

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 119 Searches and Seizures
SPONSOR(S): Criminal Justice Subcommittee; Workman
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 92

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Jones	Cunningham
2) Local & Federal Affairs Committee	17 Y, 0 N	Nelson	Rojas
3) Judiciary Committee			

SUMMARY ANALYSIS

The CS for HB 119 creates the "Freedom from Unwarranted Surveillance Act" (Act), which prohibits a law enforcement agency from using a drone to collect evidence or other information. Evidence gathered in violation of the Act is inadmissible in a criminal prosecution in any state court.

The bill provides three exceptions that allow a law enforcement agency to use a drone:

- to counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk;
- if a law enforcement agency obtains a search warrant to use the drone; or
- if a law enforcement agency has reasonable suspicion that under particular circumstances, swift action is necessary to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or the destruction of evidence.

The bill allows for a civil action by an aggrieved party to be brought against a law enforcement agency that violates the Act, and therefore may have a negative fiscal impact on state and local agencies that violate the Act and are subject to civil penalties.

The bill becomes effective July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Drones

Drones, also known as Unmanned Aircraft Systems (UAS), are unmanned aircraft that can be flown by remote control or on a predetermined flight path.¹ The size of a drone varies—it can be as small as an insect or as large as a jet.² Drones can be equipped with various devices such as infrared cameras,³ license plate readers,⁴ and “ladar” (laser radar).⁵ It is reported that the U.S. Army contracted with two corporations in 2011 to develop facial recognition and behavioral recognition technologies for drone use.⁶

There are three major markets for drones: military, civil government and commercial.⁷ The majority of drones are operated by the military and have an insignificant impact on U.S. airspace.⁸ However, drone use in this country is increasing because of technological advances.⁹ In 2010, the Federal Aviation Administration (FAA) estimated that there will be 30,000 drones in U.S. airspace within the next 20 years.¹⁰

Non-Military Drone Use

The FAA, which first allowed drones in U.S. airspace in 1990, is in charge of overseeing the integration of drones into U.S. airspace.¹¹ In doing so, it must balance the integration of drones with the safety of the nation’s airspace.¹² To safeguard the U.S. airspace, the FAA limits drone use to public interest missions such as fighting fires, search and rescue, scientific research, and environmental monitoring by the National Aeronautics and Space Administration (NASA) and National Oceanic and Atmospheric Administration (NOAA).¹³ The FAA also has limited the type of airspace where drones may operate. Currently, drones are not allowed to operate in Class B airspace, which is over the major urban areas and where the greatest numbers of manned aircraft are flown.¹⁴

¹ *Drones in Domestic Surveillance Operations*, Congressional Research Service, September 6, 2012, www.fas.org/sgp/crs/natsec/R42701.pdf (last visited on January 28, 2013).

² *See*, CRS Report R42136. *U.S. Unmanned Aerial Systems*, Jeremiah Gertler.

³ *US Army unveils 1.8 gigapixel camera helicopter drone*, BBC NEWS, December 29, 2011, <http://www.bbc.com/news/technology-16358851> (last visited on January 28, 2013).

⁴ *See*, *Draganflyer X6, Thermal Infrared Camera*, <http://www.draganfly.com/uav-helicopter/draganflyer-x6/features/flir-camera.php> (last visited on January 28, 2013).

⁵ *Unmanned Aerial Vehicles Support Border Security*, Customs and Border Protection Today, July 2004, www.cbp.gov/xp/CustomsToday/2004/Aug/other/aerial_vehicles.xml (last visited on January 28, 2013).

⁶ *Army Developing Drones That Can Recognize Your Face From a Distance And even recognize you intentions*, Clay Dillow, Popular Science, September 28, 2011, <http://www.popsci.com/technology/article/2011-09/army-wants-drones-can-recognize-your-face-and-read-your-mind> (last visited on January 28, 2013).

⁷ Federal Aviation Administration, *FAA Aerospace Forecast: Fiscal Years 2010-2030* at 48 (2010).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012; FAA Fact Sheet, *Unmanned Aircraft Systems*, December 14, 2012, http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153 (last visited on January 28, 2013).

