



State of Connecticut
DIVISION OF CRIMINAL JUSTICE

TESTIMONY OF THE DIVISION OF CRIMINAL JUSTICE

IN SUPPORT OF:

S.B. No. 971 (RAISED) AN ACT IMPLEMENTING THE RECOMMENDATIONS OF THE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE CONCERNING THE CRIMINAL USE OF DRONES.

IN OPPOSITION TO:

S.B. No. 974 (RAISED) AN ACT IMPLEMENTING THE RECOMMENDATIONS OF THE LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE CONCERNING THE USE OF DRONES BY LAW ENFORCEMENT OFFICERS AND OTHER STATE EMPLOYEES.

LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE
February 25, 2015

The Division of Criminal Justice respectfully recommends the Committee's **Joint Favorable SUBSTITUTE Report** for S.B. No. 971, An Act Implementing the Recommendations of the Program Review and Investigations Committee Concerning the Criminal Use of Drones and **Joint Favorable SUBSTITUTE Report** for S.B. No. 974, An Act Implementing the Recommendations of the Legislative Program Review and Investigations Committee Concerning the Use of Drones by Law Enforcement Officers and Other State Employees.

As a general statement, the Division strongly recommends that the Committee proceed with extreme caution in its consideration of any legislation in this area. As we noted when drone legislation was proposed last year (H.B. No. 5217, An Act Concerning the Use of Unmanned Aircraft), it seems that advances in technology are occurring so quickly that there isn't enough time to keep with the questions those advances raise let alone the answers to those questions.

Also as we noted then the use of unmanned aircraft by the police for criminal investigative purposes is already regulated by the Fourth Amendment to the United States Constitution and Article First, section 7 of the Connecticut Constitution. In the context of aerial observations, what is important is not whether the craft is manned or unmanned, but where the thing is, and what it enables one to see. Under the long-standing "open fields" doctrine, persons have no reasonable expectation of privacy in open, outdoor areas, not included within the curtilage of a

residence. *Oliver v. United States*, 466 U.S. 170, 179 (1984); *State v. Brown*, 198 Conn. 348, 356 (1986). Reasonably conducted, manned aerial overflight observations of such areas have long been upheld. *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *Florida v. Riley*, 488 U.S. 445, 450 (1989); *State v. Salvatore*, 57 Conn. App. 396, 403, 749 A.2d 71, 75 (2000). Search law, being broadly conceptual, is readily adaptable to emerging technologies as it was in *Kyllo v. United States*, 533 U.S. 27 (2001) (forward looking infrared device), to name just one example.

With this background in mind, the Division supports S.B. No. 971, but suggests changing “shall” to “may” in sections 6 and 7 to avoid creating a mandatory presumption that could render the provision constitutionally invalid.

Mandatory presumptions “violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense.” (Internal quotation marks omitted.) *State v. Gerardi*, 237 Conn. 348, 357 (1996). “A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved.” (Internal quotation marks omitted.) *Id.*

In *Gerardi*, our Supreme Court construed General Statutes § 53-202, which concerns the possession or use of a machine gun. The statute provides in pertinent part that “[t]he presence of a machine gun in any room, boat or vehicle shall be presumptive evidence of the possession or use of the machine gun by each person occupying such room, boat or vehicle.” (Emphasis added.) General Statutes § 53-202 (e). The Court determined that if construed to be mandatory, the presumption was unconstitutional. *State v. Gerardi*, 237 Conn. at 356-61. To avoid constitutional infirmity, the Court interpreted the provision as a permissive inference by construing the term “shall” as “may.” *Id.* at 359.

Here, sections 6 and 7 of the bill provide that the presence of mace, tear gas, deadly weapon, explosive device, or a controlled substance on or in an unmanned aerial vehicle “shall be presumptive evidence of the possession or use of the [weapon or substance] by each person operating or using such unmanned aerial device.” (Emphasis added.) S.B. No. 971 §§ 6 & 7. Taken literally, this language creates a mandatory presumption. Although not identical to the statutory language at issue in *Gerardi*, to avoid a potential constitutional infirmity, the Division of Criminal Justice suggests changing the language in sections 6 and 7 from “shall” to “may.”

The Division cannot support S.B. No. 974 as written because the bill fails to provide an explicit “emergency exception” for law enforcement use of drones.

“Searches conducted pursuant to emergency circumstances are one of the recognized exceptions to the warrant requirement under both the federal and state constitutions.” (Internal quotation marks omitted.) *State v. Fausel*, 295 Conn. 785, 794 (2010). “The police, in order to avail themselves of this exception, must have valid reasons for the belief that an emergency exists, a belief that must be grounded in empirical facts rather than subjective feelings It is an objective and not a subjective test. The test is not whether the officers actually believed that an emergency existed, but whether a reasonable officer would have believed that such an emergency existed.” (Internal quotation marks omitted.) *Id.* at 795.

“[T]he emergency doctrine serves an exceedingly useful purpose. Without it, the police would be helpless to save life and property” (Internal quotation marks omitted.) *State v. Fausel*, 295 Conn. at 801.

Here, section 3 (c) provides in pertinent part that “[a] law enforcement officer shall not operate an unmanned aerial vehicle in a manner to collect information about an individual or privately owned property unless” (Emphasis added.) S.B. No. 974 § 3 (c). The provision then sets forth three exceptions: (1) advance written consent; (2) search warrant; and (3) reasonable and articulable suspicion that an offense has been or is being committed by such individual or on such property. *Id.* The provision fails to provide an explicit emergency exception for law enforcement use of drones. Allowing the police to use drones in emergency situations will help save lives and protect property. Therefore, the Division of Criminal Justice requests that an emergency exception consistent with the constitutional standard be included in section 3 (c). For example, a fourth exception to section 3 (c) might read: there is reason to believe that an emergency situation exists with respect to the individual or privately owned property.

In conclusion, the Division wishes to express its appreciation to the Committee and to its staff for affording us the opportunity to provide input during the course of the study that produced these two bills. The Division further expresses its appreciation to the Committee for the opportunity to provide additional input at today’s public hearing. We would be happy to provide any additional information the Committee might require or to answer any questions that you might have.