COMMITTEE ON AERONAUTICS NEWSLETTER

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The views and opinions expressed in these articles are those of the authors and do not necessarily reflect the views of the New York City Bar Association.

From the Committee Chair and Committee Secretary:

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The Committee on Aeronautics is very pleased to present this fifth issue of the Committee's Newsletter. The prior issues are posted (by year) on the Committee's section of the New York City Bar's public website (click on the "News" button): http://www.nycbar.org/member-and-career-services/committees/aeronautics-committee.

We hope that our Committee Members and alumni (and, of course, other readers accessing this Newsletter on the Bar's website) continue to find each issue of the Newsletter very interesting.

The Committee continues to meet on a monthly basis. Our meeting this month will be held on March 27th, and, among other Committee business, it will feature a presentation by Jim MacKenzie on Airport Design Issues.

Our Committee continues to discuss plans to sponsor or co-sponsor a 3-hour aviation program for the Bar. At the March 27th meeting, the program planning committee will update the Committee on developments in that regard.

Please stay tuned for more information about upcoming Committee activities.

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SUBCOMMITTEE LIST

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Federal Preemption Subcommittee	Philip Weissman
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International Aviation Treaties Subcommittee	Christopher B. Kende
Regulatory Subcommittee	Racquel H. Reinstein
Technical Advances in Aviation Subcommittee	Jenny A. Urban

COMMITTEE NEWS

Congratulations to Committee Members:

- Jenny A. Urban has joined the law firm of K&L Gates as an associate primarily focusing on aviation and maritime matters.

ARTICLES

Rethinking ITAR

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On September 29, 2017, Elon Musk, the CEO of SpaceX, unveiled his ambitious plan to land on Mars by 2022.[2] For this to be feasible, and to compete in an ever-crowding global marketplace, U.S. aerospace companies need every regulatory advantage. However, some may consider the International Traffic in Arms Regulations or "ITAR" to be a detriment to their progress.

ITAR prohibits the unauthorized export of weaponry from the United States. Section 38 of the Arms Export Control Act (22 U.S.C. 2778) (the "AECA") is the statutory authority for ITAR; it gives the President the power "to control the import and the export of defense articles and defense services" for the purpose of the "furtherance of world peace and the security and foreign policy of the United States."[3] Among the factors to be considered in implementing these regulations are if the object can "contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements." Without question, the U.S. should be controlling the export of weaponry to other countries. But, ITAR could be considered overinclusive: it affects civilian space technology just the same as if it were a weapon of mass destruction.

Under ITAR, spacecraft, launch vehicles, and many other related articles appearing on the "munitions list" are categorized as "defense articles" and subject to export restrictions, regardless of whether they were designed to have a military or civilian purpose.[4] ITAR, among its many constraints, prohibits the unlicensed "export" (i.e. sharing) of the underlying technical data regarding this technology with foreign persons.[5] This includes all information necessary for "the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles."[6] For such defense articles, and their related information, the

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[2] Andy Pasztor, *Elon Musk Projects First Private Trips to Mars by Middle of Next Decade*, WALL ST. J., Sept. 29, 2017.
[3] 22 CFR § 120.1; 22 U.S.C. 2778.
[4] 22 CFR § 121.1.
[5] 22 CFR § 125.2. U.S. Permanent residents are excluded from this regulation. *Id.* at § 120.16.
[6] 22 CFR § 120.10(a)(1).

Directorate of Defense Trade Controls (the "DDTC") must specifically approve such export before it is allowed to happen.[7]

The inability to share the underlying technical data related to space exploration impacts the U.S. space industry, inhibiting the ability of U.S. entities to cooperate with international partners or to hire foreign employees.

International cooperation offers many benefits to space exploration. Predominantly, it offers the ability to share project costs among numerous partners to achieve a common goal.[8] Beyond sheer dollars and cents, it encourages the sharing of data among international partners, allowing them to pool their knowledge, thereby promoting the progress of space exploration with the information behind every success or failure.[9] The exchange of project information and technology is the *key* to international cooperation.[10] However, ITAR can be seen as inhibiting both the U.S. space industry and NASA itself from fully capitalizing on the numerous advantages of international cooperation. Specifically, it tends to impede communications between U.S. and foreign partners, thereby severely limiting their ability to share knowledge, data, and technology.[11]

For the U.S. space industry, ITAR has a significant negative impact. Its restrictions lead to billions of dollars' worth of lost revenue from potential foreign customers who instead contract with non-U.S. companies who don't face the same export restrictions.[12] Further, if a U.S. company violates ITAR, despite its best (and often costly) efforts to comply, it can be subject to millions of dollars in fines.[13] Unsurprisingly, industry leaders like SpaceX eschew hiring foreign personnel so as to avoid the potential for the unauthorized foreign "export" (reviewing) of technical data.[14] The unfortunate effect of this caution is that U.S. companies are missing out on these would-be employees' knowledge and expertise, while non-U.S. companies can take full advantage of this otherwise untapped talent pool.

Reforms of ITAR appear to be needed to ensure the United States space industry remains the worldwide leader and to ensure that nothing inhibits the progress of mankind in outer space. *First*, the ITAR licensing process could be streamlined to reduce wait times; it is somewhat

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[7] 22 CFR § 125.1.
[8] NASA OFFICE OF THE INSPECTOR GENERAL, IG-16-020, NASA'S INT'L P'SHIPS: CAPABILITIES, BENEFITS, AND CHALLENGES, at 25-26 (2016) [hereinafter "NASA OIG"].
[9] *See* ISECG, THE GLOBAL EXPLORATION STRATEGY: THE FRAMEWORK FOR COORDINATION, at 6 (2007).
[10] NASA OIG at 13.
[11] NASA OIG at 44-45.
[12] Mark J. Sundahl, *Space Tourism and Export Controls: A Prayer for Relief*, 75 J. AIR L. & COM. 581, 583 (Summer 2010) ("The application of ITAR to space technology has harmed the ability of U.S. space companies to compete on the world market, as is perhaps best illustrated by the practice of certain European satellite manufacturers to market 'ITAR-free' satellites."); Kurtis J. Zinger, *An Overreaction That Destroyed An Industry: The Past, Present, and Future of U.S. Satellite Export Controls*, 86 U. COLO. L. REV. 351, 359 (2015) ("The licensing regime under ITAR had extreme consequences. Indeed, the reported loss of foreign sales due to ITAR was $2.35 billion, mainly due to lengthy processing times.") (internal citation and quotation marks omitted).
[13] NASA OIG at 45.
[14] Joe Pappalardo, *SpaceX Can't Hire International Rocket Scientists Even If It Wants To*, POPULARMECHANICS.COM (Sept. 28, 2016), http://www.popularmechanics.com/space/rockets/a23080/spacex-elon-musk-itar/.

unrealistic for the space industry to wait the two to six months needed to obtain a license to make a foreign hire or to exchange information with a foreign partner.[15]

Second, while technology such as rockets undoubtedly can be used for military operations, narrowing the definition of "munition" based on if a rocket or spacecraft has a military purpose could help to ease ITAR's impact.[16] This is feasible under the current ITAR framework: for instance, not all submarines or airplanes are subject to ITAR's strictest restrictions, although practically all submarines and airplanes have some potential for military use.[17] Such "dual use" technology, which is not made for a military purpose, should not be subject to ITAR's rigorous export controls; rather, it could be made subject to the less restrictive Export Administrative Regulations.[18] While some beneficial changes have already occurred with respect to certain satellites no longer being considered munitions, additional changes could have a far greater impact and benefit to the industry.[19]

Third, ITAR's regulations could be more country specific: restrictions could be eased on trusted U.S. allies to allow them broad access to scientific data without needing government pre-approval. Under the current framework, ITAR is able to make such country based distinctions. Currently, export restrictions can be eased (at the government's discretion) for NATO members and certain major non-NATO allies for "major projects" with "foreign government end users" and commercially developed "major program[s]," where the U.S. company provides "all phases of necessary support."[20] This framework could be expanded so U.S. entities can more easily higher personnel and exchange data with the persons, businesses, and governments of these trusted allies regarding civilian, space-related technologies.

Fourth, with respect to export controls in place to prevent the dissemination of technical data, the focus can be shifted so as to balance the need to share data with the need to prevent it from being further disseminated. If a foreign person obtains a work visa, and is willing to work in the U.S. for a U.S. company, they should be allowed to access otherwise protected data, just as a U.S. citizen or permanent resident is allowed to do so. U.S. companies are missing out on the expertise of prospective foreign hires for no apparent reason—the reality is a U.S. citizen or a permanent resident can just as easily disseminate this technical data to non-authorized personnel as a work visa holder can. To that end, ITAR can be shifted to allow the export of technical data to foreign-employees of U.S. companies where appropriate controls are in place.

ITAR already has the framework in place to accommodate this type of regulation. Where a foreign-end user organization has been authorized to receive technology or data, its employees are exempt from needing further DDTC authorization, provided the foreign end user has "effective procedures to prevent diversion [of the information and technology] to destinations,

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[15] *See* NASA OIG at 44.
[16] Sundahl, *supra* note 12, at 586 (arguing "dual use" technologies—technologies which can have a commercial or military application—should be governed by less restrictive regulations).
[17] 22 CFR § 121.1.
[18] Sundahl, *supra* note 12, at 584-86.
[19] *See* Jeff Foust, *Federal government tweaks space export control rules*, SPACE NEWS (Jan. 12, 2017, http://spacenews.com/federal-government-tweaks-space-export-control-rules/).
[20] *See* 22 CFR §§ 120.31-32; 126.14 (listing NATO countries, and countries categorized as "Major non-NATO" allies).

entities, or for [unauthorized] purposes."[21] This requirement can be satisfied where (1) "a security clearance is approved by the host government for its employees;" or (2) the end-user has a process in place to screen employees and has them sign non-disclosure agreements where they will not "transfer" any defense article without specific authorization.[22] This includes the end-user screening its employees for contact with ITAR-restricted or prohibited countries.[23]

These "effective procedures" can easily be put in place to allow U.S. entities, to transfer technological data to foreign-national employees and partners without obtaining pre-authorization from the DDTC. If the entity has a process in place to screen its employees and has them sign non-disclosure agreements, or if the individual employee obtains a security clearance, they should be allowed to receive otherwise prohibited technical data.

