

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

BILL: CS/SB 92

INTRODUCER: Criminal Justice Committee and Senator Negron and others

SUBJECT: Searches and Seizures

DATE: February 6, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.	Anderson	Yeatman	CA	Favorable
3.			JU	
4.			ACJ	
5.			AP	
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/SB 92 creates the “Freedom from Unwarranted Surveillance Act.”

The Committee Substitute (CS) prohibits law enforcement agencies, as defined by the CS, from using drones to gather evidence or other information.

The CS makes exceptions from the prohibition for certain risks of terrorist attack, for when a law enforcement agency obtains a search warrant, and under limited circumstances where an agency must act on reasonable suspicion without a warrant.

The term “drone” is defined by the CS.

Evidence gathered in violation of the CS is inadmissible in a criminal prosecution in any court of law in this state. Provisions are made in the CS for civil actions by an aggrieved party against a law enforcement agency that violates the prohibitions in the CS.

The CS becomes effective July 1, 2013.

This CS creates a new section of the Florida Statutes.

II. Present Situation:

Drones Historically Utilized by Military in Warfare, Hostile Situations

Drones, also called Unmanned Aerial Vehicles and Unmanned Aerial Systems, will be referred to as “drone” in this bill analysis.

Although drones were utilized as far back as the war in Vietnam, the term “drone” has recently become part of the vernacular since the use of drones by the U.S. military has become more common knowledge among the civilian population.¹ Because drones are unmanned aircraft, they are especially useful in search and destroy missions where military personnel would otherwise be placed in harm’s way.

Drones are also highly capable of gathering military intelligence because drones can be quite stealthy and they can carry sophisticated surveillance equipment. For example, the U.S. Army recently acquired a 1.8 gigapixel camera to use on its drones which can track objects on the ground from 65 miles away while the drone is flying at an altitude of 20,000 feet.²

Drones can be equipped with infrared cameras,³ license plate readers⁴ and “ladar” (laser radar).⁵ It has been reported that in 2011 the U.S. Army contracted with two corporations to develop facial recognition and behavioral recognition technologies for drone use.⁶

Drones range in size from wingspans of six inches to 246 feet and can weigh from approximately four ounces to over 25,600 pounds.⁷ They may be controlled manually or through an autopilot which uses a data link to connect the drone’s pilot to the drone.⁸

¹ *Unmanned Aerial Vehicles Support Border Security*, Customs and Border Protection Today, July 2004, www.cbp.gov/xp/CustomsToday/2004/Aug/other/aerial_vehicles.xml.

² *Drones in Domestic Surveillance Operations*, Congressional Research Service, September 6, 2012, www.fas.org/sgp/crs/natsec/R42701.pdf.

³ These cameras are capable of “seeing” based upon the relative levels of heat in its viewing area. For example, see <http://www.draganfly.com/uav-helicopter/draganflyer-x6/features/flir-camera.php>.

⁴ *Drones in Domestic Surveillance Operations*, Congressional Research Service, September 6, 2012, www.fas.org/sgp/crs/natsec/R42701.pdf; *Unmanned Aerial Vehicles Support Border Security*, Customs and Border Protection Today, July 2004, www.cbp.gov/xp/CustomsToday/2004/Aug/other/aerial_vehicles.xml.

⁵ “Ladar” is reported to produce three-dimensional images and has the capability to “see” through trees and foliage. *Drones in Domestic Surveillance Operations*, Congressional Research Service, September 6, 2012, www.fas.org/sgp/crs/natsec/R42701.pdf; U.S. Army, UAS Center for Excellence, *Eyes of the Army, US Army Roadmap for Unmanned Aircraft Systems 2010-2035* (2010).

⁶ Clay Dillow, Popular Science, September 28, 2011, popsci.com/technology/article/2011-09/army-wants-drones-can-recognize-your-face-and-read-your-mind.

⁷ 14 CFR Part 91, Docket No. FAA-2006-25714, Department of Transportation, Federal Aviation Administration, *Unmanned Aircraft Operations in the National Airspace System*, February 6, 2007.

