
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1820 **Hearing Date:** June 21, 2016
Author: Quirk
Version: May 19, 2016
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Unmanned Aircraft Systems*

HISTORY

Source: Author

Prior Legislation: SB 167 (Gaines) not heard 2015
SB 170 (Gaines) Vetoed 2015
SB 262 (Galgiani) Failed Senate Judiciary 2015
SB 263 (Gaines) not heard 2015
SB 271 (Gaines) Vetoed 2015
AB 56 (Quirk) inactive Senate Floor
SB 15 (Padilla) failed Assembly Public Safety 2014
AB 1327 (Gorell) Vetoed 2014

Support: California Civil Liberties Advocacy; Central Coast Forest Association

Opposition: American Civil Liberties Union; California Police Chiefs Association; California State Sheriffs' Association; Consumer Federation of California; Consumer Watchdog; Electronic Frontier Foundation; Peace Officers Research Association of California; Privacy Rights Clearinghouse

Assembly Floor Vote: 43 - 25

PURPOSE

The purpose of this bill is to regulate the use of unmanned aircraft systems (UAS) by law enforcement agencies.

Existing law 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. (Cal. Const., art. 1, sec. 13.)

Existing law states that a search warrant is 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 provides that a search warrant may be issued upon any of the following grounds:

- a) When the property was stolen or embezzled;
- b) When the property or things were used as the means of committing a felony;
- c) 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;
- d) 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;
- e) 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;
- f) When there is a warrant to arrest a person;
- g) When a provider of electronic communication service or remote computing service has records or evidence, 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;
- h) When the property to be seized includes evidence of a violation of specified Labor Code sections;
- i) When the property to be seized includes a firearm or deadly weapon or any other deadly weapon at the scene of a domestic violence offense;
- j) When the property to be seized includes a firearm or deadly weapon owned by a person apprehended because of his or her mental condition;
- k) When the property to be seized is a firearm in possession of a person prohibited under the family code;
- l) When the information to be received from the use of a tracking device under shows a specified violation of the Fish and Game Code or Public Resources Code;
- m) When a sample of blood would show evidence of a DUI; or,
- n) Starting January 1, 2016, when the property to be seized is a firearm owned by a person subject to a gun violence restraining order. (Penal Code § 1524(a).)

Existing law prohibits wiretapping or eavesdropping on confidential communications, which excludes communications made in public or in any circumstance that the parties may reasonably expect that the communication may be overheard or recorded. (Penal Code § 632 (c).)

Existing law provides that nothing in the sections prohibiting eavesdropping or wiretapping prohibits specified law enforcement officers or their assistants or deputies acting within the scope of his or her authority, from overhearing or recording any communication that they could lawfully overhear or record. (Penal Code § 633.)

Existing law, in the California Public Records Act, generally provides that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Government Code, § 6250 et. seq.)

Existing law provides that public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law. (Government Code, § 6253)

This bill prohibits a law enforcement agency from using an UAS, obtaining a UAS from another public agency by contract, loan or other arrangement, or using information obtained from an UAS used by another public agency, except as provided in the provisions of this bill.

This bill specifies that the provisions of this bill apply to all law enforcement agencies and private entities when contracting with or acting as the agent of a law enforcement agency for the use of an UAS.

This bill allows a law enforcement agency to use UAS system, or use information obtained from a UAS system used by another public agency, only if the law enforcement agency complies with the regulations of this bill and all other applicable federal, state, and local laws.

This bill requires a search warrant if the use of a UAS by a local law enforcement agency involves the collection of images or data from another city or county, unless an exigent circumstance exists or the law enforcement agency has entered into a written public agreement with the appropriate law enforcement agency in the other city or county.

This bill requires a law enforcement agency to develop and make available to the public the policy on its use of the UAS, and requires training of the law enforcement agency's officers and employees on the policy, if they elect to use a UAS.

This bill requires a law enforcement agency to use the unmanned aircraft system consistent with the policy developed regarding UAS.

This bill specifies that a law enforcement agency's UAS policy must include the following:

- The circumstances under which an unmanned aircraft system may or may not be used;
- The rules and processes required before using an unmanned aircraft system;
- The individuals who may access or use an unmanned aircraft system or the information collected by an unmanned aircraft system and the circumstances under which those individuals may do so;

- The safeguards to protect against unauthorized use or access;
- The training required for any individual authorized to use or access information collected by an unmanned aircraft system;
- The guidelines for sharing images, footage, or data with other law enforcement agencies and public agencies;
- The manner in which information obtained from another public agency's use of an unmanned aircraft system will be used;
- Mechanisms to ensure that the policy is adhered to.
- The finalized policy developed shall be posted on the law enforcement agency's public Internet Web Site
- The law enforcement agency shall maintain an Internet Web site page for public input to address civilians' concerns and recommendations.

