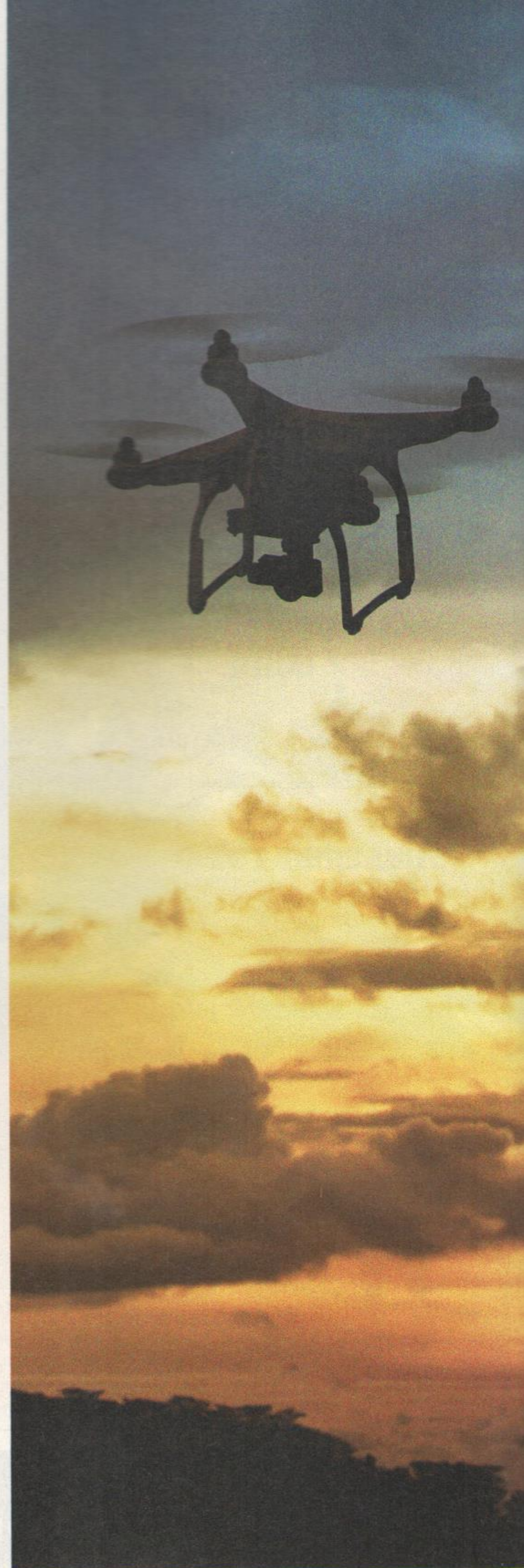
With a legal background in corporate outside counsel, civil litigation, insurance defense, and intellectual property and drone/UAV law, Jeffrey belongs to the FVAC radio-control club in St. Charles, Illinois. His interest in flying radio control led him to research new technologies, including first-person viewing (FPV) and drones.

We Won the Hobbyist Registration Case (But It's Already Moot)

In May 2017, we received wonderful news: The D.C. Circuit Court of Appeals found in favor of RC hobbyist and insurance lawyer John Taylor. The court found that the FAA's hobbyist registration regulation from 2015 violated Section 336 of the 2012 FAA Modernization and Reform Act. Specifically, the court stated: "Statutory interpretation does not get much simpler. The Registration Rule is unlawful as applied to model aircraft." This was a terrific win, and I applaud Mr. Taylor for taking it on.

While many wait to see if the FAA will appeal this decision, it doesn't really matter because the game is already on for the next challenge. You see, the court's hobby registration decision was based on the 2012 FAA Reauthorization Act. It is already time for Congress to write and vote on the 2017 FAA Reauthorization Act this summer. And you should be concerned.

