



JERRY PETROWSKI

WISCONSIN STATE SENATOR

Senate Bill 196

January 15, 2014

Mr. Chairman, members, thank you for the opportunity to testify on the proposed changes made by Senate Bill 196 relating to restricting the use of drones in Wisconsin. Drones, also known as unmanned aerial vehicles, are aircraft that do not carry a human operator and are most commonly flown remotely, but may fly on their own. The purpose of this bill is to restrict certain drone activity in order to protect personal privacy and liberty of our citizens

As technology advances it is important that our laws advance as well. Possessing a drone is as easy as going online, paying as little as \$30 and assembling it at home. These inexpensive drones are capable of capturing high resolution pictures of people's homes and areas we consider most private and worthy of protection.

Specifically, the bill prohibits law enforcement from using this technology to perform searches without a warrant. However, the bill still protects Wisconsin's citizens by providing an exception to the warrant requirement when there is an emergency or imminent harm to a person or evidence or other necessary circumstances. If any evidence is obtained in violation of this bill, the evidence is inadmissible in a criminal proceeding. Additionally this bill makes it illegal for a private citizen to intentionally film another person where they have a reasonable expectation of privacy and when they do not have their consent.

Our state and federal Constitutions guarantee that the government may only intrude on our rights through due process of law. This bill simply reinforces that notion and sets a precedent of protecting our fundamental rights even when technology far surpasses anything we could imagine today. Drone technology has the ability to generate a large amount of revenue as it advances. This growth mainly comes from applications in enhanced precision agriculture. Some instrument technology mounted on drones can help farmers quickly determine soil conditions and plant health, which can help guide planting operations and reduce the use of agrochemicals during the growing season.

SB 196 also makes it illegal to sell, possess or use a weaponized drone, but with an amendment does allow for their manufacture. It is important to remember that use of drone technology presents an incredible opportunity for growth in the state of Wisconsin.

The purpose of this legislation is not to hinder technological advancement, but rather to be proactive in ensuring our fundamental rights are protected and our not extinguished in the wake of advancing technology. While this bill is a step in the right direction to protect privacy interests, there are a few outstanding issues we hope to resolve with DOJ including the use of drone technology for the execution of warrants and data retention issues.

Thank you for hearing this bill and I urge your support. I would be happy to answer any questions you may have.

29TH SENATE DISTRICT



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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January 15, 2014

Senator Paul Farrow, Chairman
Senate Committee on Government Operations, Public Works, and Telecommunications
Room 323 South, Wisconsin State Capitol

Dear Chairman Farrow:

I'm writing to you today regarding Senate Bill 196, relating to restricting the use of drones and providing a penalty.

On May 29, 2013, the Department of Justice (DOJ) submitted a letter to the Assembly Committee on Government Operations and State Licensing when that committee held a public hearing on 2013 Assembly Bill 203, the companion bill to SB 196. Please find a copy of that letter attached.

As you will see, the May 29 letter lists five concerns with AB 203. Subsequently, the Assembly and Senate authors introduced Assembly Amendment 1 and Senate Amendment 1. Unfortunately, the amendments address only some of DOJ's concerns.

The amendments do not address DOJ's first concern regarding the suppression of evidence. DOJ's second concern, regarding search warrants, is addressed by exempting law enforcement use of a drone in a "public place", but "public place" is not defined and it may be advisable to instead exempt law enforcement use of a drone in a "place where a person does not have a reasonable expectation of privacy." The amendments only partially address each of DOJ's third, fourth, and fifth concerns.

Given the shortcomings of the amendments, DOJ must renew its opposition to SB 196 and AB 203.

Thank you for your consideration.

Sincerely,

Mark Rinehart
Legislative Liaison

cc: Committee Members



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May 29, 2013

To: Members, Assembly Government Operations and State Licensing Committee

From: Mark Rinehart, Legislative Liaison, Wisconsin Department of Justice

Re: 2013 Assembly Bill 203, relating to drones

I write to you today to express concerns with 2013 Assembly Bill 203, relating to restricting the use of drones and providing a penalty. AB 203 would place significant restrictions on government use of drones in Wisconsin without a warrant. As drafted, the bill contains the following problematic language:

1. The Fourth Amendment's exclusionary rule already requires courts to suppress evidence obtained in a manner that intrudes upon a person's reasonable expectation of privacy. This bill goes further. It requires the suppression of any evidence obtained in violation of the statute, even though law enforcement did not intrude upon anyone's reasonable expectation of privacy. DOJ opposes the creation of a statutory right to suppress evidence. Rather, any suppression language should be limited to those situations in which the conduct violates someone's constitutional rights by gathering evidence from a place where a person has a reasonable expectation of privacy.

