ASSOCIATION FOR UNMANNED VEHICLE SYSTEMS INTERNATIONAL

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COMMENTS OF THE ASSOCIATION FOR UNMANNED VEHICLE SYSTEMS INTERNATIONAL ON THE AEROSPACE STATES ASSOCIATION SUGGESTED PRIVACY LEGISLATION PLAN 2013

I. Executive Summary

The Association for Unmanned Vehicle Systems International (AUVSI)[1] supports the expanded use of unmanned aircraft systems (UAS) and encourages open discussion of privacy concerns and proposed changes to existing rules, regulations, and laws. These discussions should occur concurrently with the integration of UAS into the National Airspace System (NAS)[2] in order to fully realize the benefits of rapidly advancing UAS technology and so that a greater understanding of UAS technology's potential can be achieved. Enactment of legislation now – before sufficient experience with integration of UAS into the NAS exists – is premature, and will hinder the creation and development of this new industry. Barring unnecessary delays, AUVSI estimates that this new industry is poised to create over 70,000 new jobs and $13.6 billion in economic impact within the first three years of integration alone.[3]

New legislation at the federal or state level that is not technology neutral or that is inconsistent with existing privacy rules, regulations, and laws would stifle innovation and cause delay, and may prevent or discourage the use of UAS by public safety agencies and other potential users. Fourth Amendment jurisprudence, existing federal and state privacy laws, and comprehensive Federal Aviation Administration (FAA) regulations already provide extensive guidance that would allow for initial integration of UAS operations. The FAA, for example, has taken steps to address privacy concerns relating to the use of UAS at test sites, which will help gather knowledge and best practices about UAS operations. If the FAA completes its required and pending rulemaking activities for UAS integration, there will be ample opportunities for multi-stakeholder input.

II. Existing Fourth Amendment Protections

The Fourth Amendment and related case law already governs UAS operations by government users, ensures accountability, and guides the use of aircraft in which the cockpit and pilot are on the ground. Federal, state, and local government agents must obtain search warrants when their use of any technology, including UAS, may violate an individual's reasonable expectation of privacy protected by the Fourth Amendment.[4] These protections are well-established and address many different privacy concerns relating to government adoption and use of advancing technologies, such as UAS. For more than 220 years, the Fourth Amendment has been applied to new technologies used in warrantless

[1] AUVSI – the world's largest non-profit organization dedicated to the advancement of unmanned systems – represents more than 7,000 members from 55 allied countries and 2,500 organizations involved in fields of government, industry and academia.

[2] The FAA Modernization and Reform Act of 2012 requires FAA to safely integrate UAS into the NAS by September 2015, and mandates, among other things, the creation of UAS test sites and rulemaking proceedings addressing the integration of civil UAS operations. P.L. 112-95, §§ 331-334, 126 Stat. 11, 72-77 (2012).

[3] AUVSI, *The Economic Impact of Unmanned Aircraft Systems Integration in the United States* (Mar. 2013), at 2, http://www.auvsi.org/econreport.

[4] *See Katz v. United States*, 389 U.S. 347 (1967).

observations – including several Supreme Court decisions on aerial observations[5] and, more recently, thermal imaging[6] and GPS technologies[7] – and it will continue to be applied to UAS and other future technologies that have not yet been invented. The Court, in a 2013 decision, held that law enforcement use of a highly-trained drug sniffing dog, roaming outside a home, was "an unlicensed physical intrusion" distinguishable from "Girl Scouts and trick-or-treaters," and was thus an unreasonable search.[8] UAS technology is not so distinct from other advanced technologies as to require supplemental legislation.[9] On the contrary, UAS-specific legislation and laws may have unintended effects, including confusing and complicating the application of existing search warrant requirements[10] that have been carefully developed over two centuries.

AUVSI strongly supports the International Association of Chiefs of Police (IACP) recommended guidelines for UAS operations and associated data collection,[11] which the Airborne Law Enforcement Association (ALEA)[12] and others have adopted and even the American Civil Liberties Union (ACLU) has praised.[13] Like IACP, AUVSI recognizes the "proven effectiveness" of UAS and that the "potential benefits [to public safety] are irrefutable."[14] AUVSI opposes any legislation that hamstrings first-responders.

III. FAA's Approach to Privacy and Rulemaking

The Congressionally-mandated FAA rulemaking processes for the integration of small UAS (sUAS) will provide ample opportunities for the public to comment on privacy issues relating to UAS operations.[15] Unlike government operators, who are permitted to operate UAS, albeit through a cumbersome process,[16] civilian operators have no practical, legal means of doing so until the FAA

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[5] *See Florida v. Riley*, 488 U.S. 445 (1989) (naked-eye observations through greenhouse roof from helicopter at 400 feet not an unreasonable search); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (precision aerial photographs of industrial complex from 1,200-12,000 feet not a prohibited search); *California v. Ciraolo*, 476 U.S. 207 (1986) (no reasonable expectation of privacy from naked-eye observations of yard from fixed-wing aircraft flying at 1,000 feet).

[6] *See Kyllo v. United States*, 533 U.S. 27 (2001) (warrantless use of thermal imaging device to see heat emanating from inside home deemed an unreasonable search).

[7] *See United States v. Jones*, 132 S. Ct. 945 (2012) (month-long tracking with GPS required a warrant).

[8] *Florida v. Jardines*, 133 S.Ct. 1409, 1415 (2013).

[9] "In combination, however, [the *Ciraolo, Riley, Dow Chemical, Kyllo and Jones*] rulings indicate that the Fourth Amendment is likely to provide significantly more protection from government UAS observations than is commonly assumed." John Villasenor, *Observations from Above: Unmanned Aircraft Systems and Privacy*, 36 HARV. J.L. & PUB. POL'Y 457, 516 (2013).

