

**Submitted on Behalf of the
News Media Coalition Consisting Of:**

Advance Publications, Inc.
American Society of Media Photographers
The Associated Press
Gannett Co., Inc.
Getty Images (US), Inc.
Gray Television, Inc.
Media Law Resource Center
MPA – the Association of Magazine Media
The National Press Club
National Press Photographers Association
NBCUniversal Media, LLC
News Media Alliance
The New York Times Company
Radio Television and Digital News Association
Reporters Committee for Freedom of the Press
The E.W. Scripps Company
Sinclair Broadcast Group, Inc.
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June 26, 2017

VIA EMAIL AND OVERNIGHT DELIVERY

Honorable John McCain
Chairman
Committee on Armed Services
U.S. Senate
228 Russell Senate Building
Washington, DC 20510

Honorable Jack Reed
Ranking Member
Committee on Armed Services
U.S. Senate
228 Russell Senate Building
Washington, DC 20510

Honorable Mac Thornberry
Chairman
Committee on Armed Services
U.S. House of Representatives
2216 Rayburn House Building
Washington, DC 20515

Honorable Adam Smith
Ranking Member
Committee on Armed Services
U.S. House of Representatives
2216 Rayburn House Building
Washington, DC 20515

Re: National Defense Authorization Act Legislative Proposal on Drone
Identification, Tracking and Destruction

Dear Chairman McCain, Ranking Member Reed, Chairman Thornberry and Ranking Member Smith,

On behalf of the News Media Coalition, we respectfully submit the following comments regarding the 2018 National Defense Authorization Act (NDAA). These comments reflect our concerns with the request from the Administration to amend Title 18 to authorize the federal government, or its designee, to detect, identify, track and potentially destroy unmanned aircraft systems, or “drones”.

Our concerns with the Administration's legislative proposal are that it 1.) avoids the Administrative Procedures Act; 2.) allows the government to designate Covered Operations without providing notice to operators; 3.) allows broad delegation of authority to federal and non-federal persons; 4.) treats similarly situated manned and unmanned aircraft differently in the event of Temporary Flight Restrictions (TFRs); and 5.) prohibits judicial review.

The News Media Coalition includes 19 news media organizations and collectively we submit these comments on behalf of newspapers, magazine, broadcast and online news outlets in the United States. The News Media Coalition includes:

- The nation's leading television news providers;
- The leading national newspapers;
- More than 400 television stations serving local U.S. markets;
- More than 2,000 regional and local U.S. newspapers;
- Dozens of U.S. radio stations;
- Content providers for hundreds of online and mobile platforms and devices;
- The leading wire service in the U.S. and abroad;
- The largest stock film and photo agencies worldwide;
- The leading professional association of visual journalists;
- The nation's premier trade association representing independent photographers;
- The leading membership association for content providers in all media, supported by over 135 media members and 210 law firms worldwide;
- The world's largest professional organization devoted exclusively to electronic journalism, whose members include local and network news executives, news directors, producers, reporters, photographers, editors, multimedia journalists and digital news professionals in broadcasting, cable and digital media, as well as journalism educators and students;
- The premier trade association of the magazine media industry;
- The nation's largest and most broad-based journalism organization dedicated to encouraging the free practice of journalism;
- The world's leading professional organization for journalists, with more than 3,000 members representing most major news organizations;
- A Washington D.C.-based nonprofit that, for more than 40 years, has provided free legal resources, support and advocacy to protect the First Amendment and freedom of information rights of journalists.

For the past four years, the News Media Coalition has worked cooperatively with the federal government on the development of a regulatory framework that allows the safe operation of UAS to gather and report the news. As part of those efforts, the News Media Coalition actively participated in the development of safety protocols for newsgathering at the Federal Aviation Administration (FAA) test site at Virginia Tech, the FAA aviation rulemaking committee (ARC) on flights over people, the National Telecommunications and Information Administration's (NTIA) drone privacy best practices and the new FAA ARC assembled to make recommendations to the FAA Administrator on remote identification and tracking.

We have come together for these comments in the unified belief that preserving the right to gather news in public spaces, from the ground or from the air, is a fundamental issue that Congress must consider with any legislation affecting the rights of journalists to gather news in the public interest. With the compelling First Amendment principle in mind, the News Media Coalition respectfully offers this Comment to help Congress ensure that the final 2018 NDAA bill recognizes the First Amendment rights of journalists to gather news and the public to be informed, while at the same time addressing the government's legitimate security concerns.

Comments

The News Media Coalition in these comments address the Administration's legislative proposal to the House and Senate Armed Services Committees to amend Title 18 in the 2018 NDAA bill to grant the federal government that authority to use counter UAS technology. The News Media Coalition appreciates the proactive outreach the FAA and the Department of Justice (DOJ) have made regarding this legislative proposal. We have raised our concerns with the FAA and DOJ and will seek to continue a dialogue with the Administration to meaningfully address legitimate security concerns while protecting the First Amendment rights of journalists to gather the news and First Amendment interest in the timely receipt of information of public concern.

