
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 56 **Hearing Date:** July 7, 2015
Author: Quirk
Version: June 24, 2015
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Unmanned Aircraft Systems*

HISTORY

Source: Author

Prior Legislation: SB 15 (Padilla) failed Assembly Public Safety 2014
AB 1327 (Gorell) Vetoed 2014

Support: None known

Opposition: ACLU (unless amended); California Police Chiefs Association Inc.; California State Sheriffs' Association (unless amended)

Assembly Floor Vote: 61 - 12

PURPOSE

The purpose of this bill is to set forth when an unmanned aircraft system can be used by a law enforcement agency.

Existing federal law, the Aviation Administration Modernization and Reform Act of 2012 requires the Secretary of Transportation to develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system. The plan is required to provide for safe integration of civil unmanned aircraft systems into national airspace as soon as practicable, not later than September 30, 2015. (112 P.L. 95, 332.)

Existing law authorizes the Attorney General, chief deputy attorney general, chief assistant attorney general, district attorney or the district attorney's designee to apply to the presiding judge of the superior court for an order authorizing the interception of wire or electronic communications under specified circumstances. (Penal Code §§ 629.50 *et. seq.*)

Existing law prohibits wiretapping or eavesdropping on confidential communications. (Penal Code § 630.)

Existing law makes it a crime for a person, intentionally, and without requisite consent, to eavesdrop on a confidential communication by means of any electronic amplifying or recording device. (Penal Code § 632.)

Existing law exempts the Attorney General, any district attorney, specified peace officers such as city police and county sheriffs, and a person acting under the direction of an exempt agency from the prohibitions against wiretapping and other related activities to the extent that they may overhear or record any communication that they were lawfully authorized to overhear or record prior to the enactment of the prohibitions. Existing law provides that any evidence so obtained is admissible in any judicial, administrative, or legislative proceeding. (Penal Code § 633.)

The US Constitution provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.” (4th Amendment of the U.S. Constitution.)

The California Constitution provides that “the right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.” (Article I, Section 13 of the California Constitution.)

Existing law defines a “search warrant” as an order in writing in the name of the People, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and in the case of a thing or things or personal property, bring the same before the magistrate. (Penal Code § 1523.)

Existing law permits a search warrant to be issued for any of the following grounds:

- When the property subject to search was stolen or embezzled;
- When property or things were used as the means to commit a felony;
- When the property or things are in the possession of any person with the intent to use them as a means of committing a public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing them from being discovered;
- When the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony;
- When the property or things to be seized consist of evidence that tends to show that sexual exploitation of a child or possession of matter depicting sexual conduct of a person under the age of 18 years has occurred or is occurring;
- When there is a warrant to arrest a person;
- When a provider of electronic communication service or remote computing service has records or evidence, as specified, showing that property was stolen or embezzled constituting a misdemeanor, or that property or things are in the possession of any person with the intent to use them as a means of committing a misdemeanor public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing their discovery;

- When the property or things to be seized include an item or any evidence that tends to show a violation of a specified section of the Labor Code, or tends to show that a particular person has violated that section;
- When the property or things to be seized include a firearm or any other deadly weapon at the scene of, or at the premises occupied or under the control of the person arrested in connection with, a domestic violence incident involving a threat to human life or a physical assault, as specified;
- When the property or things to be seized include a firearm or any other deadly weapon that is owned by, or in the possession of, or in the custody or control of, specified persons;
- When the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms, as specified, if a prohibited firearm is possessed, owned, in the custody of, or controlled by a person against whom a specified protective order has been issued, the person has been lawfully served with that order, and the person has failed to relinquish the firearm as required by law; or when the person is subject to a gun violence restraining order,
- When the information to be received from the use of a tracking device constitutes evidence that tends to show that either a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code has been committed or is being committed, tends to show that a particular person has committed a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code, or is committing a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code, or will assist in locating an individual who has committed or is committing a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code; and
- When a sample of the blood of a person constitutes evidence of a DUI. (Penal Code §1524(a).)

This bill provides that a law enforcement agency shall not use an unmanned aircraft system (UAS), or contract for the use of an UAS, except as provided.

