

# Virginia Liberties

Newsletter of the American Civil Liberties Union of Virginia Spring 2010

## LGBT Rights under Attack by New Administration

### ACLU Warns against Discrimination; Offers Legal Assistance to Gays and Lesbians

Shortly after Governor Bob McDonnell took office, the principal buzz was not about what he had done, but what he had not done, namely, follow the tradition of new governors by issuing an executive order affirming Virginia's non-discrimination policy as regards state employees. When he finally did -- as order #6 rather than the usual #1 -- noticeably absent from the list of protected classes were gays and lesbians.

After the ACLU and other rights groups complained, McDonnell announced that he would not tolerate discrimination of any kind, but claimed he did not have the legal authority to prohibit discrimination on the basis of sexual orientation.

As if taking a cue from the new governor, Attorney General Ken Cuccinelli shortly thereafter sent a letter to the presidents of state universities advising them that state law does not allow them to have policies protecting gays and lesbians from

discrimination. The ACLU shot back immediately, sending our own letter to state universities advising that the U.S. Constitution protects public employees from discrimination based on LGBT status and warning that we would provide legal representation to any university employee subjected to such discrimination.

Widespread criticism of Cuccinelli from rights groups and ridicule from the media forced the Governor to react by issuing Executive Directive #1, acknowledging that discrimination on the basis of sexual orientation is prohibited under the Constitution. Legal experts quickly noted that an Executive Directive is not much more than an opinion, and unlike an Executive Order it has no legal authority.

Meanwhile, a bill in the General Assembly that would have prohibited LGBT discrimination in public employment passed the Senate but failed in the House.

## Under Threat of Lawsuit, Lawmakers Pass Pro-Choice Plate

With a little help from the ACLU, Virginia's lawmakers reluctantly set aside the politics of abortion and let the First Amendment guide them to passage of a bill authorizing a pro-choice specialty license plate, with revenues from the sale of the plates supporting Planned Parenthood. The "Trust Women, Respect Choice" license plate was in doubt until the last day of the session, when conferees from the House, which had passed an amended version of the bill stripping revenues from Planned Parenthood, and conferees from the Senate, which had maintained revenues for Planned Parenthood, agreed on the Senate's version. The ACLU made it clear to conferees that removing Planned Parenthood as the revenue recipient would constitute illegal viewpoint discrimination, since the legislature had already passed an anti-choice plate with revenues going to support an anti-abortion counseling agency.



The final vote was 22-15 in the Senate and 64-30 in the House, but the saga of the pro-choice license plate will not be over until Governor McDonnell signs the bill. A veto by the Governor or amendments that alter the bill could result in litigation.

The ACLU of Virginia has long advocated that the specialty license plate program not be subjected to the political process, but that plates should be approved by the Department of Motor Vehicles based on content-neutral rules. In the future, we will use the pro-choice/anti-choice license plate controversy as an example of why that should happen sooner rather than later.

## ACLU Security & Intelligence Expert to Speak at Annual Meeting

The ACLU's top policy counsel on national security and privacy at the Washington Legislative Office will speak at the ACLU of Virginia's Annual Membership Meeting on May 15 at the Virginia Holocaust Museum in Richmond.

Michael German is a former FBI special agent whose 16-year tenure focused on domestic terrorism, bank fraud and public corruption, and included undercover operations aimed at preventing terrorist attacks. Now he spends his time educating Congress and the public on where the FBI went wrong after 9/11 and how to fix it.

German is a graduate of Wake Forest University and earned his J.D. from Northwestern University Law School. His articles on terrorism have appeared in the *Washington Post*, the *San Francisco Chronicle* and the *National Law Journal*.

In a talk titled "State of Surveillance" German will discuss the complexities of balancing national security and privacy rights, including a look at the proliferation of secret data-gathering "fusion centers" (there's one in Virginia!) and the anticipated increase in the use of controversial full-body scanners at airports.



Michael German

# From the Director

## Failure to Expand Death Penalty Shows Success

To most of the audience, the failure of lawmakers to eliminate the ‘triggerman rule’ again this year looks like old hat. But to the stagehands, the behind-the-scenes grassroots lobbyists who called and wrote their legislators throughout the session, you know this was magic.