As it stands, ITAR could be viewed as having a significant drag on the growth and progress of the U.S. space industry. By adopting the above-discussed, possible reforms, ITAR can be amended to allow for the broad sharing of information and data related to civilian space technology. This will help to ensure that the U.S. space industry retains its worldwide leadership position by being able to hire the most-qualified employees and partner with trusted foreign entities; freeing participants to develop the technology which is so valuable for the future of mankind.

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[21] 22 CFR § 126.18(b).
[22] 22 CFR § 126.18(c).
[23] *Id.*; *See* 22 CFR § 126.1 (listing restricted or prohibited countries).

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East River Helicopter Tragedy The Latest In A String Of Charter Aircraft Accidents

Tragedy struck the charter flight industry for the third time in as many months on Sunday evening, March 11th, when five sightseers were killed during a sunset helicopter tour over New York City's East River. Videos of the accident show the helicopter swiftly losing altitude before impacting the water, capsizing and disappearing beneath the waves. The helicopter's pilot was the only survivor, escaping onto the top of the sinking aircraft while his passengers, four men and one woman, remained harnessed to their seats and trapped inside. Two of the victims were pronounced dead at the scene while the others passed away at a local hospital. The doomed chopper, a Eurocopter AS350, had been owned by New Jersey-based Liberty Helicopters and chartered by NYONair as part of the company's "doors-off helicopter photo experience." Though the cause of the crash was not immediately known, the helicopter's pilot transmitted a mayday call to LaGuardia Airport shortly before impact stating that the aircraft was experiencing engine failure. Unconfirmed reports later suggested that a passenger's bag may have accidentally hit the emergency fuel cut-off switch.

The East River tragedy happened just one month following another deadly tour accident, when five British tourists perished in a fiery helicopter crash on February 10th in Arizona's Grand Canyon.[2] The victims had chartered a Eurocopter EC-130 from Papillon Grand Canyon Helicopters for a sightseeing trip as part of a friend's 30th birthday celebration.[3] While the cause of the crash has not yet been determined, the NTSB preliminary report notes that the aircraft made at least two 360-degree turns before crashing near its planned landing site.[4] The NTSB's full investigation is expected to examine not only the cause of the accident, but also of the post-crash fire; specifically, whether or not the helicopter had been equipped or retrofitted with a crash-resistant fuel system as required by a 1994 Federal Aviation Administration regulation.[5]

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[1] Erin Applebaum is an associate at Kreindler & Kreindler LLP representing passengers injured or killed during the course of commercial air travel.
[2] Deabler, Alexandra. (2018, Mar. 13). "Tourists can't get enough of dangerous helicopter tours." Retrieved from https://nypost.com/2018/03/13/tourists-cant-get-enough-of-dangerous-helicopter-tours/?utm_campaign=SocialFlow&utm_source=NYPTwitter&utm_medium=SocialFlow.
[3] Fonseca, Felicia. (2018, 13 Feb). "Investigators probe cause of deadly helicopter crash in Grand Canyon." Retrieved from http://www.chicagotribune.com/news/nationworld/ct-grand-canyon-helicopter-crash-cause-20180213-story.html.
[4] Apgar, Blake. (2018, Feb. 21). "NTSB issues report on deadly Grand Canyon helicopter crash." Retrieved from https://www.reviewjournal.com/news/nation-and-world/ntsb-issues-report-on-deadly-grand-canyon-helicopter-crash/.
[5] *Id*.

The first of the three fatal events occurred only six weeks earlier, when ten American passengers and two local crew members died in a New Year's Eve plane crash in Costa Rica. The American victims consisted of two families and their tour guide from the U.S.-based travel company Backroads. The group's Cessna 208B Grand Caravan, operated by Costa Rica's Nature Air, had been chartered by Backroads to transport the families from Punta Islita on the country's Pacific coast to its inland capital, San Jose.[6] Witnesses reported seeing the aircraft turn sideways and "cartwheel" before crashing into a hillside shortly after takeoff.[7] The cause of the crash has been tentatively attributed to either strong winds or mechanical problems.[8] A final determination will ultimately be made by Costa Rican aviation authorities.

In this author's view, these tragedies serve to highlight the importance of investigating a charter air company's safety record prior to setting foot onboard one of its aircraft. Travelers would be especially well-advised to research the company's history of prior accidents and crashes rather than to rely purely on its advertised guarantees.

Indeed, despite being caused by a combination of factors, each of the three recent charter crashes involved a company that publicly notes its robust safety standards while neglecting to mention the previous accidents on its record.

Liberty Helicopters continues to describe itself on its website as "the largest and most experienced helicopter sightseeing and charter service in New York City."[9] Until just a few days ago, the company also advertised that it had been "in business and flying safely for over 30 years.[10] "Sunday's fatal accident was Liberty's third crash in eleven years, however. In 2009, nine people were killed when a Liberty helicopter fatally collided with a small private plane over the Hudson River. The Liberty pilot was found partially to blame for the accident due to poor situational awareness. Two years earlier, in 2007, a Liberty-owned helicopter crashed into the Hudson River during a sightseeing tour when it suffered a midflight rotor blade separation. All seven passengers and the pilot survived.[11]

Papillon Grand Canyon Helicopters claims to be the "world's largest aerial sightseeing company, conducting more tours of the Grand Canyon than any other tour company." The business advertises on its website that "safety is our top priority.[12] "February's crash was not Papillon's first brush with disaster, however; it was the company's fourth deadly accident in less than 20 years. In 1999, a Papillon-operated helicopter crashed into a tree when its engine cut off during

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[6] Glusac, Elaine. (2018, Jan. 4). "After a Plane Crash, Questions About Travel in Costa Rica." Retrieved from https://www.nytimes.com/2018/01/04/travel/costa-rica-air-travel-safety.html.
[7] Balu, Reuven and Dillon, Nancy. (2018, 2 Jan.). "Plane did 'cartwheel' before Costa Rica crash that killed 10 Americans and 2 pilots, witnesses say." Retrieved from http://www.nydailynews.com/news/world/plane-cartwheel-deadly-costa-rica-crash-witness-article-1.3731495.
[8] Associated Press. "Costa Rica Investigating Cause of Plane Crash That Killed U.S. Families." (2018, 1 Jan.). Retrieved from https://www.wsj.com/articles/costa-rica-investigating-cause-of-plane-crash-that-killed-u-s-families-1514840661.
[9] (2018, 12 March). Retrieved from www.libertyhelicopters.com.
[10] *Id*.
[11] Gonen, Yoav and Golding, Bruce. (2018, 12 March). "Helicopter crash company has spotty safety record." Retrieved from https://nypost.com/2018/03/12/helicopter-crash-company-has-spotty-safety-record/.
[12] (2018, 13 March). Retrieved from www.papillon.com.

takeoff, killing the trainee-pilot and seriously injuring his instructor-passenger. The NTSB determined that the crash had been caused by pilot error when the crew failed to properly preflight the aircraft.[13] In 2001, another Papillon helicopter crashed and burst into flames during a Grand Canyon sightseeing tour, killing the pilot and five passengers while leaving the sole survivor with severe burn injuries.[14] The NTSB concluded that the crash had been caused by pilot error; specifically, the decision to fly too close to dangerous terrain.[15] Pilot error was blamed once more when in May 2014, a Papillon helicopter pilot was killed after exiting his aircraft to relieve himself. The chopper unexpectedly went airborne before impacting the ground and rolling over, fatally striking the pilot with its rotor blades. The NTSB determined that the pilot had left the still-running aircraft in the incorrect "idle" mode, which had caused it to nose forward into the ground.[16]

Nature Air still advertises itself online as "Costa Rica's leading airline" with "20 years of experience and an excellent safety record."[17] The company's website fails to mention not only the New Year's Eve crash, but also the occurrence of a second crash on September 5, 2017, when two of its passengers were killed minutes after takeoff as their Nature Air flight plummeted into a river.[18] According to news sources, Nature Air had endured considerable internal turmoil in the weeks leading up to the first accident, with problems including staff changes and issues with aircraft rental contracts.[19] The airline was temporarily grounded by Costa Rican authorities after the December crash once it was determined that staffing was too low for Nature Air to even carry out its flight schedule.[20]

The important lesson to be learned from each of these recent events is that, in this author's opinion, air travelers should never make presumptions about the safety of a charter aircraft company or airline. Independent research is necessary and paramount to confirm that the company's advertised safety record is more than just an empty promise.

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[13] National Transportation Safety Board Aviation Accident Final Report. (1999, 1 April). Retrieved from https://app.ntsb.gov/pdfgenerator/ReportGeneratorFile.ashx?EventID=20001205X00484&AKey=1&RType=HTML&IType=FA.

[14] McFadden, Robert. (12 Aug. 2001). "5 From a Brooklyn Family Die in a Helicopter Crash." (2001, Aug. 12). Retrieved from http://www.nytimes.com/2001/08/12/nyregion/5-from-a-brooklyn-family-die-in-a-helicopter-crash.html.

[15] "Uncontrolled Descent and Impact with Terrain, Eurocopter AS350-B2 Helicopter, N169PA. (2004, 3 June). Retrieved from https://www.ntsb.gov/investigations/AccidentReports/Pages/AAB0402.aspx.

[16] Pohl, Jason. (2018, 11 Feb.) "Papillon Grand Canyon Helicopters involved in 3 other deadly incidents in 20 years." Retrieved from https://www.azcentral.com/story/news/local/arizona-breaking/2018/02/11/papillon-grand-canyon-helicopters-involved-3-other-deadly-incidents-20-years/327219002/.

[17] (2018, 13 March). Retrieved from http://www.natureair.com/two-weeks.html.

