



**Testimony for the House Environmental Matters Committee
March 1, 2013**

HB 938 – Transit Service – Audio Recordings – Requirements and Limitations

Support With Sponsor’s Amendments

The ACLU of Maryland urges a favorable report on HB 938, with the Sponsor’s amendment to allow a ‘driver-only’ system as well. The bill seeks to limit audio surveillance by public transit authorities. We believe that transit riders should not have to give up their fundamental right to privacy, and have all of their conversations recorded, as a condition of riding public transit Maryland.

Furthermore, the privacy implications of this practice, and the issues raised by this bill, go far beyond the rights of public transit riders. At stake is the principle that the government should not be able to record and monitor every conversation that takes place in a public locale.

Background

MTA’s buses currently have six cameras on each bus. Each camera records video and has the capability of recording audio as well. In 2009, MTA considered activating the audio capability on these devices. The press reported on it, and in the face of widespread opposition from legislators, the public, and the ACLU, MTA backed down.¹ In each legislative session since then, bills have been introduced that would have not only authorized such audio surveillance, but required it.² None have received a favorable committee report. Despite this consistent history of Marylanders and our representatives rejecting the idea of audio surveillance on public transportation, the MTA activated the audio on ten of its buses, as a pilot program, with plans to expand the audio recording to half the fleet by this summer, and to every bus thereafter.³ According to MTA, right now MTA buses have audio surveillance in the front and the back of their buses. In addition, they have plans to expand the audio surveillance to their light fleet.

It is our understanding that Montgomery County has one device that captures both audio and video, located near the driver. Prince George’s County has “DriveCam” devices, also located near the driver. The DriveCam devices are constantly recording, but the

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¹ Michael Dresser, *MTA Taping Idea Stifled*, Baltimore Sun, at 1A, July 21, 2009 (available at http://articles.baltimoresun.com/2009-07-21/news/0907200097_1_mta-swaim-staley).

“After inquiries from The Baltimore Sun Monday, acting Secretary Beverly Swaim-Staley ordered the request withdrawn. “It certainly should have been vetted at the department level and it was not,” she said. “We have not weighed the issues we should weigh before making a decision like this.” Swaim-Staley said she would review whether the state would move forward with such a program. “Any privacy matters are of the ultimate importance,” said Swaim-Staley. “They’re the ultimate test of people’s trust in government.”

² HB 529, 2010 Session; HB 123, 2011 Session; HB 166, SB 979, 2012 Session,

<http://mgaleg.maryland.gov/webmga/fmMain.aspx?tab=subject3&ys=2012rs/billfile/sb0979.htm>.

³ Candy Thompson, *MTA Recording Bus Conversations to Eavesdrop on Trouble*, Baltimore Sun, Oct. 17, 2012, <http://www.baltimoresun.com/news/maryland/bs-md-mta-bus-safety-20121016,0,4501380.story>.

clips are almost immediately recorded over. The system saves the clips when triggered by the driver or in the case of a crash.⁴

HB 938 provides a balanced approach

With the addition of the Sponsor's Amendments, HB 938 would prohibit blanket audio surveillance on public transit, but would allow limited audio recording in ways that respect passengers legitimate expectations of privacy. The bill would allow limited recordings either with a driver-operated unit, or in the vicinity of the driver. In the first case, the audio recording would be on a constant loop, such as in Prince George's County, and the loop would only be stopped, and thus the recording preserved, if the driver presses a button. In this instance there would not truly be wholesale recording of individuals' conversations, as the recording is almost immediately taped over. Passengers' privacy would be respected because the audio would be turned on only when there is some public safety rationale.

In the case of the 'driver-only' amendment, the microphone would be "installed in a location where it can record only those words, spoken in a normal speaking volume, that are audible to the vehicle operator." While we maintain the government should not be recording our conversations, we recognize that an individual would not have a reasonable expectation of privacy in a conversation that the driver could overhear. Thus, the ACLU of Maryland can support this compromise.

What we do not support, however, is broader audio surveillance of people, whether on buses, trains, streets or sidewalks.

Public Audio Surveillance is an Invasion of Privacy

Government surveillance and recording of all conversations that take place on a public bus (which is what occurs when microphones mounted throughout each bus are constantly recording) is an invasion of privacy. It is true that many conversations that occur on public transit vehicles are ones in which there is no legitimate expectation of privacy, because they occur with the knowledge that other people are present who can overhear them. But that does not mean that there is no expectation of privacy with respect to all conversations in such places. Put simply, the fact that not all conversations in a public place are private does not mean that none are. Common sense, lived experience, and the law all demonstrate that there are, in fact, many occasions when we have private conversations in public locales such as buses, or on the street. There are many conversations with loved ones, friends, doctors, lawyers, etc. that can take place in such locations, whether in person or on cell phones, conversations that can be and are about extremely private details of our lives. And in closed environments, like a bus, it is quite easy to see with certainty whether anyone else is within earshot. But audio recorders cannot distinguish between private conversations and ones in which there is no expectation of privacy, and simply record everything. Moreover our expectations of privacy are not dictated solely by the subject matter of our conversations, and whether we are talking about intimate, inherently private, or embarrassing details, or by the location. Rather, there is simply no legitimate need for the government to be making recordings of our conversations absent an individualized need, and pursuant to a warrant or other exception in the wiretap act.

⁴ Mark Berman, *On buses, cameras are watching and listening*, The Washington Post, December 5, 2012 (available at http://articles.washingtonpost.com/2012-12-02/local/35584713_1_surveillance-cameras-drivecam-buses).

