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Addressing Drone Threats While Protecting the First Amendment

Unmanned aircraft systems (UAS or drones) provide new aerial capabilities that journalists embrace as important new tools for newsgathering, but that some federal law enforcement agencies view as potential threats. Safety concerns presented by these evolving technologies must be balanced against the Constitution's protection of a free press. We have serious concerns that the current Counter-UAS proposals (S. 2836, H.R. 5366 and H.R. 6401) in the FAA Reauthorization Act do not comport with the First Amendment and the public's interest in receiving the free flow of information provided by journalists.

The United States Constitution requires that any limitations on First Amendment rights, such as the right to gather and report the news, be narrowly tailored and reasonable in terms of time, place, and manner. While some federal law enforcement agencies may have a compelling security interest to track and limit certain operations of drones – for example, the Secret Service oversight in the proximity of Presidential travel – the current legislation is overly broad and unconstitutional. As currently drafted, federal Counter-UAS legislation would allow DHS and DOJ to track and potentially destroy drones operating near “covered facilities or assets,” which could include courthouses, public protests, prisons and other detention facilities, and disaster areas. In this respect, these proposals fail to sufficiently protect the First Amendment rights of journalists to gather the news and the First Amendment interest in the timely receipt of information involving issues of public concern near such covered facilities or assets.

Specifically, we request that these proposals be amended to:

- **Include Reasonable Accommodations for the News Media Which Already Exists for Manned Aircraft.** The current proposals state DHS and DOJ shall “avoid infringement of the privacy and civil liberties of the people of the United States and the freedom of the press consistent with Federal law and the Constitution of the United States.” However, there is no explicit requirement that DHS and DOJ provide a reasonable accommodation to journalists to operate drones near covered facilities and assets. For manned aircraft, the Federal Aviation Administration (FAA) allows “accredited news representatives” to operate in otherwise closed airspace if they coordinate in advance (14 C.F.R. § 91.137). Congress should provide similar First Amendment accommodations for accredited news representatives in any Counter-UAS legislation.
- **Require the Domestic Counter-UAS Framework to Be Established Under the Administrative Procedures Act.** The proposals state that DHS and DOJ “may prescribe regulations and shall issue guidance” to implement these Counter-UAS capabilities. Without requiring DOJ and DHS to establish its Counter-UAS framework and promulgate a definition of “threat” via notice and comment rulemaking, the public, including the news media, will be denied a forum to raise legitimate concerns and to provide constructive input on the creation of domestic Counter-UAS policies.
- **Require Public Notice of Covered Assets.** Under these proposals, DHS and DOJ are permitted to designate “covered assets” across the United States without an express requirement to provide notice to drone operators. For manned aircraft, the FAA promulgates a public Temporary Flight Restriction (TFR) to pilots before restricting airspace. Unlike “facilities,” which are likely fixed locations, “assets” could appear anywhere, could be mobile, and could be located near events covered by the news media on the ground and in the air, such as search and rescue, emergency response, disaster recovery, or fugitive apprehension. Without providing advance or contemporaneous notice, a journalist reporting on a story of public concern that is designated as a covered asset -- or an entirely different news story in the vicinity of a covered asset -- could be tracked and subject to lethal force against their newsgathering drone without notice that a covered asset had been so designated.