⁸ *Id.*

Non-Military Drone Flight in the United States

There is usefulness for drones not just militarily but domestically as well. As far back as 2007, the Federal Aviation Administration (FAA) was aware of approximately 50 companies, universities, and government organizations developing and producing some 155 drone designs in the United States alone.⁹

Drones have been used in a multitude of tasks by U.S. government agencies, and in other countries. The first non-military use of drones by a government agency came in 2004 when the U.S. Customs and Border Patrol began to utilize them.¹⁰ In February 2010, the U.S. Customs and Border Patrol began operating a center in Cocoa Beach flying eight drones along Florida's shorelines and the Gulf Coast.¹¹

Other documented non-military tasks have included earthquake damage assessment at Japan's Fukushima power plant, volcano activity assessment of Mount St. Helens in Washington for the U.S. Geological Survey, and surveying wild fires in Texas.¹²

At the University of Florida, over the last 12 years, the Unmanned Aerial Systems Research Group has been developing an 11 pound drone with a 9 foot wingspan that is called "Nova 2.1." According to researchers, it can be used to safely and accurately gather data that will be helpful to wildlife biologists and many others.¹³

Clearly, the drone industry is becoming motivated to move into more civilian markets.¹⁴ Reportedly Florida is competing to secure a position as a leading development, testing, and manufacturing site for drones.¹⁵

Integrating Drones into the Nation's Airspace System

In February 2012 Congress passed the FAA Modernization and Reform Act of 2012 (Act), which requires the FAA to safely open the nation's airspace to drones by September 2015.¹⁶ Under the timetable set forth by Congress, the FAA has authorized government public safety

⁹ 14 CFR Part 91, Docket No. FAA-2006-25714, Department of Transportation, Federal Aviation Administration, Unmanned Aircraft Operations in the National Airspace System, February 6, 2007.

¹⁰ *Unmanned Aerial Vehicles Support Border Security*, Customs and Border Protection Today, July 2004, www.cbp.gov/xp/CustomsToday/2004/Aug/other/aerial_vehicles.xml.

¹¹ *Space Florida Probing Drone's Future Potential*, Howard Altman, Tampa Bay Online, August 5, 2012, www2.tbo.com/news/breaking-news/2012/aug/05/space-florida-probing-drones-future-potential-ar-453511/.

¹² *Drones for Hire*, Air & Space Smithsonian, James Chiles, January 2013, www.airspacemag.com/flight-today/Drones-for-Hire-179517781.html.

¹³ *Florida Hopes to Fill Its Skies with Unmanned Aircraft*, Florida Today, James Dean, June 23, 2012, <http://usatoday30.usatoday.com/news/nation/story/2012-06-23/increased-drone-use-privacy-concerns/55783066/1>; *UF Team's Work Pays Off With Unmanned-flight System that Captures Valuable Data*, Phys Org, October 20, 2010, <http://phys.org/news/2010-10-uf-team-unmanned-flight-captures-valuable.html>.

¹⁴ *Drones for Hire*, Air & Space Smithsonian, James Chiles, January 2013, www.airspacemag.com/flight-today/Drones-for-Hire-179517781.html.

¹⁵ *Florida Vies to be America's Drone Capital*, RT, June 29, 2010, <http://rt.com/usa/news/florida-drone-space-unmanned-091/print/>.

¹⁶ 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.

agencies to operate drones under certain restrictions and made the process for approving authorization requests more efficient.¹⁷

However, the FAA appears to be proceeding with caution in its implementation of the 2012 Federal Act. The FAA has delayed selecting the six test sites for drones mandated by Congress. Further, although it seems to be outside the congressional mandate and beyond the scope of the FAA's airspace-safety responsibilities, the FAA has notified Congress that "privacy issues" have become a concern as drones are integrated into the airspace.¹⁸

The 2012 Act directed the FAA to "allow a government public safety agency to operate unmanned aircraft weighing 4.4 pounds or less" under certain restrictions. The Act specified that these 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.¹⁹

Prior to the passage of the Act in 2012, the FAA and the Department of Justice had been working on an agreement to streamline the Certificate of Authorization (COA) process for law enforcement agencies. Initially, law enforcement organizations will receive a COA for training and performance evaluation. When the organization has shown proficiency in flying its drone, it will receive an operational COA. The agreement between the FAA and the Department of Justice expands the allowable drone weight up to 25 pounds.²⁰

Drone Use by Law Enforcement Agencies in Florida

The FAA issued COAs to Florida law enforcement agencies as early as 2009. Those early COAs for training and trial purposes were issued to the Miami-Dade Police Department and the Polk County Sheriff's Office.²¹

Reportedly, officials in Polk County, Florida, decided after a year of drone trials that the cost of meeting FAA regulations, in particular, the cost of pilot training, was too high and halted use of its fixed-wing model drone in 2010.²²

¹⁷ *FAA Makes Progress with UAS Integration*, Federal Aviation Administration, May 14, 2012, www.faa.gov/news/updates/?newsId=68004; Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012.

¹⁸ A *Bloomberg* report quotes the FAA Acting Chief as having written to members of the Congressional Unmanned Systems Caucus: "However, increasing the use of UAS in our airspace also raises privacy issues, and these issues will need to be addressed as unmanned aircraft are safely integrated." *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->

¹⁹ 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.

²⁰ FAA Fact Sheet, Unmanned Aircraft Systems, December 14, 2012, http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153.

