

## Academic Freedom Wins Round One in Fight Over Scientist's Records

*Court says AG misused law to demand private communications of global warming expert*

An Albemarle County judge has rejected Attorney General Ken Cuccinelli's efforts to obtain hundreds of emails and other communications belonging to a global warming scientist once employed by the University of Virginia.

A critic of climate change theories, Cuccinelli has been accused of using his position as AG to harass UVA and Professor Michael Mann, who is now at the University of Pennsylvania. The ACLU and other proponents of academic freedom say that Cuccinelli's actions, if unchecked, will chill scientific inquiry at the university.

The controversy over academic freedom in Virginia began after Cuccinelli issued a "civil investigative demand" for Mann's records under the Virginia Fraud against Tax Payers Act, which allows the AG to pursue claims of fraud against the state. Because Mann had used state funds to conduct his research, Cuccinelli claimed he may have defrauded taxpayers.

After UVA officials announced that they intended to comply with the AG's demands, the ACLU of Virginia joined forces with the American Association of University Professors to publicly urge the university to resist.

UVA then reversed course, asking its lawyers to take the matter to court and argue that under Virginia law Cuccinelli does not have the authority to view the communications of a college professor without first articulating a basis for believing that fraud has occurred. The ACLU, AAUP, the Union of Concerned Scientists, and the Thomas Jefferson Center for the Protection of Free Expression then filed an amicus brief with the court arguing that allowing the AG to access such records without a compelling reason is unconstitutional.

Despite losing his case in court, Cuccinelli has since filed another demand for Mann's records, precipitating an additional round of legal action—hopefully with the same results as before.

***If scientists refrain from novel methodological approaches because they may be characterized as "fraudulent," then scientific research, and, by extension, society as a whole, will be the loser.***

-- ACLU, AAUP letter to UVA

## Court Rules Police May Use GPS to Track Drivers

Police in Virginia have begun placing Global Positioning System tracking devices on cars without the knowledge of the owners or warrants -- and thus far the courts are allowing them to do it. Under a ruling by a three-judge panel of the Virginia Court of Appeals in *Foltz v. Commonwealth*, Fairfax County Police did not violate David Lee Foltz, Jr.'s privacy rights when they affixed a GPS device to his vehicle and remotely tracked his movements to determine if he were about to commit a crime.

The ruling in the *Foltz* case has broad reaching privacy implications for all drivers, as it apparently gives police the authority to use GPS devices to track anyone's movements, even those who are not suspected of any wrongdoing, and to do so without the oversight of the courts. The ACLU of Virginia has filed a brief with the full Virginia Court of Appeals arguing that the Fourth Amendment requires police to obtain a warrant when remotely tracking individuals' movements through the use of GPS devices.

## Voter Restoration Changes Instituted But Governor's Efforts Fall Short of Real Reform

After receiving strong criticism from the ACLU of Virginia and the national media for instituting regressive changes to Virginia's already worst-in-the-nation felon disenfranchisement law, Governor Robert McDonnell not only reversed himself, but instituted the most significant reforms to Virginia's voter restoration process in many years. By shortening the waiting period for non-violent felons and guaranteeing that applications will be processed in 60 days, McDonnell has set the stage for exceeding the record-setting number of restorations granted by predecessors Mark Warner and Tim Kaine.

The changes, however, fall short of bringing Virginia in line with other states, most of which automatically restore voting rights once former felons have completed their sentences. McDonnell's reforms will likely result in as many as 6,000 individuals having their voting rights restored during his term in office, but that still leaves well over 300,000 Virginia residents without the right to vote.

The ACLU is part of a broad coalition of groups, Virginians for the Restoration of Voting Rights, that is pressing for a constitutional amendment to provide for automatic restoration of voting rights for felons once their sentences have been completed. Virginia's felon disenfranchisement law is the last formal vestige of Jim Crow, and it still disproportionately affects African-Americans. Virginia and Kentucky are the only two states that permanently remove voting rights upon conviction for a felony. If you are interested in helping, contact Tom Fitzpatrick at [tfitzpatrick@acluva.org](mailto:tfitzpatrick@acluva.org).



# From the Director

## Sharon Bottoms, LGBT Rights, and the ACLU Way for 90 Years!

I remember clearly the telephone call from Sharon Bottoms. She had lost custody of her two-year-old son because she was a lesbian, and I had expressed outrage in a Richmond newspaper. "Well," she said brusquely, "if the ACLU thinks what happened to me is so wrong, why don't you do something about it?"