In Virginia, except for a few situations, only the actual killer (the triggerman) is eligible for capital punishment. For three years running, lawmakers passed a bill to allow accessories and others indirectly involved in murders to qualify for the death penalty. In the hands of aggressive prosecutors, the elimination of the triggerman rule could dramatically expand executions here.

Each year, Governor Kaine vetoed the triggerman measure, sending it back to the General Assembly. Each year the House easily mustered the two-thirds vote for override, and each year the Senate failed to override by a vote or two.

When Governor McDonnell won election, he invited legislators to send him the triggerman bill, and it appeared Virginia was on the verge of its most significant expansion of the death penalty in 40 years. With the Governor and two-thirds of the legislature behind the bill, what other possibility was there?

But this story has a happy ending. Before and during the session, death penalty opponents, led by our allies at Virginians for Alternatives to the Death Penalty, educated legislators about the bill’s consequences, always being sure to mention how much money it could cost the state to implement.



When all was said and done, the triggerman bill garnered its usual support in the House of Delegates, but was bottled up by the Senate Courts of Justice Committee. It never got to the Governor’s desk.

People often say it must be discouraging to work for the ACLU in Virginia, where our causes are often ignored by lawmakers. But I remind them that we win most of our cases in one of the most conservative court systems in the nation, that we celebrate many legal victories without going to court (check out the Advocacy page!), and that, with a lot of hard work from a lot of stagehands, we can even have an impact on the legislative process.

*Kent Willis*  
Executive Director

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### *Virginia Liberties*

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## *Mark These Dates...*

### **ACLU Annual Membership Meeting**

Saturday, May 15, 2:00-4:00 p.m.

Virginia Holocaust Museum  
2000 East Cary Street  
Richmond, VA 23223

“State of Surveillance”

Presentation by Michael German, Policy Counsel  
ACLU Washington Legislative Office

Meet and Greet ACLU Reception

Free parking is available in the museum lots with entrances on Cary St. and S. 21st St. We’d like to know if you’ll be attending. Call us at (804) 644-8080 or email us at [acluva@acluva.org](mailto:acluva@acluva.org).

### **NOVA ACLU Chapter Annual Meeting and Crabfest in Alexandria, June 6**

Don’t miss this annual ACLU tradition! Join the Northern Virginia Chapter of the ACLU on Sunday, June 6, from 1:00 to 5:00 p.m. at Fort Hunt Park, Area B, for crabs, hamburgers, hot dogs, veggie burgers, and more. Guest speaker: ACLU of Virginia Executive Director Kent Willis. For details, contact the NOVA ACLU Chapter at (703) 360-1096 or [novachapter@acluva.org](mailto:novachapter@acluva.org).

# ACLU of Virginia Legal Action

## Virginia Supreme Court Upholds Defendant's Due Process Rights

In a unanimous decision, the Virginia Supreme Court in late February ruled that when a criminal defendant enters a drug court treatment program as part of a plea bargain, termination from the program resulting in jail time may not occur without the defendant being afforded a hearing on the reasons for the termination.

Judson Harris was charged with felony drug possession in Fredericksburg and agreed to a plea bargain that required him to enter a drug treatment program. Upon successful completion of the program, charges would be dismissed. If he did not complete the program, he would be convicted and sent to prison. Harris had participated in the program for over a year and made significant progress in treatment, but was terminated from the program without notice because of comments he made on his MySpace page. Harris was not given the chance to defend himself against the termination, and the circuit court subsequently imposed the conviction and sent him to prison.

ACLU of Virginia Legal Director Rebecca K. Glenberg argued that Harris's Fourteenth Amendment rights were violated when he was not given the opportunity to defend himself before being terminated from the drug program and sent to prison, and the Virginia Supreme Court agreed.

## Prince William County Drops Loitering Charges against Latinos

For the second time in five years, Prince William County dismissed charges brought against a group of Latino men rather than defend the constitutionality of a local anti-loitering ordinance. The ordinance makes it illegal to loiter "under circumstances which justify a reasonable suspicion that such person may be engaged in, or is about to engage in, a crime, or with the purpose of begging." ACLU lawyers argued that the ordinance is unconstitutionally vague, allowing police to arrest almost anyone in a public place, and that the arrests in question were illegally based on the nationality of the defendants. In this case, the men were merely standing on a public sidewalk near their apartment complex in Manassas when police asked for IDs. Those who showed they were residents of the complex were charged with loitering, and those who could not were charged with trespassing.