The Fourth Amendment already prohibits the use of surveillance technology to penetrate and make observations in places where people have a reasonable expectation of privacy. Courts already have the authority to suppress any evidence obtained through the use of the drone if the evidence intruded on a place where a person has a reasonable expectation of privacy. Any evidence officers seize will be suppressed. Further, any citizen whose rights officers violate would have a cause of action under 42 USC 1983. As drafted, this bill would exclude evidence obtained through a drone, even if the evidence obtained through the drone relates to conduct occurring in purely public spaces, spaces where no one has a reasonable expectation of privacy.

2. This bill creates a general rule that prohibits law enforcement use of a drone to gather evidence without a search warrant. It creates the following exceptions:

- The use of a drone to assist in an active search and rescue operation,
- To locate an escaped prisoner, or
- If a law enforcement officer has reasonable suspicion to believe that the use of a drone is necessary to prevent imminent danger to an individual or to prevent imminent destruction of evidence.

AB 203 prohibits law enforcement from using drones without a warrant except under these limited conditions. Thus, this prohibition applies, even if law enforcement is operating a drone over public lands and water as state parks and national forests. For example, suppose DNR wardens use a drone to monitor state forests and during a flyover with a drone observe a marijuana grow operation. The drone provides wardens and law enforcement with sufficient information to identify and apprehend those responsible for engaging in criminal activity on public land. AB 203 would require the exclusion of the evidence, even though the perpetrators had no reasonable expectation of privacy in their activities on state lands. Yet, the DNR would be unable to obtain a warrant for this flyover for inspection purposes because they would not have probable cause to believe that anything illegal was occurring on state property.

3. AB 203 makes it a crime to “sells, transports, manufactures, possesses, or operates any weaponized drone.” This provision is problematic for two reasons. First, it creates a term “weaponized” drone but does not define it. Under this definition, both lethal and nonlethal weapons would be prohibited. Would this definition extend to every drone, since by its nature, any drone could be crashed in to a person or object and cause harm?

Second, this language would prohibit legitimate companies from manufacturing, transporting, and testing these drones in Wisconsin, even if it were for legitimate military use by our armed forces. With absolute language like this, no legitimate manufacturer would establish research and production facilities in Wisconsin out of a risk that it or its employees would be exposed to liability under Wisconsin criminal laws.

4. AB 203 makes it a crime for any person to use a drone to photograph, record, or otherwise observe another individual in place where the person has a reasonable expectation of privacy. This sounds good, but what does it mean? For example, it does not prohibit the use of a drone to document activities in a place where a person has a reasonable expectation of privacy, but an individual is not observed. Likewise, it does not offer protections to persons who happen to be in places where others might have a reasonable expectation of privacy. This provision does contain an exemption for law enforcement use of a drone that otherwise complies with the requirements governing law enforcement use.

This language could create problems for private users of this technology. For example, suppose someone places a privacy fence alongside utility lines. The fence surrounds the curtilage. The utility uses a drone to inspect power lines—which might be very important following a severe snow storm or tornado. Could the owner of the property bring a complaint against the utility because it operated a drone and inadvertently observed activities occurring within a place adjacent to the utility lines?

5. The definition of drone is broad. It would extend to any object including model airplanes that recreational hobbyists build and operate with mounted cameras. It also uses the word “powered” without defining it. Does “powered” mean a motorized source such as an engine? Would extend to objects which are naturally powered such as kites or gliders?

At the national level, Congress is considering several bills, including a bipartisan bill sponsored by Rep. Sensenbrenner and Rep. Lofgren, regulating domestic use of drones. In addition, the FAA is in the process of developing administrative rules governing operation of drones in domestic airspace. To avoid preemption issues, it would be prudent to see how Congress and the FAA address these issues before promulgating a state statute that is inconsistent with federal law.

Further, drones have legitimate civilian use outside of military and law enforcement applications. This legislation could potentially hamper legitimate development and deployment of drone technology in Wisconsin.

