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# CIVIL LIBERTIES IN VIRGINIA

Privacy, Technology, & Criminal Justice Reform



Spring 2015

# PRIVACY & TECHNOLOGY

We came into the 2015 General Assembly session with an ambitious goal – to cement Virginia’s status as a model for 21st century privacy protection. We made some progress toward that goal, but much remains to be done.

The Virginia General Assembly laid the foundation for protecting Virginians’ privacy when it passed the Government Data Collection and Dissemination Practices Act (Data Act) more than a decade ago. The Data Act is based on a simple concept – government should not collect or maintain more information about us than is necessary to fulfill its mission. The Data Act says that, unless it is pursuing a criminal investigation, law enforcement must comply with the law like any other government agency and establish the need in advance before it collects any Virginian’s personal information.

In the years since the Data Act became law, the Commonwealth’s ability to spy on its residents has greatly expanded. While the Data Act should restrain law enforcement agencies from abusing these technologies, and despite a 2013 Attorney General’s opinion to the contrary, some law enforcement agencies rely on their own interpretation of the law. They claim the law gives them a blank check to conduct mass surveillance of law-abiding Virginians, collecting personal information about us for no reason and keeping it in mass data bases “just in case.”



*Photo by Florida Turnpike*

Numerous law enforcement agencies are using license plate readers (LPRs) to build enormous databases of innocent motorists’ location information, including their vehicles’ locations with timestamps.

This information is

often retained for months or years and shared with law enforcement officials in other jurisdictions despite the fact that this data can enable law enforcement to determine your friends, politics, and medical conditions just by documenting where you go in your car.

The decision of these agencies to ignore the Attorney General’s opinion set the stage for an unusual scene during the 2015 General Assembly session. Delegates pulled out their smart phones to snap a picture of the people who came to testify before them. What caused this? Our Executive Director Claire Guthrie Gastañaga and former Virginia Attorney General Ken Cuccinelli standing side-by-side in support of legislation to place reasonable restrictions on the government’s ability to spy on Virginians. It was a terrific moment – one that reinforced the broad consensus and the diverse coalition we’ve built around the need to rein in the surveillance state. Unfortunately, and despite this broad consensus, the Governor rejected legislation offered by Delegate Rich Anderson (R Prince William) and Senator Chap Petersen (D Fairfax) intended to confirm the Attorney General’s

opinion, thus giving comfort to law enforcement agencies that continue to flout the Data Act. Accordingly, we have now filed suit against the Fairfax County Police to require them to comply with the Data Act, as interpreted by the Attorney General.

In addition to license plate readers, some law enforcement agencies have deployed secret devices called Stingrays – also known as “cell site simulators” or “IMSI catchers.” These devices mimic cell phone towers and send out signals to trick cell phones in the area into transmitting their locations and identifying information, thus enabling law enforcement to conduct dragnet surveillance, undermine the First Amendment right to free association, and gain real time control of your phone including the power to access and send email, calls, and texts. Even when used to track a suspect’s cell phone, stingrays also gather information about the phones of countless bystanders who happen to be nearby. Last year, we worked with Delegate Betsy Carr (D Richmond) and Delegate Bob Marshall (R Manassas) to win legislative approval of a bill that blocked law enforcement from getting real time cell phone tracking information from your cell phone provider without a warrant. This session, we worked with the same legislators to strengthen that prohibition by prohibiting the use of Stingrays and similar devices to do the same thing.



*Photo by Don McCullough*

Finally, we knew that Virginia’s first-in-the-nation statewide drone moratorium, which we had helped to pass in 2013, would expire this summer. Thus, drones equipped with facial recognition software, infrared technology, and speakers capable of monitoring personal conversations could have been just

around the corner. We worked with Delegate Ben Cline (R Rockbridge), Delegate Todd Gilbert (R Shenandoah), and Senator Donald McEachin (D Henrico) to win passage, over the Governor’s objections, of legislation that requires law enforcement to obtain a warrant to use a drone – even when the U.S. Constitution wouldn’t require them to do so.

We are encouraged by these victories, but know that new challenges will be presented as the law enforcement/government dominated sub-panel of Virginia’s Secure Commonwealth Panel looks at issues related to law enforcement use of technology, including drones, license plate readers, and body-worn cameras. We will continue to bring Virginians together from across the political and ideological spectrum to advocate for freedom and security, and for a democracy in which we know more about the government than it knows about us.



