

"AS THE DRONE FLIES" LEGAL WHITE PAPER

As the Drone Flies: How to Think About Property Ownership, Federal Preemption, and Airspace Control in the Era of Remotely Piloted Aircraft is a new paper authored by Sara Baxenberg and Josh Turner, experienced uncrewed aircraft systems (UAS or drones) and preemption attorneys who serve as outside counsel to AUVSI. In the article, the authors trace the legal history of property rights, aviation, and federal preemption to demonstrate that the legal frameworks that helped courts and lawmakers understand the skies after the advent of powered flight can be applied in the era of remotely piloted aircraft. The article provides a solid foundation decisionmakers to pursue policies that address constituent concerns about next generation aircraft, promote the advanced aviation industry and the significant social benefits it will bring, and comport with the federal government's expansive authority over aviation safety and airspace navigation.

LEGAL PRINCIPLES



ACTIONS

Some argue that drones—given their small size and ability to fly at low altitudes—raise novel issues about who owns the airspace and whether federal, state, or local government regulation should control. However, these questions aren't new—they were asked and answered at the advent of powered flight.

Property Rights

Under *U.S. v. Causby* and its progeny, individual landowners have a robust right in the surface of their property, but not the airspace itself. Aviation activities impact real property rights only where those activities occur in the "immediate reaches" of the property and "substantially interfere" with the property owner's use and enjoyment of the land.

Preemption

The federal government has exclusive control over U.S. airspace. Because airspace is an instrumentality of commerce, this authority is rooted in the Commerce Clause of the Constitution. Further, given the complexity of the airspace as it has developed, exclusive federal control (under Federal Aviation Administration (FAA) authority) continues to be necessary for safety. Federal law in this area not only preempts inconsistent state and local regulation, but occupies the entire field of aviation safety, including air navigation.

"Navigable Airspace"

While federal law uses the phrase "navigable airspace," there is no "non-navigable" airspace in which landowners have a property right and states and localities are free to regulate. "Navigable airspace" is any airspace in which the FAA authorizes flight, including that in which drones can operate under Part 107 of FAA regulations. For property owners, the relevant question for determining whether their rights are impacted is not whether flights occurred in "navigable airspace," but whether they were in the "immediate reaches" of the land—an independent legal concept.

Recognize Federal Control Over the Airspace.

- Ensure that existing "right to fly" laws include the operation of UAS.
- Avoid laws that directly or indirectly regulate air navigation or aviation safety
- Ensure that existing aviation laws (e.g., takeoff and landing) do not unduly restrict air navigation in the UAS context.
- Adopt state laws that preempt inconsistent approaches by localities.

Leverage Existing Law.

- To address constituent concerns about problematic conduct carried out via drone, consider whether an "extension of self" law making clear that a non-property-based crime or tort committed with a drone is a violation of that existing law.
- Clarify that violations of property-based legal regimes, such as trespass, do not occur when a drone simply flies overhead. Instead, doctrines such as aerial trespass provide the appropriate test.

Tread Carefully with Any Laws Targeted at Drone Operations.

- Ensure that the law does not inadvertently intrude on federally-occupied fields of aviation safety and air navigation.
- Take care to ensure the law is appropriate given the unique characteristics of UAS.