



BY JOHN S. YODICE

Freedom to fly

Our right to use the airspace

ALL OF US in general aviation have a very special interest in the airspace over the United States—that is, the airspace available for our flying activities. We often take this availability for granted. The reality is that over many years this limited airspace resource has been shrinking (we won't be getting any more navigable airspace), often without much notice of the shrinking effect. With the proliferation of TFRs, painfully evident in this election year, this is a good time to be reminded of how easily the airspace can be limited and restricted against general aviation use.

The shrinking of the airspace has been principally caused by the power of the government conferred in federal legislation to control the use of the airspace for three specific purposes: "safety," "security," and the "efficient use of airspace." It is hard to argue against these objectives, although one might argue that many sins have been committed against airspace users in the name of these laudable objectives. And,

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we pilots often wonder whether the large amount of particular airspace taken is justified by the stated objective. Nevertheless, we find ourselves with the familiar designations of prohibited areas, restricted areas, an alphabet soup of airspace designations with their restrictions, and more. The most recent cause of shrinking has been because of "temporary flight restrictions," or TFRs, which in most cases have turned out not to be very temporary at all.

Ordinarily, this column is devoted to providing specific legal information to aircraft owners and pilots that I believe would be helpful in their flying activities, especially information that is not easily obtainable from other sources. This month, with a slight departure from my usual bread-and-butter approach—and considering the growing encroachments into the navigable airspace—I would like to discuss something that is not usually mentioned by the airspace regulators: the legal basis that underlies the pilots and owners "right" to operate in the airspace overlying the United States. I am driven to this because it seems to me that

it has become too accepted that the right (sometimes called a "privilege"—erroneously, in my view) is given to us by the government, and that we should be grateful for the privilege extended to us by a beneficent government. On behalf of many owners and pilots, I would like to express a contrary opinion.

The current version of the United States Code, almost never recognized in the imposition of airspace restrictions, expresses it simply in this way: "A citizen of the United States has a public right of transit through the navigable airspace" [49 U.S. Code 40103(a) (2)]. To demonstrate how obscure and unnoticed this provision has been, years ago in a rewrite of the aviation laws, this provision was being left out—until AOPA caught it. It was reinstated.

Even this current version could lend itself to the interpretation that this is a right conferred by the government on citizens. Such an interpretation would be wrong. The earlier version of this provision in the Federal Aviation Act of 1958, from which the current version was drawn, makes this clear, and is better expressed. It says: "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." Notice that the right is being *recognized and declared to exist*, not being gratuitously conferred by the government. It would be nice to see Congress, at the next opportunity, reinstate this better language to prevent the government regulators from misinterpreting the current version.

And as for the possibility of misinterpretation, I hasten to assure our friends in business aviation that the same legislation, recognizing this right of citizenship in airspace, defines citizen of the United States to include not only individuals but also corporations, associations, and partnerships essentially controlled by individual citizens.

So, in summary, with apologies to my faithful readers for straying from my usual topics, I think it appropriate from time to time to remind ourselves as well as the regulators of the *right* of general aviation to the use of the airspace, and to give this *right* due consideration when they seek to adopt prohibitions and restrictions on general aviation use.

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