No Adequate Public Safety Rationale

The MTA has asserted that activating the audio recording capability is necessary to keep passengers and drivers safe. While we strongly agree that keeping public transit passengers safe is a critically important goal, the contention that pervasive audio monitoring is necessary to do so is simply unfounded. It is important to remember that the MTA's buses, like those of many other transit systems in Maryland and around the country, already have video surveillance (six cameras on each bus in the case of the MTA), and the ACLU has never objected to that surveillance (nor has any other group, to our knowledge). The addition of audio surveillance adds nothing meaningful to passenger safety, it just means that the largely African American and lower income persons who comprise the MTA's bus passengers, many of whom have no other options for getting around, will have less privacy than everyone else. Surveillance advocates assert that audio recordings can be helpful to understand why a particular incident happened. While that may be true, why an assault happened is not necessary to prove the fact of the assault. And as to the latter, the video evidence alone is sufficient. Moreover the background to any incident can be ascertained and proven through witness testimony, just as it has been for the entire history of the United States, and as is done in hundreds of cases every day in police stations and courtrooms throughout the state. Put another way, except in incredibly narrow circumstances, speech (by the definition the only thing captured on audio), is simply not a crime.

Nor does misbehavior, such as discourteous treatment by employees or passengers that does not rise to the level of a crime, justify wholesale audio surveillance of all passengers at all times. This behavior is properly addressed through a complaint to the proper jurisdiction (in the case of a driver) or simply turning the other cheek.

Legality of Public Audio Surveillance

Advocates of public audio surveillance assert that it is lawful because one cannot reasonably expect that conversations that take place in a public place are private. As a statement of law, such an assertion grossly oversimplifies things, and is simply inaccurate. It is true that under both the Fourth Amendment, Art. 26 of the Maryland Declaration of Rights, and the state wiretap act, Md. Code, Cts. & Jud. Proc. § 10-401, *et seq.*, the relevant inquiry as to the legality of government recording of third parties' oral communications turns on whether the participants had a "reasonable expectation of privacy" in their conversation. But it is simply incorrect to say that the fact that a conversation takes place in a public place is in and of itself a sufficient basis on which to say that there is no expectation of privacy.

While courts have not yet grappled specifically with public audio surveillance by the government, it is clear that we can and do retain reasonable expectations of privacy in conversations that take place in public locales. The seminal reasonable expectation of privacy case, *Katz v. United States*, 389 U.S. 347 (1967), itself addressed the question whether individuals may be said to have a reasonable expectation of privacy with regard to communications made in a public place. There, the defendant raised a Fourth Amendment challenge to the introduction of evidence "overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed [telephone] calls" in violation of a federal gambling statute. *Id.* at 348. Emphasizing that "the Fourth Amendment protects people, not places," the Court held that "what [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351. In response to the government's argument that Katz was visible to the public while placing his telephone calls in the glass phone booth, the Court pointed out that "what [Katz]

sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear” and determined that “[h]e did not shed his right to do so simply because he made his calls from a place where he might be seen.” *Id.* at 352. The Court accordingly concluded that “[o]ne who occupies [a public phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world,” and is therefore protected by the Fourth Amendment. *Id.*

Finally, some have argued that the fact that the MTA puts up a sign warning passengers that audio surveillance is in use means that passengers impliedly consent to the recording of their conversations. This cannot be so. The government could not require that stickers be affixed to every cell phone stating that all calls are being recorded and thereby argue that each purchaser had consented to the recording. Further, the notion that riders “consent” to the recording of their conversations by virtue of riding the bus despite the sign makes a mockery of the idea of consent. A significant portion of the MTA’s (and most public transit agencies’) ridership utilizes public transit because they lack any other alternative means of transportation, either because of age or their financial resources. Such persons do not “consent” to any conditions imposed, they simply have to live with them.

Broader Privacy Implications of Pervasive Audio Surveillance

As noted above, the principle at stake here is not limited to conversations that take place on public transportation. The public safety rationale offered for activating audio recording on buses would also apply to any public space, including the sidewalks of every municipality in Maryland. If audio recording is truly necessary for fighting crime on buses (which it is not), then it is presumably equally necessary to fight crime on the streets. And if the government can record all of the conversations that take place on public buses, what principle prevents the government from recording all conversations that take place on every street? We already have ‘blue light’ cameras all over the City of Baltimore. The cost of the recorders and data storage is continually declining. Video and/or audio recorders could be placed on every utility pole and lamp post in the City, and could record everything we say outdoors. In our view, the government simply should not be in the business of making it impossible to have a private, unmonitored conversation anywhere outside of a building.

Further, once the public audio surveillance takes root, the data is available for law enforcement monitoring, even in the absence of a particularized incident to investigate. Data mining software to identify and isolate speakers in audio recordings already exists.⁵ In 2012 a letter was offered from the Director of Transit for the City of Wichita in which he said “[t]he police have also used our audio in the past with monitoring known criminals that may be using our services.” If databases of passenger conversations are created in Maryland, it is only a matter of time before law enforcement seeks access to them to “monitor” the conversations of persons they suspect, despite the fact that they have no warrant that would allow them to legally do so.

For the foregoing reasons, we urge a favorable report on HB 938.

⁵ See http://perceivesolutions.com/police_forensics.php (offering forensic audio data mining software that “can process large databases of audio files for data mining applications . . . isolating individual speakers in a conversation, . . . keyword spotting, . . . [and] identifying who is speaking regardless of what is said, the language spoken or the channel used.”)