Statement for the Record On Importance of Protecting Civil Liberties and Providing Accountability For C-UAS Authorities

The American Civil Liberties Union, Center for Democracy & Technology, Electronic Frontier Foundation, and Electronic Privacy Information Center jointly submit this Statement For The Record regarding counter unmanned aerial system ("C-UAS") authorities.

We recognize that the government has a genuine need for counter-drone monitoring and mitigation powers and support the development of policies that responsibly achieve this goal. However, given the expanding use of drones by the public—notably by journalists and activists—it is critical that those powers are carefully tailored, and that checks and oversight mechanisms exist to prevent misuse and allow ordinary, law-abiding individuals to exercise their rights.

Unfortunately, as we and many other civil society advocates have highlighted, past proposals have failed to give due consideration to these needs.[1] Congress should produce well-balanced rules that address all these priorities, not grant de facto authority to law enforcement to take down drone flights whenever they want. Ultimately, Congress must decide whether drones will be a technology that mainly serves government agencies and big companies, or whether it might also empower individuals.

To make progress in stabilizing C-UAS authorities and addressing emerging issues, Congress should adopt a more comprehensive approach that accounts for the full range of risks and implements proper safeguards. We recommend future C-UAS legislation include the following priorities, which are essential to protecting civil liberties and providing accountability:

Strong and explicit safeguards for First Amendment-protected activities: Protection of First Amendment rights is essential as drones have become a valuable tool for journalists, as well as activists recording demonstrations both to spread awareness and document potential police mistreatment of protesters. Law enforcement has already, on numerous occasions, abused their authority to block drone flights purely to stop journalists from recording the behavior of police;[2] Congress must not allow C-UAS powers to be misused in this nefarious manner. It is unacceptable that an investigative reporter or protester might have a drone they are using in a lawful and Constitutionally-protected manner abruptly taken out of the air due to overbroad or unclear rules. Any legislation extending C-UAS authorities should guard against this risk by providing strict protections for journalism and other Constitutionally-protected activities.

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[1] See, e.g., Letter from Civil Society Orgs. to Reps. Rodney Davis & Cedric Richmond re: H.R. 6846, the Advancing Innovation Act (Sept. 25, 2020), available at https://www.eff.org/wp-content/uploads/2020/09/Civil-Society-Letter-on-Drones-Sept-2020.pdf; Letter from Civil Society Orgs. to Reps. Rodney Davis & Cedric Richmond re: H.R. 6846, the Advancing Innovation Act (Jan. 13, 2020), available at https://www.eff.org/wp-content/uploads/2020/01/Civil-Society-Letter-on-Drones-Jan-2020.pdf

[2] See, e.g., Colleen Long, Police Use "Emergency" Powers to Shut Down Drone Journalism, Associated Press (Jun. 4, 2020), available at https://apnews.com/article/ap-top-news-drones-police-misconduct-technology-journalism-6f8f3e4e5d2e8f3b4c9d1a2b3c4d5e6f; Jason Koebler, How Police Have Used FAA Rules to Ground Journalist Drones, Vice (Sept. 17, 2020), available at https://www.vice.com/en/article/foia-how-police-have-used-faa-rules-to-ground-journalist-drones; Powell, "Temporary flight restrictions used to block journalists' drones at protests," Oregonian (Jun. 2, 2020), available at https://www.oregonlive.com/news/article/portland-protest-flight-restrict

Ensure transparency and require detailed reporting: Strong transparency measures and reporting requirements for C-UAS activities are essential to guard against abuse, as well as to ensure efficacy given rapid evolution in how drones are used and uncertainty over what C-UAS measures will most effectively mitigate threats. Legislation extending or expanding C-UAS powers should require any entity exercising those powers to provide annual public reporting that includes 1) the number of times mitigation measures were deployed, 2) a summary of any incidents in which aircraft were seized, disabled, damaged, or destroyed pursuant to C-UAS authority, 3) a description of any non-compliance events, and 4) a description of any C-UAS actions that disrupted unmanned aircraft engaged in Constitutionally-protected activities. Required reporting on these important metrics would not compromise methods and techniques, yet would protect against abuse, and provide the public and policymakers useful information on how counter-drone systems might be improved in the future.

Furthermore, if C-UAS powers are extended to state and local law enforcement, state open record laws and other transparency rules should be applied to their use of this authority. States and localities—and most importantly, the residents of those localities—must not be inhibited from assessing how their law enforcement personnel deploy new powers granted by the federal government.

Provide due process and recourse for improper counter-drone activities: C-UAS authorities—especially actions that result in the damage or seizure of private property—should be subject to reasonable due process and redress measures to account for impropriety. Individuals, including both drone operators and bystanders, must have reasonable means of contesting whether harmful C-UAS actions were within the bounds of the law, and seeking redress for any improper damage that does occur. Problematic practices that undermine due process rights such as asset forfeiture should not be considered.

Require C-UAS mitigation to involve least-invasive methods: Necessary counter-drone measures can range significantly depending on the situation. Most of the time, simply identifying the owner of a drone, checking whether a drone is on an authorized "white list" to fly in a sensitive area, or notifying its operator that it has veered into a restricted airspace is sufficient to remedy a threat. When these and other low-risk countermeasures are reasonably available, authorizing more extreme actions such as a kinetic response or otherwise downing a drone is both unnecessary and dangerous. C-UAS authorities should empower personnel to take only the least-intrusive measures reasonably necessary to mitigate a potential threat, and promote the development of guidelines on how to evaluate threats and necessary responses across various situations. Congress should also stipulate that no mitigation measures may be applied to drones unless they are actually flying within a prohibited or restricted area.

These common sense rules would still permit counter-drone activities as needed in any given situation, while removing the danger of sloppy and overbearing mitigation measures, or even worse, abuse of C-UAS powers, such as disrupting journalists' drones based on the pretext of a threat. Limiting C-UAS mitigation powers to least-invasive methods is especially critical for any legislation that seeks to expand the personnel authorized to engage in counter-drone activities to include not just federal officials, but state and local law enforcement.

Maintain reasonable retention limits on data collection: Current law creates a 180-day retention limit for data collected via C-UAS activities, but also includes a broad exemption for whenever the government

deems necessary for an investigation or to support ongoing security operations.[3] The general retention period along with this exemption provides ample authority for preserving data to meet any legitimate security needs. Congress should maintain current retention rules, especially given that innovation in drone use could mean that in the future these aircraft contain new forms of sensitive data. Already today drones may contain personal video that would, in a cell phone or any other device, not be accessible to law enforcement without a warrant.

Maintain sunset for C-UAS powers as drone uses continue to evolve: Congress has been wise to place a sunset on C-UAS authorities. Drones are still a relatively new technology and are evolving in terms of their capabilities and uses to the public. Counter-drone techniques are evolving as well and involve even newer, more uncertain technologies. Periodic review ensures that rules created at this time do not improperly inhibit unforeseen future uses and do not grant authorities that prove needlessly broad or dangerous. Congress should continue to include a sunset on C-UAS authorities to protect civil liberties and promote efficacy.

We hope Congress will take effective action on this important issue. However, it must do so in a careful manner that protects privacy and civil liberties, as well as addressing public safety concerns. We urge you to only extend C-UAS authorities with the limits described above to help ensure that counter-drone authorities are wielded responsibly.

[3] 6U.S.C. § 124n(e)(3).