



**Testimony of Becky Straus, Legislative Director
Regarding SB 71 with the Dash 6 Amendment
Senate Committee on Judiciary
March 20, 2013**

Chair Prozanski and Members of the Committee:

Thank you for the opportunity to provide comments in regard to SB 71 with the Dash 6, a proposal to regulate the use of drones in Oregon.

The ACLU strongly believes that the use of drones needs to be regulated in Oregon — sooner rather than later. To this end, we have helped draft another bill – HB 2710 – that would bring clear and transparent guidelines for law enforcement agencies in their use of drones. Undoubtedly, this is an area of technology that is quickly developing and there is a great danger to the privacy of Oregonians if this technology is abused. At least 30 states are looking at drone regulation bills this session. We commend the Committee for joining this conversation and for its foresight in bringing forth a proposal. We do have some concerns with SB 71-6 and, again, thank you for the opportunity to share them here today.

Heightened Criminal Penalties

Section 2 of the bill would enact heightened penalties for a list of crimes when that crime is committed using a drone. The ACLU opposes enhancing penalties for crimes, generally. It is important to clarify that crimes in current law would be criminal through the use of a drone. Our proposal does not address this issue and we are pleased to see it addressed in SB 71, but we do not believe these existing penalties should be enhanced.

There may too be unforeseen and unintended problems that result from moving too quickly on the criminal front. For example, Section 2(4) of the bill would heighten the penalty for criminal trespass in the second degree from a Class C to a Class A misdemeanor when the crime is committed using a drone. This crime does not have a mental state component or an intent element. It appears that a hobbyist, for example, who accidentally lands a drone in his neighbor's backyard, or even on public property where he is not permitted to enter, is subject to a Class A misdemeanor charge. At what height above any such property would the person be considered trespassing?

Law Enforcement Use of Drones

Section 4 provides guidelines for the use of drones by law enforcement that are, in our view, dangerously broad. The bill allows for drone surveillance of “the interior of a residence or of any other place in which a person has a reasonable expectation of privacy” under two circumstances: 1) with a probable cause search warrant or 2) if there are “reasonable grounds to believe that a crime is being committed at the time the drone is used.” The use of the “reasonable expectation of privacy” standard codifies the standard used by federal courts under the U.S. Constitution but is less protective of privacy rights than the standard used by Oregon

courts under the Oregon Constitution. Courts in Oregon look not for the privacy that we *expect*, but the privacy that we *deserve*. It is a more objective test that focuses on whether the police conduct is sufficiently intrusive to be classified as a search.¹

And even if a person does have a “reasonable expectation of privacy” in a particular place, the bill would allow for law enforcement to conduct warrantless drone surveillance with merely “reasonable grounds” to believe that a crime is being committed. We are concerned that this type of surveillance authority for law enforcement would, in fact, take us backward from long-standing constitutional precedent that suggests that a warrant should be required in such situation.

Section 4(3) raises further concerns because it creates the same “reasonable grounds to believe” exception to a requirement that law enforcement obtain a warrant before using drone surveillance on a specific person. The bill grants law enforcement the broad authority to survey a person with a drone not only in an instance when law enforcement has reasonable grounds to believe that the person is committing a crime, but also when law enforcement has reasonable grounds to believe that the person *intends* to commit a crime and certain – undefined – exigent circumstances are present.

Law enforcement surveillance using a drone is not unlike tracking someone with a mobile tracking device, but our current law not only requires not only a probable cause warrant for such tracking but also statutory authority to track for that particular crime being investigated. SB 71 would authorize law enforcement to track a person without either of these safeguards.

Much Needed Guidance

Despite these concerns, it is a legislative priority for the ACLU this session to work for clear and transparent guidelines for use of drones by law enforcement agencies. We are pleased to see this issue come forward and do support some of the provisions being proposed by SB 71-6. We greatly appreciate the opportunity to raise some of our concerns with the Committee today and hope that we might be afforded an opportunity to discuss possible improvements, share with you the proposal in HB 2710, and assist in moving forward the strongest protection possible for Oregonians.

Thank you for your consideration and please feel free to be in touch at any time about these issues.

¹ State v. Ainsworth, 801 P.2d 749, 750 (Or.1990)