THOMSON REUTERS

Westlaw®

Causby and effect: How the Uniform Law Commission's misplaced reliance on a 1946 Supreme Court case threatens the drone industry

By Joshua S. Turner, Esq., and Sara M. Baxenberg, Esq., *Wiley Rein LLP**

OCTOBER 17, 2018

The dawn of manned aviation more than 100 years ago revolutionized transportation. But what is less well known is that it also sparked a radical rethinking of property rights.

As the Supreme Court explained in *United States v. Causby* in 1946, 328 U.S. 256 (1946), although historically owning land was thought to convey a property right "to the periphery of the universe," this concept had "no place in the modern world."

Congress recognized as far back as the Air Commerce Act of 1926 that "navigable airspace" — that is, the airspace above minimum safe flight altitudes — had to be subject to a "public right of freedom of foreign and interstate air navigation." The result, as the *Causby* court put it, is that "the air is a public highway."

The well-settled concepts of navigable airspace as a public good and air navigation as a federal right face new questions with the rise of small, unmanned aircraft — "drones" in the vernacular, "small unmanned aircraft systems" (sUAS) in the language of regulators and the industry.

Just as advances in internal combustion engines made heavier than air flight possible, miniaturization of sensors and electronics and advances in batteries have, over the past few years, opened dramatic new vistas for flight.

What's unique is that these new vistas are not in the stratosphere. They are down low, in the interstitial spaces where only barnstormers might have flown before. Freed of the need to accommodate human crew, sUAS can operate nearly anywhere, taking off from a driveway, sidewalk, or vehicle, and using their small size and nimble attitude control to navigate in places where large, manned aircraft never could safely go.

In short, they radically expand the safe altitude for flight. Indeed, under FAA rules, sUAS are not only authorized to operate below 400 feet, but absent a waiver are limited exclusively to this swath of airspace.

Despite the pervasive federal role in regulating navigable airspace, FAA guidance denouncing local restrictions on UAS airspace navigation, and the fact that the only federal court to squarely address these issues so far (in a case called *Singer v. Newton*) agreed with the FAA, state and local governments continue trying to restrict when and where drones can fly. Drone operators are likely familiar with many of these attempts.

But a troubling new effort to restrict drone operations has emerged which may be below the radar of most drone pilots. The Uniform Law Commission (ULC), a publicly funded organization with state-appointed members from around the country which seeks to encourage uniform state-law approaches, has established a drafting committee for tort laws relating to drones.

The well-settled concepts of navigable airspace as a public good and air navigation as a federal right face new questions with the rise of small, unmannedaircraft — "drones" in the vernacular.

The committee's current draft proposal would sharply restrict drone operations by giving property owners a right to exclude all unmanned aircraft up to 200 feet above any structure or the ground.

Drone operators would be barred from flying below 200 feet without express, individual permission from every landowner below, thus establishing, in the parlance of tort law, a "per se" trespass. The mere act of flight would be an injury that could lead to a lawsuit against the drone operator, even if no other injury were caused.

The ULC committee and its supporters justify this approach by referring to *Causby*, a World War II-era Supreme Court decision in which a chicken farmer asserted that the low-level descent of fighters and four-engined heavy bombers to a nearby military airfield was a federal taking of his property.

Proponents of the ULC's approach point to the Court's holding that although "the air is a public highway," property owners should still be able to "control" the "immediate reaches" of their property.

The Court declined to define the scope of these "immediate reaches," and case law since has offered little clarity. Nevertheless, the ULC committee has set out to provide a bright-line altitude below which unmanned aircraft cannot fly without permission.

Thomson Reuters is a commercial publisher of content that is general and educational in nature, may not reflect all recent legal developments and may not apply to the specific facts and circumstances of individual transactions and cases. Users should consult with qualified legal counsel before acting on any information published by Thomson Reuters online or in print. Thomson Reuters, its affiliates and their editorial staff are not a law firm, do not represent or advise clients in any matter and are not bound by the professional responsibilities and duties of a legal practitioner. Nothing in this publication should be construed as legal advice or creating an attorney-client relationship. The views expressed in this publication by any contributor are not necessarily those of the publisher.

the answer company™
THOMSON REUTERS®

The practical problems of this approach are obvious. Since federal law generally limits sUAS operations to below 400 feet, a 200-foot minimum altitude would cut the usable airspace in half. Negotiating a right of transit below that altitude likely would be unworkable, creating a warren of restricted airspace that even the most technologically advanced aircraft would be hard pressed to navigate.

The legal problems with adopting a 200-foot per se trespass regime are even more significant. First, any efforts by the states to define the "immediate reaches" of property and create a right of exclusion for airspace that is otherwise navigable would be inconsistent with, and therefore preempted by, federal law.

As *Causby* and numerous cases since have held, there is a federal right to transit "navigable airspace," with which states cannot interfere. What constitutes "navigable airspace" is a question not for states but for the federal government.

A state's attempt to define "immediate reaches" will be preempted to the extent it conflicts or interferes with the ability of aircraft — manned or unmanned — to safely navigate the skies consistent with federal law.

Causby's refusal to define precisely the scope of the "immediate reaches" does leave open the question of whether there is a level below which "navigable airspace" could not extend. But *Causby* provides no support for adopting a hard and fast altitude limit. Indeed, *Causby* starts by acknowledging that aerial property rights are mutable.

The very idea of the sky as a public highway changed the ancient conception of how property works. *Causby* is thus perhaps best understood as standing for the proposition that our comprehension of property rights is not fixed, and that changes in technology can and do impact the limits of property rights.

Because the public right of navigation through the sky was established by Congress in an act that *Causby* recognizes was proper, the case further suggests that the federal government has flexibility in defining what lies in the public domain.

Second, regardless of where the "public highway" ends, and even if there are some "immediate reaches" into which navigable airspace cannot extend, establishing a per se trespass is fundamentally inconsistent with *Causby*'s central holding. There, the Supreme Court determined that flights *below* the navigable threshold "are not a taking unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."

A single intrusion is thus not enough to deprive the owner of a property right. But this is precisely what the ULC's "per se" trespass seeks to establish — a right to prohibit even the smallest intrusion.

At its core, *Causby*'s holding is that the "control" that people have over the immediate reaches is limited. Any rights they have come not from the fact of the aircraft transiting the airspace, but from interference the aircraft might cause with the use of the property below. The irony in the ULC's draft is that it contradicts the very Supreme Court decision on which it purports to rely.

In short, the ULC's rethinking of property rights has the potential to dramatically curtail the development of the drone industry. To quote *Causby* (only slightly out of context), "[c]ommon sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."

The idea that property owners have the right to exclude drones flying above their property simply "has no place in the modern world."

This article appeared in the October 17, 2018, edition of Westlaw Journal Aviation.

* © 2018 Joshua S. Turner, Esq., and Sara M. Baxenberg, Esq., Wiley Rein LLP

ABOUT THE AUTHORS

Joshua S. Turner (L), partner and co-chair of **Wiley Rein**'s Unmanned Aircraft Systems practice in Washington, represents clients in proceedings before the FCC, the FAA and other federal agencies, as well as in federal and state court actions. **Sara M. Baxenberg** (R), associate in **Wiley Rein**'s UAS practice in Washington, provides counsel to clients seeking to operate unmanned aircraft systems, as well as advises telecommunications and mass media clients on a variety of regulatory, transactional and compliance matters. A version of this expert analysis was first published in the October 2018 edition of the Association for Unmanned Vehicle Systems International's Unmanned Systems magazine. Republished with permission.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.