This bill provides that if a law enforcement agency elects to permit another law enforcement agency to use an UAS within the jurisdiction by means of an agreement, the agency shall post a copy of the agreement on its Internet Web site. The agreement shall at minimum specify that the policies developed by the law enforcement agency that owns the UAS will be complied with by the law enforcement agency in the jurisdiction in which the UAS is used.

This bill prohibits a law enforcement agency from using a UAS, or information obtained from an UAS used by another public agency, to surveil private property unless the law enforcement has obtained a search warrant or express permission of the person or entity with legal authority to authorize a search of the property.

This bill allows a law enforcement agency, without first obtaining a warrant or consent from the property owner over private property, to use an UAS if an exigent circumstance exists.

This bill specifies that exigent circumstances include, but are not limited to, the following:

- In emergency situations if there is an imminent threat to life or of great bodily harm, including, but not limited to fires, hostage crises, "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 requires images, footage, or data obtained through the use of an UAS shall be permanently destroyed with one year, except in the following circumstances the agency may retain the data:

- For training purposes of the law enforcement agency's employees in matters related to the mission of the law enforcement agency;
- For academic research or teaching purposes;
- If a search warrant authorized collection of the images, footage, or data; and
- 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 prohibits a person, entity, or public agency from equipping or arming an UAS with a weapon or other device that may be carried by or launched from an UAS and that may cause

bodily injury or death or damage to, or the destruction of, real or personal property, unless authorized by federal law.

This bill specifies that law enforcement agencies using unmanned aircraft systems shall operate them 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 purposes unrelated to the justification for the operation.

This bill states that none of the provisions in this bill are intended to conflict with or supersede federal law, including rules and regulations of the Federal Aviation Administration (FAA)

This bill authorizes a local legislative body to adopt more restrictive policies on the acquisition or use of unmanned aircraft systems by a law enforcement agency.

This bill states that except for provisions of this bill, that surveillance restrictions on electronic devices shall also apply to UAS.

This bill defines “surveil” as “the purposeful observation of a person or private property with the intent of gathering criminal intelligence.”

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

This bill defines “law enforcement agency” as “the Attorney General, each district attorney, and each agency of the state or subdivision of the state authorized by statute to investigate or prosecute law violators and that employs peace officers.”

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.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several 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 December of 2015 the administration reported that as “of December 9, 2015, 112,510 inmates were housed in the State’s 34 adult institutions, which amounts to 136.0% of design bed

capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015.” (Defendants’ December 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).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 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 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:

Per the Federal Aviation Administration (FAA), an unmanned aircraft system (UAS) is an unmanned aircraft and all of the associated support equipment, control station, data links, telemetry, communications and navigation equipment necessary to operate the unmanned aircraft. A UAS is flown either by a pilot via a ground control system or autonomously through use of an on-board computer, communication link and any additional equipment used to operate the UAS.

Current FAA rules prohibit UAS use in FAA airspace but allow commercial users to apply for an exemption from the FAA rules along with an FAA Certificate of Authorization (COA) permitting commercial uses, such as real estate marketing, wedding photography, television, film, mapping, and land surveys. Federal, state and local government agencies, law enforcement, and public colleges and universities can also receive a COA from the FAA, authorizing specific uses of UAS for specific time periods.

On February 15, 2015, the FAA published a proposed a new framework of regulations for the use of UAS in national airspace (above 400 feet), which would allow the routine use of certain small UAS (under 55 pounds). The proposed rules would limit flights to non-recreational, daylight, visual-line-of-sight operations. The rules also address height restrictions, operator certification, aircraft registration and marking, and operational limits.

An UAS is 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. However, most UAS currently available for purchase by law enforcement lack the capability to do more than simply hover for small periods of time before needing to recharge.

UAS have myriad practical applications. For example, UAS can be used to survey damage, locate victims, and assess threats in natural and manmade disasters without risking the lives of rescue workers. UAS can be used in agriculture to observe and measure crops while conserving resources and avoiding the use of heavy equipment. UAS can also give the media safe, economical, and environmentally-friendly access to aerial views for news broadcasts when compared to the current use of helicopters and other manned aircraft. Some law enforcement agencies have acquired UAS for the intended use in emergency situations such as hostage-taking, school shootings, and kidnapping-related crimes.

California lacks any law or regulation governing the acquisition and use of UAS by law enforcement agencies. Several jurisdictions have already purchased drones with very little, if any, public announcement or discussion.

In response to the lack of direction on the use of this new technology, AB 1820 requires law enforcement agencies to develop policies on the use of unmanned aircraft systems. Areas that must be covered in the policy include the following:

- Circumstances under which an unmanned aircraft system may or may not be used
- The individuals who may access the unmanned aircraft system and training requirements
- Safeguards to protect against unauthorized use or access
- Guidelines for sharing images, footage or data with other law enforcement agencies and public agencies
- Mechanics to ensure the policies are ensured

AB 1820 requires law enforcement agencies to post the policies on their website and to allow for public to comment on any concerns or suggestions on their use.