¹² FAA Fact Sheet, *Unmanned Aircraft Systems*, December 14, 2012, http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153 (last visited on January 28, 2013).

¹³ *Id.*

¹⁴ *Supra* note 7.

In 2004, the U.S. Customs and Border Patrol (Border Patrol) began utilizing drones to monitor the borders.¹⁵ In 2010, the Border Patrol expanded its use of drones to monitor Florida's shorelines.¹⁶

FAA approval is necessary to operate a drone for non-military purposes. There are two ways to obtain this approval:¹⁷ through acquisition of a private sector experimental airworthiness certificate that allows for research, development, training and flight demonstrations,¹⁸ or a Certificate of Waiver of Authorization (COA), which allows public entities, including governmental agencies, to fly drones in civil airspace.¹⁹ An agency seeking a COA must apply online and detail the proposed operation for the drone.²⁰ If the FAA issues a COA, it contains a stated time period (usually two years) a certain block of airspace for the drone, and other special provisions unique to the specific operation.²¹ As of November 2012, there were 345 active COAs.²²

FAA Modernization Reform Act of 2012

In February 2012, Congress passed the FAA Modernization Reform Act (Reform Act), which requires the FAA to safely integrate drones into U.S. airspace by September 2015.²³ The Reform Act authorizes the FAA to allow government public safety agencies to operate drones under certain restrictions and makes the process for approving authorization requests more efficient.²⁴ Drones must be flown within the line of sight of the operator, less than 400 feet above the ground, during daylight conditions, inside Class G (uncontrolled) airspace, and more than five miles from any airport or other location with aviation activities.²⁵ The Reform Act also instructs the FAA to develop operation standards and certification criteria for drones and conduct studies concerning the safe use of drones.²⁶

Implementation of the Reform Act has caused privacy²⁷ issues to be raised. The FAA recently delayed the selection of six drone safety testing sites, mandated by the Reform Act, because of privacy concerns with integrating drones into U.S. airspace.²⁸ In a letter to Congressional Unmanned Systems Caucus, FAA Acting Chief Michael Huerta addressed the delay and said "...[i]ncreasing the use of UAS [drones] in our airspace also raises privacy issues, and these issues will need to be addressed as unmanned aircraft are safely integrated."²⁹ The Reform Act does not address privacy concerns and it is not clear if the FAA will attempt to address this issue through drone operational standards or studies required by Reform Act.³⁰

¹⁵ *Supra* note 5.

¹⁶ *Space Florida Probing Drone's Future Potential*, Howard Altman, Tampa Bay Online, August 5, 2012, <http://www2.tbo.com/news/breaking-news/2012/aug/05/space-florida-probing-drones-future-potential-ar-453511/> (last visited on January 18, 2013).

¹⁷ *Supra* note 12.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012; *Drones in Domestic Surveillance Operations*, Congressional Research Service, September 6, 2012, www.fas.org/sgp/crs/natsec/R42701.pdf (last visited on January 28, 2013).

²⁴ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012; *FAA Makes Progress with UAS Integration*, Federal Aviation Administration, May 14, 2012, www.faa.gov/news/updates/?newsId=68004 (last visited on January 28, 2013).

²⁵ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012.

²⁶ *Id.*

²⁷ *See*, the **III. COMMENTS, A. CONSTITUTIONAL ISSUES: 2. Other**, section of the analysis for a discussion of this issue.

²⁸ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012; *FAA Going Slow on Drones as Privacy Concerns Studied*, Alan Levine, Bloomberg, November 26, 2012, <http://go.bloomberg.com/political-capital/2012-11-26/faa-going-slow-> (last visited on January 22, 2013).

