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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** SB 262                      **Hearing Date:** April 14, 2015  
**Author:** Galgiani  
**Version:** February 18, 2015  
**Urgency:** No                              **Fiscal:** No  
**Consultant:** MK

**Subject:** *Unmanned Aircraft Systems: Law Enforcement Use*

## HISTORY

**Source:** California Police Chiefs Association

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

**Support:** California District Attorneys Association; California Peace Officers Association;  
Peace Officers Research Association

**Opposition:** None known

## PURPOSE

*The purpose of this bill is to allow 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.*

*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.” (4<sup>th</sup> 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 may use an unmanned aircraft system if the use of the unmanned aircraft system complies with all the following:

- Protections against unreasonable searches guaranteed by the United States Constitution and the California Constitution.
- Federal law applicable to the use of an unmanned aircraft system by law enforcement agency, including but not limited to, regulations of the Federal Aviation Administration.
- State Law applicable to a law enforcement agency's use surveillance technology that can be attached to an unmanned aircraft system.

*This bill* defines law enforcement agency as the police or sheriff's department of a city, county or city and county.

*This bill* defines unmanned aircraft as an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.

*This bill* defines unmanned aircraft system as an unmanned aircraft and associated elements, including, but not limited to, 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.

#### 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:

As the Federal Aviation Administration (FAA) prepares to open the skies to regulated public and private use of unmanned aircraft systems, clear guidelines for law enforcement use of this new technology is absolutely imperative.

The FAA has jurisdiction over specific policy requirements of the operation of both unmanned and manned aircraft. The FAA recently issued proposed unmanned aircraft systems (UAS) regulations for public review. It would be preemptive and confusing to propose legislation that could potentially conflict with the upcoming FAA regulations for the public use of unmanned aircraft systems. Thus, this legislation addresses broad privacy concerns and the responsible use of unmanned aircraft systems by law enforcement in respect to the privacy of our state's citizens without creating policy that could conflict with future FAA regulations.

This legislation simply applies what is currently required by the Fourth Amendment (U.S. Constitution) to the use of unmanned aircraft. This allows for the utilization of plausible vantage points, in compliance with the Fourth Amendment. SB 262 applies privacy regulations that are currently applied to manned aircraft to unmanned aircraft.

AB 1327 required the acquisition of a warrant for the use of unmanned aircraft systems over both public and private land in most instances. Because public property is the quintessential "plausible vantage point," an observation of evidence that could have been seen from a public place is not a search, and therefore should not require a warrant. A search warrant for the use of electronic aerial visual surveillance, enabled by an unmanned or manned aircraft is not required if an aircraft or UAS is flown in accordance with FAA regulations and the aircraft or UAS is not flown in a physically intrusive manner. The test to whether or not a warrant is required if the officers utilized technology that merely permitted them to see things they could have seen from a plausible vantage point, although less clearly and with somewhat more effort. Nor is a warrant required merely because a surveillance device was "sophisticated" or technologically complex.

### 2. Unmanned Aircraft Systems

This bill would use the term "unmanned aircraft systems," as defined, to reference what are commonly known as drones. That term, also used by the Federal Aviation Administration (FAA), would be defined to include the unmanned aircraft itself (the drone) and the associated elements (which include the components that control the aircraft). Regarding the types of aircraft that may be considered unmanned aircraft systems, the FAA's fact sheet notes:

Unmanned Aircraft Systems (UAS) come in a variety of shapes and sizes and serve diverse purposes. They may have a wingspan as large as a Boeing 737 or smaller than a radio-controlled model airplane. Regardless of size, the responsibility to fly safely applies equally to manned and unmanned aircraft operations.

Because they are inherently different from manned aircraft, introducing UAS into the nation's airspace is challenging for both the FAA and aviation community. UAS must be integrated into a National Airspace System (NAS) that is evolving from ground-based navigation aids to a GPS-based system in NextGen. Safe integration of UAS involves gaining a better understanding of operational issues, such as training requirements, operational specifications and technology considerations.