[18] Anders, Wendy. "US Traveler is Second to Die in Pavas, Costa Rica Nature Air Crash." https://news.co.cr/us-traveler-resident-second-die-pavas-costa-rica-nature-air-crash/65294/.

[19] Anders, Wendy. "NatureAir Crash Update: Two U.S. Tourists On-Board Hospitalized for Injuries." (2018, 5 Sept.). Retrieved from https://news.co.cr/nature-air-crash-update-two-us-tourists-on-board-hospitalized-for-injuries-costa-rica/65282/.

[20] Negroni, Christine. (2018, 5 Jan.). "How to Check the Safety of a Charter Airline." Retrieved from https://www.nytimes.com/2018/01/05/travel/charter-airline-safety-tips.html.

Dude, Where's My Drone…Liability Policy?

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Today, companies like Amazon and Google are exploring the use of drones as part of their everyday business activities. With the creation of "Prime Air," for example, Amazon is working to deliver packages to its customers in thirty (30) minutes or less.[2] So what does this mean from an insurer's standpoint? Cue an opportunity for aviation insurers everywhere.

Experts in the aviation insurance industry are anticipating that while drone business is only a small part of the aviation insurance sector today, within the next few decades the drone space will apparently "power the biggest growth in aviation insurance in 50 years."[3] This is due in part to the fact that the drone industry is "in its infancy" and the "technology is very new," so the industry has a lot to learn.[4] Still, aviation insurers see room for growth.

A recent panel comprised of experts from various aviation insurance agencies discussed the evolving concept (and need) for drone insurance. Kathleen Swain, Senior Director of UAS programs at AOPA explained that drone insurance is comprised of two camps: a hobbyist standpoint or a commercial standpoint.[5] The focus at the moment, however, is on the commercial industry and the need for liability coverage for businesses using drones on a regular basis as issues arise in the daily operation of drones. The panel acknowledged that it is only dealing with very small premium numbers right now, but truly believes the industry is going to continue to grow exponentially.[6] Though adjusters have really only experienced physical damage claims at present (i.e. damage to the drone itself), because the technology is so new and continuing to evolve, it is only a matter of time before aviation insurers see a "major liability claim" as a result of drone use, be it as a result of commercial or private.[7]

One London-based start-up company, "Flock," is not afraid of any growing pains. It's ready to be one of the first of its kind to provide on-demand insurance to commercial unmanned aircraft

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[2] Amazon Prime Air (2018 Mar. 12). Retrieved from: https://www.amazon.com/Amazon-Prime-Air/b?ie=UTF8&node=8037720011
[3] Insurance Journal.com (2018 Feb. 22). "Drone Segment Will be Biggest Growth in Aviation Insurance in 50 Years, Experts Say", Insurance Journal. Retrieved from: https://www.insurancejournal.com/news/national/2018/02/22/481396.htm.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

systems pilots, though it's still limited to drone users operating out of the U.K.[8] Flock is getting in on the ground running (or, should I say, in the air flying?) and providing pilots low cost insurance on a per-flight basis.[9] Flock permits drone pilots to purchase coverage more or less instantaneously and its developers are equating it to Uber for insurance, using location information to assist in the development of the insurance quote.[10] The start-up also partnered with global aviation insurer Allianz, which could arguably be seen as a move that many other aviation insurers will soon follow.[11] According to an Allianz official, Flock users choose a 500-meter radius circle and the app's algorithms then "'aggregate and analyze localized data with that area to quantify the risk of any given drone flight in real time.'"[12] A quote is delivered immediately to the user who can then choose whether to make the purchase for that particular day's flight - all in a matter of minutes!

With the growing use of drones, there is a real opportunity for aviation insurers globally. Perhaps it's only a matter of time before aviation insurers are "flocking" to provide coverage to drone users everywhere!

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[8] Dronelife.com (2018 Mar. 05). "Flock App Offers On-demand Drone Insurance." Retrieved from: https://dronelife.com/2018/03/05/flock-app-offers-demand-drone-insurance/
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

3rd Annual FAA UAS Symposium Held March 6-8 in Baltimore

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The Federal Aviation Administration (FAA) and the Association for Unmanned Vehicle Systems International (AUVSI) co-sponsored the third annual UAS Symposium last week in Baltimore, Md. The three-day event gave stakeholders in the UAS industry the opportunity to talk face to face with a cross-section of government and industry representatives about regulations, research and initiatives to integrate unmanned aircraft into the national airspace system. Speakers at the Symposium included Baltimore Mayor Jennifer Pugh, FAA Acting Administrator Dan Elwell and Earl Lawrence, Executive Director of the FAA UAS Integration Office. Transportation Secretary Elaine Chao appeared by video on the closing day of the Symposium.

Government officials stressed their desire to support the expansion and growth of UAS operations, and envisioned that the current 75,000 commercial drone registrations would grow fivefold over the next five years. As Michael Kratsios, Deputy Assistant to the President and Deputy U.S. Technology Officer stated, "We've never seen such a massive adoption of new vehicles taking to the sky at such a rapid pace."[2]

In his welcoming speech, FAA Acting Administrator Dan Elwell noted that "the next 12-18 months are critically important to integration" and announced a number of initiatives, including the rollout of "LAANC" (Low Altitude Authorization and Notification Capability).[3] Under the FAA's Part 107 drone rules, operators must secure advance approval from air traffic control before flying in controlled airspace. However, under the current system, obtaining such permission is a time-consuming exercise requiring manual authorization that can take weeks. LAANC, which will undergo a national beta test starting April 30, is an automated process that will enable UAS operators to obtain near instantaneous, real time approvals. Final deployment of LAANC throughout the nation is scheduled to begin in September 2018.

FAA representatives also noted the FAA's desire to work with industry to expand small UAS operating parameters, such as flight beyond visual line of sight (BVLOS) and nighttime operations. (Such operations are currently prohibited unless the operator obtains a waiver from the FAA.)

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[2] http://www.auvsi.org/speakers-see-appetite-uas-integration-remote-id-must

[3] https://www.faa.gov/news/speeches/news_story.cfm?newsId=22574

The FAA stressed, however, that while its goal for UAS remained full and complete integration in the national airspace system, its overriding priority was safety. Among the hottest topics at the Symposium was how to enable remote identification for unmanned aircraft. As Acting Administrator Elwell stated: "For this industry to flourish commercially and be of public service, all aircraft – unmanned or otherwise – must be identifiable. You wouldn't expect to see unlicensed vehicles on the highway. Dirt bikes are fine for the woods, but when you see one on the Beltway, there's a problem – a problem for them and a problem for everyone around them."[4]

As reported in this Committee's January 2018 Newsletter, a rulemaking committee established by the FAA was previously unable to come to agreement on whether recreational drones should be covered by remote ID requirements. However, at the Symposium, Elwell appeared to weigh in on the side of including recreational drones in the requirements. As he stated in his opening speech: "The provisions excepting [recreational drones] in the FAA Modernization Act of 2012 from *any* regulation must be revisited – soon – to address ongoing concerns related to security, law enforcement and integration."[5]

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[4] *Id.*
[5] *Id.*

Georgia Lawmakers Choose to Punish Delta Over NRA Decision; Update: 11th Circuit Hears Oral Arguments in Clayton County v. FAA

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Georgia Lawmakers Choose to Punish Delta Over NRA Decision

Georgia lawmakers dealt a blow to the state's largest employer, Delta Airlines, by voting to remove a $50 million tax break from a broader tax-relief bill. The move by the Georgia legislature was a response to Delta's decision to end a National Rifle Association discount[2] following the mass shooting at the Marjory Stoneman Douglas High School in Parkland, Florida.[3] "It was a one-time group rate for the NRA's annual meeting, which I believe will be in April," a Delta spokesman told The Points Guy website.[4]

The deal for NRA members would have saved travelers between 2 and 10 percent on a $180 flight, which comes to between $5.60 and $18.[5] According to the company, only 13 tickets were purchased using the discount.[6] Delta indicated in a statement that it would not reconsider cutting ties with the NRA, and it would not consider moving its headquarters out of Atlanta.[7]

Before Delta decided to end the NRA discount lawmakers had been very active in support of the $50 million tax exemption for fuel sales taxes. Almost immediately after Delta's announcement, Lt. Gov. Casey Cagle, who leads the Georgia State Senate, demanded that Atlanta-based Delta make a choice: Reverse its NRA decision, or watch Republican lawmakers strike down a $50 million sales tax exemption on jet fuel, of which Delta would be the primary beneficiary.[8]

"I will kill any tax legislation that benefits @Delta unless the company changes its position and fully reinstates its relationship with @NRA," Cagle tweeted. "Corporations cannot attack

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[2] https://www.washingtonpost.com/news/business/wp/2018/02/26/georgia-republicans-threat-to-delta-stop-boycotting-the-nra-or-lose-your-tax-breaks/?utm_term=.57be04776d07.
[3] https://www.usatoday.com/story/news/nation-now/2018/02/15/florida-shooting-what-we-know-attack-parkland-high-school/340110002/.
[4] https://thepointsguy.com/2018/03/delta-only-sold-13-tickets-with-nra-discount/.
[5] https://www.cnbc.com/2018/03/02/georgia-lawmakers-delta-attack-wont-help-atlanta-bid-for-amazon-hq2.html.
[6] *Id.*
[7] *Id.*
[8] https://www.washingtonpost.com/news/business/wp/2018/02/26/georgia-republicans-threat-to-delta-stop-boycotting-the-nra-or-lose-your-tax-breaks/?utm_term=.57be04776d07.

conservatives and expect us not to fight back." Cagle says he is "a lifelong member of the NRA" and boasts that he has earned an A+ rating from the organization every year he has served in elected office. The gun-rights group has also endorsed Cagle in the past.[9]

Cagle, who has been Lt. Gov. since 2007 is the leading GOP candidate in the upcoming Georgia gubernatorial race.[10] Cagle's position sits in stark contrast to current GOP governor Nathan Deal. Deal, which promising to sign the bill into law, stated that he is a supporter of the jet-fuel tax break, but that he would sign the bill only because it also included a significant reduction in personal and corporate tax rates.[11] "Georgia and our businesses are global competitors; we need direct air travel to provide our companies with immediate access worldwide," Deal said in a statement on February 6. "By removing the sales tax on jet fuel, we can level the playing field for our airports and airlines to compete."[12] According to the Delta Airlines corporate website, the company currently employs 33,000 in the Atlanta area and contributes nearly $44 billion to the Georgia economy annually.[13] Others estimate that the contribution to Georgia is closer to $80 billion.