That was 1993, only a few years after the Virginia Supreme Court ruled that all gay men and lesbians were unfit parents and three years before the U.S. Supreme Court would strike down state laws that discriminate on the basis of sexual orientation. Taking Sharon's case seemed unwise. There were no clear legal avenues to success, via federal or state court. National LGBT groups warned that it would make "bad law." But we decided that the injustice against Sharon was too great to ignore. Representing her was simply the right thing to do.

Two years later, under intense national scrutiny, the Virginia Supreme Court ruled that its earlier case had been misinterpreted. It didn't really mean that gay men and lesbians were per se unfit parents, only that being gay or lesbian could be used against a parent when it could be demonstrated that it adversely affected the child.

The Bottoms case was only a small victory for LGBT rights, but it put the gay custody issue on front pages across the nation, and it made the Virginia Supreme Court blink when forced to rule on a LGBT case in the public spotlight.

The vicissitudes of the LGBT movement since are well known. On the upside, the U.S. Supreme Court ruled that the government

can't discriminate against gay men and lesbians (1996) or interfere with their private consensual sexual relationships (2003). On the downside, the gay marriage issue has seen more failure than success, with states like Virginia adding laws that ban gay marriage or anything that approximates it.



Now, we represent Janet Jenkins, a lesbian whose right to visit her non-biological child from a civil union in Vermont is being challenged as a violation of the Virginia constitutional amendment forbidding marriage-like arrangements between persons of the same sex.

LGBT advocates say there may not be one major turning point for gay and lesbian rights. Instead, through scores of cases like Bottoms and Jenkins--taken by the ACLU and others simply because they are the right thing to do--we'll gradually overtake the opposition and move forward.

The specific issue discussed here is LGBT rights, but the theme fits the ACLU as a whole. For 90 years, the ACLU has been on the right side, taking cases small and large, often against overwhelming odds, that seek to advance the cause of civil liberties. The path is not always smooth or even consistently in one direction. But we know we're right, and in the end we'll prevail because of it.

*Kent Willis, Executive Director*

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### Virginia Liberties

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### Interested in Serving on the Board?

Would you like to be part of the dynamic group of people who govern the Virginia affiliate of the ACLU? Members of the ACLU of Virginia Board of Directors serve three-year terms and are voted in by the membership. If you would like to be considered for nomination, you must be a member in good standing and submit a brief statement of interest addressed to the ACLU of Virginia Nominating Committee Chair. You may also be nominated by a petition signed by five members of the ACLU of Virginia and submitted with a statement of interest. The deadline for submissions is March 14, 2011. Send to Kent Willis at the main office address in Richmond or email [kwillis@acluva.org](mailto:kwillis@acluva.org).

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I would like to support the public education and litigation work of the ACLU Foundation of Virginia. Please find enclosed my tax-deductible donation of \$ \_\_\_\_\_.

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# Litigation and Advocacy

## In Brief...

### **Court Rules Privacy Advocate Can Publish Records**

The Fourth Circuit Court of Appeals in late July affirmed and remanded a U.S. District Court decision holding that privacy advocate B.J. Ostergren may post on her website public records containing the Social Security Numbers of Virginia legislators and other government officials, despite a 2008 Virginia law prohibiting the dissemination of such information. Ostergren finds Social Security Numbers on publicly accessible government websites and posts them to illustrate to legislators how easily private identifying information can be stolen from such records in Virginia.

### **Loudoun Officials Keep Public Forum at Courthouse**

In September, the Loudoun County Board of Supervisors voted 8-1 to keep the Leesburg courthouse grounds open as a public forum, allowing ten displays at a time on a first-come, first-served basis. Controversy over the forum erupted this summer when a committee of the board recommended closing it. Religious groups objected because it would eliminate privately sponsored displays at Christmas. The ACLU urged the supervisors not to eliminate the forum, but to issue content-neutral rules for its use to ensure equal access by all individuals and groups, both religious and secular.

### **Challenge to Secrecy Provisions of Federal Law Argued**

The ACLU in September presented oral arguments before the Fourth Circuit Court of Appeals in a lawsuit challenging provisions of the False Claims Act that prevent the public from learning about serious allegations of fraud against the U.S. government. The overreaching secrecy provisions of the law gag plaintiffs and require that complaints be filed under seal, thus preventing the public from learning about many ongoing threats to public health and safety.

