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PERSPECTIVE

Who controls low-altitude airspace?

By Jared Greenberg

On March 21, a federal judge in the Western District of Kentucky dismissed, on jurisdictional grounds, a federal lawsuit seeking a declaratory judgment to define airspace rights of aircraft operators and property owners. The case, *Boggs v. Merideth*, also known as the "Drone Slayer" case, arose from a landowner shooting down a drone flying 200 feet above his property. The landowner claimed the drone was trespassing and invading his privacy, while the pilot asserted he was in navigable airspace under the jurisdiction of the federal government. The dismissal of this case further delays answering one of the most important questions for the commercial drone industry: Who owns low-altitude airspace?

In addition to uncertain private property rights, the validity of state and local government laws regarding drone operations remains foggy. Although Part 107 to Title 14 of the Code of Federal Regulations created a federal regulatory framework for commercial drone operations, there is still significant confusion as to what constitutes a legal flight under evolving state and local laws. Laws regulating the drone industry exist in 32 states, and five states have adopted resolutions regarding drones. Last year, at least 38 state legislatures considered legislation to regulate the drone industry, and 17 states passed 31 pieces of legislation. In addition, many local governments proposed and passed ordinances impacting the drone industry at the local level. Drone pilots face the challenge of understanding which state and local law apply to each commercial operation, and whether any of these laws may be preempted by federal law.

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The confusion stems from the Federal Aviation Administration's position that it controls the airspace "from the ground up," and that the notion that it does not control airspace below 400 feet is a "myth." However, many state and local governments, as well as property owners, do not agree with the FAA's interpretation. There are major implications for where navigable airspace begins, and the question ultimately will be settled by federal courts. Without clarification, legal compliance and enforcement will be uncertain in most areas and may be impossible within some localities.

While the FAA governs the navigable airspace of the United States, navigable airspace boundaries are unclear below 500 feet, the minimum safe altitude for flight in non-congested areas. Although regulations permit aircraft to fly below the minimum safe altitude for takeoff or landing, when these rules were created, the very concept of low-flying, low-price drones — which can take off and land on any property — only existed in science fiction. Due to the proliferation of drones, boundaries are required to define where private property rights end and navigable airspace begins.

The U.S. Supreme Court provided some guidance on property rights and navigable airspace in 1946 in *United States v. Causby*. In Causby, a chicken farm was located near an airport, and the glide path for one of the runways was 83 feet above the property. The court examined whether military aircraft flying 83 feet above the property was a taking. The court held that it was a taking and stated: "[I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run." The court also acknowledged that an invasion of air above one's property can be in the "same category as invasions of the surface." The court declined to determine the exact boundary between one's property and public airspace: "We need not determine at this time what those precise limits are." Even if the court did determine precise limits, a military aircraft landing at an airport in 1946 is fundamentally different from today's low-flying, low-price, consumer and commercial drones.

With the *Boggs* case dismissed, the industry will continue to wait for a court to define navigable airspace in the context of drones. Last July, U.S. District Judge Jeffrey Meyer, of the District of Connecticut, provided dicta on the issue, which questioned the FAA's position: "the FAA believes it has regulatory sovereignty over every cubic inch of outdoor air in the United States ... [T]hat ambition may be difficult to reconcile with the terms of the FAA's statute that refer to 'navigable airspace.'" The dicta addressed the question of where the FAA's authority begins, but noted that the "case does not yet require an answer to that question."

The boundaries and jurisdiction of low-altitude airspace must be defined to unlock the full potential of the commercial drone industry. As drone operations expand, the importance of the question will continue to grow. Although many disagree on how the boundaries should be drawn, any clarity would be better than prolonged uncertainty.

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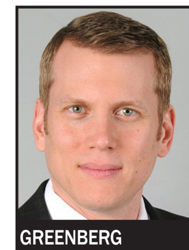
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