Delta is not alone in its move to cut ties with the NRA.[14] Enterprise Holdings - operators of Enterprise, Alamo and National Car Rental - TrueCar, Hertz, Avis, Symantec, MetLife, SimpliSafe, BestWestern, Wyndam Hotels, First National Bank of Omaha, United Airlines and Chubb Insurance have ended discount and loyalty programs for NRA members.[15]

But Delta is unlikely to move its headquarters from Atlanta. Delta recently signed a 20-year lease to stay in Atlanta, its corporate home for nearly 77 years.[16] Delta CEO Ed Bastion stated that, "[o]ur people and our customers have a wide range of views on how to increase safety in our schools and public places, and we are not taking sides. Our objective in removing any implied affiliation with the NRA was to remove Delta from this debate," Bastian wrote in the statement.[17] He added that many employees have gotten questions from customers, and that he knows it is "not comfortable to be caught in a highly emotional debate."[18] "None of this changes the fact that our home is Atlanta and we are proud and honored to locate our headquarters here," he wrote. "And we are supporters of the 2nd Amendment, just as we embrace the entire Constitution of the United States."[19]

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[9] https://www.washingtonpost.com/news/business/wp/2018/02/26/georgia-republicans-threat-to-delta-stop-boycotting-the-nra-or-lose-your-tax-breaks/?utm_term=.757a1b04634e.
[10] *Id.*
[11] https://www.nytimes.com/2018/03/01/business/delta-nra-georgia.html.
[12] http://www.businessinsider.com/delta-airlines-nra-tax-break-georgia-republicans-in-bind-2018-2.
[13] https://www.cnn.com/2018/03/03/opinions/delta-tax-break-cut-bad-for-georgia-opinion-moore/index.html.
[14] https://www.washingtonpost.com/news/business/wp/2018/02/26/georgia-republicans-threat-to-delta-stop-boycotting-the-nra-or-lose-your-tax-breaks/?utm_term=.757a1b04634e.
[15] https://www.vox.com/policy-and-politics/2018/2/24/17048500/nra-florida-shooting-companies-boycott.
[16] http://time.com/5179625/delta-atlanta-nra-blowback/.
[17] https://www.ajc.com/business/wake-nra-flap-delta-reviewing-all-group-discounts-politically-divisive-nature/Ktzqmj9TT6e87jC6t9mrhI/.
[18] *Id.*
[19] https://www.bizjournals.com/atlanta/news/2018/03/02/delta-ceo-releases-memo-stating-pride-in-atlanta.html.

Update: 11th Circuit Hears Oral Arguments in Clayton County v. FAA

While Georgia lawmakers set off a firestorm of controversy over the decision to ax a $50 million tax break on aviation fuel taxes at Atlanta's Hartsfield, lawyers for Clayton County, home to most of the airport, tried to persuade the 11th Circuit Court of Appeals to uphold a county airport fuel tax. The tax, amounting to approximately $18 million has been levied on aviation fuel sales and directed to funding both the county and the Clayton public schools.[20]

In 2014, the Federal Aviation Administration ruled that local taxes on aviation fuel must be used in support of airport operations and facilities.[21] The ruling affects any airport that has received federal funding for construction, maintenance or upgrades. Clayton County is attempting to argue that the FAA ruling is "arbitrary and capricious" and does not take into account that Hartsfield is located in Clayton, but the county has no access to it as a revenue source outside of the fuel tax.[22]

Lawyers for the county may face an uphill battle. During the oral argument, Judge William Pryor stated that since the FAA has continued to grant extensions on enforcement on a case-by-case basis, "it seems to me you don't have a final order here."[23] This statement has led some court reporters to speculate that the claim is not ripe for adjudication since it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.[24]

This is not the first time that Clayton County has been to court over tax breaks at the airport.[25] In 2003, Clayton County sued the City of Atlanta to collect *ad valorem* taxes on parcels of land located within the boundaries of the county.[26] The county argued that while public property is generally exempt from *ad valorem* taxes, property owned by a political subdivision outside of its territorial limits is subject to taxation unless it is exempted under OCGA § 48-5-41(a)(1)(B).[27] Clayton County ultimately lost on appeal.[28]

For additional information please refer to our February 2018 Newsletter.

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[20] https://www.myajc.com/news/local-govt--politics/clayton-seeks-continue-fuel-tax-collections-from-hartsfield-jackson/0csaoqS7fMkbbTKjDITYXJ/.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] http://caselaw.findlaw.com/ga-court-of-appeals/1187081.html.
[27] *Id.; see also,* https://law.justia.com/codes/georgia/2016.
[28] City of Atlanta v. Clayton County Board of Tax Assessors, No. A06A2192, March 22, 2007 (Ct of App. Georgia).

Essential Air Service: Just More Pork Barrel Politics?[1]

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Introduction

The Airline Deregulation Act of 1978 (ADA)[3] made sweeping changes to the US airline industry. In some instances, there were unintended consequences that gave rise to modifications to the act. The Essential Air Service (EAS) program[4] was established by Congress during the pre-ADA debates in order to correct one such consequence.[5] Fearing that air carriers would refocus their service after deregulation on more profitable routes having higher load factors,[6] Congress added a section[7] to the ADA shortly after its passage in order to insure continuity of airline service to small, geographically isolated communities.[8] Prior to deregulation the Civil Aeronautics Board (CAB) had controlled the route structure of each airline and set the fares.[9] After deregulation, of course, this was no longer possible and airlines did indeed begin to focus on the most profitable routes.[10] The EAS was meant to be a temporary measure of ten years duration[11] designed to give the serviced communities time to create their own incentives to

[1] It is important to note that the EAS program deals only with commercial passenger transport and has nothing to do with emergency medical evacuation, aerial policing and other public service aviation services.
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[3] *See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified* as amended in scattered sections of 49 U.S.C.).
[4] The EAS program, for purposes of the analysis presented herein, excludes services offered in Alaska and Hawaii due to the unique circumstances existing in those states.
[5] Office of Aviation Analysis. (2009). *What is Essential Air Service (EAS)?* Washington, DC: U.S. Department of Transportation.
[6] Yang, R. Y. (2017). *Essential Air Service.* Congressional Research Services. Washington, DC: Congressional Research Services, at 1.
[7] Section 419 which is now §49 U.S.C. 41731-41742.
[8] Meyer, Logan R., "Evolution of the Essential Air Service Program, 1978 to 2012" (2013). Research Papers. Paper 435. http://opensiuc.lib.siu.edu/gs_rp/435/, at 1.
[9] Card, D. (1996). *Deregulation and Labor Earnings in the Airline Industry (NBER Working Paper 5687)*. National Bureau of Economic Research. Cambridge: National Bureau of Economic Research.
[10] The operating certificates of carriers serving what became ESA communities required the carrier, prior to deregulation, to provide two round trips daily. *See supra,* note 5 at 2.
[11] Tony Grubesic, R. W. (2016). Essential Air Service in the United States: Exploring Strategies to Enhance Spatial and Operational Efficiencies. *International Regional Science Review, 39*(1), 108-130, at 108.

attract commercial airline service.[12] Instead, the program has been funded at greater and greater levels[13] while arguably serving a diminishing need.[14]

Historical Criteria for EAS Participation

The original ESA modifications to the ADA made every community having commercial airline service on October 24, 1978 eligible to participate in the EAS program. At the time, there were 746 eligible communities, 200 of which were in Alaska.[15] Almost 300 of those 746 communities have received some sort of EAS subsidy for air transport since the beginning of the program. It is worth noting that subsidies for certain routes existed prior to deregulation. The Civil Aeronautics Board, which governed the allocation of air routes in the United States until the passage of the ADA, exercised its discretion to grant subsidies in order to foster growth and provide service to rural areas.[16] Deregulation, however, was supposed to emphasize competition instead of government control,[17] and the EAS has proven to be a significant exception to that goal.

The initial criteria for EAS subsidy participation were: (1) a certificated air carrier provided service to the community on October 24, 1978 (otherwise the community was not eligible to receive subsidized air service), (2) the air carrier provided service on specified types of aircraft, (3) the air carrier provided at least two round trips per day to an airport from which unsubsidized air carrier service was available and (4) the air carrier demonstrated that it could not continue this service without incurring a loss.[18] In 1984 the General Accounting Office recommended liberalizing the criteria because passenger enplanements in some communities had declined by more than 50% since the ADA was passed.[19]

Congress expanded the program in 1987 and extended it for another 10 years (until 1998).[20] The EAS provisions were extended several times thereafter by Congress with increasingly stringent requirements and increasingly large budgets. The number of communities served by the program began to decrease.[21]

The rules governing EAS eligibility were further restricted by the Department of Transportation