## **ACLU Asks Supreme Court to Uphold Freedom of the Press on College Campuses**

The ACLU has petitioned the U.S. Supreme Court to overturn a Fourth Circuit Court of Appeals ruling that allows the Virginia Alcoholic Beverage Control Board to prohibit the advertising of beer, wine, and mixed drinks in Virginia's college student publications. Even though the ABC Board presented no evidence to support claims that such ads increase underage drinking by students, the Fourth Circuit reversed a 2008 U.S. District Court decision striking down the ABC regulations. In our cert petition, we argue that the state is violating the college newspapers' free speech and free press rights by banning the ads, which are an important source of revenue, without any evidence that the restrictions advance an important societal goal.

## **ACLU Defends Teen against Felony 'Sexting' Charges**

The ACLU of Virginia provided legal representation to a minor who was charged with felony possession of child pornography after he received nude photos on his cell phone from a female classmate. The young man had not shared the photos with anyone else, but the principal of his school was informed of their existence by a friend of the young girl who had sent them. Fortunately, after the ACLU became involved, prosecutors dropped the charges. ACLU board member Patrick Anderson, who represented the boy, said afterwards, "This was an unconscionable application of the child pornography statute. That law was intended to protect children from adults who could prey on them, not make criminals of kids who make stupid mistakes."

## **Threats to Virginia's Immigrant Population Continue**

Signs that anti-immigrant sentiments in Virginia may be on the wane were misleading. Latinos especially still face hostility from government officials.

This summer, Herndon proposed an anti-solicitation ordinance targeting the town's predominately Latino day laborer population. The proposal allowed roadside solicitations by firefighters and high school fundraisers but not day laborers, a clear example of viewpoint discrimination. After we threatened to sue, the town eliminated the viewpoint discrimination, but we are still concerned that the ordinance will be enforced only against Latinos.

Also this summer, Attorney General Ken Cuccinelli told law enforcement

officials that they have the authority to question individuals about their immigration status whenever there is "reasonable suspicion" to believe they are illegally present. The AG's opinion mirrors a controversial Arizona anti-immigration law that was struck down by a federal court.

Meanwhile Corey Stewart, a Prince William County elected official, launched his "Rule of Law" campaign to amend the state code to increase police powers to conduct background checks and make arrests without warrants, as well as prohibit day laborers from soliciting for work.

In August, the governor asked the Department of Homeland Security to allow the State Police to enforce federal immigra-

tion law. The ACLU urged DHS to reject the request, arguing that in localities where police enforce immigration laws incidences of racial profiling have increased.

Finally, following a car accident involving a Bolivia-born driver, DMV decided not to accept as proof of legal presence federal work permits issued to foreign nationals. The decision was made without a public hearing and prevents many legally present immigrants from obtaining drivers' licenses. The ACLU joined with numerous other groups to pressure the governor to reverse DMV's decision.

For more on the ACLU's efforts to combat national origin discrimination in Virginia, contact [jfigueredo@acluva.org](mailto:jfigueredo@acluva.org).

# ACLU of Virginia People

## Presidential Changes: Vail Steps Down, Barnard Steps Up



John Vail

At the September meeting of the Board of Directors, the ACLU of Virginia presidency changed hands for the first time in five years. From 2005 to 2010, John Vail oversaw the most significant expansion of the ACLU of Virginia in the organization's history -- with staff, programs and budget doubling under his leadership. But John, who in his professional life is Vice President and Senior Litigation Counsel for the Center

for Constitutional Law in D.C., will be the first to tell you that he takes the most pride in helping to shape the board and staff into a more professional, goal-oriented organization, all without sacrificing any of the gritty independence and determination that has long defined the ACLU's character.

John may be stepping down as President, but he is hardly out. He now occupies the venerable position of Immediate Past President, meaning he will continue to serve on the Executive Committee of the Board. John will also remain on the Legal

Panel, the board committee that evaluates and approves cases for litigation.

Jayne Barnard, our new President, is not new at all to the ACLU. A board member for a dozen years, Jayne has served the Virginia affiliate as Vice-President, Secretary, and most recently as chair of the Legal Panel.



Jayne Barnard

Jayne is the James G. Cutler Professor of Law and the Kelly Professor of Teaching Excellence at William and Mary's Marshall-Wythe Law School. Formerly a partner with the Chicago law firm Jenner & Block, Jayne is a nationally recognized expert in corporate law whose recent work addresses the vulnerability of the elderly to investment fraud, gender discrimination in investment scams, and the use of victim impact testimony in economic crime cases. She has brought her considerable insight and people skills to every position she has occupied at the ACLU of Virginia, and there is no reason to believe that will change with her new position.