[10] *See* Richard M. Thompson II, CONG. RESEARCH SERV., R42701, *Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses* (Apr. 3, 2013), at 18-21 (reviewing several bills that "establish arguably greater constraints on [UAS] usage than the Fourth Amendment requires." *Id*. at 18).

[11] IACP, *Recommended Guidelines for the Use of Unmanned Aircraft* (Aug. 2012) ("IACP Guidelines").

[12] ALEA, *Resolution in Support of the International Association of Chiefs of Police Aviation Committee's Recommended Guidelines for the Use of Unmanned Aircraft* (Aug. 29, 2012), http://www.alea.org/assets/cms/files/Resolutions/In%20Support%20of%20UAS%20Guidelines.pdf.

[13] *See* Jay Stanley, *Police Chiefs Issue Recommendations on Drones: A Look at How they Measure Up*, ACLU (Aug. 17, 2012, 9:39 AM), http://www.aclu.org/blog/technology-and-liberty/police-chiefs-issue-recommendations-drones-look-how-they-measure.

[14] IACP Guidelines, at 1. What appears to be the first documented instance of a human life being saved with a UAS occurred in Canada earlier this year. *See Single Vehicle Rollover - Saskatoon RCMP Search for Injured Driver with Unmanned Aerial Vehicle,* ROYAL CANADIAN MOUNTED POLICE (May 9, 2013), http://www.rcmp-grc.gc.ca/sk/news-nouvelle/video-gallery/video-pages/search-rescue-eng.htm. It will certainly not be the last.

[15] P.L. 112-95, § 332 (requiring the sUAS and integration final rules by August 14, 2014 and December 14, 2015, respectively).

[16] FAA, *Unmanned Aircraft Systems (UAS): Certifications and Authorizations*, http://www.faa.gov/about/initiatives/uas/cert/; *see also* Felicity Barringer, *F.A.A.'s Concerns Hold Up Use of Wildfire Drones*, N.Y. TIMES (May 21, 2013), http://www.nytimes.com/2013/05/22/us/faas-concerns-hold-up-use-of-wildfire-

completes its legally required, and long-delayed, rulemakings.[17] Recognizing the importance of addressing privacy concerns, the FAA has taken extraordinary measures to permit public participation in determining the privacy policies that will govern UAS test sites – the agency's first major step toward integration.[18] Indeed, FAA "aim[ed] to assure maximum transparency of privacy policies associated with UAS test site operations in order to engage all stakeholders in discussion about which privacy issues are raised by UAS operations and how law, public policy, and operators should respond to those issues in the long run."[19] Rather than passing uninformed[20] and potentially unenforceable[21] legislation now, Congress and state lawmakers should wait for the FAA to complete its rulemaking processes.

The FAA's primary mission is, and must remain, aviation safety. Still, insofar as privacy issues are inextricably linked to the agency's creation of a regulatory framework for the integration and operation of UAS, the FAA rulemaking process is the appropriate forum to address privacy concerns. The FAA has properly recognized the role that federal and state law enforcement agencies play in enforcing laws regarding the protection of an individual's right to privacy, as well as its complementary authority to revoke or suspend a UAS operator's license. Like the Fourth Amendment jurisprudence applicable to public UAS operators, analogous state laws relevant to civil operators that "address trespass, invasion of privacy, harassment, and stalking [are] well established."[22] AUVSI supports the FAA's position that Fair Information Practice Principles (FIPPs) should inform UAS privacy policies on the collection, storage, and use of data.[23] Clearly, the registration of certain UAS and pilots with the FAA, the equipage of UAS with identification/position broadcast capability, and the guidelines set forth in AUVSI's UAS Operations Code of Conduct[24] could all contribute to the creation of an overall approach to managing privacy concerns. FAA rulemaking proceedings are the proper forum to address all of these important considerations.

IV. Conclusion

AUVSI supports the integration of UAS into the NAS in a safe and responsible manner, while safeguarding the existing right to privacy and ensuring transparency and accountability. Existing federal and state privacy protections should extend to the operations of UAS, just as they do to the operations of any other advanced technology. But before consideration of any supplemental technology neutral privacy legislation, the FAA should be allowed to gain experience through the UAS test site program and to then complete the well-established regulatory processes for UAS integration that Congress has already mandated. Fourth Amendment jurisprudence, federal and state privacy protections, and other existing laws and regulations are sufficiently robust to guide this effort.

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[17] *See* Alissa M. Dolan and Richard M. Thompson II, CONG. RESEARCH SERV., R42940, *Integration of Drones into Domestic Airspace: Selected Legal Issues* (Apr. 4, 2013), at 4 (internal citations omitted). Indeed, the FAA's sUAS notice of proposed rulemaking has already been delayed more than two years beyond the agency's initially projected publication date of March 10, 2011. DEPT. TRANSP., *Report on DOT Significant Rulemakings* (May 10, 2013), at 13.

[18] *See* Unmanned Aircraft Test Site Program, 78 Fed. Reg. 12,259 (Feb. 22, 2013); *see also* FAA, *Transcript of Online Session on UAS Test Site Privacy Policy* (Apr. 3, 2013), http://www.faa.gov/about/initiatives/uas/media/UAStranscription.pdf.

[19] 78 Fed. Reg. at 12,260.

[20] *See supra* note 9, at 517 (contrasting UAS with other emerging technologies in that the focus on privacy concerns has come before the benefits are widely recognized).

[21] *See supra* note 17, at 27-29 (noting that state and local regulation of UAS may be subject to challenge on federal preemption grounds).

[22] *See supra* note 9, at 514.

[23] 78 Fed. Reg. at 12,260.

[24] http://www.auvsi.org/conduct.