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[12] "There is nothing so permanent as a temporary government program.", Milton Friedman.
[13] *See supra*, note 11 at 111.
[14] The irony of having to amend the ADA, which presumed the incontestability of the airline industry, before it had even become law in order to subsidize a certain type of commercial air transport seems to have been lost on the drafters.
[15] Tang, R. (2012). *Essential Air Service (EAS): Frequently Asked Questions.* Washington, DC: Congressional Research Service, at 1.
[16] Sickles, R. C. (1986). Allocative Distortions in the Regulatory Transition of the U.S. Airline Industry. *Journal of Econometrics, 33*, 143-163, at 145.
[17] Mattos, B. (2016). Effects of the Airline Deregulation Act on Aeronautical Industry. *International Journal of Advance Innovations, Thoughts & Ideas, 3*(2), 1-16, at 1.
[18] Meyer, L. R. (2013). *The Evolution of the Essential Air Service Service Program, 1978 TO 2012.* Southern Illinois University Carbondale. Carbondale, IL: OpenSIUC, at 8.
[19] Oliver W. Krueger (1984, January 31). Associate Director Resources, Community and Economic Development Division. *Testimony before House Sub Committee on Aviation*. (U.S. Congress).
[20] Airport and Airway Safety and Capacity Expansion Act of 1987, Public Law 100-223. *See supra,* note 3 at 1.
[21] *See supra,* note 15 at 9.

and Related Agencies Appropriations Act of 2000 (P.L. 106- 69, §332) (2000 Act)[22] which prohibited any subsidies (1) for communities that were less than 70 highway miles from the nearest FAA-designated large or medium hub and (2) in excess of $200 per passenger for communities that do not lie more than 250 highway miles from the nearest FAA-designated large or medium hub. The Secretary of the Department of Transportation (DOT) was, however, afforded liberal authority to grant waivers to these restrictions. As examples, Hagerstown, MD, 70 driving miles from Washington Dulles International Airport, and Lancaster, PA, 70 driving miles from Philadelphia International Airport, both lost their EAS funding pursuant to the 2000 Act[23] but the Secretary was able to restore funding through FY 2007 based on certifications from the respective state governors that the subject airports in their state were more than 70 driving miles from an FAA-designated large or medium hub.[24]

In 2004, pursuant to the Vision 100—Century of Aviation Reauthorization Act (P.L. 108-176, §405), DOT established two programs intended to incentivize serviced communities to explore other options for their transportation needs. Under the Alternate EAS program[25], a community can receive a grant in lieu of EAS subsidies to use for transportation needs in a manner better suited to their particular situation (*e.g.*, on demand air taxi, smaller aircraft or ground transportation such as scheduled bus service to the nearest hub). In another program designed to reduce ESA participation, up to 10 communities can forego ESA subsidies for ten years and receive a lump sum payment equal to two years' worth of ESA subsidies.[26]

The Airport and Airway Extension Act of 2011,[27] in a further attempt to get some control over costs and reduce overall participation in the program, put an absolute ceiling of $1,000 on per passenger subsidies which the Secretary is not entitled to waive. In addition, it allowed the use of smaller aircraft (less than 15 passenger seats) where warranted by average passenger count in an effort to make non-subsidized service seem more attractive to air carriers.

The number of eligible communities (other than those in Alaska and Hawaii) was effectively capped by the Federal Aviation Administration Modernization and Reform Act of 2012 (FAA Reform Act of 2012) which provided that only those communities that participated in the EAS program between September 30, 2010 and September 30, 2011 would be eligible for future participation. In addition, the legislation required a minimum number of enplanements for eligibility.[28] The EAS program was then extended through FY 2017 without any revisions by the

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[22] *See supra,* note 6 at 2.
[23] DOT Order 2004-3-26 (Lancaster, PA) and DOT Order 2005-4-17 (Hagerstown, MD).
[24] *See supra,* note 15 at 8.
[25] Establishment of Alternate Essential Air Service Pilot Program Pursuant to Vision 100 -- 49 U.S.C. § 41745 Docket OST-2004-18715.
[26] *See supra,* note 6 at 11.
[27] Airport and Airway Extension Act of 2011, Part IV. Pub. L. 112-27, Part IV. 125 Stat. 270-272. https://www.congress.gov/112/plaws/publ27/PLAW-112publ27.pdf. Web December 1, 2017.
[28] Federal Aviation Administration Modernization and Reform Act of 2012. Pub. L. 112-95. 126 Stat. 11-155. https://www.congress.gov/112/plaws/publ95/PLAW-112publ95.pdf. Web December 1, 2017.

FAA Extension, Safety, and Security Act of 2016.[29] As of October 2016 there are 173 communities[30] in the EAS program.[31]

EAS Air Carriers

As one might expect, major air carriers do not play a large role in the EAS program.[32] Instead, EAS subsidized communities are served by a number of smaller air carriers such as Cape Air, Boutique Air, Southern Airways Express and Great Lakes Airlines. The DOT solicits requests for proposals (RFPs) for particular routes and selects a carrier based on (1) service reliability, (2) contractual and marketing arrangements with larger carriers at the related large or medium hub or hubs, (3) interline arrangements with other carriers at the relevant hub or hubs and (4) input from the serviced community.[33] Curiously, subsidy cost is not one of the elements required to be considered by the DOT.[34] The contracts are usually awarded for a two year period and, if an air carrier desires to end the contract prior to its expiration date, the DOT can exercise "hold-in authority" requiring the carrier to continue service until a substitute air carrier can be found, thereby insuring continuity of service.[35] EAS air carriers are paid monthly for flights completed without regard to the passenger load factor[36] of any particular flight.[37]

Cost of the EAS Program

Program costs are paid through a combination of overflight fees and discretionary annual appropriations. The cost increases of the EAS program over time have been dramatic, increasing 600% since 1996 and 132% since 2008.[38] Various legislative efforts to reign in expenditures seem to have been ineffectual and have sometimes worked at cross purposes. The FAA Reform Act of 2012[39] provided for reduced discretionary appropriations over time, starting at $143 million in FY2012 with step downs in FY2013 to $118 million, FY2014 to $107 million and FY2015 to $93 million. But at the same time the FAA Reform Act of 2012 increased the amount

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[29] FAA Extension, Safety and Security Act of 2016. Pub. L. 114-190. 130 Stat. 615-665. https://www.congress.gov/bill/114th-congress/house-bill/636/text. Web December 1, 2017.

[30] For a list of subsidized communities as of October 2016 other than those in Alaska and Hawaii, please see *Eligible EAS communities (excluding Alaska and Hawaii)* as of October 2016.* Office of Aviation Analysis. Washington, DC: Department of Transportation.

[31] Rodriguez, F. A. (2017, November 1). *Op-Ed: How Essential is the Essential Air Service (EAS) Program?* Retrieved from Airways Magazine: https://airwaysmag.com/industry/op-ed-how-essential-is-the-essential-air-service-eas-program/

[32] Where a major carrier was obligated to provide service under the EAS program, it sometimes worked with a much smaller air carrier in order to enable the smaller air carrier to present an acceptable bid to the DOT to provide substitute EAS service. *See,* Compart, A. (2011, October 31). *Delta Partners With Great Lakes To Boost EAS Bid.* Retrieved from Aviation Week Network: http://aviationweek.com/author/andrew-compart-andrewcompartaviationweekcom-2.

[33] *See supra,* note 6 at 4.

[34] *See supra,* note 6 at 7.

[35] *See supra,* note 6 at 4 and 5.

[36] As used herein, "passenger load factor" is the fraction, expressed as a percentage, where the numerator is revenue passenger kilometers and the denominator is available seat kilometers. *See* Air Transport Bureau. (2017). *Introduction to Air Transport Statistics.* International Civil Aviation Organization, Economic Analysis and Policy Section. Montreal: International Civil Aviation Organization.

[37] *See supra,* note 6 at 5.

[38] *See supra*, note 6 at 5.

[39] *See supra*, note 28.

allocated to the EAS program from overflight fees from the historically fixed amount of $50 million to an amount equal to all overflight fees collected in any particular fiscal year. The discretionary appropriations ceiling did not hold and the funding from overflight fees was increased so the net effect was to increase the total amount of funds allocated to the program.

Understanding cost overruns in federal programs is a surreal exercise worthy of a Lewis Carroll fantasy,[40] but some reasons for the seemingly uncontrollable EAS budget can be suggested. A 2017 Congressional Research Services report to Congress, outlined seven problems with the EAS program that can lead to increasing expenditures: (1) few (and sometimes only one) competitive bids are submitted for routes in response to an RFP, (2) as mentioned above in the section entitled "EAS Air Carriers," cost is not a factor that the DOT is required to consider when evaluating bids, (3) the DOT is required to consider the views of the community being serviced but that community and its local officials are under no obligation to factor comparative cost into their recommendations, (4) a subsidized route may service multiple hubs thus increasing expense and arguably undercutting the rationale for the subsidy, as was the case with 30 of the 173 subsidized communities in FY2016, (5) the hub used to determine whether EAS subsidies are warranted is not necessarily the hub serviced by the subsidized air carrier, thus potentially increasing the cost of each flight, (6) some air carriers in the program use larger than necessary aircraft thereby unnecessarily increasing operating expenses and (7) since the EAS program does not regulate fares charged by the air carriers, some may elect to charge higher fares to fewer passengers thus decreasing load factors and increasing per passenger subsidies.[41] These problems are fundamental to the program and there seems to be no significant appetite to correct them. It seems obvious that in subsidized congressional districts, efforts on the part of legislators to maintain the EAS program (including obtaining waivers where the requirements of the program are not satisfied) is considered "bringing home the bacon" and is rewarded at the polls.[42]

Time to Abolish the EAS Program

The EAS program is one of the most highly criticized federal subsidy initiatives but bipartisan efforts at reducing the subsidies or repealing the program in its entirety have been thwarted. In 2013, Representative Tom McClintock (R-CA) introduced a bill to completely repeal the EAS but it was rejected by a 166 to 248 vote. In a separate vote that year, Congress rejected a proposal by Representative Alan Grayson (D-FL) to put an absolute restriction of $250 on ticket subsidies.[43] Arguments have been made that, with the improved interstate highway system since 1978, private automobiles or regular coach bus service offer viable, cost effective alternatives to EAS subsidies.[44] But those arguments have failed to gain much traction. Even Senator John

[40] e.*g.*, Carroll, L. [Charles Lutwidge Dodgson] (1865). ***Alice in Wonderland.*** United Kingdom: Macmillan.
[41] ***See supra***, note 6 at 7 and 8.
[42] Joshua Hall, A. R. (2015). ***The Political Economy of the Essential Air Service Program.*** West Virginia University, Department of Economics Working Paper No. 15-18. Morgantown: West Virginia University, at 19.
[43] ***See supra***, note 11 at 123.
[44] Dana Lowell, T. C.-A. (2011). ***Comparison of Essential Air Service Program to Alternative Coach Bus Service.*** Manchestr, NH: M.J. Bradley & Associates LLC at 16.

