Senate Bill 1587 (Amendment #1): The Freedom from Drone Surveillance Act

Written testimony of Adam Schwartz
Before the Illinois Senate Criminal Law Committee
On March 6, 2013

Introduction

Good morning. My name is Adam Schwarz. I'm a lawyer at the ACLU of Illinois. On behalf of our 20,000 members and supporters across the state, thank you for allowing me to testify in support of Senate Bill 1587, amendment #1 – the Freedom from Drone Surveillance Act.

Why we need to regulate drones

Drones are unmanned aerial vehicles. Our federal government routinely uses drones abroad for surveillance. Now state and local police are seeking to use drones at home. A federal statute enacted last year requires the Federal Aviation Administration to immediately allow police to fly drones weighing less than 4.4 pounds as high as 400 feet above the ground; to expeditiously grant permits to government for other kinds of drone use; and by 2015 to safely integrate all kinds of drones into domestic airspace.[1] Here in Illinois, the National Guard and the Champaign County Sheriff have already conducted drone test flights, and the Cook County Sheriff is exploring whether to acquire drones.[2]

The unmanned drones of the future pose a far greater danger to our privacy than the manned airplanes and helicopters of the past. Drones are far less expensive, so they will be far more common. Drones are small and quiet, so they can be secretly deployed. Drones are highly maneuverable, so they can move in very close to the surveillance target.[3]

Reasonable people expect that the government is not tracking our movements in public places, storing that information in a dossier, and later using it against us. When the government monitors *where* we are, it learns *who* we are: whether we went to a political protest, a union meeting, a controversial movie, a psychiatrist, a church, or a criminal defense lawyer.[4]

In short, unmanned drones give government a new way to watch where we are going – far less expensively, and far more effectively. This new technology calls for new regulations.

How SB 1587 would regulate drones

Sections 10 and 15 of the bill would generally require police to obtain a warrant before using a drone to gather information. There would be four exceptions. Most importantly, in an emergency, police could use a drone for 48 hours without a warrant. Police also could use a drone without a warrant, and with no time limit: to locate a missing person; for crime scene photography; and when the federal government finds a high risk of terrorist attack.

Section 20 would give the police 30 days to review the information gathered by a drone. Police could keep drone information about reasonably suspected crime, or when relevant to an investigation. Police would be required to destroy the remainder of the drone information.

Section 25 would allow police to share with other government agencies the drone information that is suspicious, or relevant to an investigation. The bill would bar other sharing.

Section 30 remedies violations of these rules with non-admissibility. Critically, the bill would allow courts to "independently review" admissibility. The means that courts could apply traditional exceptions to the suppression remedy, such as good faith or inevitable discovery.

Section 35 would require police agencies that own drones to annually report their number of drones to the Illinois Criminal Justice Information Authority. The Authority, in turn, would be required to annually publish that information on its website.

Application of the federal and state constitutions to drones

Last year, in *United States v. Jones*, the U.S. Supreme Court unanimously held that a "search" occurs – triggering Fourth Amendment protection – when police attach a GPS device to a drug suspect's car and monitor its whereabouts for 28 days. Five Justices reasoned that police trespassed on the suspect's property. Another five Justices reasoned that police invaded the suspect's reasonable expectations of privacy, without regard to the physical trespass. Only Justice Sotomayor embraced both theories.[5]

Jones has ramifications far beyond placing GPS devices on cars. Rather, *Jones* began the larger process of regulating powerful new technologies that greatly expand the power of police to monitor where people are going.

Moreover, some police uses of drones would burden the First Amendment. For example, if police attempted to use drones to identify the people at a lawful protest, that would deter people from attending. As Justice Sotomayor explained in *Jones*: "Awareness that the Government may be watching chills associational and expressive freedoms."[6]

Older Supreme Court decisions hold that there is no Fourth Amendment violation when police look down on a suspect's property from a manned airplane at 1,000 feet,[7] or a manned helicopter at 400 feet.[8] But drones are far more invasive of reasonable expectations of privacy than manned aircraft: they will be far more common, stealthy, and close to the target. Thus, just as *Jones*

distinguished its decades-old precedents regarding a more primitive tracking technology called "beepers,"[9] the Court in the future should distinguish its manned aircraft decisions from unmanned drones. Moreover, if drones get too close to a suspect's property, they collide with Justice O'Connor's controlling concurrence in the manned helicopter case, which warned that aerial surveillance from lower altitudes might invade reasonable expectations of privacy.[10] And if drones use sense-enhancing technologies, they collide with the Court's holding in *Kyllo v. United States* that police cannot aim such technologies (such as thermal imagers) at homes.[11]