²⁹ *Id.*

³⁰ *Id.*

In response to the Reform Act, U.S. Senator Rand Paul filed legislation entitled “Preserving Freedom from Unwarranted Surveillance Act of 2012.”³¹ Senator Paul’s legislation, which is essentially identical to this bill, did not become law.³²

Drone Use by Law Enforcement Agencies in Florida

The Miami-Dade Police Department, Orange County Sheriff’s Office, and Polk County Sheriff’s Office are law enforcement agencies in Florida that have obtained a COA from the FAA and purchased drones:³³

- The Miami-Dade Police Department’s COA became effective on July 1, 2011. Its drones have not been flown in an actual operation.³⁴
- The Polk County Sheriff’s Office determined that the expense of training pilots to operate the drone was too high and have discontinued use of the drone.³⁵
- The Orange County Sheriff’s Office is currently experimenting with its drones.³⁶ The Sheriff’s Office needs permission from the Orange County Commission before the drones can be put to use, and hopes to launch the drones by the summer of 2013.³⁷

Several police chiefs who do not have COAs and who have not started drone testing have indicated that drone use would benefit their agencies by reducing the risk to officers and citizens in high risk situations involving hostages, active shooters, or armed and barricaded suspects.³⁸

Effect of Proposed Changes

The CS for HB 119 creates the “Freedom from Unwarranted Surveillance Act,” which prohibits a law enforcement agency from using drones to collect evidence or other information. Evidence obtained in violation of the Act is inadmissible in a criminal prosecution in any state court.

The bill provides the following three exceptions that allow a law enforcement agency to use a drone:

- to counter a high risk of a terrorist attack by a specific individual or organization if the U.S. Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk;
- if a law enforcement agency obtains a search warrant to use the drone; or
- if a law enforcement agency has reasonable suspicion that under particular circumstances, swift action is necessary to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or the destruction of evidence.

The last exception appears to require a reasonable, articulable suspicion, based on objective facts, that a person has engaged in, is engaging in, or is about to engage in, criminal activity. See, *Terry v. Ohio*,

³¹ *Preserving Freedom from Unwarranted Surveillance Act of 2012*, S.3287, H.R. 5925.

³² Govtrack.us <http://www.govtrack.us/congress/bills/112/s3287> (last visited on January 24, 2013).

³³ FAA Drones COA, <https://www.eff.org/file/34697#page/1/mode/1up> (last visited on January 23, 2013).

³⁴ Miami-Dade Police Department Fact Sheet, Special Patrol Bureau/Aviation Unit, Micro Air Vehicle “MAV” Program, provided to Senate Committee Staff, January 8, 2013 (on file with the Criminal Justice Subcommittee).

³⁵ *Central Florida Sheriff Wants to Fly Drones by the Summer*, Aero News Network, January 16, 2013, <http://www.aero-news.net/getmorefromann.cfm?do=main.textpost&id=2ee04d46-6fe7-4f65-bae5-c843dce80ab5> (last visited on January 24, 2013).

³⁶ *Orange sheriff: Drones won’t be used for spying*, Dan Tracy, Orlando Sentinel, January 18, 2013, <http://www.orlandosentinel.com/news/local/breakingnews/os-orange-sheriff-drone-flies-20130118.0.6760531.story> (last visited on January 24, 2013).

³⁷ *Id.*

³⁸ Memo provided to Senate Committee Staff on December 12, 2012, by the Florida Police Chiefs Association (on file with the Criminal Justice Subcommittee).

392 U.S. 1 (1968). The bill's standard takes the particular circumstances into account, and a precise analysis of each situation will need to be made on a case-by-case basis.

The bill authorizes an aggrieved party to initiate a civil action against a law enforcement agency that violates the Act to obtain all appropriate relief that will prevent or remedy the violation. This language appears to provide for injunctive relief as well as actions for damages against a law enforcement agency.

The bill defines "drone" as a means a powered, aerial vehicle that:

- does not carry a human operator;
- uses aerodynamic forces to provide vehicle lift;
- can fly autonomously or be piloted remotely;
- can be expendable or recoverable; and
- can carry a lethal or nonlethal payload.

"Law enforcement agency" is defined by the bill as a lawfully established state or local public agency that is responsible for the prevention and detention of crime, local government code enforcement, and the enforcement of penal, traffic, regulatory, game, or controlled substance laws.

The CS for HB 119 becomes effective on July 1, 2013.

