

September 28, 2018

RE: ACLU urges you to vote NO on H.R. 302 unless sections 1602 and 1919 are removed

Dear Senator,

On behalf of the American Civil Liberties Union (ACLU), we write to urge you to press for removal of Section 1602 and Section 1919 in H.R. 302, the FAA Reauthorization Act of 2018. This bill has passed the House, and we anticipate that it will soon be considered in the Senate. Should this legislation be considered as is, we urge you to vote NO on H.R. 302 given the threat it poses to press freedom, the Fourth Amendment, and other civil liberties. The ACLU will include your vote on H.R. 302 in our voting scorecard for the 115th Congress.



AMERICAN CIVIL LIBERTIES UNION

Washington Legislative
Office
915 15th Street, 6th
Floor
Washington DC 20005
(202) 544-1681
aclu.org

Susan Herman
President

Anthony Romero
Executive Director

Faiz Shakir
*National Political
Director*

Section 1602 of H.R. 302 includes a modified version of the Preventing Emerging Threats Act¹, a bill that would give the Departments of Homeland Security (DHS) and Justice (DOJ) broad authority to surveil, seize, monitor or even shoot down drones – without a warrant or any judicial oversight whatsoever. In addition, the provision could foreclose journalists from using drones in circumstances they have been previously deployed to aid reporting, including transfer of children to detention facilities², protests³, and hurricane responses⁴. The Preventing Emerging Threats Act has been opposed by the Reporters Committee for Freedom of the Press⁵ and the National Press Photographers Association.

Section 1919 of H.R. 302 directs the Transportation Security Administration (TSA) and the U.S. Customs and Border Protection (CBP) to consult on the deployment of biometric technologies. While Section 1919 is markedly better than language that was originally proposed as part of the TSA Modernization Act⁶, it does not explicitly require TSA to obtain legislative authorization and follow baseline privacy standards before collecting biometrics domestically or on Americans.

¹ S. 2836, 115th Cong. (2018).

² See Mike Sorrentino, “See drone video of a reported Texas ‘tent city’ for immigrant children,” CNet (June 22, 2018), <https://www.cnet.com/news/see-a-drone-view-of-a-texas-tent-city-for-migrant-children>.

³ See April Glaser, “The FAA banned drones from flying at the Standing Rock oil pipeline protest,” Recode (Nov. 28, 2016), <https://www.recode.net/2016/11/28/13767216/faa-bans-drones-standing-rock-dakota-access-pipeline-video>.

⁴ See Matthew Hutson, “Hurricanes Show Why Drones are the Future of Disaster Relief,” NBC News (Sept. 9, 2017), <https://www.nbcnews.com/mach/science/hurricanes-show-why-drones-are-future-disaster-relief-ncna799961>.

⁵ Letter from ACLU et al. to U.S. Senate (June 12, 2018) (on file with ACLU).

⁶ S. 1872, 115th Cong. § 216 (2017).

A. The Drone Provisions Threaten Freedom of the Press and Grant the Government New Warrantless Surveillance Powers

The intent of Section 1602 is to purportedly arm DOJ and DHS with “the ability to act quickly and effectively when a [drone] poses a security risk to large-scale events and government facilities.”⁷ This goal may be admirable, but the bill does not achieve it. Instead, it creates an unnecessary surveillance backdoor, undermines freedom of the press, and raises additional public safety risks. Section 1602 grants DOJ and DHS the power to surveil, seize, monitor or even shoot down drones in any case where it determines a drone poses a “credible threat” to broadly defined “covered facilit[ies] or asset[s].” This provision raises the following concerns:

- **The bill empowers DOJ and DHS to declare large swathes of areas as “covered facilit[es] or asset[s],” implicating areas where journalists have First Amendment rights.** The bill’s definition of “covered facility or asset” is broad and vague – including, for example, areas related to an “active Federal law enforcement investigation, emergency response, or security function.” As applied, this definition may implicate areas where there is a strong public interest for drone use in reporting. For example, in the days following Hurricane Florence, local outlets dispatched media drones to capture footage of the flooding and wreckage.⁸ Drones have also previously been used to report on protests in Ferguson⁹ and the transfer of immigrant children to detention facilities.¹⁰ However, under this bill, DOJ and DHS would have the authority to limit journalists from flying in areas like these where there is a strong interest in providing information to the public.
- **H.R. 302 grants new warrantless surveillance powers to DHS and DOJ.** The bill exempts DOJ and DHS from key provisions of Title 18, including the Wiretap Act and Pen Register and Trap and Trace statute, in cases where it deems a drone poses a “credible threat.” As a result, it allows the government to collect sensitive metadata and communications without a warrant or court order. Such a loophole is unnecessary given that many provisions in Title 18 already include emergency exceptions that allow the government to collect information in cases where safety is threatened with only after-the-fact approval from a judge. Moreover, the bill explicitly permits this information to be retained and used for purposes unrelated to the drone threat, including other investigations, criminal prosecutions, or supporting “ongoing security operation[s].”
- **The bill permits DOJ and DHS to take extreme measures, like seizing or using force to take down a drone, without adequate due process.** The bill would allow DOJ and DHS to take severe actions against private property, including forfeiture of a drone, without any prior or after-the-fact review from a judge. Additionally, the bill does not contain any provisions in the event that such actions are unwarranted and fails to establish proper procedures for

