

June 12, 2018

Re: Coalition Opposes S. 2836, the Preventing Emerging Threats Act of 2018

Dear Senators,

On behalf of the undersigned civil liberties organizations, we urge you to oppose S. 2836, the Preventing Emerging Threats Act of 2018, including efforts to attach it to other pieces of legislation. While we recognize the need to protect against the threat posed by malicious drones is legitimate, this bill fails to adequately protect the private property, due process, First Amendment, and Fourth Amendment interests of individuals in the U.S.

During a June 6, 2018, U.S. Senate Committee on Homeland Security and Government Affairs hearing, Chairman Ron Johnson repeatedly stated that S. 2836 would grant “incredibly limited authority”¹ to the Department of Justice (DOJ) and the Department of Homeland Security (DHS). We strongly disagree. S. 2836 would empower the DOJ and DHS to monitor, surveil, and destroy drones – even in cases where a drone is operated by a non-malicious actor such as a journalist or commercial entity. The government would be empowered to act in order to mitigate any threat to the “safety or security” of broadly defined “covered asset[s] or facility[ies].” This power would be granted to DOJ and DHS with virtually no oversight or accountability measures to ensure that it is not used arbitrarily, abusively, unnecessarily, or in ways that jeopardize public safety. For example:

The bill would allow DOJ and DHS to seize drones without prior consent or any evidence of wrongdoing. The bill permits DOJ and DHS to seize private drones without prior or post-hoc judicial authorization of any kind and hold private property indefinitely. Moreover, it permits the punitive measure of seizing or forfeiting of private property without any due process, showing of wrongdoing, or necessity. Absent clear judicial checks, the bill creates a clear pathway for unbridled abuses of government power and raises serious concerns about the use, or possible misuse, of authority by DOJ and DHS.

The bill fails to include adequate oversight and accountability measures to prevent DHS and DOJ from abusing or misusing their authority. The bill would give tremendous authority to DOJ and DHS to take significant actions without independent review or authorization. Use of force to destroy or disable a drone, seizure, or other counter measure would not require judicial authorization or post-hoc review to ensure that it is appropriate or lawful. In other words, the agencies could shoot down a drone – implicating the safety of the public and damaging private property – with no independent review to ensure such actions were appropriate and proper. Moreover, in cases where an individual was adversely impacted by such actions, the bill provides no clear mechanisms for redress. The bill also does not contain provisions requiring sufficient transparency or reporting so that the public is aware of how the agencies are exercising their authority.

¹ S. 2836, the Preventing Emerging Threats Act of 2018: Countering Malicious Drones
: Hearing before the U.S Senate Committee on Homeland Security and Government Affairs, 115th Cong.

The bill exempts DOJ and DHS actions from restrictions in the Wiretap Act, Stored Communications Act, and other provisions in title 18. The bill permits DOJ and DHS to intercept, interfere or otherwise gain access to wire, oral, electronic, or radio communications used to communicate with a drone without a warrant, court order, notice, or compliance with existing law. This information can then be shared and used for purposes entirely unrelated to averting an imminent threat. Given that existing authorities permit the government to act quickly during an emergency, such an exception is unnecessary and raises Fourth Amendment concerns.

The bill’s broad definition of what constitutes a “covered facility or asset” is vague and may raise First Amendment concerns. The bill’s definition of “covered asset or facility” is broad – including, for example, areas related to an “active Federal law enforcement investigations, emergency responses, or security operations” – and subject to interpretation. As written, this definition could apply to almost any situation where law enforcement has a connection to an interested area, creating perverse incentives for government abuse. Moreover, this definition would 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 – raising as applied First Amendment concerns.

This bill provides insufficient clarification as to what constitutes a threat and permits extreme measures in cases where there is no imminent threat to safety. The bill permits DOJ and DHS to use reasonable force to destroy, disable, or otherwise disrupt the control of a drone to “mitigate the threat.” However, the legislation fails to define exactly what that “threat” is – leaving this to the discretion of the agencies in consultation with the Department of Transportation. As such, the bill would allow extreme measures – including seizure of a drone or using force to destroy a drone – in cases where there is no imminent threat to life and safety.

It is possible to mitigate the potential threats posed by drone – while simultaneously respecting property, First Amendment, Fourth Amendment, and due process rights. This bill fails to achieve both of these objectives. For these reasons, we urge you to oppose S. 2836 and any efforts to attach it to other pieces of legislation.

If you have questions or concerns, please contact ACLU Legislative Counsel, Neema Singh Guliani, at 202-675-2322 or nguliani@aclu.org.

Sincerely,

American Civil Liberties Union
American-Arab Anti-Discrimination
Committee
Arab American Institute
Center for Democracy & Technology
Constitutional Alliance
Defending Rights & Dissent

Demand Progress Action
Electronic Frontier Foundation (EFF)
FreedomWorks
Government Information Watch
Liberty Coalition
New America's Open Technology Institute
Reporters Committee for Freedom of the Press