## Chesterfield County Kills Warrantless Home Search Proposal

Following the threat of a legal challenge from the ACLU, the Chesterfield County Board of Supervisors unanimously voted down a controversial proposal that would have allowed county inspectors to enter rental units in designated districts without first obtaining a warrant. If the owners of the building or their tenants refused, the owners could be punished with a fine of up to \$2,500.

After learning about the proposed ordinance, ACLU lawyers sent a letter to members of the Board and the County Attorney, informing them that such an ordinance is in violation of the Fourth Amendment's prohibition against unreasonable searches and would be subject to a lawsuit. At its next meeting, the Board of Supervisors voted down the proposal.

### In Brief...

#### Courts Continue to Rule in Favor of ACLU in Same-Sex Custody Case; Child Now Missing

In February, the Virginia Court of Appeals again affirmed a lower court's ruling that custody orders from a Vermont court must be registered and complied with in Virginia. Both the Virginia and Vermont Supreme Courts have held that Vermont holds jurisdiction in a custody dispute over a child born during a Vermont civil union of two women who separated and dissolved their union after the child was born. The Vermont court awarded custody to Lisa Miller, the birth mother, and visitation rights to Janet Jenkins, Miller's partner. Miller moved to Virginia and refused to grant visitation rights to Jenkins, claiming that Virginia should have jurisdiction and that the state's anti-gay marriage law supported her no-visitation position. After Miller continued to refuse visitation, a Vermont court judge ordered that custody be transferred to Jenkins early this year. Miller failed to appear with the child on the date set for custody exchange, and both the child and Miller are now missing.

#### Virginia Supreme Court to Hear Case of Voters Sanctioned for Attempting to Remove Elected Officials

The Virginia Supreme Court in late March agreed to hear the appeal of 40 Gloucester citizens who were ordered to pay \$80,000 in legal fees after they failed to remove four members of the Board of Supervisors from office. The ACLU will file a friend-of-the-court brief in support of the petitioners, arguing that the sanctions violate their First Amendment right to petition for redress of grievances.

#### Prince William Will Not Prosecute Man who Allegedly Cursed at Police Officer

Prince William County dropped abusive language charges against a man who allegedly cursed at a campus police officer. ACLU lawyers were prepared to challenge the charge, arguing that the man's speech, while perhaps impolite and inappropriate, was protected by the First Amendment. Under Virginia law (and the First Amendment) abusive language must rise to the level of "fighting words," to be found illegal.

#### Fourth Circuit Hears Arguments Supporting Privacy Advocate's Free Speech Rights

The Fourth Circuit Court of Appeals on March 23 heard oral arguments in the case of B.J. Ostergren, who posts the Social Security Numbers of public officials on her website to demonstrate how easily such information can be obtained from publicly-accessible government websites. Rather than create a law preventing Social Security Numbers from being posted online, legislators passed the "anti-B.J. law," making it illegal to disseminate Social Security Numbers once they have been downloaded. Lawyers for the ACLU argued that once documents are made public by the government, the government cannot then limit their use.

## Supporters Gather for ACLU's "Reckoning with Torture"

Nearly 400 people packed into Georgetown University Law Center's Hart Auditorium on March 3 for an enlightening-- and frightening -- evening calling attention to the abuse and torture of "War on Terror" detainees in U.S. custody. Members of Congress, artists, writers, and others read straight from recently declassified documents, including legal memos, FBI emails, and testimonials from detainees themselves.

Rep. Bobby Scott (VA-3) read a particularly harrowing excerpt from a legal memo on waterboarding signed by Assistant Attorney General for the Justice Department's Office of Legal Counsel Jay Bybee. Bybee concluded that waterboarding was not torture because it did not cause pain and was too short in duration to cause "extreme suffering."

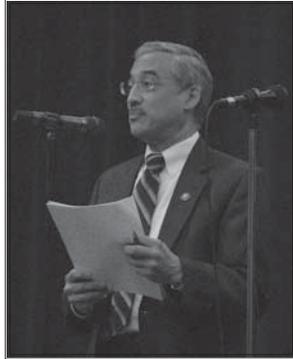


Photo Credit: CDD Photography  
Rep. Scott reads legal memo excerpt.

