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Via Email (Aa_jud@mlis.state.md.us)

Maryland General Assembly
House Judiciary Committee
House Office Building, Room 101
6 Bladen Street
Annapolis, Maryland 21401

Re: House Bill No. 159 / Persistent Aerial Surveillance

Dear Committee Members:

As an organization committed to reining in the surveillance state's attempts to erode personal privacy, and civil liberties in general, The Rutherford Institute¹ appreciates the Maryland General Assembly's efforts to prevent the government from adding to its already burgeoning arsenal of surveillance devices that monitor and track the citizenry's public activities 24-hours a day. Certainly, legislation preventing law enforcement from adding to its integrated surveillance tools, such as license plate readers, high-definition cameras, and facial recognition software, which it employs *ad hoc* to invade the citizenry's privacy and erode their fundamental right to be free from unreasonable searches and seizures by the government,² is long overdue.

However, while House Bill 159³ signifies a step in the right direction, as drafted, its protections fall short of providing any real relief for the citizenry from persistent aerial surveillance by the government that can monitor the movements of an entire city. The following analysis and recommendation are intended to ensure that House Bill 159,⁴ once amended to remove the language limiting its protections only to criminal investigations, can serve as an effective bulwark against "persistent aerial surveillance" on the citizenry.

¹ The Rutherford Institute is a national, non-profit civil liberties organization that educates the public on policy issues of constitutional concern and provides legal representation at no charge to individuals whose civil rights are threatened or infringed.

² John W. Whitehead, "Big Brother Is Still Watching You: Don't Fall for the NSA's Latest Ploy," The Rutherford Institute (May 1, 2017), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/big_brother_is_still_watching_you_u_dont_fall_for_the_nsas_latest_ploy.

³ <http://mgaleg.maryland.gov/2021RS/bills/hb/hb0159F.pdf>.

⁴ <http://mgaleg.maryland.gov/2021RS/bills/hb/hb0159F.pdf>.

Baltimore's Aerial Surveillance Program

House Bill 159 arose in response to the City of Baltimore's implementation of an aerial surveillance program in 2016 and in 2020. The original program became operational without the knowledge of the public or the City's Mayor.⁵ Although the initial program was halted when its existence was made public, the Baltimore Police Department (BPD) entered into a contract with a private corporation, the aptly-named Persistent Surveillance Systems, to redeploy aerial surveillance of the City for six months beginning in April 2020.⁶

Dubbed the Aerial Investigative Research program (AIR), it involved the deployment of three planes over the City during daytime hours, weather permitting. The planes were equipped with cameras that covered 90% of the city and that had a resolution reducing each individual on the ground to a pixelated dot. The photographs were transmitted to a control room staffed by analysts who accessed the photographs when specific crimes were reported in a particular location. Upon receiving a notification, analysts "tagged" the dots photographed around the crime scene and tracked those dots' movements before and after the reported crime. BPD thereby obtained reports that included the location and timing of the crime, the observable actions at the crime scene, the tracks of people and vehicles to and from the crime scene, and the locations the individuals at the crime scene visited before and after the crime.⁷

However, the information BPD obtained using AIR was not limited to the identification of dots at or near a crime scene. AIR information was combined with other considerable surveillance tools already in place, such as on-the-ground surveillance cameras and license-plate readers, allowing law enforcement to specifically identify witnesses and suspects. Within seventy-two hours, analysts can give the police a more detailed report about those present at the crime scene including identifying information about individuals and tracking their movements.⁸

The information obtained by AIR surveillance cameras was not used in real-time, but was stored on computer servers for recall and use when needed. The program called for storing of the data obtained for 45 days,⁹ but there is no technical impediment for retaining the information indefinitely. Thus, a surveillance system such as AIR has the capability of maintain vast amounts of information about the movements and activities of individuals throughout a city and, when combined with the vast array of ground-based cameras and license plate readers, of identifying

⁵ Monte Reel, "Secret Cameras Record Baltimore's Every Move From Above," *Bloomberg Businessweek* (Aug. 23, 2016), <https://www.bloomberg.com/features/2016-baltimore-secret-surveillance>.

⁶ Ethan McLeod, "Aerial surveillance planes to begin flying over Baltimore Friday," *Baltimore Business Journal* (Apr. 30, 2020), <https://www.bizjournals.com/baltimore/news/2020/04/30/aerial-surveillance-planes-to-begin-flying-over.html>

⁷ *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 979 F.3d 219, 223 (4th Cir. 2020).

