



June 6, 2018

Re: ACLU opposes S. 2836

Dear Senator,

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On behalf of the American Civil Liberties Union (ACLU), we submit this letter for the record in connection with the Senate Homeland Security and Government Affairs Committee hearing on June 6, 2018 titled, “S. 2836, the Preventing Emerging Threats Act of 2018: Countering Malicious Drones.” **The ACLU opposes S. 2836.**

While the potential security threat posed by drones is real and the need to protect certain facilities is legitimate, strong checks and balances to protect property, privacy, and First Amendment rights are vital. S.2836 lacks such measures. The bill amounts to an enormous unchecked grant of authority to the government to forcefully remove drones from the sky in nebulous security circumstances.

S. 2836 would empower the Department of Homeland Security (DHS) and Department of Justice (DOJ) to intercept, surveil, destroy, or seize drones in a wide array of circumstances – including in cases they are operated by a non-malicious actor like a hobbyist, commercial entity, or journalist. The bill contains insufficient protections to ensure that such authority is not used arbitrarily, abusively, or unnecessarily, and would permit conduct that raises privacy and due process concerns.

The National Defense Authorization Act for Fiscal Year 2018¹ authorized the Department of Defense to take action in cases where drones pose a threat to certain assets and facilities. Given this, there are practical questions regarding whether additional DHS or DOJ authority is needed to protect against the safety threats that could be posed by drones. There are also serious questions regarding whether DHS and DOJ have the expertise to carry out such a mission safely and effectively.

Nevertheless, S. 2836 would empower DHS or DOJ to take actions – including seizure, interception of communications, or use of force to destroy a drone – in any case where it is necessary to “mitigate the threat” that a drone may pose to the

¹ 10 U.S. Code § 130i

“safety or security of a covered asset or facility.” Among the civil rights and civil liberties concerns posed by the bill are the following:

The bill would allow DHS and DOJ to take extreme actions when it may not be necessary.

The bill permits DOJ and DHS to use force to destroy or disable a drone, intercept private communications, seize a drone, or take other significant actions. However, the bill’s language fails to make clear that such measures may only be employed in a true emergency when there is a threat to life or safety. Instead, the bill permits such extreme measures – which in and of themselves may implicate public safety – simply to “mitigate the threat” to the safety or security of a covered facility. Such language is broad and fails to ensure that the extreme measures contemplated by the bill are only used in a true emergency.

The bill would allow the government to seize private property without adequate due process or any showing of wrongdoing. The bill permits DHS and DOJ to seize private drones (which are then subject to forfeiture) without prior or post-hoc judicial authorization of any kind. The lack of judicial oversight fails to provide an adequate check on DHS or DOJ in cases where exercise of their authority under the bill is abusive, improper, or without appropriate cause. Moreover, it permits the punitive measure of seizing or forfeiting of private property without any due process, showing of wrongdoing, or necessity.

The bill’s broad definition of what constitutes a “covered facility or asset” is vague, applies to areas where there may not be a temporary flight restriction in place, and may raise First Amendment concerns as applied. The bill’s definition of “covered asset or facility” is vague and broad – including, for example, areas related to an “active Federal law enforcement investigations, emergency responses, or security operations.” This definition is far more expansive than the authority that has been granted to the Department of Defense.² As applied, the broad definition in S. 2836 could implicate areas where there is a strong public interest in drone use by the media – such as reporting on the response to a national disaster like Hurricane Harvey – implicating First Amendment concerns. Additionally, this definition could apply in places where there is not a temporary flight restriction in place.³ Thus, there is a significant risk that a drone operator may not be aware of where a prohibited area is or may enter into such an area only inadvertently, yet nonetheless be subject to actions including surveillance or seizure of their private property.

The bill fails to include oversight and accountability measures to prevent DHS and DOJ from abusing or misusing their authority. The bill permits DOJ and DHS to take significant actions without sufficient oversight or accountability mechanisms. Interception of communications, seizure, or use of force to destroy or disable a drone would not require judicial authorization or post-hoc review to ensure that it is appropriate or consistent with the law. Additionally, the bill does not contain provisions requiring sufficient transparency or reporting so that the public is aware of how the agencies are exercising their authority. Such protections are critical to prevent abuse or misuse of DHS and DOJ authority.

² 10 U.S. Code § 130i

³ 14 C.F.R. § 91.137-145

The bill exempts DHS and DOJ actions from restrictions in the Wiretap Act, Stored Communications Act, and other provisions in title 18, permitting collection of private information without a warrant or other privacy protections. The bill permits DHS or DOJ to intercept or interfere with wire, oral, electronic, or radio communications used to communicate with a drone without a warrant from a judge, notice, or other protections that may be required under current law. Such an exception is unnecessary given that existing laws provide ample opportunity for the government to act quickly in an emergency. For example, the Wiretap Act permits the government to intercept communications in an emergency without judicial authorization, and seek approval after-the-fact. Moreover, once collected, the bill permits information that is collected to be used and disseminated for purposes unrelated to averting an imminent threat, raising additional Fourth Amendment concerns.

The ACLU urges you to oppose S. 2836. If you have questions, please contact Neema Singh Guliani at nguliani@aclu.org.

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
Legislative Counsel