This bill provides that a law enforcement agency may use an UAS if the law enforcement agency complies with all of the following:

- Protections against unreasonable searches guaranteed by the United States Constitution and the California Constitution.
- Federal law applicable to the use of an UAS by an agency, including, but not limited to, regulations of the Federal Aviation Administration (FAA).
- State and local applicable to any agency's use of surveillance technology that can be attached to an UAS.
- If the use of an UAS by a local law enforcement agency may involve the collection of images from an adjacent county, city, or city and county, the law enforcement agency shall obtain a warrant based upon probable cause.
- The agency develops and makes available to the public a policy on the use of an UAS and trains the law enforcement agency's officers and employees on the policy, prior to the use of the UAS.

- The law enforcement agency uses the UAS consistent with the policy developed pursuant to this paragraph.
- Prior to finalizing the policy required by this paragraph, the law enforcement agency shall provide an opportunity for public comment at a regularly scheduled meeting of its governing body.
- The policy required by this paragraph shall specify, at a minimum, the circumstances under which an unmanned aircraft may be used and the time limits applicable to each circumstance.

This bill prohibits a law enforcement agency from using an UAS to surveil private property unless the law enforcement agency complies with the requirements under this bill, and has either obtained a search warrant based on probable cause, or the express permission of the person or entity to authorize a search of the specific private property to be subjected to surveillance.

This bill allows a law enforcement agency to use an UAS to surveil private property if an exigent circumstance exists, including but not limited to, either of the following circumstances:

- In emergency situations if there is an imminent threat to life or of great bodily harm, including, but not limited to fires, hostage crises ,barricaded suspects, "hot pursuit" situations if reasonably necessary to prevent harm to law enforcement officers or others; and search and rescue operations on land or water;
- To determine the appropriate response to an imminent or existing environmental emergency or disaster, including, but not limited to, oils spills or chemical spills

This bill provides that images, footage or data obtained by a law enforcement agency through the use of an UAS shall not be used by the law enforcement agency for any purpose other than for which it was collected.

This bill provides that images, footage, or data obtained through the use of an unmanned aircraft system shall be permanently destroyed within one year, except that a law enforcement agency may retain the images, footage or data in the following circumstances:

- For training purposes. Images, footage or data retained can be used for the education and instruction of a law enforcement agency's employees in matters related to the mission of the law enforcement agency and for no other purpose.
- For academic research or teaching purposes. Images, footage or data retained for academic research or teaching purposes shall be used only for the advancement of research and teaching conducted by an academic or research institution and matters related to the mission of the institution and for no other purpose.

This bill provides that law enforcement may retain beyond one year images, footage, or data obtained by an UAS in both of the following circumstances:

- If a search warrant authorized the collection of the images, footage or data.
- If the images, footage or data are evidence in any claim filed or any pending litigation, internal disciplinary proceeding, enforcement proceeding or criminal investigation.

This bill provides that unless authorized by federal law, a person or entity including a law enforcement agency shall not equip or arm an unmanned aircraft system with a weapon or other device that may be carried by, or launched or directed from, an unmanned aircraft system and that is intended to cause incapacitation, bodily injury or death or damage to, or destruction of real or personal property.

This bill provides that all unmanned aircraft systems shall be operated so as to minimize the collection of images, footage or data of persons, places, or things not specified with particularity in the warrant authorizing the use of an unmanned aircraft system, or if no warrant was obtained, for the purposes unrelated to the justification for the operation.

This bill provides that a local legislative body may adopt more restrictive policies on the acquisition, use of or retention of unmanned aircraft systems.

This bill defines "UAS" as an unmanned aircraft and associated elements, including communication links and the components that control the unmanned, aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system.

This bill defines "criminal intelligence" as information, compiled, analyzed or disseminated in an effort to anticipate, prevent, monitor, or investigate criminal activity.

This bill provides that "law enforcement agency" means the Attorney General, each district attorney, and each agency of the state or political subdivision of the state authorized by statute to investigate or prosecute law violators.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v.*

Brown (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

International industry development, growth, and investment over the past several years have allowed Unmanned Aircraft Systems (UAS) to evolve from remotely piloted vehicles with limited capabilities to semi and fully autonomous systems for commercial applications. There are some 100 U.S. companies, academic institutions, and government organizations developing over 300 UAS designs.