McCain (R-AZ) was unable to rally his colleagues in the U.S. Senate behind an effort to eliminate funding for EAS.[45]

Advocates for increased efficiency and opponents of EAS, including the Congressional Budget Office, note that the subsidies are of value to a small, select group of people but are of limited value to the bulk of the population.[46] In addition, they point to a myriad of examples of waste. The Council of Citizens Against Government Waste in 2011[47] highlighted Representative John Murtha's (R-PA) ceaseless efforts to protect the EAS subsidies received by Johnstown, PA airport (now the John Murtha Johnstown-Cambria County Airport (KJST)) even though it only has 30 passenger enplanements per day and is a mere two-hour drive from Pittsburgh International Airport (KPIT).[48] In 2011 it was pointed out that the route between Ely, Nevada (KELY) and Las Vegas (KLAS) was subsidized in the amount of $3,720 per passenger, although as of 2017 Ely is no longer receiving EAS funding.[49] Finally, efforts to undermine the intent and purpose of the EAS program in order to technically satisfy eligibility requirements occasionally come to light, such as occurred in November 2014 at Morgantown Municipal Airport (KMGW) in West Virginia where free flights were offered to Wheeling, West Virginia (KHGL) (a distance of just over 78 driving miles) in an effort to satisfy EAS annual passenger requirements.

It is important to note that elimination of EAS subsidies in the continental United States does not mean that the affected communities will be without air service. It simply means that the local communities will have to determine whether they want to do what is necessary in the way of infrastructure enhancements and economic subsidies funded by the local community in order to attract and maintain reliable air service. Some communities will determine that their citizens are better off driving to the nearest hub airport and others will shoulder the economic burden necessary for local air service.

At least one community has already begun to adopt the latter approach.[50] Wyoming, a state heavily reliant on EAS funding and one with the lowest passenger load factor in the system (about 11% in 2016),[51] has decided to enter into capacity purchase agreements (much like major airlines do with their regional carriers[52]) with an airline to provide service to Denver International Airport (KDEN) thrice daily from eight Wyoming airports. This proposal in effect creates a state-run EAS-equivalent but with greater oversight, more negotiating leverage and the possibility of educating Wyoming residents to fill the new jobs created by the program. It is even considering selling the intellectual property created by the program to other interested states

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[45] Grass, J. (2011, February 8). *McCain targets cash for Essential Air Service for rural communities*. Retrieved from JuneauEmpire.com: http://juneauempire.com/stories/020811/loc_782431056.shtml#.WirQICOZNo4.

[46] Congresional Budget Office. (2016). *Eliminate Funding for Amtrak and the Essential Air Service Program.* Washington, DC: U.S. Government Printing Office.

[47] Paige, L. K. (2011, February 14). *CCAGW Supports McCain Amendment Ending Essential Air Service*. Retrieved from Citizens Against Government Waste: https://www.cagw.org/media/press-releases/ccagw-supports-mccain-amendment-ending-essential-air-service.

[48] Grimm, T. (2009, September 3). John Murtha's Airport for No One. *The Wall Street Journal.*

[49] Demirjian, K. (2011, July 21). Miles from major metro area, rural Ely airport could close. *Las Vegas Sun.*

[50] Murdock, S. (2017, September 13). *The Cowboy State Plans To Devolve Air Service As An Innovative Alternative To EAS*. Retrieved from JDA Journal: https://jdasolutions.aero/blog/.

[51] *See supra*, note 11 at 120.

[52] Lederman, S. J. (2010). *The Role of Regional Airlines in the U.S. Airline Industry.* The RAND Journal of Economics. Santa Monica: Wiley-Blackwell for RAND (USA), at 8.

and localities. Wyoming's innovative approach, along with multimodal transportation programs such as busses and air taxi service that have been adopted by other communities, may be the best approach for rural, small community air service in the future.

It is unclear what position President Trump and his administration will ultimately take on continued funding for EAS. The program survived the spending bill signed in May of this year[53] but is again on the chopping block. The 2018 budget calls for cutting funding by $178 million which would gut the program.[54] Predictably, there has been push-back from legislators whose constituents are beneficiaries of EAS subsidies.[55] Meanwhile, the DOT continues to pare the list of eligible communities, eliminating 27 in FY2016 due to poor passenger load factors.[56]

The EAS program seems like low hanging fruit for deficit-conscious legislators. The amounts involved are not large, but the dollar amount would probably resonate with the average citizen if it were characterized as wasteful spending. Egregious examples certainly make the program seem unnecessary – what person of driving age would advocate subsidizing flights from Vasilia, CA to Fresno (45 minutes away by car), Hot Springs, AK to Little Rock (less than an hour's drive), Decatur, IL to St. Louis (110 miles by air), or Victoria, TX to Austin (103 miles by air) and Houston (123 miles by air)?[57] So how does the program survive year after year? Look to the theory of concentrated benefits and dispersed costs[58] for the answer – that is to say, the benefits of the program are concentrated in a localized few who can serve as an active voting block and the costs are disbursed among all taxpayers who hardly notice the miniscule charge.

Conclusion

The EAS program in the continental United States is wasteful, unnecessary[59] and largely unsustainable without greater and greater federal funding allocations. It constitutes an unfair transfer of wealth from taxpayers at all socio-economic levels to the few who chose to live in relatively isolated areas and use air transport. In my view, the program should be rapidly scaled down and ultimately terminated.

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[53] ch-aviation. (2017, May 9). *US Essential Air Service survives Trump's spending bill*. Retrieved from ch-aviation: https://www.ch-aviation.com/portal/news/55757-us-essential-air-service-survives-trumps-spending-bill.
[54] Paul, J. (2017, June 7). Trump budget targets flight program that links small towns to "the outside world". *Denver Post.*
[55] Zanona, M. (2017, April 6). *Senators fight to defend rural air service from Trump budget cuts*. Retrieved from The Hill: http://thehill.com/policy/transportation/327631-senators-fight-for-rural-air-service-after-trumps-proposed-budget-cuts.
[56] ch-aviation. (2017, October 5). DOT axes 27 subsidized routes over poor load factor. Retrieved from ch-aviation: https://www.ch-aviation.com/portal/news/60137-dot-axes-27-subsidised-routes-over-poor-load-factor.
[57] Leff, G. (2017, May 17). *No, Donald Trump Isn't Going to End the Essential Air Service Program. Sad!* Retrieved from View from the Wing: http://viewfromthewing.boardingarea.com/2017/03/17/no-donald-trump-isnt-going-end-essential-air-service-program-sad/.
[58] Boaz, D. (2013, August 25). *Concentrated Benefits and Diffuse Costs, Local Airports Edition*. (Cato Institute) Retrieved from Cato at Liberty: https://www.cato.org/blog/concentrated-benefits-diffuse-costs-local-airports-edition.
[59] In 2011 the average passenger load factor was 41.45%. *See supra*, note 11 at 112.

VFR vs IFR Flight Rules: A Primer for Non-Pilots

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When you see aircraft flying above your backyard, you can be sure that they are flying under "Visual Flight Rules" ("VFR") governed by 14 CFR 91.151-161 or "Instrument Flight Rules" ("IFR") governed by 14 CFR 91.167-193. For aircraft in the air (excluding ultra-lights and rockets), there are no alternatives – VFR or IFR. In short, you are permitted to fly VFR if weather conditions and airspace restrictions allow it. Otherwise, you must operate IFR. A pilot must have an instrument rating and be "current", i.e., having recent actual or simulated instrument flight wherein certain activities were conducted or practiced. An instrument rating – i.e., training to fly by reference to internal instruments rather than external visual references – is not required for VFR flight.

As a practical matter, the constraints for VFR flying do not permit airlines and other high-altitude operations, that is, any operations above 18,000 mean sea level ("msl") which is 'Class A Airspace," to fly VFR. Even if an airline crew determined that if could make a flight legally under VFR, scheduled airline company operating procedures do not allow VFR operations with passengers on board under any circumstances. Some commercial flights, especially sightseeing and low-level seaplane and helicopter flights, are conducted mostly under VFR. Corporate aviation these days is flown mostly in jets that fly above 18,000 msl feet, and therefore even in good weather, corporate jets will fly under IFR. They are permitted to fly under VFR below 18,000 feet msl. Most single-engine piston aircraft (the "Cessnas and Pipers") are not oxygen equipped and fly in lower altitude ranges, generally below 12,500 msl where after 30 minutes of flight, the crew must have oxygen available. Most of these general aviation flights are conducted under VFR because almost all of the 50% of all pilots who do not have instrument ratings required to fly under IFR are flying in this category – piston aircraft without oxygen.

IFR flying is conducted on an instrument flight plan whereby air traffic control ("ATC") assigns routing and altitude and maintains radar and voice contact with the pilot. IFR flights may be conducted in clouds and other reduced visibility conditions. ATC is responsible for other traffic (collision avoidance). The most challenging aspect of IFR flight is the approach to land in low visibility conditions. Technological advances have eased the burdens on IFR pilots in all aspects of IFR flight, but especially so in the approach phase. In addition, ATC will provide en route

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weather advisories, time and equipment permitting. For a VFR flight, the pilot may choose her own routing, subject to airspace restrictions. VFR flying is conducted on the "see and avoid" principle, although ATC will keep VFR aircraft on radar and assist with traffic separation, workload permitting, but the pilot remains primarily responsible for collision avoidance.