# CRIMINAL JUSTICE REFORM



From R to L: Marc Schindler of the Justice Policy Institute; Craig DeRoche of Justice Fellowship; Bart Hinkle of the Richmond Times Dispatch; Frank Knaack of the ACLU of Virginia; and former Virginia Attorney General Ken Cuccinelli discussing the need to reform Virginia's Criminal Justice System. *Photo by Charles Koch Institute*

Twenty years ago, with broad bi-partisan support, the Commonwealth abolished parole. This decision doubled-down on the belief that the solution to crime is prisons and jails – as many as necessary. The rationale? Criminal punishments were too soft, and because of that, we were less safe. This decision contributed to an over 700 percent increase in Virginia's incarceration rate since 1970. The problem is that in most cases, incarceration doesn't actually make us safer. States that have decreased their prison and jail populations have seen a larger decrease in their violent and non-violent crime rates than Virginia. It's time for Virginia to rethink its approach to criminal justice. And, we're starting to see progress.

Just like there was bi-partisan consensus around the decision to abolish parole, there's now a growing movement from advocates across the political spectrum to move Virginia toward a common-sense, effective justice system. On December 2, 2014, at the invitation of the Charles Koch Institute, we joined former Attorney General Ken Cuccinelli, the Justice Policy Institute, the Justice Fellowship, and Richmond Times Dispatch columnist Bart Hinkle for a wide-ranging panel discussion on the need to reform Virginia's criminal justice system. The takeaway was clear – regardless of where you fall on the ideological spectrum, the tough-on-crime approach is ineffective, costly, and disproportionately harms communities of color. To improve public safety, we must take a level-headed look at our criminal justice system and rely on proven, effective solutions.

One of these solutions is encouraging people who require emergency medical attention because of a drug or alcohol overdose to seek it without fear of arrest. During the 2015 General Assembly session we saw movement in this direction. Together with a diverse coalition of stakeholders, including Commonwealth's Attorneys, law enforcement, impacted families, Delegates Betsy Carr (D Richmond) and John O'Bannon (R Henrico), and Senator Chap Petersen (D Fairfax), we worked to pass legislation that protects Good Samaritans and individuals who have overdosed from prosecution when they call for help. This legislation is a first step toward a public health approach to drug use – an alternative that will reduce our prison populations and

address the underlying causes of drug use.

In addition to this victory, we saw major movement in our effort to end policing for profit in Virginia. It's astonishing that, under Virginia law, the police can pull you over, seize your money and your car, and keep it unless you prove that the property doesn't have a "substantial connection" to a crime, even if you aren't charged with a crime. By placing the burden on the property owner, this law flips our justice system on its head. Our work with Delegate Mark Cole (R Spotsylvania), the Virginia Tea Party Patriots Federation, and the Institute for Justice to end this abusive program made tremendous progress during the 2015 General Assembly session, where it passed the House by a 92 – 6 margin. Though it failed to pass the Senate, we'll be back next session to see this work through.

We also advocated for marijuana decriminalization. This legislation, patroned by Senator Adam Ebbin (D Alexandria), offered us a tremendous opportunity to educate legislators, the press, and the public about how the War on Marijuana needlessly ensnares people in the criminal justice system, disproportionately harms communities of color, and wastes the Commonwealth's limited resources.



Our marijuana decriminalization advocacy relied on national and Virginia-specific information published in the ACLU's marijuana report, *The War on Marijuana in Black and White*.

We're on the cusp of transformational change – from a criminal justice system based in hollow rhetoric and a one size fits all approach, into a common-sense system that relies on a variety of proven effective solutions that increase public safety, save tax dollars, and don't treat some communities more harshly than others.



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## REGISTER TODAY

ACLU of Virginia NoVA Chapter  
Crabfest & Annual Meeting  
Sunday, June 7, 1 p.m. - 4 p.m.  
(Rain or Shine)

Fort Hunt National Park, Area B  
8999 Fort Hunt Road, Alexandria, VA, 22308

Register online before noon on June 4 at:  
[bit.ly/2015CRAB](http://bit.ly/2015CRAB)

No on-site registration allowed

Questions?

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**SAVE THE DATE**  
**SEPTEMBER 19**  
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**2015 ANNUAL MEETING**