## NOVA ACLU Chapter Meeting Focuses on Legislative Session

After a two-week postponement due to inclement weather, the Northern Virginia Chapter held its annual winter issues brunch on February 21, with a crowd of over 75 ACLU members in attendance.

ACLU of Virginia Legislative Counsel Hope Amezcuita explained how bills introduced in the 2010 General Assembly would impact civil liberties this year. She covered topics such as the pro-choice specialty license plate, religious liberty, censorship at public colleges, the death penalty, and reproductive rights. Afterwards, there was a lively question and answer period. Special thanks to our active Northern Virginia Chapter and its volunteers, who organized the event and provided another delicious brunch for everyone who attended.

## NOVA and GMU Law Chapters Host Privacy and Technology Event

In November, 60 supporters gathered at George Mason Law School in Arlington to hear ACLU privacy experts Jay Stanley and Mary Bonventre speak on new technologies-- used by both the government and the private sector-- that invade personal privacy and create expanding opportunities for identity theft. The Q&A that followed the presentation focused on balancing the individual right of privacy with the need to use new technologies to protect national security. The event was sponsored by the GMU Law School and Northern Virginia Chapters of the ACLU of Virginia.

## Chapters Raise Awareness of Civil Liberties on Campus

The ACLU chapter at **William and Mary Law School** is keeping busy. On February 8, ACLU of Virginia Executive Director Kent Willis spoke to chapter members on the affiliate's recent court cases and our felon disfranchisement project. On March 16, the chapter co-sponsored an event with Richmond City Commonwealth's Attorney Michael Herring, who spoke about prosecutorial immunity in wrongful conviction cases. And on March 18, the chapter organized student protestors-- who wore t-shirts with the phrase, "Torture is a War Crime" -- to speak out against the presence on campus of John Yoo, the author of the now discredited legal memos rationalizing torture during George W. Bush's administration.

In nearby Newport News, the chapter at **Christopher Newport University** responded to Attorney General Ken Cuccinelli's anti-LGBT advisory to colleges by co-sponsoring on March 16 a protest and petition drive to urge CNU administrators to oppose discrimination against LGBT employees and students. On March 22, the Chapter screened the HBO film "Iron Jawed Angels," the story of a group of young women who risked their lives to fight for women's suffrage. The CNU chapter has also scheduled this semester an event to discuss religious tolerance and liberty.

Meanwhile at the **University of Virginia**, the students are planning to screen a documentary, "Cruel and Unusual," about transgendered women detained in male prisons. The film covers an ACLU of Virginia case and includes interviews with ACLU of Virginia lawyers. The chapter is also co-sponsoring a speaker from Law Enforcement against Prohibition (LEAP) who will discuss sensible drug policies.

Special thanks to the **George Mason Law School** chapter, which provided space for, and helped to organize, an event on privacy and technology last fall. The GMU Law chapter also found space for the ACLU of Virginia Board of Directors to meet immediately before the event. (See event details on this page.)

## ACLU Welcomes New Student Chapter at Old Dominion

The ACLU of Virginia welcomes a new student chapter at **Old Dominion University**, which received official recognition by the Virginia Board of Directors at its meeting on March 20. The Chapter hit the ground running with membership recruitment efforts and has plans to hold an event to raise awareness about students' rights when encountering police officers.

# From the State Capitol- 2010 Session

*Below are some of the significant civil liberties issues addressed in this year's legislative session. The ACLU of Virginia and our grassroots supporters lobbied for or against more than 100 bills in the 2010 session. Because this newsletter goes to press prior to the April 21 veto session, there is a chance that the status of some legislation will have changed.*

## **Free Speech Protected by Passage of Pro-Choice License Plate**

Under the threat of a lawsuit from the ACLU, lawmakers passed a bill authorizing a pro-choice specialty license plate, with proceeds from the sale of the plate going to Planned Parenthood. The bill took a tortuous path through the legislature that included attempts to redirect revenues away from Planned Parenthood. The bill now goes to the Governor, who is unlikely to veto the bill, but has the power to offer amendments. The ACLU of Virginia maintained that lawmakers were required to vote in favor of a pro-choice plate this year because they passed an anti-choice plate last year. (See story on first page.)