⁷ Press Release, U.S. House Committee on Homeland Security (July 18, 2018).

⁸ See Jennifer Kite-Powell, “These Drones and Humans Will Work Together in Hurricane Florence Recovery Efforts,” *Forbes* (Sept. 16, 2018), <https://www.forbes.com/sites/jenniferhicks/2018/09/16/these-drones-and-humans-will-work-together-in-hurricane-florence-recovery-efforts/#7d6695feb714>.

⁹ See Russell Brandom, “Ferguson’s no-fly zone was about keeping the media out, according to new documents,” *The Verge* (Nov. 3, 2014), <https://www.theverge.com/2014/11/3/7149445/fergusons-drone-blackout-was-about-keeping-the-media-out-faa>.

¹⁰ See Mike Sorrentino, “See drone video of a reported Texas ‘tent city’ for immigrant children,” *CNet* (June 22, 2018), <https://www.cnet.com/news/see-a-drone-view-of-a-texas-tent-city-for-migrant-children>.

redress for an aggrieved party. Without such checks, the bill creates a clear pathway for unbridled abuses of government power and raises serious concerns about the use, or possible misuse, of authority by DOJ and DHS.

- **The bill would authorize the government to take extreme actions that cause, rather than prevent, harm to public safety.** The Federal Aviation Administration recently warned civil airports against testing or using counter drone technologies, noting that they could create “hazards” and had a risk of “false positives.”¹¹ Despite this, H.R. 302 empowers DOJ and DHS to use counter drone technologies – including hacking a drone, jamming radio and electronic signals (potentially impairing cellular signals in an entire region), or even using force to take down a drone “if necessary” – in cases where there is a “credible threat.” DHS and DOJ have yet to present any evidence to Congress that they can use counter drone technologies safely and responsibly. Moreover, the bill fails to define exactly what a “credible threat” is, leaving this to the discretion of the agencies in consultation with the Department of Transportation. As such, the government could exert its power in cases where there may not be a real-life or imminent threat, causing more harm than it prevents.

B. The Biometric Provision Fails to Ensure Individual’s Privacy Rights Are Protected

TSA is currently testing deployment of biometric technologies in domestic airports on Americans.¹² TSA biometric deployments are alarming considering that Congress has never explicitly authorized widespread collection of biometrics on Americans for domestic travel and TSA has yet to undertake rulemaking clarifying how it intends to ensure such collection does not violate Americans’ privacy rights. Notwithstanding these existing concerns, Section 1919 instructs TSA to consult with CBP when deploying biometric technology. This language is an improvement over the original proposed language in the TSA Modernization Act¹³, which instructed TSA to deploy biometric technologies in screening areas, boarding areas, and other areas it deemed “appropriate” with no reporting or privacy protections whatsoever. However, Section 1919 is still flawed as it fails to condition biometric deployments on explicit legislative authorization from Congress and adherence to baseline privacy standards. As such, the provision does not fully address key issues, including the collection of data, use of data across government agencies, and the sharing of data with law enforcement for surveillance, immigration or other unrelated purposes.

For these reasons, the ACLU urges you to vote NO on H.R. 302 unless sections 1602 and 1919 are removed. If you have any additional questions, please feel free to contact Neema Singh Guliani, Senior Legislative Counsel at nguliani@aclu.org.

¹¹ Letter from John R. Dermody, Dir. Of Airport Safety and Standards, Federal Aviation Administration (July 19, 2018).

¹² See Russell Brandom, “Airport face recognition could extend to US citizens, says Customs,” The Verge (May 9, 2017).

¹³ S. 1872, 115th Cong. § 216 (2017).

Sincerely,

A handwritten signature in black ink, appearing to read 'Faiz Shakir'.

Faiz Shakir
National Political Director

A handwritten signature in black ink, appearing to read 'Neema Singh Guliani'.

Neema Singh Guliani
Senior Legislative Counsel