One of the most alarming hazards for VFR-only pilots is the unexpected encounter with low visibility conditions. If the pilot relies on vanishing external visual references, such as a horizon line over water that disappears as sea and sky all turn to the same grey color, that misplaced reliance can cause spatial disorientation. Instead, the pilot should look down at and believe the instruments that indicate attitude, speed (horizontal and vertical), altitude and heading and fly exclusively with reference to those instruments. Attempting to fly visually in low visibility conditions is very dangerous as normal body clues used in visual conditions can be misinterpreted without the visual references. Spatial disorientation among non-instrument rated or instrument-current pilots is a common cause of fatal accidents.

WEATHER:

Here are the FAA's weather minimums for VFR flight. If these conditions do not exist, VFR flight may not legally be undertaken; if they are not forecast to exist throughout the VFR flight, VFR flight is not recommended.

14 CFR 91.155 Basic VFR weather minimums.

(a) Except as provided in paragraph (b) of this section and §91.157, no person may operate an aircraft under VFR when the flight visibility is less, or at a distance from clouds that is less, than that prescribed for the corresponding altitude and class of airspace in the following table:

Airspace	Flight visibility	Distance from clouds
Class A	Not Applicable	Not Applicable.
Class B	3 statute miles	Clear of Clouds.
Class C	3 statute miles	500 feet below.
		1,000 feet above.
		2,000 feet horizontal.
Class D	3 statute miles	500 feet below.
		1,000 feet above.
		2,000 feet horizontal.
Class E:		
Less than 10,000 feet MSL	3 statute miles	500 feet below.
		1,000 feet above.
		2,000 feet horizontal.
At or above 10,000 feet MSL	5 statute miles	1,000 feet below.
		1,000 feet above.

Airspace	Flight visibility	Distance from clouds
		1 statute mile horizontal.
Class G:		
1,200 feet or less above the surface (regardless of MSL altitude)		
For aircraft other than helicopters:		
Day, except as provided in §91.155(b)	1 statute mile	Clear of clouds.
Night, except as provided in §91.155(b)	3 statute miles	500 feet below.
		1,000 feet above.
		2,000 feet horizontal.
For helicopters:		
Day	½ statute mile	Clear of clouds
Night, except as provided in §91.155(b)	1 statute mile	Clear of clouds.
More than 1,200 feet above the surface but less than 10,000 feet MSL		
Day	1 statute mile	500 feet below.
		1,000 feet above.
		2,000 feet horizontal.
Night	3 statute miles	500 feet below.
		1,000 feet above.
		2,000 feet horizontal.
More than 1,200 feet above the surface and at or above 10,000 feet MSL	5 statute miles	1,000 feet below.
		1,000 feet above.
		1 statute mile horizontal.

(b) *Class G Airspace.* Notwithstanding the provisions of paragraph (a) of this section, the following operations may be conducted in Class G airspace below 1,200 feet above the surface:

(1) *Helicopter.* A helicopter may be operated clear of clouds in an airport traffic pattern within ½ mile of the runway or helipad of intended landing if the flight visibility is not less than ½ statute mile.

(2) *Airplane, powered parachute, or weight-shift-control aircraft.* If the visibility is less than 3 statute miles but not less than 1 statute mile during night hours and you are operating in an airport traffic pattern within ½ mile of the runway, you may operate an airplane, powered parachute, or weight-shift-control aircraft clear of clouds.

(c) Except as provided in §91.157, no person may operate an aircraft beneath the ceiling under VFR within the lateral boundaries of controlled airspace designated to the surface for an airport when the ceiling is less than 1,000 feet.

(d) Except as provided in §91.157 of this part, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR, within the lateral boundaries of the surface areas of Class B, Class C, Class D, or Class E airspace designated for an airport—

(1) Unless ground visibility at that airport is at least 3 statute miles; or

(2) If ground visibility is not reported at that airport, unless flight visibility during landing or takeoff, or while operating in the traffic pattern is at least 3 statute miles.

(e) For the purpose of this section, an aircraft operating at the base altitude of a Class E airspace area is considered to be within the airspace directly below that area.

14 CFR 91.157 Special VFR weather minimums.

(a) Except as provided in appendix D, section 3, of this part, special VFR operations may be conducted under the weather minimums and requirements of this section, instead of those contained in §91.155, below 10,000 feet MSL within the airspace contained by the upward extension of the lateral boundaries of the controlled airspace designated to the surface for an airport.

(b) Special VFR operations may only be conducted—

(1) With an ATC clearance;

(2) Clear of clouds;

(3) Except for helicopters, when flight visibility is at least 1 statute mile; and

(4) Except for helicopters, between sunrise and sunset (or in Alaska, when the sun is 6 degrees or more below the horizon) unless—

(i) The person being granted the ATC clearance meets the applicable requirements for instrument flight under part 61 of this chapter; and

(ii) The aircraft is equipped as required in §91.205(d).

(c) No person may take off or land an aircraft (other than a helicopter) under special VFR—

(1) Unless ground visibility is at least 1 statute mile; or

(2) If ground visibility is not reported, unless flight visibility is at least 1 statute mile. For the purposes of this paragraph, the term flight visibility includes the visibility from the cockpit of an aircraft in takeoff position if:

(i) The flight is conducted under this part 91; and

(ii) The airport at which the aircraft is located is a satellite airport that does not have weather reporting capabilities.

(d) The determination of visibility by a pilot in accordance with paragraph (c)(2) of this section is not an official weather report or an official ground visibility report.

Social Media Discovery: Forman v. Henkin

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The New York Court of Appeals recently weighed in on the proper scope of social media discovery in a decision equally applicable to airline passengers as it is to horseback riders. The Court held that plaintiff's private photographs posted on Facebook before and after the accident were discoverable. The decision is notable because it is clear that the Court believed that broader discovery of plaintiff's social media information was appropriate; however, New York's highest court was constrained by defendant's failure to appeal the trial court's order and, therefore, only the scope of disclosure ordered by the Appellate Division was before the Court of Appeals.

In *Forman v. Henkin*, __ N.E.3d __, 2018 WL 828101 (2018), plaintiff filed suit for injuries she allegedly sustained when she fell from a horse owned by defendant. During her deposition, plaintiff testified that she previously had a Facebook page on which she posted photos showing her pre-accident active lifestyle, but she deactivated her account six months after the accident. She alleged that, following the accident, she became reclusive and had difficulty using a computer and composing coherent messages.

Defendant sought an unlimited authorization to obtain plaintiff's entire private Facebook account. The Supreme Court granted the motion in part and ordered plaintiff to produce limited information from her Facebook account: (1) all photos of plaintiff privately posted prior to the accident that she intended to use at trial; (2) all photos of plaintiff privately posted after the accident; and (3) an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. Even though plaintiff produced minimal information, plaintiff appealed to the Appellate Division, and that Court further limited disclosure to only photos posted on Facebook that plaintiff intended to use at trial, both before and after the accident. The Appellate Division eliminated the trial

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court's authorization for defendant to obtain data relating to post-accident messages posted on Facebook.

Defendant was granted permission to appeal to the Court of Appeals, which reversed the Appellate Division and reinstated the Supreme Court's order. The Court held that the Appellate Division erred by applying a heightened threshold for social media discovery that turns on whether the information is public or private. "New York's discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information." The Court rejected plaintiff's argument that discovery of social media information was an invasion of her privacy, pointing out that when a party puts her physical or mental condition at issue, certain privacy interests, *e.g.*, the doctor-patient privilege, are waived. The same holds true for social media information. "For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information." However, because defendant did not appeal the trial court's order, the full scope of social media disclosure that will be sanctioned by New York's highest court will be determined another day.

The *Forman* decision however confirms that, in actions that allege physical and/or emotional injuries, New York defendants are entitled to private social media information.

Federal Preemption and Land Use Regulation: The "Thin Line" Between Permissible and Impermissible Local Regulation

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A recent Massachusetts state court decision, *Roma III, Ltd. v. Board of Appeals of Rockport,* addressed whether federal law preempted a town's zoning bylaw prohibiting the usage of land within the town for the landing of aircraft. The court's decision is a reminder of the fine line between what courts have considered permissible and impermissible local regulation pertaining to aviation. As seen below, although the United States Supreme Court held a city ordinance imposing a curfew on flights to address noise during evening hours to be preempted by federal law, several courts have found zoning regulations prohibiting the use of land for takeoffs and landings as permissible local regulation not preempted by federal law.

In *City of Burbank v. Lockhead Air Terminal Inc,* the plaintiffs/appellees sought to enjoin the enforcement of a city ordinance prohibiting "pure jet aircraft" takeoff from Hollywood-Burbank Airport between the times of 11:00 PM and 7:00 AM.[2] The purpose of the ordinance was to "afford local residents at least partial relief, during normal sleeping hours, from the noise associated with jet airplanes" and neither addressed flights over the city nor categorically prohibited all jet takeoffs.[3] The plaintiffs/appellees argued successfully to the District Court and Court of Appeals for an injunction on the enforcement of the city ordinance.[4] The United States Supreme Court affirmed the decision of the Court of Appeals finding the city ordinance preempted by federal law, specifically, the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972.[5]

In *Burbank,* the United States Supreme Court majority found that the "the pervasive nature of the scheme of federal regulation of aircraft noise" led to a conclusion in favor of preemption.[6] In so finding, the Court held that, even though the control of noise is "deep-seated in the police power of the States," federal law preempted the field of aircraft noise regulation and had preempted this area of the law even prior to the Noise Control Act of 1972, which required the FAA in consultation with the EPA to address "the control and abatement of aircraft noise and sonic

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[2] *City of Burbank v. Lockheed Air Terminal Inc.,* 411 U.S. 624, 625-26 (1973).
[3] *Id.* at 642.
[4] *Id.* at 625.
[5] *Id.* at 626.
[6] *Id.* at 633.

boom."[7] Specifically, with respect to the takeoff curfew, the Court found that if the ordinance had been upheld and other curfews were imposed by municipalities throughout the country, "it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow."[8] Moreover, the Court cited the findings of the district court that the imposition of such curfews on a national level would result in the bunching of flights, increasing congestion and noise issues, inconsistent with the objectives of the federal statutory and regulatory scheme.[9]

Despite the United States Supreme Court's *Burbank* decision, courts have found local ordinances – having a similar purpose as the *Burbank* ordinance – that prohibit the usage of land for aircraft landing to not be preempted by federal law.