### 3. Fourth 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.]

### 4. Use of Unmanned Aircraft System by Law Enforcement

This bill would permit a police or sheriff's department to use an unmanned aircraft system (drone) if they comply with all of the following:

- Protections against unreasonable search and seizures;
- Federal law applicable to the use of an unmanned aircraft system by a law enforcement agency; and
- State law applicable to a law enforcement agency's use of surveillance technology.

The sponsor states that this bill:

[W]ould allow law enforcement agencies to utilize and deploy new life-saving technology while respecting the privacy of California citizens.

### 5. Use of Drones on Public Property

The author's statement talks about a warrant not being necessary for a "plausible vantage point." While this is true, are drones the same as a police car driving by or a person watching from a window across the street or a helicopter flying overhead? If technology were such that a drone could be small enough to hover over a street corner amongst the trees and watch what is going on below, is that the same as a police officer walking or driving by? Is a quiet drone flying over a

yard the same as a helicopter flying overhead? Does the fact that a drone can fly lower than a helicopter or airplane differentiate it from a helicopter?

## 6. Approval of Legislative Body?

This bill permits a police or sheriff's department to use a drone without an specific requirement that the local governing agency approve the use. In 2013, in Alameda County, the sheriff attempted to request funding for a drone. Ultimately, public backlash and concern led to the sheriff to abandon his pursuit of the drones. (Woodall, *War on terror money funding drones, surveillance in the Bay Area*, Oakland Tribune (April 7, 2013).) More recently, the Berkeley City Council passed a one year moratorium on the use of drones by their police department, while still allowing the fire department to use drones. (Shuttlesworth, Jeff, *Berkeley Bans Police Drones for One Year* SFbay.ca February 25, 2015) Two drones acquired by LAPD were "grounded" until the Police commission approves a policy for their use. (Palmer and Mester, *LAPD's Two Drones Will Remain Grounded During Policy Review, Police Commission Says Among Protest*, KTLA 5 News, September 15, 2014)

Should this bill require approval by the appropriate legislative body before a police or sheriff's department acquires or uses a drone?

## 7. Policy and Training

This bill allows a police or sheriff's department to use a drone without requiring that the department creates a policy on the use of a drone. Should the bill require a policy be established before drones are used? A policy should include when the drone is to be used; what is to be done with the data that is collected, including how long it will be stored and how a member of the public can get access to the data and any limits that are to be placed on the use of the drone. As noted in the previous comment, LAPD is already in the process of crafting policies for the use of their drones. "Having rules in place may not be much comfort to the person who looks up from his backyard and sees an LAPD drone overhead. But it could, at least, ensure that the devices are used to fight crime, not to spy or harass." (Newton, Jim *Drones and the LAPD* Los Angeles Times, November 16, 2014

Should the bill also require those who are to be using the drones to be trained in the policies adopted by the agency? If an agency must adopt a policy before using a drone it may make sense to require those charged with operating the drone to be trained in the policy.

## 8. Weapons

Drones have the capability of being armed with weapons, lethal and nonlethal. The United States has used armed drones to target militants in military operations abroad. (Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, New York Times (Mar. 17, 2009).) Domestically, there has been a push by some law enforcement agencies to arm drones to fire rubber bullets and tear gas. (See *Drones over US to get weaponized – so far, non-lethally*, RT.com (May 24, 2012).) Should this bill prohibit the weaponization of drones or should that be part of the policies established locally?

**9. Other Similar Bills**

AB 56 (Quirk) prohibits the use of a drone by a public agency, including a law enforcement agency, unless under specified circumstances including with a warrant; in an emergency where there is a threat to life; by a first responder to a traffic accident; to check for wilderness fires; and, to determine appropriate response to a disaster. This bill is very similar to AB 1327 (Gorell) which was vetoed last year. AB 56 (Quirk) is scheduled for a hearing in Assembly Public Safety on April 14th.

**-- END --**