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RESEARCH SUMMARY

Reach for the Stars, Overreach by the FAA: Federal Regulators Seek to Extend Their Orbit to Outer Space

The US government is currently considering what new activities it should and should not regulate in outer space. Examples of new space enterprises include ventures such as satellite servicing, asteroid mining, lunar transport, and orbital habitats. Government discussions are focused on the provisions of the Outer Space Treaty, which was signed in 1967 by the United States, the Soviet Union, and other countries.

In the meantime, commercial companies face considerable regulatory uncertainty in this area. Particularly significant is the posture of the Federal Aviation Administration (FAA). The agency believes that Article VI of the Outer Space Treaty grants it the authority to deny access to space to any unauthorized and unsupervised entities.

Article VI declares the following: "The activities of non-governmental entities in outer space . . . shall require authorization and continuing supervision by the appropriate State Party to the Treaty."

Laura Montgomery shows that, contrary to the FAA's claim, Article VI should not be viewed as a barrier to private entities seeking to operate in outer space.

Montgomery bases her analysis on two main points, which are set forth in her paper "US Regulators May Not Prevent Private Space Activity on the Basis of Article VI of the Outer Space Treaty."

- *Article VI is not self-executing.* This means that it is not enforceable federal law unless Congress enacts domestic implementing legislation. Congress would have to identify what activities require authorization and assign regulatory authority in this area to a particular agency.
- *The FAA is overreaching.* Absent congressional action, the FAA and other regulatory agencies may not rely on Article VI to deny space access to private actors. Attempting to do so usurps the role of Congress.

Article VI of the Outer Space Treaty has caused confusion for private-sector enterprises seeking to operate in outer space. Simply understanding that Article VI is not self-executing and thus not enforceable should go a long way toward reducing any uncertainty. Alternatively, the executive branch could make clear that it will not attempt to deny private actors access to space on the basis of Article VI.

Montgomery's analysis shows that private entities may operate in outer space—and they may do so even without authorization or supervision. Absent congressional action, the FAA and other regulatory agencies may not rely on Article VI to attempt to deny access to space.