²¹ The University of Florida was also the recipient of a COA from the FAA. The UF drone is reported previously in this Bill Analysis. <https://www.eff.org/file/34697>. Staff with the Florida Sheriff's Association reports that the Orange County Sheriff's Offices also have a drone program. Additional information on the Orange County program has not been provided.

²² *Space Florida Probing Drone's Future Potential*, Howard Altman, *Tampa Bay Online*, August 5, 2012, www2.tbo.com/news/breaking-news/2012/aug/05/space-florida-probing-drones-future-potential-ar-453511/.

The Miami-Dade Police Department received its COA for drone operational status in July 2011. It was renewed in December 2012 for a two-year period. The Miami-Dade Police Department has two Honeywell Corporation T-Hawk Model drones. One of the T-Hawks is on lease for one dollar (\$1) while the other was procured through a Department of Justice grant program. As of January 8, 2013, the T-Hawk drones had not flown an actual operation. The Aviation Unit was deployed to the scene of an armed and barricaded subject in December 2012 but the Unit saw no flight time.²³

Several Chiefs of Police in Florida have indicated that drones would benefit their agencies by reducing the risk to officers and citizens in high risk situations involving hostages, active shooters or armed, barricaded suspects.²⁴ Also, one police chief reported that drones could aid police agencies in their ability to patrol and search for persons in areas like bodies of water or a wooded area.²⁵

According to one police chief, drone technology provides an opportunity to conduct patrols that are normally conducted by traditional aviation at a fraction of the cost.²⁶ Another police chief mentioned that a drone would be useful in serving high-risk search warrants, natural disasters, and other emergencies.²⁷ Drones could diminish public safety risks that might otherwise occur during a high-speed car-chase because a drone could more safely follow a fleeing vehicle, according to one police chief.²⁸

Another police chief reported that the rapid deployment and aerial platform capabilities provided by drone technology, much like the current aviation units, significantly increase the search and rescue capabilities that are essential for police assistance where time is of the essence. He cited some examples such as situations involving missing swimmers, overturned boats, missing children, missing elderly people, and hazardous material response.²⁹

Federal and Other State Legislation

Senator Rand Paul filed a bill in Congress in 2012 that was essentially identical to Senate Bill 92. Neither the Senate bill nor its House companion bill made it out of committee.³⁰ Senator Paul is reportedly refileing the bill for consideration by the 113th Congress.

Similar legislation is expected to be filed in California, Illinois, New Jersey, Oregon, Missouri, Michigan, Indiana and Virginia.³¹

²³ Miami-Dade Police Department Fact Sheet, Special Patrol Bureau/Aviation Unit, Micro Air Vehicle “MAV” Program, provided to Senate Committee Staff, January 8, 2013.

²⁴ Memo provided to Senate Committee Staff on December 12, 2012, by the Florida Police Chiefs Association.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Preserving Freedom from Unwarranted Surveillance Act of 2012*, S.3287, H.R. 5925.

³¹ *New ND Lawmaker 1 of Many Drafting Drone Measures*, AP story by Dave Kolpack, January 4, 2013. The North Dakota bill appears to have been filed in response to a local case where the Border Patrol offered the use of its drone to verify that three armed men were no longer armed or on the premises where law enforcement was investigating an alleged cattle rustling situation. See *State v. Brosshart*, 32-2011-CR-00049, Northeast Central Judicial District, North Dakota.

III. Effect of Proposed Changes:

The short title for the CS is the “Freedom from Unwarranted Surveillance Act.” It generally prohibits law enforcement agencies from using drones to gather evidence or other information. Evidence obtained or collected by a law enforcement agency using a drone, unless it is permitted under one of the CS’s exceptions, is not admissible in a criminal prosecution in any court of law in this state.

A law enforcement agency is defined as a lawfully established state or local public agency that is responsible for the prevention and detection of crime, local code enforcement, and the enforcement of penal, traffic, regulatory, game, or controlled substance laws.

In addition to the inadmissibility of evidence, a provision in the CS specifically allows for an aggrieved party to initiate a civil action to prevent or remedy a violation of the prohibitions in the CS. This language appears to provide for injunctive relief as well as actions for damages against the law enforcement agency in violation of the prohibitions in the CS.