## **Public Colleges Won't Be Censored**

After William and Mary allowed the benign but controversial Sex Workers Art Show to perform on campus last year, lawmakers responded with a bill removing the public college exemption from Virginia's obscenity law and requiring university boards of visitors to review performances that might be considered obscene. We lobbied against the bill on grounds that it could subject any and all performances on college campus to the equivalent of a censorship committee. The bill, HB 1296, failed in the House of Delegates.

## **Police May Explore Immigration Status of Crime Victims & Witnesses**

A bill to encourage immigrants who are victims or witnesses to crimes to speak to the police passed the Senate 40-0, but narrowly missed a full House vote when it was bottled up in committee on a 10-10 vote. The bill (SB 462) would have prohibited police officers from inquiring about the immigration status of any person who is victim of a crime or a witness.

## **Bill to Protect LGBT Employees from Discrimination Fails**

Following efforts by the Governor (Executive Order 6) and the Attorney General (letter to colleges informing them that anti-discrimination policies protecting gays and lesbians are illegal) to undermine efforts to protect gays and lesbians from discrimination, legislators seriously grappled with a bill to ban discrimination against LGBT persons employed by the state. A Senate bill (SB 66) passed by a healthy 23-17 margin, but failed to survive the House General Laws Committee.

## **Available Soon!**

### **2010 Virginia General Assembly Review**

*For full details on these and other bills that impact civil liberties in Virginia, contact us at (804) 644-8080 or [lobby@acluva.org](mailto:lobby@acluva.org)*

## **Major Death Penalty Expansion Avoided Again**

Before taking office, Governor McDonnell vowed to sign the same death penalty expansion bill that had been passed for the last three years by both the House of Delegates and the Senate but was then vetoed by Governor Kaine. That bill would have dramatically expanded the death penalty by adding to the list of persons other than the actual killer who may be prosecuted for a capital crime.

Currently, under Virginia's "Triggerman Rule," only the actual perpetrator is eligible for the death penalty, with three narrow exceptions. Although the House triggerman bill (HB 502) easily passed the full House of Delegates, the Senate Courts of Justice Committee blocked it on a 9-6 vote, meaning it never made it to the Governor's desk.

The General Assembly did pass a bill making the killing of auxiliary police officers a capital crime, but this will have almost no impact on death penalty prosecutions in Virginia, as there is no record of such targeted killings in the state.

## **Reproductive Rights Unharmful**

For the sixth year in a row, the Senate prevented anti-choice bills from passing. HB 393 placed onerous and unnecessary financial requirements on abortion clinics. It passed the House 75-25, but failed in the Senate. HB 1042 amended the informed consent law to require physicians to provide pregnant women with ultrasound images of fetuses before performing an abortion. It passed the House 65-33 and failed in the Senate.

## **Proof of Citizenship and ID Voting Bills Fail**

Bills requiring individuals to provide proof of citizenship to register and government-issued photo IDs to vote were defeated. Voting rights advocates opposed these bills because they are unnecessary (there is no evidence of voter fraud in Virginia) and they would have a disproportionate impact on the elderly, racial minorities, and low-income voters, all of whom are less likely to have record of citizenship or to carry a government-issued photo ID.

## **Bill to Expand Arrests and Searches Defeated**

For the third year in a row, bills to grant law enforcement officials the authority to arrest individuals for Class 1 & 2 misdemeanors passed the House, but were killed in a Senate Committee. Currently, Virginia law permits the arrest of individuals for such misdemeanors only in very limited circumstances. These bills would have vastly expanded the power of law enforcement to make arrests-- and thus conduct searches. HB 681 passed the House 68-28 but was killed in Senate Courts of Justice Committee. SB 643 never made it out of the Senate Courts Committee.

## **Government Prayer Bill Fails**

Legislators seem to be running out of steam in an effort to pass an unconstitutional bill that would have prevented the chief of the state police from requiring that prayers offered by police chaplains at government-sponsored events be non-sectarian, as required by the Supreme Court. The bill passed the House last year, but was killed in the Senate. This year, it never made it out of a committee in the House.

# ACLU of Virginia Advocacy

## Groups Urge Governor to Act on Felon Disfranchisement

*ACLU, NAACP, Rutherford Institute, League of Women Voters, Faith Groups Joined Forces*

In an unprecedented show of force, a broad range of interests groups joined together last fall and early this year to urge Governor Tim Kaine to issue an executive order to reform Virginia's antiquated and racist felon disfranchisement law. The civil rights, civil liberties, and faith-based organizations -- including the ACLU, Rutherford Institute, NAACP, Virginia Interfaith Center for Public Policy, Virginia Catholic Conference, the Virginia Organizing Project and Virginia League of Women Voters -- communicated with the Governor, negotiated with top officials in the Governor's office, and engaged in lengthy legal and strategy sessions over the last months of the Governor's term.