Certainly, the issue of the government use and private party operation of drones in Wisconsin airspace is an appropriate issue for legislative consideration. However, because of the long term implications of this legislation on law enforcement and commerce in this state and the likelihood of additional federal legislation and regulations governing domestic use of drones, the Wisconsin Department of Justice believes that the Legislature should defer enacting this legislation. In the interim, the Fourth Amendment prohibitions against unreasonable searches and seizures will protect citizens from government intrusions in to spaces where citizens have reasonable expectations of privacy.

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Wisconsin legislators unveil bill to restrict use of aerial drones



By Howard Veregin
May 15, 2013

Details of the bill

Last week a bipartisan group of Wisconsin lawmakers introduced a bill that would limit the use of aerial drones in the state. Drones – or more accurately Unmanned Aircraft Systems (UAS) or Unmanned Aerial Vehicles (UAV) – are powered aircraft that can fly autonomously or can be piloted remotely. The bill would restrict law enforcement agencies from using UAS to collect information without a warrant, and would bar the private use of UAS for reconnaissance purposes, including the collection of photographs and videos.

The full text of the bill can be found here. Under the bill, no law enforcement agency could use a UAS equipped with video or audio recording equipment to collect evidence in a criminal investigation without first obtaining a search warrant. Certain exceptions would be made for emergencies and other special circumstances. The bill would also prohibit individuals from using a UAS to “photograph, record, or otherwise observe another individual in a place where the individual has a reasonable expectation of privacy.”

The authors of the bill cite privacy and civil liberties issues as the rationale behind their efforts. They argue that the bill reinforces the notion that no one is allowed to violate privacy regardless of technological innovations. The ACLU (American Civil Liberties Union) of Wisconsin is an early supporter of the bill.

UAS laws in other states

The ACLU has been monitoring UAS legislation initiatives across the country and maintains up-to-date information on their status. According to the ACLU report, as of May 10, 2013, UAS legislation has been introduced in 41 states.

Virginia enacted the first such law in April of this year; the law calls for a two-year moratorium on the use of UAS. The law primarily applies to law enforcement and regulatory agencies, prohibiting the use of UAS except in emergencies and in search and rescue operations. Other exceptions include utilization of UAS by the Virginia National Guard for damage assessment following disasters. The law specifically exempts universities and other research organizations and institutions, which are free to use UAS for research and development purposes (subject to federal oversight regulations).

Idaho has also enacted a UAS law, which is set to go into effect on July 1st of this year. The law prohibits law enforcement agencies, with some exceptions, from using UAS to collect information without a warrant. The law restricts the private use of UAS for reconnaissance, but an exception is made for “mapping or resource management.”

Two other states that have recently enacted UAS laws are Florida and Montana. Florida’s law, which goes into effect on July 1st of this year, prohibits the use of UAS by law enforcement without a search warrant, except to counter the risk of a terrorist attack and in situations of imminent danger. The bill is silent on private use of UAS. Montana’s law, which goes into effect on October 1st of this year, similarly focuses on law enforcement restrictions rather than private use.

UAS regulations and policy

Currently the Federal Aviation Administration (FAA) regulates UAS use at the federal level. According to the FAA, public entities that want to fly a UAS in civil airspace must first obtain a Certificate of Authorization (COA). Common COA requests include applications in law enforcement, fire fighting, border patrol, disaster assessment, search and rescue, and training. According to the FAA there were 327 COAs active as of February 15, 2013.

In the public’s mind, UAVs are often linked to the armed military drones that have received so much attention in the media recently. This accounts in part for the general aversion by industry insiders to the term “drone.” Although they share some of the same technology as military drones, civilian UAS are generally employed for beneficial purposes.

John Villasenor, senior fellow at the Brookings Institution and professor of electrical engineering and public policy at UCLA, in a recent Harvard Journal of Law and Public Policy article, notes that civilian UAS applications include search and rescue, emergency response, traffic assessment, surveying and mapping, resource monitoring, air quality analysis, weather prediction, and precision agriculture. He notes that analysts predict significant economic benefits from use of the technology and the refinement of the technology itself. Villasenor argues that when drafting new UAS legislation it is critical to adopt a balanced approach that recognizes, not just the increasingly well recognized privacy concerns of the technology, but also the much less widely appreciated benefits.

