

NEW YORK
CITY BAR

COMMITTEE ON AERONAUTICS NEWSLETTER

Volume 2, No. 4, Spring 2018

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House Passage of the FAA Reauthorization Act of 2018 Leaves Recreational Drone Users in Limbo

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On April 27, 2018, the U.S. House of Representatives passed the Federal Aviation Administration (FAA) Reauthorization Act of 2018 (the “Bill”) by a 393-13 vote.² The Bill includes two contradictory provisions regarding the regulation of recreational unmanned aerial vehicles (UAVs).³

The two amendments seek to address a U.S. Court of Appeals for the District of Columbia Circuit’s 2017 decision that struck down the FAA’s rule requiring the registration of recreational UAVs in *Taylor v. Huerta* and preempted any FAA regulation of most recreational UAVs.⁴ In an opinion written by Judge Brett Kavanaugh, a George W. Bush appointee widely rumored to be a leading contender for the next Supreme Court vacancy to arise during a Republican administration, the D.C. Circuit held that recreational UAVs weighing less than 55 pounds constitute “model aircraft” for the purpose of Section 336 of the FAA Modernization and Reform Act of 2012 which prohibits the FAA from regulating “model aircraft.”⁵ Although the National Defense Reauthorization Act for Fiscal Year 2017 signed by President Trump on December 13, 2017 reinstated the registration requirement for recreational UAVs struck down in *Taylor*, the D.C. Circuit’s holding continues to deprive the FAA of the statutory authority to otherwise regulate recreational UAVs weighing less than 55 pounds.⁶

The more expansive of the two seemingly conflicting amendments (the “DeFazio Amendment”), was introduced by Rep. Peter DeFazio (D-OR), the Ranking Member of the House Committee on Transportation and Infrastructure. The DeFazio Amendment would require all recreational UAV operators to obtain specific certification or operating authority from the FAA through a process to be developed by the FAA unless they only operate their UAVs within their line of site, give way to all manned aircraft, and pass an aeronautical knowledge and safety test to be

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² FAA Reauthorization Act of 2018, H.R. 4, 115th Cong. (2018).

³ *Id.*

⁴ *Taylor v. Huerta*, 856 F.3d 1089, 1093 (D.C. Cir. 2017).

⁵ *Id.*

⁶ National Defense Reauthorization Act for Fiscal Year 2017, S. 2943, 115th Cong. § 1092(d) (2017).

developed and administered by the FAA.⁷ The DeFazio Amendment would also grant the FAA Administrator the authority to periodically update its restrictions on UAV operations exempt from the FAA certification or operating authority requirement in response to emerging trends in recreational UAV technology, safety, and usage.⁸

The DeFazio Amendment was seemingly nullified by the amendment (the “Sanford Amendment”) introduced by Rep. Mark Sanford (R-SC), the former Governor of South Carolina considered a rising star in national politics before a 2009 sex scandal, which restricts FAA regulation of recreational UAVs “notwithstanding any other provision of law.”⁹ The Sanford Amendment would prohibit the FAA from regulating “model aircraft” including recreational UAVs weighing less than 55 pounds with the exception of a recreational UAV capable of flight beyond its operator’s line of sight when its operator is a member of “a community-based organization” and does not fly the UAV within 3 miles of an airport without previously notifying the airport operator or air traffic control tower.¹⁰ The Sanford Amendment would seemingly enable recreational UAV operators to evade all federal regulation besides the registration requirement re-imposed by the National Defense Reauthorization Act by declining to join any aviation or drone organizations and never operating their UAVs within 3 miles of an airport.¹¹

The conflict between the DeFazio and Sanford Amendment sets up a debate that will play out in the U.S. Senate as the upper chamber drafts and debates its own version of the Bill. On the one hand, Senate Republican leadership, which has become increasingly hostile towards the administrative state, and centrist Democrats reluctant to set a precedent that could lead to innovation-stifling federal regulation of autonomous vehicles may favor the Sanford Amendment’s approach over the DeFazio Amendment’s. On the other hand, Republican and centrist Democrat hawkishness on national security which has increased during the Trump administration may forge a bipartisan consensus in favor of increased federal regulation of recreational UAVs such as the DeFazio Amendment’s approach especially in light of concerns that ISIS and other terrorist organizations could use UAVs to perpetrate terrorist attacks. Even if the Senate were to adopt the Sanford Amendment’s approach granting the FAA very narrow regulatory authority over recreational UAVs, they will likely refine its language to prevent UAV operators from escaping all federal regulations besides the registration requirement by declining to join any aviation or drone organizations and never operating their UAVs within 3 miles of an airport.

The Senate may also consider pending drone legislation as amendments to the upper chamber’s version of the Bill such as the Drone Operator Safety Act introduced by Sen. Sheldon Whitehouse (D-RI) which would make it a federal crime to operate UAVs, including recreational UAVs considered “model aircraft,” in a manner that recklessly or knowingly interferes with manned aircraft including operating UAVs within runway exclusion zones without prior air traffic control tower approval.¹²

⁷ FAA Reauthorization Act of 2018, H.R. 4, 115th Cong. § 332 (2018).

⁸ *Id.*

⁹ FAA Reauthorization Act of 2018, H.R. 4, 115th Cong. § 343 (2018).

¹⁰ *Id.*

¹¹ *See, Id.*

¹² Drone Operator Safety Act of 2017, S. 1755, 115th Cong. (2017).