Major industry groups, including the industry powerhouse organization the Association for Unmanned Vehicle Systems International (AUVSI) and the Small UAV (Unmanned Aerial Vehicle) Coalition, have stated their support for hobbyist registration and oppose the court's decision. AUVSI's president and CEO Brian Wynne said, "[AUVSI plans] to work with Congress on a legislative solution that will ensure continued accountability across the entire aviation community, both manned and unmanned." I like Mr. Wynne, but I don't think he is right when it comes to registering hobbyists who can only fly within line of sight. When I applied my FAA registration sticker to my traditional RC fixed-wing airplane, all I could think of was, "this is just so stupid." I might be willing to consider the registration of drones that are capable of autonomous, beyond-line-of-sight flights, especially if they are not already registered through the Academy of Model Aeronautics. But otherwise, no—not for hobbyists.



Increasing Local Regulations

In addition to preventing more hobbyist regulation, you should be aware of two other issues this summer that require action. First, there's an ever-increasing pace of improper regulation by local governmental authorities across the country that can only be effectively fought by adding the legal doctrine called "express federal preemption" to the 2017 FAA Reauthorization Act. Doing so would make it clear that local and state governmental authorities would not be able to meddle



with the traditional federal regulation of our national airspace. "Express federal preemption" means that Congress has said that only the feds can regulate drone airspace. Anything less and you have room for loopholes with local- and state-government lawyers arguing their side and on the other side a weaker legal argument called "implied" or "field preemption." But as I explain below, this won't happen anyway because hobbyists (and most drone companies) can't afford to hire lawyers, so local and state governments will ride over your rights

without any resistance at all. Second, Congress must vote no on the new bill introduced by U.S. Senator Dianne Feinstein: the Drone Federalism Act. And in news that may shock you (as it shocked me), today's current FAA leadership isn't the steadfast stalwart of traditional federal authority of national airspace anymore. FAA Administrator Michael Huerta is open to discussing local and state jurisdiction of drone airspace and operations. This has manned aviation groups alarmed, and you should be alarmed too.



Hobbyists Need Federal Protection

Hobbyists need federal protection. Most aren't skillful lawyers like Mr. Taylor, and they can't afford to press a legal fight on their own. A real legal challenge to even a park-district ordinance banning drones would take tens of thousands of dollars in legal fees. Appealing the decision one or more levels up? That's a six-figure fight. So we either win at the federal level right now with a crystal-clear provision in the 2017 FAA Reauthorization Act that says national airspace and all aspects of drone operations are strictly a federal matter for Congress and the FAA to oversee or the fight is probably lost. Legally speaking, this doctrine is called "express federal preemption," and we must have Congress include it in the 2017 FAA Reauthorization Act. Without it, you will see a lot more local and state regulation of drones, both commercial as well as hobbyist. It will be impossible to play "whack-a-mole" and sue all these local and state governments and turn back the tide. And probably none will be challenged anyway because, as I said, most hobbyists can't afford to hire a lawyer.

The Fight over Airspace

I am seeing what I believe to be two dangerous actions giving local and state governments the power to regulate drone airspace. The first is an effort in the U.S. Senate to take away the traditional exclusive federal authority of the FAA to regulate our national airspace. The Drone Federalism Act, introduced in May by Senators Dianne Feinstein (D-CA), Richard Blumenthal (D-CT), Mike Lee (R-UT), and Tom Cotton (R-AR) is an *anti*-express federal preemption law. It reads, in part, to allow "State, local, or tribal [governments to] issue reasonable restrictions on the time, manner, and place of operation of a civil unmanned aircraft system that is operated below 200 feet above ground level or within 200 feet of a structure" and to ensure that these local regulations are not preempted by federal law. These "reasonable" regulations include limits on speed, noise, and flying over public and private land. In a statement, Senator Feinstein says, "This bill allows communities to create low-altitude speed limits, local no-drone zones or rules that are appropriate to their own circumstances." In addition, Representative Jason Lewis (R-MN) has sponsored the Drone Innovation Act, which would define operations of civil UAS (unmanned aircraft systems) under 200 feet and reportedly ban drones from flying over property without the permission of the property owner. According to a study by the Center for the Study of the Drone at Bard College, 135 localities in 31 states have enacted their own local drone laws in recent years. The study states that the most common local restrictions include prohibitions against flying drones over public property and private property without the property owner's consent. Traditional aviation law is clear that these types of proscriptions are preempted by federal law. But low-altitude drone operations are not being given this traditional deference.

