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COMMENTS IN SUPPORT OF 13-H 5780 – RELATING TO CRIMINAL PROCEDURE April 2, 2013

The ACLU of RI strongly supports this legislation and its restrictions on the use of unmanned aerial vehicles, commonly referred to as drones, by law enforcement. Advancements in technology have made drones smaller, cheaper, and more powerful, ending drone use solely as a military surveillance tool and raising considerable interest among state and local law enforcement agencies. This tremendous step forward in surveillance capability carries serious implications for the privacy rights of all individuals, and strict parameters should be placed on the use of this equipment prior to its use by Rhode Island law enforcement.

The ACLU of RI opposes the increasing use of surveillance technology in law enforcement, of which drone technology is arguably the most significant advancement to date. Although manned aerial surveillance has been possible for decades, its tremendous costs have been a disincentive to law enforcement agencies to engage in this sort of surveillance. Unmanned aerial surveillance, however, is much less costly and thereby unrestricted by the natural barriers that have thus far governed such aerial surveillance. As a result, statutory barriers are critical.

Current drone technology ranges from Hummingbird drones six inches long and weighing less than a AA battery, to large fixed-wing aircraft that can carry heavy weaponry and remain in the air for more than a day. Most drones remain used primarily among military entities, but small fixed-wing craft are currently the favorite for domestic deployment. As the technology improves, so do the aircraft. As they become smaller, quieter and less expensive, the drones are increasingly capable of providing detailed, accurate surveillance even from several hundred feet in the air. As such, these drones allow law enforcement to perform more invasive surveillance than ever before.

Concerns about the increasing use of drones among local law enforcement agencies are not unfounded. Although we are unaware of any use of drones by Rhode Island law enforcement at this time, we expect Rhode Island will face an experience similar to the rest of the nation. In 2011, Customs and Border Protection began offering the use of their drones to local police departments for their domestic efforts. The same year, a Colorado police department became the first in the nation to win FAA permission to operate a drone. Local police departments in Miami, Houston, Arlington, and Ogden, UT have tested or begun operating drones. Last month the Seattle Police Department abandoned their drone program in response to public concerns, after the public discovered two drones had been purchased without the City Council's knowledge.

Public concern about drone use is not unfounded. The use of any surveillance equipment raises a number of privacy concerns, including the need for a narrowly tailored warrant before surveillance can begin and the implications for the privacy of those untargeted individuals who happen to be caught by surveillance equipment. In 1986, the US Supreme Court held that warrantless aerial surveillance of private property was not automatically a violation of the Fourth Amendment protections against unreasonable search and seizure, in part because “[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed.”¹ Drones carry considerably more potential for intrusion than the helicopter surveillance the Court was considering. While each drone is different, the potential exists for drones to carry surveillance equipment ranging from high-powered zoom lenses to infrared imaging, recording devices, and even GPS tracking – each of which carries their own individual privacy implications – all while being less noticeable to the individual under surveillance. Also in 1986, the Supreme Court noted, “surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.”² In the past 25 years surveillance technology has improved, but the legislative and legal protections against unreasonable surveillance have not.

This legislation implements those protections by requiring a warrant based on probable cause or reasonable suspicion be obtained prior to drone surveillance, except in those emergency cases where law enforcement has reason to believe there is imminent threat to the life or physical safety of a person. The legislation further requires surveillance be conducted only on an articulated target and that any data captured on a non-target individual must be deleted within 24 hours, ensuring that no individual may see their privacy infringed upon because a drone was on its way to monitor some other individual. Surveillance of any one target is limited to 48 hours, unless a court determines that an extension of up to 30 days is warranted. Finally, the legislation requires annual reporting on drone use, allowing the General Assembly to evaluate the technology and its use in Rhode Island. These standards should not be foreign to law enforcement – they mirror the very workable and long-standing requirements already in place in state law for police use of wiretapping equipment.

In the context of other privacy technology legislation, we have sometimes heard opponents argue that it is premature for the General Assembly to attempt to regulate emerging technology. With respect, we believe that argument has it precisely backward. We should not allow law enforcement to begin purchasing and using emergency technologies without ensuring that adequate privacy protections for our state’s residents are in place. Passage of this legislation will ensure that clear guidelines for drone use within Rhode Island are established before law enforcement obtains this technology and before any individual’s privacy is unduly impacted.

¹ California v. Ciraolo, 476 U.S. 207 (1986).

² Dow Chemical Co. v. United States, 476 U.S. 227 (1986).