With limited exceptions, data captured by unmanned aircraft systems must be destroyed within a year.

AB 1820 requires law enforcement agencies to operate unmanned aircraft systems in a way that minimizes the inadvertent collection of images, footage and data.

Additionally, the bill prohibits the use of a drone over private property unless access to the property is granted, or, pending an exigent circumstance, a warrant is obtained.

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 UAS by a Law Enforcement Agency

Generally, this bill requires allows a law enforcement agency to use a UAS on public lands when specified requirements are met and requires a warrant, permission or exigent circumstance for an UAS to be used on private property.

It would require a law enforcement agency to develop a public policy on the use of an UAS and train its officers and employees in the use before using an UAS. The bill specifies what issues at minimum the policy must address and requires that the policy be posted on the law enforcement agency's website.

The bill also provides that if an agency uses an UAS from another jurisdiction they may only do so if an exigent circumstance exist or if the law enforcement agency has entered into a written, public agreement with the appropriate law enforcement agency in the other jurisdiction and that the other law enforcement agencies complies with the requirements of the law.

4. Use on Private Property

This bill provides that a law enforcement agency shall not use an UAS or borrow a UAS to surveil private property unless the law enforcement agency has either obtained a search warrant or has the express permission of the person or entity with the legal authority to authorize a search of the property. However if there is an exigent circumstance, including an emergency situation where there is an imminent threat to life or of great bodily harm or a need to determine the appropriate response to an imminent or existing environmental emergency or disaster.

5. Retention of Data

This bill provides that a law enforcement agency using a UAS should make a good faith effort to operate the system 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 or for purposes unrelated to the justification for the operation.

This bill provides that images, footage or data obtained through the use of an UAS shall be permanently destroyed within one year unless:

- The data, images etc. are to be use for educational and training of the law enforcement agency's employees.
- The data, images etc. are to be used for academic research or teaching purposes.
- If a search warrant authorized the collection of images, data etc.
- If the images, data etc. are evidence in any claim filed or any pending litigation, internal disciplinary proceeding, enforcement proceeding or criminal investigation.

5. Arming of a UAS

This bill prohibits equipping or arming an UAS with a weapon or other device that may be carried by, or launched or directed from, an UAS and that is intended to cause incapacitation, bodily injury or death, or damage to, or the destruction of, real or personal property.

6. Support

The California Civil Liberties Advocacy supports this bill stating:

The CCLA believes that law enforcement should never be permitted to use unmanned aerial vehicles absent a warrant based on probable cause. Nor should they be allowed to disseminate images or video footage of persons or property captured by such vehicles to other agencies or to the public absent a warrant, court order, absent the express consent of the persons or lawful owners of the property contained in the footage.

Under the provisions of AB 1820, law enforcement agencies will be prohibited from using unmanned aerial vehicles absent a usage and data retention policy that must be finalized pursuant to a regularly scheduled public meeting. The bill stipulates—and it is imperative—that local members of the public have an opportunity to weigh in on these policies. To exclude members of the public from the policy-making process would be to circumvent a fundamental component of a democratic republic. Though local legislative bodies and law enforcement groups would likely be opposed, it would be far more ideal if such policies were put to a vote by the local electorate. These pragmatic concerns aside, the opportunity for public comment is necessary at the bare minimum in order to preserve some semblance of a democracy.

The most significant provision of AB 1820 is the requirement that law enforcement agencies obtain a search warrant based on probable cause. Nonetheless, AB 1820 currently contains provisions for exigent circumstances where obtaining a warrant would hinder law enforcement, or where “the collection of images, footage, or data” may involve another jurisdiction. This should ameliorate any fears from law enforcement that AB 1820 will hinder “hot pursuit” or emergency situations, or the incidental collection of images or footage involving other jurisdictions.

6. Opposition

The ACLU, Consumer Watchdog, Privacy Rights Clearinghouse and Consumer Federation of California oppose this bill stating in part:

Although it may be unintended, AB 1820 appears to grant unparalleled and unconstitutional surveillance powers to the state. For example, by allowing unlimited use of a drone over all public lands, highways, and spaces open to the public, law enforcement would apparently be authorized to track any person by following them around any time they are in public, without any judicial oversight or cause to suspect wrongdoing. This kind of monitoring is even more intrusive than using a GPS device to track the movements of a suspect, which was invalidated as an unconstitutional search in *United States v Jones* (2012) 132 S. Ct. 945 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.)

By omitting the need for a warrant when a law enforcement agency uses drones over public lands within its jurisdiction, among other omissions, AB 1820 implies there is no expectation of privacy so long as the drone is over a public area. The right to privacy is not lost simply because the surveillance is over public land. This kind of invasive spying authorized by AB 1820 is not consistent with reasonable expectations of privacy and appears to be in violation of both article 1§ 1 of the California Constitution and the Fourth Amendment to the US Constitution.

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