On the table were several possibilities, all centered on the issuance of an executive order by the Governor automatically

restoring the right to vote to some or all of Virginia's 300,000 disfranchised voters. When the Governor failed to act, the concerned organizations vowed to grow in number, continue to educate the public, and to focus on legislative initiatives in the 2011 General Assembly to reform the law.

For the moment, Virginia has the dubious distinction of being one of only two states in the nation -- Kentucky is the other-- that permanently disfranchises every felon, requiring an act of the governor to restore the right to vote. Felon disfranchisement is the last formal vestige of the Jim Crow era, and continues to disproportionately impact minorities.

For more information on felon disfranchisement in Virginia, visit [www.restoreourvote.org](http://www.restoreourvote.org)

## Protecting Religious Liberty (and some free speech, too)

### Prayers and Protests at Gate City High

Last fall, after receiving a complaint from a parent, we warned Gate City High School officials that a sectarian prayer delivered over the public address system at a football game was unconstitutional, and we sought assurances that the incident would not be repeated. A couple of weeks later, when students prepared to organize a protest against the ACLU's position on school prayer, we warned school officials not to interfere with the students' right to protest the ACLU. In the end, the students were allowed to protest, and there have not been anymore prayers over the public address system.

### Prayers at Chesapeake City Council

Chesapeake City Council was opening its meetings with sectarian prayers, but considering a change to nonsectarian prayers. The Alliance Defense Fund and the Family Foundation sent members of city council misleading legal opinions claiming that sectarian prayers must be allowed. In response, we sent City Council a letter informing them that meeting-opening prayers must be nonsectarian, as the Supreme Court and Fourth Circuit Court of Appeals have ruled. City Council changed its policy to require that prayers be nonsectarian.

### Stafford County School Board Prayers

When the Stafford County School Board considered allowing sectarian prayers to open its meetings, we advised them that only nonsectarian prayers were constitutionally permissible, and that the best policy would be a moment of silence at the beginning of meetings. The School Board wisely opted for the moment of silence.

## ACLU Protects Rights of Student Journalists at Tech and JMU

In two separate instances, ACLU lawyers sent letters to college officials warning against actions that threatened freedom of the press on campus. At JMU, two campus newspaper reporters were charged with trespassing for entering a dormitory to interview students about a Peeping Tom incident on campus. Instead, one reporter was not disciplined and the other agreed to a nominal penalty in lieu of prosecution. At Virginia Tech, the Commission on Student Affairs threatened to remove \$70,000 in university funding from the student newspaper, the *Collegiate Times*, because it allowed online readers to post anonymous comments that are sometimes offensive. Our letter to Tech officials warned of a lawsuit if Student Affairs followed through on its threat. After our letter arrived, the threats were withdrawn.

## Manassas City Council Revises Assembly Ordinance

The Manassas City Council in February considered a new ordinance regulating public assemblies, but put the proposal on hold after the ACLU expressed concerns about its constitutionality. One provision gave city officials the broad authority to reject applications for demonstrations that "present a clear and present danger to public health or safety." This vague standard could have been interpreted to allow officials to deny permits based on applicants' purpose or political views. Another provision required event organizers to submit security plans to officials, pay for costs incurred by the city to host events, and to obtain insurance. The ordinance was revised, addressing most of our concerns. Security plans are still required, but in limited circumstances. Also under the new proposal, officials dropped the reference to "present a clear and present danger to public health or safety." At the time of printing, City Council has not yet voted on the revised ordinance.

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***You're Invited!***

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Annual Membership Meeting  
and

Meet and Greet Reception

Saturday, May 15, 2:00-4:00 p.m.

Virginia Holocaust Museum  
2000 East Cary Street, Richmond

Keynote Address:

**“State of Surveillance”**

**Michael German**

Policy Counsel for National Security Issues  
ACLU Washington Legislative Office

We'd like to know if you'll be attending. Call us at (804) 644-8080 or email us at [acluva@acluva.org](mailto:acluva@acluva.org). Details inside.

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