The News Media Coalition has five primary concerns with the Administration's legislative proposal on counter UAS authorities. The legislative proposal:

1.) Avoids the Administrative Procedures Act. The Administration's legislative proposal in subsection (d) requires the Administration to develop a government-wide policy regarding the use of countermeasures against UAS that pose a threat to federal facilities and operations. Individual federal departments and agencies must issue policies, procedures, or plans to carry out the activities described in the government-wide policy.

We commend the Administration for including in their proposal a requirement that the government must "respect privacy, civil rights, and civil liberties" in the creation of its policy. However, the legislative proposal to establish the authority to "disable, disrupt, damage, or destroy" unmanned aircraft operating domestically in the national airspace system does not compel the government to follow Administrative Procedures Act (APA) requirements for notice and comment rulemaking in promulgating government-wide policies, procedures or plans to implement the legislation. By avoiding the APA requirements, the public, including drone operators like the news media, would be denied a forum to raise legitimate concerns or provide constructive input to a government-wide policy that would create a fundamental change to the operation of unmanned aircraft in the United States.

2.) Allows the Government to Designate Covered Operations without Providing Notice to Operators. The Administration's legislative proposal in (i)(2) allows the head of a department or agency to designate a broad variety of public safety, law enforcement, or national or homeland security operations as eligible for counter UAS protection. This would include events that are newsworthy and would be typically reported on by the news media on the ground and in the air, such

as a “law enforcement investigation,” “search and rescue operations,” “fugitive apprehension operation,” or “emergency response” operation.

The Administration’s legislative proposal does not include any prior notice to drone operators regarding the designation of a “covered operation.” While under the Act a “covered facility, location, or installation” is a fixed site where a permanent flight restriction could be established, a “covered operation” could be a dynamic event moving rapidly across multiple jurisdictions or states, such as fugitive apprehension or search and rescue operations. Without providing advance or contemporaneous electronic notification to drone operators, a journalist reporting information about a “covered operation” -- or an entirely different news story in the vicinity -- could be subject to lethal force against their unmanned aircraft while operating domestically in the national airspace system. The FAA is currently developing electronic two-way communication systems through the Low-Altitude Authorization and Notification Capability (LAANC) program and through Unmanned Traffic Management (UTM), either of which could constitute a notification system, but neither is operational today.

3.) Allows Broad Delegation of Authority to Federal and Non-Federal Persons. The Administration’s legislative proposal in subsection (a) vests the authority to implement the counter UAS capabilities in the Act with the head of an Executive Branch department or agency or any designated “covered person.” A “covered person” is defined in (i)(3) as “any member of the Armed Forces, a Federal officer, employee, agent, or contractor, *or any other individual*” (emphasis added).

The phrase “or any other individual” means that the authority to track, without prior consent, and use lethal force against an unmanned aircraft flying domestically in the national airspace system, could be delegated to anyone: federal employees, non-federal employees, government contractors, private security or any other person. Although section (d)(4) requires that the government-wide policy include a requirement that the covered person receive “appropriate training” and act “subject to Federal Government oversight,” the scope of the delegation is virtually open-ended. Additionally, because the Act specifically denies any opportunity to seek a judicial interpretation of a drone operator’s legal rights, the federal or non-federal person would exercise their delegated authority with complete impunity.

4.) Treats Similarly Situated Manned and Unmanned Aircraft Differently in the Event of Temporary Flight Restrictions (TFRs). The Administration’s legislative proposal does not provide reasonable accommodations for the news media to operate drones near covered locations or during covered operations. However, for manned aircraft, 14 C.F.R. § 91.137 currently provides that “accredited news representatives” can operate within a TFR in the vicinity of a disaster or hazard area if the news media, prior to entering the area, files a flight plan with the appropriate FAA or ATC facility specified in the Notice to Airmen and the operation is conducted above the altitude used by the disaster relief aircraft, unless otherwise authorized by the official in charge of on scene emergency response activities. That regulation reasonably comports with the news media’s First Amendment right to gather and disseminate information, and the public’s First Amendment right to receive that information, during important newsworthy events. Congress should provide similar First Amendment recourse in any legislation, such as the Administration’s proposal, that would impact the ability of journalists to gather news through unmanned aircraft operations.

5.) Prohibits Judicial Review. The Administration's legislative proposal in subsection (f) prohibits judicial review of a covered person acting under the authority granted for counter UAS activities under this Act.

This broad prohibition on any judicial review is extremely concerning. For instance, if a covered person abuses the rights granted under the Act to track or surveil a drone operating in the national airspace without a legitimate safety purpose, the proposal would preclude the violated party from any legal recourse. Alternatively, if a covered person uses lethal force to destroy an unmanned aircraft flying domestically in the national airspace system and that drone falls to the ground injuring a person or destroys property, the Act would bar any legal recourse against the covered person by the injured person or property owner.

Conclusion

The News Media Coalition recognizes the significant importance of securing the national airspace system, while protecting the First Amendment rights of journalists to gather the news and the First Amendment interest in the public's timely receipt of information of public concern. We look forward to working with Congress and the Administration to address these concerns. However, we have significant procedural and substantive concerns regarding the Administration's legislative proposal for counter UAS capabilities in its current form.

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