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## FISCAL IMPACT REPORT

SPONSOR SJC ORIGINAL DATE 3/16/15  
LAST UPDATED 3/19/15 HB \_\_\_\_\_  
SHORT TITLE Freedom From Unwarranted Surveillance Act SB 303/SJCS/aSFI#1  
ANALYST A. Sánchez/Daly

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	NFI	NFI	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

Homeland Security and Emergency Management Department (HSEMD)

Department of Military Affairs (DMA)

New Mexico Municipal League (NMML)

Public Defender Department (PDD)

### SUMMARY

#### Synopsis of SFI Amendment #1

Senate Floor Amendment #1 to the Senate Judiciary Committee Substitute for Senate Bill 303 adds when a law enforcement agency is engaged in hot pursuit as a second exigent circumstance in which use of drones is not prohibited under the Freedom from Unwarranted Surveillance Act.

#### Synopsis of Original Bill

Senate Judiciary Substitute for Senate Bill 303 proposes to create a new act (Freedom from Unwarranted Surveillance Act) in which a person or state agency shall not use a drone or unmanned aircraft to gather evidence or other information pertaining to criminal conduct in violation of a statute or regulation except to the extent authorized in a warrant. It also requires that a person or state agency shall not use a drone or unmanned aircraft "to conduct surveillance" of an individual or of property owned by an individual, farm or agricultural industry without the consent of that individual, property owner, farm or agricultural industry. It would permit law enforcement to use such when exigent circumstances exist, defining exigency as when the agency possesses reasonable suspicion that swift action is necessary to prevent imminent danger

to life. Any data collected in accordance with the proposed act would be maintained together with a complete and unbroken record of chain of custody.

The bill also requires that information acquired under the proposed act must be maintained consistent with law enforcement procedures. The bill provides for the unilateral action to remove offending drones by an aggrieved person to be exempt from prosecution unless the action is prohibited by law, information collected in violation of the act is not admissible in court and shall be made available only to the aggrieved party for in-camera review.

The bill would provide any aggrieved party could obtain all appropriate relief in a civil action and would be immune from prosecution should it decide to engage in self-help. The act would provide that no data collected in violation of the act would be admissible as evidence in state courts or administrative proceedings (except to establish violations of the act). Violations would be a petty misdemeanor and would require forfeiture of all data obtained in the violation. “Using” or “disseminating” any data collected in violation of the act would constitute a fourth degree felony.

## **SIGNIFICANT ISSUES**

The HSEMD proposes the following be considered

1. Section 2 (b): Law enforcement agency definition includes “federal”. It is not clear to the Department whether the State can actually prohibit federal law enforcement from utilizing UAVs without a warrant, if obtaining a warrant first is not also a federal law, particularly in matters of national security and counterterrorism investigations when Foreign Intelligence Surveillance Act (FISA) and Patriot Act rules are applied. If this is the instance, the sponsor should include language to recognize those exceptions.
2. Section 3 (b) could potentially be interpreted in such a way as to exclude HSEMD’s or National Guard’s future ability to use a UAV to conduct damage assessments subsequent to a natural disaster or terrorist attack. While we do not currently have UAV capability, consideration should be given to future needs and capabilities or the application of federal assets in damage assessment situations.
3. Section 6 - The first half of the sentence provides for civil action if a court finds in favor of the complainant. The language seems to suggest that an individual can attack a drone and be held harmless from prosecution or liability.

The New Mexico Municipal League cites the US Supreme Court in *California v. Ciraolo*, 476 U.S. 207 (1986) and *Florida v. Riley* 488 U.S. 445(1989) which established that aerial searches conducted from a public vantage point do not violate the 4<sup>th</sup> Amendment prohibition against unreasonable searches and seizures. The New Mexico Court of Appeals in *State v. Davis* 2014-NMCA-042 held that the NM Constitution affords greater rights than the 4<sup>th</sup> Amendment and held that targeted aerial surveillance, that has the purpose to intrude and attempt to obtain information from a protected area, such as the home or its curtilage, and that could not otherwise be obtained without physical intrusion into that area, that aerial surveillance constitutes a search and is therefore presumptively unreasonable unless a warrant is obtained.

The DMA points out that SB 303 involves federal and state questions regarding the 4<sup>th</sup> and 5<sup>th</sup>

amendments to the Constitution, in terms of search and seizure and the right not to bear witness against one's self. Balances against constitutional protection are the rights of law enforcement entities to perform lawful criminal investigations into suspected criminal activity.

### **OTHER SUBSTANTIVE ISSUES**

The DMA reports that SB 303 may be contrary to established federal law and regulation which authorizes the FAA to regulate air space and the use of so-called "drone" flights. Thus there may be implications of the US Constitutional supremacy clause that would not permit state statutes to regulate "drone" flights.

Additionally, the legal issues in SB 303 are before the NM Supreme Court in *State v Norman*, 2013-NMSO-0028 (2013), currently the State Police and the NM National Guard counterdrug aerial surveillance program perform a lawful program to identify, suppress and seize narcotics and marijuana under a court warrant to conduct searches of property as a law enforcement mission. Further, these regulations could negatively impact NMNG training (Raven UAVS) and other military training and operational activities (UAV training at all AF bases in NM).

ABS/bb/aml/je/aml