The second dangerous action to give local and state governments the power to regulate drone airspace comes from the current head of the FAA itself, Administrator Michael Huerta. Anyone who thinks the FAA leadership wouldn't dare to allow local and state authorities to usurp traditional federal jurisdiction is, in my opinion, dead wrong. Why? At the Drone Advisory Committee meeting on May 3 in Herndon, Virginia, Mr. Huerta is quoted as saying, "I have a very clear sense of what existing FAA authorities are [and] what our processes are to enforce them. ... I don't have a great deal of clarity in my mind as to what state and local and government entities would desire to regulate."

And at the meeting of the U.S. Conference of Mayors in Washington, D.C., Mr. Huerta is quoted as saying, "We are open to looking at the question of how we can resolve this; the first thing we need to understand is what it is—what exactly the state and local governments would like to [control] and how can we find a way to coexist."

From my perspective, this kind of talk from someone holding the top position at the FAA is akin to World War II's Neville Chamberlain practicing appeasement by asking Germany, "Just how much of Europe would you like? Maybe just a little would be OK." I do not think I am the only one who feels alarmed. Heidi Williams, director of air traffic services and infrastructure at the National Business Aviation Association (NBAA), issued a statement in response to Mr. Huerta, stating, "The NBAA is concerned that the FAA may be open to ceding any of its authority over airspace and aviation safety to local, state and regional organizations interested in regulating small drone operations. The possibility of local, state or regional entities developing independent policies and procedures raises many concerns."

And according to reporter Bill Carey, of *Aviation International News*, Matthew Zuccaro, president and CEO of the Helicopter Association International, responded to Mr. Huerta's statements at the Drone Advisory Committee, saying, "Now we're into areas where we're talking about potentially up to what altitude a local municipality or a state can mandate aeronautical decision making or [exercise] authority over aircraft. ... We're heading down the road where state and municipal authorities seem to be, in my mind anyway, potentially breaching the preemption of airspace control by the FAA. ... As we fly along, certainly in the work we do and the altitudes we fly and the places we land, are we going to have to carry around a computer database and check every town and village that we fly over? We're very concerned about this."

You Need to Fight This Summer—Or It's All Over

If you like flying or doing business with drones in accordance with traditional federal authority, don't want hobbyist regulation, and don't want meddling local and state government regulating our airspace, call or write your congressional representatives in the U.S. House and Senate right now after you finish reading this article. Insist on crystal-clear express federal preemption in the 2017 FAA Reauthorization Act, and ask them to prevent the Drone Federalism Act from becoming law.

In sum, we must insist that Congress (1) maintain the letter and spirit of the current "hands-off" approach to recreational/hobbyist drones and RC aircraft in the new 2017 FAA Reauthorization Act, as it now stands under the current FAA Act's Section 336; (2) include the language known as the "express federal preemption" in the 2017 FAA Reauthorization Act to stop local and state governments from regulating drone airspace; and (3) vote "no" on the Drone Federalism Act.

If there is not a huge grassroots uprising this summer demanding these two things from Congress, we stand to lose, in my opinion, a great deal of autonomy as well as the traditional freedoms from intrusive local governmental regulation of aviation we have enjoyed for generations. Oh, and if you are running a business operating, supporting, or supplying drones, you could lose a lot of money.

To contact your congressional representatives, call the Capitol at 202-224-3121 or visit the following links to find your representative: U.S. Senate—senate.gov/senators, and U.S. House—house.gov/representatives. ✈

Disclaimer: None of the author's accounts or impressions of the FAA UAS Symposium has been reviewed by the FAA, and they are, therefore, just the author's opinion. And as always, none of this article constitutes legal advice. Please consult an attorney if you have legal questions.