⁸ *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 979 F.3d at 223.

⁹ *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 456 F. Supp. 3d 699, 704 (D. Md. 2020).

and tracking the movements of those individuals. Indeed, the resolution of cameras such as those used in the AIR program could be increased to allow those cameras to capture images that could identify individuals.¹⁰

Although the constitutionality of Baltimore's AIR program was upheld in a 2-1 November 2020 decision of a federal appeals court panel, the legality of this kind of pervasive aerial surveillance is not settled. That November 2020 decision is being reconsidered by all the judges of the Fourth Circuit Court of Appeals.

House Bill 159 Should Be Amended To Remove the "Criminal Investigation" Limitation

The evident purpose of House Bill 159 to restrict persistent aerial surveillance is a laudable one and supported by The Rutherford Institute. However, the precise wording of House Bill 159 is problematic and too limited to achieve the purpose of reining in the surveillance state.

As currently drafted, House Bill 159's prohibition is as follows:

(B) Except as provided in subsection (C) of this section, a unit or an agency of the State or a political subdivision of the State may not conduct persistent aerial surveillance to gather evidence or other information **in a criminal investigation**.¹¹

By using the term "in a criminal investigation," the legislation would only prohibit the use of persistent aerial surveillance if it is done in the course of a specific criminal investigation. It would leave government entities free to conduct persistent aerial surveillance if there is no active criminal investigation. Indeed, the current language of House Bill 159 would not prevent the AIR program that gave rise to the legislation because AIR surveillance was not conducted and data was not collected as part of a criminal investigation but was used *after* a criminal investigation was begun.

The current language of House Bill 159 would leave government entities free to conduct AIR-type aerial surveillance that collects data allowing individuals to be monitored and tracked so long as the data is not collected as part of a criminal investigation.

In order to effectuate the intended purpose of the law to stop the collection of tracking data through dragnet aerial surveillance, House Bill 159 should be amended to remove the "in a criminal investigation" limitation, thereby broadly forbidding persistent aerial surveillance except in the situations set forth in subsection (C).

¹⁰ *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 979 F.3d at 238 n.5 (Gregory, C.J., dissenting).

¹¹ <http://mgaleg.maryland.gov/2021RS/bills/hb/hb0159F.pdf>.

Persistent and Pervasive Aerial Surveillance Violates the Fourth Amendment

If amended and adopted, a less-limited House Bill 159 would protect the Fourth Amendment rights of Maryland's citizens. By prohibiting "unreasonable searches and seizures," the Fourth Amendment seeks to "to place obstacles in the way" of surveillance that is "too permeating" and to "assure [] preservation of that degree of privacy against government that existed" when the Amendment was adopted."¹²

Persistent aerial surveillance of the kind employed by the City of Baltimore through its AIR program, allowing the government to track and monitor the activities of citizens over weeks and even months, is exactly the kind of intrusion into privacy the framers of the Constitution sought to prohibit.

That persistent aerial surveillance is unconstitutional is supported by the U.S. Supreme Court's most recent decisions examining the government's use of surveillance technologies.

In 2012, the Court found that the placement of GPS tracking devices on a person's vehicle to monitor his movements for nearly a month violated the Fourth Amendment.¹³ Five justices acknowledged in that case that persons have a reasonable expectation protected by the Constitution that police will not secretly monitor and catalog the movements of their vehicles using surveillance technologies.¹⁴

This logic was extended to the government's use of cell site location (CSLI) information to track persons, which the Court's 2018 decision in *Carpenter v. United States* found violated the Fourth Amendment.¹⁵ This location information, captured from anyone who uses a cell phone, "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familiar, political, professional, religious, and sexual associations." It is "detailed, encyclopedic, and effortlessly compiled," it is "tireless and absolute," and its "retrospective quality" gives the government access to information "otherwise unknowable." For these reasons, the Supreme Court ruled that collection of CSLI for a seven-day period violated *Carpenter's* reasonable expectation of privacy.¹⁶

The *Carpenter* decision also makes clear that the fact that GPS or CSLI information tracks a person's public activities that would otherwise be observable by law enforcement did not eliminate any expectation of privacy. Thus, "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere"; there is a line between permissible short-term tracking of a person in public and an individual's "expectation of privacy in the whole

¹² *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018).