In *Roma III, Ltd. v. Board of Appeals of Rockport,* plaintiff Roma III, Ltd. owned private oceanfront property in a residential zoning area in the town of Rockport.[10] The FAA and Commonwealth of Massachusetts approved the use of the property as a licensed private use heliport.[11] Ron Roma, a licensed helicopter pilot and helicopter owner, used the heliport on the property for landing of his helicopter, which was flown solely for non-commercial purposes.[12] After Roma used the heliport in November 2014, the Rockport building inspector issued an enforcement order prohibiting the usage of the heliport on the property because such usage was in violation of the town zoning bylaw.[13] The town's board of appeals denied Roma's appeal noting in its decision that "the vibration and noise [from a helicopter landing] in this neighborhood, even when an over-ocean approach path would be utilized would, in the judgment of this board, be detrimental."[14]

The main issue addressed by the Massachusetts court was whether Massachusetts state law preempted the town zoning bylaw and required the town to seek permission from the aeronautics division of the Massachusetts Department of Transportation.[15] However, in addressing that issue, the court found it necessary to first address whether federal law preempted the town's regulation of aircraft landing sites.[16] In finding that federal law did not preempt such regulation (and ultimately finding that the town was entitled to enact its zoning bylaw prohibiting landing sites), the court distinguished between regulations pertaining to flight operations (subject to federal preemption) and regulations pertaining to local control of land use (which courts have found not subject to federal preemption).[17]

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[7] *Id.* at 635-38.
[8] *Id.* at 639.
[9] *Id.* at 627-28.
[10] *Roma III, Ltd. v. Board of Appeals of Rockport,* 478 Mass. 580, 580-81 (2018).
[11] *Id.* at 581.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 582.
[15] *Id.* at 580.
[16] *Id.* at 587.
[17] *Id.* at 587-88.

The Massachusetts court cited a Sixth Circuit decision in *Gustafson v. City of Lake Angelus*,[18] as support for its finding against federal preemption. In *Gustafson,* the plaintiff, a seaplane pilot and owner of a waterfront home on Lake Angelus within the City of Lake Angelus, received a warning from a city official that his landing of a seaplane on the surface of the lake violated two city ordinances.[19] The city ordinances prohibited certain activities deemed "public nuisances," including (1) "[t]he mooring, docking, launching, storage, or use of any… aircraft powered by internal combustion engines…" and (2) "[t]he landing upon the lands, waters or ice surface within the Village of Lake Angelus of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft."[20] After a failed attempt to have the ordinances rescinded or modified, the plaintiff brought an action in federal court asserting, *inter alia*, that the ordinances were preempted by federal and state law and seeking to enjoin the ordinances' enforcement.[21]

The district court found the city ordinances to be preempted by federal law. The district court found support for its decision in *Burbank*, holding that, due to the FAA's broad authority to regulate the use of navigable airspace, the ordinances at issue were preempted through "pervasive federal regulation of the field."[22] The Sixth Circuit reversed the district court's decision finding the Supreme Court's holding in *Burbank* to be distinguishable from the land regulation issues raised in the matter before it.[23]

The Sixth Circuit found "the United States' sovereign regulation of the airspace over the United States and the regulation of aircraft in flight is distinguishable from the regulation of the designation of the place of landing sites, which involves local control of land (or in the present case, water) use."[24] The Sixth Circuit's findings were based upon its examination of the Federal Aviation Act and its regulations, which, according to the court, indicated that the designation of plane landing sites was a matter to be determined on the local level.[25] Specifically, the Sixth Circuit noted the lack of federal regulations addressing landing sites and an FAA regulation pertaining to the establishment of civil airports, which appears to defer to local zoning ordinances.[26] Moreover, the court found that the ordinances did not conflict with or impede the objectives of federal law in that the ordinances did not "impinge upon the 'exclusive sovereignty of airspace of the United States' [pursuant to 49 U.S.C. § 40103(a)(1)] … nor [did] it interfere with the congressional mandate to insure the safety of aircraft and the efficient utilization of airspace pursuant to 49 U.S.C. § 40103(b)(2)."

Circuit Judge Nathanial R. Jones, despite reaching the conclusion that the majority opinion was "legally unassailable," issued a concurring opinion in which he expressed concern with respect to the Sixth Circuit's opinion.[27] Finding that "zoning is one of the few spheres of control the

[18] 76 F.3d 778 (6th Cir. 1996).
[19] *Id.* at 781.
[20] *Id.*
[21] *Id.* at 781-82.
[22] *Id.* at 783.
[23] *Id.* at 784.
[24] *Id.* at 783.
[25] *Id.* at 784.
[26] *Id.* at 785-88.
[27] *Id.* at 792.

Federal Aviation Act explicitly leaves to local governments," the judge expressed concern that "some states and localities will use [the Sixth Circuit's decision] as a rallying point in their efforts to undermine particular areas of federal control."[28] Concerned with the "local governments' ability to interfere with comprehensive federal regulatory programs," the judge noted that the "line between permissible local regulation, such as the zoning regulation in this case, and impermissible encroachments on federal power in the name of zoning or other traditional state police power functions, such as protecting citizens health and welfare, is a thin line."[29] As a result, the judge cautioned courts to be "mindful" of attempts by localities to "test the boundaries" of their authority.[30]

The above cases would appear to have increasing importance due to the continuing development of new technology, such as drones, and local government's attempts to regulate such technology. It can be expected that certain localities may "test the boundaries" of their authority in regulating such technology and that it will be left to the courts to determine where the "thin line" between permissible and impermissible local regulation lies.

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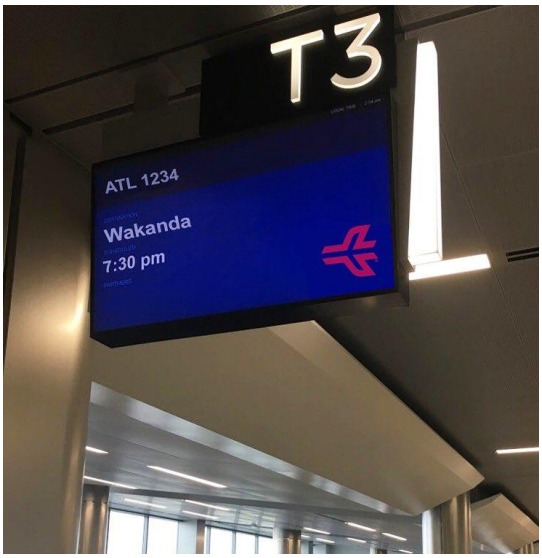
[28] *Id.*
[29] *Id.*
[30] *Id.*

FUN PAGES[1]

A Marvel*ous* Destination?



As reported by CNN.com: "On Monday [Feb. 19], Hartsfield-Jackson Atlanta International Airport airport tweeted a digitally altered picture of gate T3, which showed a flight departing at 7:30 p.m. The destination? The kingdom of Wakanda. Wakanda, of course, is fictional -- the home of Prince T'Challa and his superhero alter ego Black Panther. It's also at the center of 'Black Panther,' which just set the box office record for the biggest Presidents' Day opening."

https://www.cnn.com/2018/02/21/entertainment/atl-airport-flight-to-wakanda-trnd/index.html

Model Drones or Drone Models?[2]

At Milan Fashion Week last month, Dolce & Gabbana sent drones down the runway displaying handbags that were part of its latest collection.

[1] Readers are encouraged to please submit (via email to alan.reitzfeld@hklaw.com) aviation-related original cartoons, other works of art (especially airplane doodles), poems, photographs, crossword puzzles, etc. for the Newsletter Fun Pages.

[2] Thanks go to Aviation Finance Subcommittee Chair Michael P. Peck for providing the news and link.

https://www.digitaltrends.com/news/dolce-and-gabbana-drone-fly-catwalk/

Newark Airport IAH-EWR, Winter Storm Quinn, 3/7/18, 5:30 pm Landing?[3]

Did you know?

Aviation History

Fifteen years ago this month, the Transportation Security Administration was moved into the new Department of Homeland Security (which had been established in late 2002). https://www.faa.gov/about/history/brief_history/

Aviation Vocabulary Builder: Selected Federal Aviation Regulations

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES, available at https://www.ecfr.gov/cgi-bin/text-idx?SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&node=pt14.1.13&rgn=div5

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND ARTICLES, available at https://www.ecfr.gov/cgi-

[3] Thanks go to Fuel Subcommittee Chair Patrick Ryan Morris for the photos.

bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.21

PART 23—AIRWORTHINESS STANDARDS: NORMAL CATEGORY AIRPLANES, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.23

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.25

PART 26—CONTINUED AIRWORTHINESS AND SAFETY IMPROVEMENTS FOR TRANSPORT CATEGORY AIRPLANES, available at: https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.26

PART 27—AIRWORTHINESS STANDARDS: NORMAL CATEGORY ROTORCRAFT, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.27

PART 29—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY ROTORCRAFT, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.29

PART 31—AIRWORTHINESS STANDARDS: MANNED FREE BALLOONS, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.31

PART 33—AIRWORTHINESS STANDARDS: AIRCRAFT ENGINES, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.33

PART 34—FUEL VENTING AND EXHAUST EMISSION REQUIREMENTS FOR TURBINE ENGINE POWERED AIRPLANES, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.34

PART 35—AIRWORTHINESS STANDARDS: PROPELLERS, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.35

PART 36—NOISE STANDARDS: AIRCRAFT TYPE AND AIRWORTHINESS CERTIFICATION, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.36

PART 39—AIRWORTHINESS DIRECTIVES, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.39

PART 43—MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION, available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6d338cbb02ed7543e75fccffa6aa373c&mc=true&r=PART&n=pt14.1.43

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