Congress has essentially closed off national airspace to commercial drone flights. The passage of the Federal Aviation Administration (FAA) Modernization and Reform Act of 2012 has directed the FAA to establish regulations by 2015 to allow for commercial use of drones. Six test sites have been approved to allow the FAA to develop research findings and operation experiences to help ensure safe integration. However, the Act does allow for the FAA to grant permits for certain commercial unmanned aircraft operations (e.g. to film movie scenes). The flying of drones for recreational purposes is allowed as long as the aircraft is flown in accordance with certain safety rules.

Drones are inherently different from manned aircrafts, both in size and flying capability. Some unmanned aircraft weigh 1,900 pounds and can remain aloft for 30 hours or more because there is no need for them to land to change pilots. Some are 6 inches long. Others can perform dangerous missions without risking loss of life.

Commercially used drones can serve many societal benefits including assessing hostage situations, addressing bomb threats and detecting forest fires. Despite the possible benefits, there is potential for misuse without clearly established policies that protect privacy rights.

There is no California law or regulation governing the use of drones and no guidelines on how public agencies can acquire them. Several jurisdictions have already purchased drones with very little, if any, public announcement or discussion.

We live in a culture that is extremely sensitive to the idea of preventing unnecessary government intrusion into any facet of our lives. Drones, as with other technologies, can be a great asset to the state and improve public safety. For example, the California Military Department provided firefighters with aerial surveillance while battling the massive Rim Fire in 2013 along the foothills of the Sierra Nevada. This aerial surveillance allowed firefighters to track the fire in real time, allowed commanders to move firefighters out of harm's way and reposition firefighters as the wind shifted the fire across the mountainside. However, privacy concerns are an issue that must be dealt with effectively if the public is to support the use of drones by their local law enforcement agencies.

Over the last few years a number of law enforcement agencies have purchased drones with no public input and little transparency in the process. This has stirred feelings of frustration, skepticism and concern from Californians regarding how drones will be operated. Though some agencies have indicated that they are not intending to deploy them anytime soon, allowing for some form of public forum as they develop their policies and guidelines would help ease tensions and help to build trust.

AB 56 will establish a set of parameters for the use of drones in public and private spaces. The bill creates accountability and transparency by requiring that law enforcement agencies allow for public engagement in the development of their policies regarding the use of drones and requiring that those policies be made publicly available. Additionally the bill provides protections to ensure that there isn't a backdoor use of drones by agencies that have no approved policies in place. This bill recognizes that drones can be a beneficial tool, but at the same time they can be abused without the proper oversight or guidance on their use."

2. Technology and the 4th Amendment

Both the United States and the California constitutions guarantee the right of all persons to be secure from unreasonable searches and seizures. (U.S. Const., amend. IV; Cal. Const., art. 1, sec. 13.) This protection applies to all unreasonable government intrusions into legitimate expectations of privacy. (*United States v. Chadwick* (1977) 433 U.S. 1, 7, overruled on other grounds by *California v. Acevedo* (1991) 500 U.S. 565.) In general, a search is not valid unless it is conducted pursuant to a warrant where a person has a reasonable expectation of privacy. The mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for the warrant required by the Constitution. (*Arkansas v. Sanders* (1979) 442 U.S. 753, 758, overruled on other grounds by *California v. Acevedo*, supra.) There are exceptions to the warrant requirement, but the burden of establishing an exception is on the party seeking one. [*Arkansas v. Sanders* (1979) 442 U.S. 753, 760, overruled on other grounds by *California v. Acevedo*, supra.]

Courts have been confronted with questions of how evolving technology intersects with the Fourth Amendment. In *Kyllo v. United States* (2001) 533 U.S. 27, the U.S. Supreme Court considered whether the use of a thermal imager, which detects infrared radiation invisible to the naked eye, to determine whether the defendant was growing marijuana in his apartment, was a search in violation of the Fourth Amendment. The Court held that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that

would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." (*Id.* at p. 40.)

