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DC Appeals Court Upholds FAA Authority to Establish Safety Standards for Recreational Drones

Transportation Legal Update

The greater availability of Unmanned Aircraft Systems (UAS) to consumers, along with the potential for rapid commercial expansion of UAS, have resulted in both congressional attention and litigation over federal authority in this arena. Who has the authority to regulate the operation of UAS is an active area of litigation in the wake of the FAA Modernization and Reform Act of 2012, Pub. L. 112-95 (codified at 49 U.S.C. § 40101 *et seq*.) (FMRA). One front has been in state and local preemption. For example, in *Singer v. City of Newton*, 284 F. Supp. 3d 125 (D. Mass. 2017), the United States District Court for the District of Massachusetts held that the FMRA and FAA's implementing regulations preempted particular local regulations regarding the operation of UAS over that city, while recognizing that state and local governments have a role to play in UAS regulation.

Another battle has been waged by model aircraft enthusiasts who have challenged the FAA's authority to regulate both model aircraft and UAS generally. Model aircraft have long been a point of FAA uncertainty — the FAA has previously declined to regulate them — and advocates assert the FAA lacks the authority to do so. In the FMRA, Congress largely (but not entirely) exempted "model" aircraft, defined as UAS "flown for hobby or recreational purposes," from the FAA's regulatory power. In response to the revised statute, the FAA promulgated regulations related to UAS, including model aircraft.

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John Taylor, a model aircraft enthusiast, has challenged multiple FAA regulations related to UAS. He won a victory in 2017, when the United States Court of Appeals for the District of Columbia Circuit held that the FAA's regulation requiring the registration of small UAS violated the FMRA's prohibition on regulation of model aircraft, *Taylor v. Huerta*, 856 F.3d 1089, 1093 (D.C. Cir. 2017) (Kavanaugh, J.), although Congress soon restored the rule to effect. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1092(d), 131 Stat. 1283, 1611 (2017). In a second suit, Taylor asserted the FAA's implementation of FMRA § 336 in the regulation Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed.Reg. 42064 (June 28, 2016), which subjects some UAS up to 55 pounds to safety standards similar to commercial UAS, likewise violated the FMRA carve-out for model aircraft. Taylor challenged the UAS regulations codified at 14 C.F.R. §§ 101.41 and Part 107, asserting they exceeded FAA authority.

In *Taylor v. FAA*, published on July 6, 2018, the United States Court of Appeals for the District of Columbia Circuit concluded otherwise. 2018 WL 3320874. In an opinion by Chief Judge Garland, the court held that the FAA has authority to promulgate regulations governing the operation of certain model aircraft pursuant to its mandate to insure safe use of the nation's airspace.

First, the court noted that 14 C.F.R. § 101.41 merely defined the "safe-harbor" for model aircraft, setting out the five operational criteria in FMRA § 336 that such aircraft must meet to be exempt from FAA regulation. Those are that:

(a) The aircraft is flown strictly for hobby or recreational use;

(b) The aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization;

(c) The aircraft is limited to not more than 55 pounds…;

(d) The aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft; and

(e) When flown within 5 miles of an airport, the operator of the aircraft provides the airport operator and the airport air traffic control tower … with prior notice of the operation.

The court took pains to explain that this new regulation also included the exception to the "safe harbor provision" contained in FMRA § 336(c)(3). That exception states:

Nothing in § 336 shall be construed to limit the authority of the [FAA] Administrator to pursue enforcement action against persons operating model aircraft to endanger the safety of national airspace system.

The court reasoned that because 14 C.F.R. § 101.41 mirrored the relevant text of the FMRA, it did not exceed the FAA's authority.

As to the FAA's substantive regulations, Part 107 sets forth restrictions on the operation of UAS, applicable only to aircraft that do not meet the exemption criteria in 14 C.F.R. 101.41. These restrictions include: airspace restrictions, remote pilot certification, visual observer requirements and operational limits. See 14 C.F.R. §§ 107.33, 107.37, 107.41, and 107.61. The court held that because these regulations applied only to UAS that did not meet the "safe harbor" carve-out for model aircraft, the FAA had appropriate authority to establish standards for the safe operations of UAS consistent with the FMRA § 336.

The court rejected a number of additional arguments against the FMRA regulations. It rejected the contention that the FAA lacks statutory authority under Part 107 to regulate any model aircraft based on FAA's previous regulatory interpretation of the scope of UAS regulation, explaining that the UAS regulations arose from new, explicit congressional authority contained in § 336. Chief Judge Garland cautioned that the court's ruling applied only to Part 107, and that the court was not deciding whether the FAA may properly apply regulations promulgated prior to passage of the FMRA to UAS. The court also rejected arguments that Part 107 was "arbitrary and capricious," holding that Part 107 and the rulemaking that led to it was consistent with the FMRA and rulemaking principles.

The *Singer* and the *Taylor* cases are just the start of FMRA cases to come as the boundaries of FAA authority is litigated around the country. At least

for now, the courts appear to be backing the FAA's authority to "integrate unmanned aircraft systems into the national airspace system" as Congress has directed.