



**Testimony for the Senate Finance Committee
March 14, 2012**

**SB 979 – Maryland Transit Administration – Audio Recording Devices on
Vehicles Used for Transit Service**

OPPOSE

AMERICAN CIVIL
LIBERTIES UNION
OF MARYLAND

MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
or 240-274-5295
F/410-366-7838

FIELD OFFICE
6930 CARROLL AVENUE
SUITE 610
TAKOMA PARK, MD 20912
T/240-274-5295

WWW.ACLU-MD.ORG

OFFICERS AND DIRECTORS
SARA N. LOVE
PRESIDENT

SUSAN GOERING
EXECUTIVE DIRECTOR

C. CHRISTOPHER BROWN
GENERAL COUNSEL

The ACLU of Maryland opposes Senate Bill 979 and urges an unfavorable report. This bill would allow audio recording on all MTA vehicles that would be able to record both the vehicle operator and all passengers. We believe this to be bad public policy and of questionable legality.

The Maryland Wiretap law, Md. Code Ann. § 10-402(a), prohibits the willful interception of oral communications, except where both parties have given prior consent. *Id.* at § 10-402(c)(3). An “oral communication” is defined as words spoken in “private conversation.” *Id.* at § 10-401(2)(i). In determining whether there is an oral communication, Maryland courts ask whether “at least one of the parties had a reasonable expectation of privacy.” *Fearnow v. C & P Telephone Co.*, 342 Md. 363, 376, 676 A.2d 65, 71 (1996). This inquiry tracks the Fourth Amendment expectation of privacy inquiry, which requires both an actual subjective expectation of privacy and a determination that the expectation is objectively reasonable. *Malpas v. State*, 116 Md.App. 69, 83-84, 695 A.2d 588, 595 (Md.App. 1997).

While the Court in *Malpas* found that the defendant “could have no expectation of privacy in statements made in his apartment that were shouted so loudly as to be overheard by persons in the adjacent apartment,” this doesn’t mean that a court would find that conversations spoken softly on a bus are also denied any reasonable expectation of privacy. An audio device on an MTA vehicle will pick up all passenger conversations, whether uttered softly or shouted. This is of particular concern in that SB 979 does not limit the audiotaping to merely the front of the bus by the driver. Currently, buses have videotaping throughout the bus, not just at the front, so when these audio devices are turned on they will capture conversations of riders throughout the bus. We believe that this raises significant Fourth Amendment concerns.

It is also important to note that Senate Bill 979 would be the first and only exception that allows private parties, with no court or other supervision or accountability, to intercept communications. Even law enforcement officers under current law must submit to oversight and accountability. Examples can be found at § 10-402 (c) (2) (ii) (“acting at the prior direction of and under the supervision of” another law enforcement officer”); 10-402 (c) (4)(i) (law enforcement officer must be party to the communication and the vehicle stop and encounter must be video recorded); 10-402 (10)(law enforcement officer must be acting at direction of another law enforcement officer). Other provisions limit the

use of communications intercepted by law enforcement, even where lawful. For example 10-402 (c) (6)(ii) prohibits intercepted communications under an officer safety exception from being used against a defendant in a criminal proceeding. This bill's provision contains no limitations, no accountability, and no oversight as to how intercepted communications can be used. Maryland's wiretap statutory framework has been carefully constructed to balance privacy interests with public safety. There is no reason for the State to upset this balance by enacting this bill.

While the advice letter from the Assistant Attorney General contends that posting a notice advising passengers that their conversations will be recorded makes any expectation of privacy unreasonable, we do not agree. Signage is not necessarily sufficient to imply consent to the recording; if the sign stated that by entering the bus you were consenting to a strip search would that be all that was needed to lawfully require all passengers to strip down?

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Even if a court were to hold that this law was constitutional, that still does not mean that it is good public policy. Few people have a choice whether or not to take a bus; it is often a result of being too poor to have your own vehicle transportation. Should people be subjected to a loss of privacy merely because they are not financially able to afford a car where they could have private conversations with others while they commuted? Another important consideration is whether this takes us down the slippery slope to greater erosions of individual privacy. Will the next step be posting signs on the streets that all conversations are being recorded and wiretapping all citizens on public sidewalks? The public weighed in on this debate in 2009 when audiotaping on MTA vehicles was first publicly discussed. As reported in the Baltimore Sun, when the MTA considered installing audio recording equipment in 2009 it quickly abandoned the idea amidst large public outcry against this overreaching and intrusive proposal.¹ We believe it should be abandoned once again.

For the foregoing reasons, this bill should receive an unfavorable report.

¹ See Michael Dresser, "Maryland Transit Administration Considers Train, Bus Surveillance," Baltimore Sun (Jul. 21, 2009).