In *United States v. Jones* (2012) 132 S. Ct. 945, the Supreme Court was presented with a Fourth Amendment challenge to the use of a Global Positioning System (GPS) tracking device by law enforcement officers to monitor the movements of a suspected drug trafficker's vehicle over a period of 28 days. The Court held that the government's installation of the GPS device on the defendant's private property for the purpose of conducting surveillance constituted a "search" under the Fourth Amendment. GPS technology is intrusive because it "generates a precise, comprehensive, record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future." (*Id.* at pp. 955-956.)

Because technology is always evolving it is important to consider how new technology should be regulated in order to avoid governmental abuse. The Court's decisions in prior cases provide some guidance on how new technology may be evaluated within the framework of the Fourth Amendment's protections against unreasonable searches and seizures. As illustrated in *Kyllo* and *Jones*, even in a public space, the use of advanced technology to conduct surveillance without a warrant may be restricted by the Fourth Amendment.

3. Use of Drones by Law Enforcement

This bill generally prohibits the use of an unmanned aircraft system, commonly referred to as a drone, over private property by law enforcement except with a warrant or permission and under the other provision of this bill. This bill does not address the use of a drone by law enforcement on public property nor does it address the use of drones by other public agencies.

a. Must have a policy.

In order to use a drone, this bill requires that the law enforcement agency develop a policy. The bill lists what the policy shall contain and will be amended in the Senate Judiciary Committee, if it passes this Committee, to include:

- i. Circumstances under which the unmanned aircraft system may and may not be used;
- ii. Time limits applicable to each circumstance;
- iii. Rules and processes required prior to such use;
- iv. Individuals who may access or use the system or access collected information and circumstances under which they may do so;
- v. Safeguards to protect unauthorized use or access;
- vi. Training required for any individual authorized to use or access the system or information;
- vii. Sharing of images, data or footage with other law enforcement and public agencies;
- viii. How information obtained from another public agency will be used;
- ix. Mechanisms to ensure the policy is followed.

b. Input from legislative body.

This bill requires that the law enforcement agency make available to the public the policy on the use of drones. Amendments to be taken in Senate Judiciary, if this passes this

Committee, will clarify that the law enforcement agency shall present the proposed policy at a regularly scheduled and noticed public meeting of its governing body with an opportunity for public comment.

This bill also states that a local governing agency can adopt more restrictive policies on the acquisition, use or retention of a drone. Thus, if a city or county wanted to ban the use of drones by law enforcement in their jurisdiction they could.

c. Images and footage obtained.

The images, footage and data obtained through the use of a drone by law enforcement shall in general be destroyed within one year. However there are exceptions made for images, footage and data obtained by a warrant, needed in an active investigation, proceeding etc., or if the images, footage or data are being obtained for educational or academic purposes.

d. Prohibits arming.

This bill clearly prohibits the arming of drones with any type of weapon.

e. Information from another public agency.

This bill specifies that the requirements on law enforcement under this bill also apply to anyone law enforcement may contract with. . Amendments to be taken in Senate Judiciary, if this passes this Committee, will clarify that use of a drone not only by law enforcement or contract with law enforcement but also by loan or any other arrangement or information obtained from an unmanned aircraft system used by another public agency also must follow the law as set forth in this bill.

4. Other Legislation

SB 262 (Galgiani), which passed this Committee on April 14, 2015 with a vote of 5-1 and is now in Senate Judiciary Committee where it hasn't been heard allows a law enforcement agency to use an unmanned aircraft system if the agency complies with: (1) protections against unreasonable searches and seizures; (2) Federal Law applicable to the use of unmanned aircraft systems; and, (3) state law applicable to the use of surveillance technology.

SB 170 (Gaines) which passed this Committee on April 14, 2015 with a vote 6-0 makes the intentional operation of an unmanned aircraft system in airspace over laying a prison or jail a misdemeanor. This bill is now in the Assembly Committee on Privacy and Consumer Protection.

SB 271 (Gaines) which passed this Committee on April 14, 2015 with a vote 6-0 prohibits the unauthorized use of a drone on a school grounds during school hours or to capture images of the school grounds during school hours. This bill is now in the Assembly Committee on Privacy and Consumer Protection.