## Women's Rights Project Launched, Dunn Fellow Expands Legal Program

Our two newest staffers, Thomas Okuda Fitzpatrick and Katherine A. Greenier, have much in common. They are both 2010 law school graduates; both served as president of their law school's ACLU chapter; and, both occupy positions at the ACLU of Virginia that did not exist before they arrived.

Tom is our Dunn Fellow, here on a two-year grant provided by the Tony Dunn Foundation to expand our litigation capabilities and oversee our ongoing efforts to reform Virginia's felon disenfranchisement law (see article on front page). Tom is a graduate of the Marshall-Wythe School of Law at William & Mary with a strong background in legislative and political advocacy. If you are interested in becoming involved with voter restoration reform work in Virginia, contact Tom at [tfitzpatrick@acluva.org](mailto:tfitzpatrick@acluva.org)



Tom Fitzpatrick and Kathy Greenier

Kathy attended New York Law School where she worked closely with long-time national ACLU President Nadine Strossen (who says Kathy was one of her best students ever). She is the first director of the Patricia M. Arnold Women's Rights Project of the ACLU of Virginia, which is funded through a trust established by Ms. Arnold, a long-time member and supporter of the Virginia ACLU.

Among numerous other duties, Kathy will coordinate legal assistance for women who are victims of gender discrimination, create new public education programs to promote women's rights, advocate for the constitutional rights of incarcerated women, and expand our ongoing efforts to protect reproductive rights in Virginia. Please feel free to contact Kathy at [kgreenier@acluva.org](mailto:kgreenier@acluva.org) if you have questions about the project or need assistance.



## Remembering Nat Wilson

On June 4, the ACLU of Virginia lost a bit of its spark with the passing of Nathaniel Wilson. Nat, a resident of

Arlington, was a generous donor who began his service on the Board of Directors in May 2005 and soon became an active participant in our efforts to expand programs and secure future funding. We could always count on Nat for his wisdom, selflessness, and a mischievous sense of humor.

Born and raised in Richmond and educated at Purdue University, Nat traveled the world as an officer in the U.S. Navy, as a Foreign Service Officer with the Department of State, and during his 25-year tenure with the Air Transport Association, from which he retired as Vice President of International Affairs in 1995.

In addition to his work with the ACLU of Virginia, Nat's retirement commitments included teaching English as a Second Language, volunteering at the Whitman-Walker Clinic and with Transplant Recipients International Organization, as well as supporting Parents, Families and Friends of Lesbians and Gays (PFLAG) and the Arlington Gay and Lesbian Alliance.

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**Grassroots Lobbying:** Help us defend civil liberties in the Virginia General Assembly by joining our grassroots lobbying program. We'll send you action alerts that provide you with the ACLU's position and talking points to use in communications with elected officials.

**ACLU Events:** Subscribe to ACLU of Virginia E-News (see below) and receive e-vites to upcoming events in your area.

**Learn More...**

**Virginia ACLU Reports:** Our annual report, our review of the 2010 General Assembly Session, and our litigation and legal advocacy report are available now.

**ACLU E-News:** Want to know more about what we're doing throughout the year? Sign up for E-News. Not only will you receive email updates on lawsuits, advocacy efforts, and other actions as they happen, but you'll also get e-vites to local events (as mentioned above).

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**To become a grassroots lobbyist or to sign up for E-News (and e-vites), visit [www.acluva.org](http://www.acluva.org). For copies of ACLU of Virginia reports or other materials, call 804-644-8080 or email us at [acluva@acluva.org](mailto:acluva@acluva.org).**

***You're Invited!***

Northern Virginia Chapter of the ACLU  
**Annual Legislative Brunch**

**Sunday, February 13, 1:00-3:30 p.m.**

**Ernst Cultural Center**

**Northern Virginia Community College  
8333 Little River Turnpike, Annandale**

**“Civil Liberties and the  
2011 General Assembly”**

**Hope R. Amezquita**

**ACLU of Virginia Legislative Counsel**

**Q&A to follow**

Brunch at 1:00 p.m. Program starts at 2:00p.m. The Northern Virginia Chapter would like to know if you'll be attending. To RSVP or for more information, call (703) 360-1096 or send an email to [novachapter@acluva.org](mailto:novachapter@acluva.org).