¹³ *United States v. Jones*, 565 U.S. 400 (2012).

¹⁴ *United States v. Jones*, 565 U.S. at 430 (Alito, J., concurring).

¹⁵ *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018).

¹⁶ *Carpenter v. United States*, 138 S. Ct. at 2216-18.

of their physical movements.”¹⁷ “For example, while most people understand that a security camera may record them as they walk down a city block, they also reasonably expect that police will not secretly monitor and catalogue every single movement of an individual’s car for a very long period.”¹⁸

Persistent aerial surveillance falls on the impermissible side of the line drawn by the Fourth Amendment. Programs like the AIR have the same features that make CSLI collection so invasive: aerial surveillance—both on its own, and in conjunction with other surveillance techniques—creates a detailed, encyclopedic record of the movements of persons. It allows the government travel back in time to track the movements and activities of person, a power that is virtually unlimited under current technology.

This kind of dragnet surveillance is the very antithesis of the Fourth Amendment’s right to privacy from government intrusion. It is incumbent on the representatives of the people to enact legislation that prevents its implementation.

House Bill 159 Would Stem the Tide of the Surveillance State

House Bill 159 would be a first step in reining in the government’s surveillance capability, a power that has become frighteningly extensive. For example, license plate readers already are posted on traffic lights throughout the State of Maryland, capturing virtually every vehicle license numbers that passes by.¹⁹ Additionally, thousands of high-tech cameras have been installed in public spaces throughout the state and nation that can capture images of people as they walk down the street, lounge in a public park, or engage in any of the common activities of life.²⁰ Using facial recognition technology and motor vehicle department databases of digital photographs, law enforcement agencies now have a comprehensive system for identifying and tracking people whenever and wherever they go out in public.²¹

When combined with other technologies, we have come to the point that whenever you’re walking through a store, driving your car, checking email, or talking to friends and family on the phone, it is likely that some government agency is tracking and monitoring your behavior.²²

¹⁷ *Carpenter v. United States*, 138 S. Ct. at 2217.

¹⁸ *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 979 F.3d at 235 (Gregory, C.J., dissenting).

¹⁹ Capital News Service, “Maryland Uses Surveillance, Data, To Track Motorists, Traffic,” *The MarylandReporter.com* (Dec. 10, 2019), <https://marylandreporter.com/2019/12/10/maryland-uses-surveillance-data-to-track-motorists-traffic/>

²⁰ Sara Schwartz, “9 Ways You’re Being Spied On Every Day,” *HuffPost* (Dec. 6, 2017), https://www.huffpost.com/entry/government-surveillance_n_5084623.

²¹ Nicole Martin, “The Major Concerns Around Facial Recognition Technology,” *Forbes* (Sept. 25, 2019), <https://www.forbes.com/sites/nicolemartin1/2019/09/25/the-major-concerns-around-facial-recognition-technology/#1e751eb14fe3>.

²² John W. Whitehead, “Big Brother Is Still Watching You: Don’t Fall for the NSA’s Latest Ploy,” The Rutherford Institute (May 1, 2017),

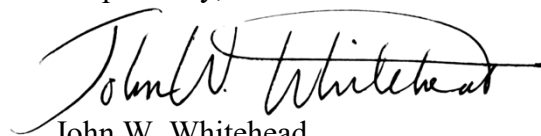
A more robust House Bill 159 would help to stem the tide of this pervasive and oppressive surveillance of citizens by the government by limiting persistent aerial surveillance.

Conclusion

The Supreme Court has recognized that elected officials should play a leading role in crafting policies that balance the need for public safety and the need for privacy.²³ That is exactly what Maryland's General Assembly should do here with respect to persistent aerial surveillance.

It is our hope that the House Judiciary Committee will amend and broaden the scope of House Bill 159 and, as amended, recommend its approval by the entire General Assembly.

Respectfully,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a large, sweeping initial "J" and a long horizontal stroke extending to the right.

John W. Whitehead
President

https://www.rutherford.org/publications_resources/john_whiteheads_commentary/big_brother_is_still_watching_you_dont_fall_for_the_nsas_latest_ploy.

²³ *United States v. Jones*, 565 U.S. at 429–30 (Alito, J., joined by Ginsburg, Breyer, & Kagan, JJ., concurring in the judgment) (“A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.”).