B. SECTION DIRECTORY:

Section 1: Creates an unnumbered section of law relating to searches and seizure using a drone.

Section 2: Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill authorizes an aggrieved party to initiate a civil action against a state law enforcement agency that violates the Act to obtain all appropriate relief that will prevent or remedy the violation. The remedy could result in monetary damages, which would have a negative fiscal impact on state government.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill authorizes an aggrieved party to initiate a civil action against a local law enforcement agency who violates the Act to obtain all appropriate relief that will prevent or remedy the violation. The remedy could result in monetary damages, which would have a negative fiscal impact on a local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not apply to the use of drones for any purposes other than state and local law enforcement. It does not restrict the use of drones for private research and information gathering, and should have no impact on these activities.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Currently, law enforcement can use drones, but must first obtain a COA and use the drone as specified in the COA. The drone must be used within the confines of the Fourth Amendment of the United States Constitution.

The Fourth Amendment guarantees the people of this country security in their houses, persons, papers and possessions from unreasonable searches and seizures by government actors.³⁹ Section 12, Art. 1 of the State Constitution contains the same guarantees; however, the State Constitution provides more protections by specifically extending the Fourth Amendment to protect private communications.

The U.S. Supreme Court has yet to hear a case that addresses the Fourth Amendment as it relates to a search conducted by a drone. However, some guidance is found in the Court's rulings in cases involving aerial searches by law enforcement officers in manned aircraft.

In *California v. Ciraolo* and *Florida v. Riley*, police received anonymous tips that marijuana was growing in the defendants' backyards.⁴⁰ Police were unable to see into the backyards, so used planes to fly at altitudes of 400 and 1,000 feet over the property and detected marijuana plants.⁴¹ The Court held that the naked eye aerial observation of the backyards did not constitute a search and did not violate the Fourth Amendment.⁴² Similarly, in *Dow Chemical v. United States*, the Court addressed the issue of whether "industrial curtilage" would prevent the government from conducting aerial surveillance over one of Dow's plants.⁴³ The Court again found that such aerial inspection of the plant was not a search under the Fourth Amendment.⁴⁴

If the use of a drone were challenged as being in violation of the Fourth Amendment, the Court's analysis would likely be similar to that of manned aircraft. If a drone was used in a manner that has been held constitutional as applied to manned aircraft, such use would likely not be considered a search and, therefore, not require a warrant.

B. RULE-MAKING AUTHORITY:

³⁹ The text of the Fourth Amendment provides: "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."

⁴⁰ *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Dow Chemical Company v. United States*, 476 U.S. 227 (1986).

⁴⁴ *Id.*

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

None.

Other Comments

The American Civil Liberties Union supports this bill. Ron Bilbao, Senior Legislative Associate, ACLU of Florida recently issued a statement with regard to this bill and its Senate companion that read:

“Currently our privacy laws are not strong enough to ensure that this new technology will be used responsibly and consistently with our democratic values. Courts are still wrestling with the Constitutionality of the usage of this technology. We need a system of rules to ensure that we can enjoy the benefits of this technology without bringing us closer to a “surveillance society,” in which everyone’s move is monitored, tracked, recorded, and scrutinized by authorities. These bills take serious steps toward safeguarding our privacy rights, and would make Florida the first state in the nation to pass preemptive legislation regulating the use of drones.”⁴⁵

The Florida Public Defenders Association also supports the bill.

The bill is opposed by the: Florida Sheriff’s Association, Florida Police Chief’s Association and Space Florida.

The Florida Association of Counties has no position on the bill.⁴⁶

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 7, 2013, the Criminal Justice Subcommittee adopted two amendments and reported the bill favorably as a Committee Substitute. The amendments added additional exceptions to the prohibition on using drones, and amended the definition of “law enforcement agency” to include local government code enforcement.

This analysis is drafted to the Committee Substitute.

⁴⁵ http://www.acluf.org/news_events/index.cfm?action=viewRelease&emailAlertID=4018&src=rss

⁴⁶ February 2, 2013, e-mail from Deena M. Reppen, Legislative Director for the Florida Association of Counties.