The CS provides exceptions to the prohibition of drone use by a law enforcement agency in an information or evidence-gathering capacity. Under the exceptions a law enforcement agency may use a drone:

- To counter a high risk of a terrorist attack by an individual or organization if the U.S. Secretary of Homeland Security determines that there is credible intelligence indicating that such a risk exists.
- If the law enforcement agency first obtains a search warrant authorizing the use of a drone.
- If the law enforcement agency has reasonable suspicion that 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 CS becomes effective on July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Fourth Amendment to the United States Constitution guarantees the people in this country security in their houses, persons, papers and possessions from unreasonable searches and seizures by government actors.³²

Article I, Section 12 of the Constitution of Florida contains the same guarantees as the Fourth Amendment, however the Florida provision specifically extends the protection to private communications. The Florida constitutional provision also states that it “shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.”³³

The U.S. Supreme Court has not heard a case that implicates the Fourth Amendment as related to a search by a drone. Therefore we cannot state with complete certainty how the court might rule should it directly address the reasonableness of a drone search.

We find some guidance, however, from the court in its rulings in cases involving aerial searches by law enforcement officers in more conventional aircraft. For example, in *Florida v. Riley* and *California v. Ciraolo* which were cases involving surveillance from altitudes of 400 and 1,000 feet in close proximity to homes, the court found that no search had occurred. The court has indicated that measuring the “objective reasonableness” of the reasonable expectation of privacy in a particular location should and will take into account how common (or unusual) the method of surveillance.³⁴ Therefore it may be argued that a drone flying or hovering at an uncommon altitude, utilizing uncommon surveillance equipment could implicate the Fourth Amendment.

Legal issues related to the CS would most likely arise in the argument of a Motion to Dismiss or a Motion to Suppress Evidence filed by a defendant who has been charged with a criminal offense based upon evidence obtained as a result of police use of a drone to gather evidence or other information.

³² 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.

³³ Article I, section 12, of the Florida Constitution provides:

Section 12. Searches and seizures.—

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

³⁴ *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

The defendant's arguments would be that: 1) law enforcement violated the plain language of the drone law, therefore the evidence gathered is not admissible under that law; and 2) even if the police did not violate the drone law per se, they violated the defendant's Fourth Amendment protection against unreasonable search and the evidence is inadmissible under the exclusionary rule.³⁵

It is possible that the question of the reasonableness of a police search by use of a drone under Fourth Amendment precedence may not be reached at all. It seems more likely that the protection provided in the CS³⁶ will be viewed by the courts as a statutorily-created citizen protection that does not even implicate the Fourth Amendment. It should also be noted that generally states are free to place even more rigorous restraints upon state governmental intrusion than federal law requires.³⁷ Therefore it could be the case that the CS sets a whole new precedent in Florida law with regard to this narrow area involving the use of drones.

It is likely that the courts could focus on the fact that the CS *does not subject citizens* to a drone search let alone an unreasonable one, but rather the CS *prohibits or limits* certain law enforcement conduct, and that it is within the Legislature's power to protect citizens from police conduct just as it is within its power to subject citizens to police action. If the court finds that law enforcement violated the drone law, the court should rule the evidence derived as a result of that violation inadmissible.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The CS does not apply to the use of drones for any purposes other than state and local law enforcement use to gather evidence or other information. It does not restrict the use of drones for commercial, private, or research and information gathering in any way and therefore should have no impact on the scientific, commercial, or educational sectors.

Law enforcement agencies are not permitted to use information or evidence that is gathered through the prohibited use of a drone in a criminal prosecution. Therefore citizens should not be subject to criminal prosecution in cases that are based upon information or evidence gathered beyond the scope of the CS's exceptions, unless the case can be prosecuted on some independent basis.

³⁵ Under the exclusionary rule, evidence secured in violation of the Fourth Amendment is subject to exclusion (*i.e.*, suppression) in both federal and state criminal proceedings. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

³⁶ The bill provides that evidence obtained is not admissible in a criminal prosecution in any court of law in Florida if that evidence is obtained in violation of the bill's prohibited drone use by law enforcement, unless the drone use falls within one of the bill's exceptions.

³⁷ *Traylor v. State*, 596 So.2d 957 (Fla. 1992).

C. Government Sector Impact:

State and local law enforcement are prohibited by the CS from using drones to gather evidence or information unless the use of the drone falls under one of the CS's exceptions to the prohibition. The evidence obtained or collected in violation of the prohibition, and outside the exceptions in the CS is inadmissible as evidence in a criminal prosecution; therefore, some criminal cases built around such evidence may be weakened or unprovable.

Law enforcement agencies may be subject to civil remedies, such as monetary damages or possibly an injunction preventing further drone activity, if sought by an aggrieved party under the provisions of the CS.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on January 15, 2013:

- The CS includes local government code enforcement within the definition of law enforcement agency.
- The CS adopts additional exceptions to the drone-use prohibition in the bill. One of the additional exceptions allows law enforcement to use a drone if it is first authorized by a judge in a search warrant. The other exception to the prohibition occurs when a law enforcement agency possesses reasonable suspicion that under particular circumstances, swift action is necessary in order 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.

B. Amendments:

None.