Moreover, the Illinois Supreme Court repeatedly has held that the Privacy Clause of the Illinois Constitution "goes beyond" the protections of the U.S. Constitution.[12] At the Illinois Constitutional Convention of 1970, the authors of the Privacy Clause explained their intent to protect people from "technological developments."[13] One author further explained: "Who knows, in this really marvelous scientific age – such a marvelous and terrifying scientific age – what they will come up with next? All kinds of things might invade our dignity as human beings. . . . I want to stem that tide."[14]

For example, the privacy of phone records showing who has called whom and when is more highly protected by the Illinois Privacy Clause than by the U.S. Constitution. Unfortunately, the U.S. Constitution does not protect such records.[15] Fortunately, the Illinois Privacy Clause does, according to the *DeLaire* decision of the Illinois Appellate Court. That court reasoned that the Privacy Clause "provides greater protection," and that the disputed phone records reveal "personal associations and dealings which create a 'biography.'" The court concluded that Illinois police and prosecutors cannot seize such phone records on their own authority.[16]

Conclusion

In *1984*, George Orwell imagined a dystopia where an all-powerful government used new technologies to scrutinize and dominate a submissive populace. This is not our world. And many new technologies will make us more free. But unregulated government use of drones would be a significant and troubling step towards a world where "Big Brother is watching you." The time is now for the Illinois General Assembly to adopt necessary privacy safeguards to help ensure that our national values thrive during the ongoing technological revolution.

Endnotes

[1] *See* FAA, "FAA makes progress with UAS integration," *available at* http://www.faa.gov/news/updates/?newsId=68004. *See also* Nick Wingfield, "Drones set sights on U.S. skies," N.Y. Times (Feb. 17, 2012), *available at* http://www.nytimes.com/2012/02/18/technology/drones-with-an-eye-on-the-public-cleared-to-fly.html?pagewanted=all.

[2] Nolan Peterson, *Aerial drones set to intrude on Illinois airspace*, Medill Reports (Apr. 19, 2012), *available at* http://news.medill.northwestern.edu/chicago/news.aspx?id=204472; Tom Kacich, "Unmanned drones a concern at local level," News-Gazette (March 3, 2013), *available at* http://www.news-gazette.com/news/politics-and-government/2013-03-03/tom-kacich-unmanned-drones-concern-local-level.html.

[3] *See generally* PBS Nova, "Rise of the drones" (2013), *available at* http://www.pbs.org/wgbh/nova/military/rise-of-the-drones.html.

[4] *See, e.g., United States v. Jones*, 132 S. Ct. 945, 955-56 (2012) (Sotomayor, J., concurring) (location monitoring by government exposes "a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations," including "indisputably private" trips to "the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on"); *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010) (Ginsberg, J.) ("A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups – and not just one such fact about a person, but all such facts.").

[5] Specifically, Justice Scalia's majority opinion for the Court (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor) embraced the trespass theory. *Jones*, 132 S. Ct. at 949. Justice Scalia's opinion declined to consider the reasonable expectations theory. *Id.* at 953-54 ("Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis. . . . It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question."). Justice Sotomayor's concurring opinion embraced both the trespass theory, *id.* at 954, and the reasonable expectations theory, *id.* at 954. Justice Alito's opinion concurring in the judgment (joined by Justices Ginsburg, Kagan, and Breyer) embraced the reasonable expectations theory, *id.* at 963-64, and rejected the trespass theory, *id.* at 958-62.

[6] *Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., concurring).

[7] *California v. Ciraolo*, 488 U.S. 445 (1986).

[8] *Florida v. Riley*, 488 U.S. 445 (1989).

[9] *Jones*, 132 S. Ct. at 951-52, distinguishing *United States v. Knotts*, 460 U.S. 276 (1983).

[10] *Riley*, 488 U.S. at 455 (O'Connor, J., concurring in the judgment).

[11] *Kyllo v. United States*, 533 U.S. 27 (2001).

[12] *See, e.g.*, *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992); *King v. Ryan*, 153 Ill. 2d 449, 464 (1992); *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 562 (1997); *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1998).

[13] *See* Sixth Illinois Constitution Convention, Record of Proceedings, Vol. VI, pp. 31-32.

[14] *Id.* at Vol. III, p. 1535 (Delegate Gertz).

[15] *Smith v. Maryland*, 442 U.S. 735 (1979). Significantly, Justice Sotomayor in *Jones* questions the continued validity of the *Smith* decision. 132 S. Ct. at 957.

[16] *People v. DeLaire*, 240 Ill. App. 3d 1012 (2nd Dist. 1993).