UAS in Wisconsin

Information on UAS use in Wisconsin is hard to come by, simply because the technology is new and has not yet been widely adopted. But there is clear interest in using UAS for reconnaissance and mapping. Much of this interest is centered at campuses of the UW system, although there are some signs of interest in the private sector and governmental agencies as well.

Christina Hupy, a professor in the Department of Geography and Anthropology at UW-Eau Claire, is interested in the technology for such applications as precision agriculture (e.g., to map real-time crop health for more precise targeting

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of water and pesticide use). She, along with her husband Joe Hupy, also a professor at Eau Claire, recently partnered with a small startup company offering a variety of UAS services. The pair have also obtained a COA from the FAA to use a UAS for research purposes. In Christina's view, some of the applications of UAS may have significant economic development potential, and she worries that legislation that limits the use of UAS may dampen the effects of these new applications.

Joe Hupy has also been experimenting with tethered and high-altitude reconnaissance balloons. He and his students recently launched a balloon with an attached camera that ultimately reached an altitude of 100,000 ft. (over 3 times the height of Mt. Everest). You can watch a video of the balloon's voyage here. The majority of Joe's work is with tethered balloons operating from 500 ft. Students in his Geospatial Field Methods course produced a new high-resolution map of UW Eau Claire campus using data gathered with the tethered balloon. While a balloon is not a UAS, there are some parallels between the two technologies in terms of the ability to generate on-demand, custom imagery.

Outside of Wisconsin, many other universities are actively working on UAS efforts. For example, Oregon State's new industry-academia-government UAS consortium is an effort to develop new application areas for UAS to make Oregon "a focal point of an evolving, multi-billion dollar industry, while enhancing academic research and student education." Nicholls State University is using UAS to perform barrier island mapping, inspect offshore oil rigs and monitor bird habitats. UAS is also being used for archaeological site mapping by Vanderbilt University. This isn't a comprehensive list, rather an indication that there is growing interest in UAS technology for a variety of purposes.

What's next?

It's hard to tell what impacts Wisconsin's proposed legislation will have on budding applications of UAS within the UW system and elsewhere in the state. It is noteworthy that other states that have already enacted legislation allow for some private use of UAS, whether explicitly through exemptions or implicitly by remaining silent on the issue of UAS outside of law enforcement.

At this time we don't have a listing of university departments, state agencies, companies, and other entities in Wisconsin that are interested in UAS technology. In an effort to document what's going on in this area, we're interested in hearing from you. Are you using UAS currently, or do you plan to in the future? What kinds of applications are you looking at, and what sorts of vehicles are you considering? Please feel free to email me directly if you have any information you'd like to share.



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FAA guidelines for legal documentation for initiating of COA.

Regarding the wording and prose required for the Attorney General Letter, here are some guidelines:

1) You have to prove that your University/College is part of the government of the state in which it resides, or a political subdivision of the state (however, a political subdivision is usually reserved for other forms of government such as, county commissions, city councils, public service districts, etc.). Most applicants refer to individual state statutes concerning the particular University/College; in your case, you should review how the state statutes refer to the University/College. After that, proponents should state which statutes/chapters they are referencing to prove their Public status. As a disclaimer, do NOT claim that the University/College is part of the state government or a political subdivision without proving that it is, in fact, a qualifier for such status. If you state that the University/College is Public, you have to prove it. You cannot self-certify your status. The repercussions of Public University/College presumption can result in termination of your COA application.

2) After you have laid down that first paragraph, you will need to specifically address 49 USC 40102(41) (C) or (D)*

(C) applies to when you buy or own an aircraft

(D) applies to when you are going to lease the aircraft for at least 90 continuous days*

3) Then you must address 49 USC 40125(b). This has to deal with commercial purpose. Essentially, your request for a COA will be approved contingent on the premise that you will not conduct your operations for "...compensation or hire". You cannot get paid by an outside agency to conduct your operations. Refer to 49 USC 40125(a) for a complete definition of commercial purpose.

An example of a letter could be:

"...As a Public University under the state code/statue/chapter (list your reference), an aircraft owned by ABC University qualifies and will be operated as 'public aircraft' as defined in 49 USC 40102(41)(C)or(D). In addition, the Unmanned Aircraft Systems (UAS) will not be used for "commercial purposes" pursuant to 49 USC 40125(b)."