



Written by [Joe Wolverton, II, J.D.](#) on July 19, 2012

## VA Lawmaker to Introduce Domestic Drone Regulation Bill

What could bring together the American Civil Liberties Union (ACLU) and one of Virginia's most conservative state representatives? The specter of drones filling the skies of the United States. [In a joint statement released July 17](#) by Virginia Delegate Todd Gilbert (R-Shenandoah) and the Virginia Chapter of the ACLU, the seemingly disparate pair announced plans to work to fight the unregulated use of drones by law enforcement in the Old Dominion. He stated,



Both the ACLU and I believe, as do many Virginians across the political spectrum, that the use of drones by police and other government agencies should be strictly controlled by state laws that protect the privacy and civil rights of all Virginia residents. I will be introducing legislation in the 2013 General Assembly Session to i) prohibit the use of drones by law enforcement unless a warrant has been issued; ii) require that policies and procedures for the use of drones be adopted by legislative bodies in open meetings; iii) provide for public monitoring and accountability; and iv) mandate that pictures of individuals acquired by drones be destroyed unless they are part of an authorized investigation.

Claire Guthrie Gastañaga, executive director of the Virginia ACLU, echoed Delegate Gilbert's remarks:

Delegate Gilbert is right to be concerned about the possibility that, without new laws, this new and increasingly inexpensive technology will be used in a manner that will violate the fundamental right to be free from unreasonable searches and will have a chilling effect on the First Amendment rights of Virginians to assemble peaceably and speak freely. We are proud to be working with Delegate Gilbert to build a coalition in favor of the legislation he will introduce — a coalition that will bring together diverse voices from across the Commonwealth.

Despite their cooperation on this issue, Gilbert and the Virginia ACLU have been foes in previous matters. For example, [Delegate Gilbert recently sponsored a bill](#) that would permit state-assisted private adoption agencies to reject prospective parents if the agency objected to the couple's religion or sexual orientation. Gilbert described the measure as a "conscience clause," while the ACLU countered that it was state-sponsored anti-homosexual discrimination. The bill is now the law in Virginia.

In spite of being on opposite sides of the adoption bill, when asked by the *Washington Post* when the last time was that the ACLU and Delegate Gilbert found themselves on the same side of an issue, [Gastañaga said](#), "Todd and I are friends. We don't always see completely eye to eye on things, but on this we are in absolute perfect harmony."

Gilbert agrees: "We probably agree on more things than you would think, but this is our first foray into legislation together," he said. "I think on an issue like this, you're going to see the ACLU and Tea Party conservatives in lockstep. Civil rights and civil liberties cross preconceived notions of ideological boundaries."



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While Virginia's Governor Bob McDonnell signed Gilbert's "conscience clause" bill into law, his recent comments concerning the deployment of drones by police departments has him facing criticism from the Right and Left and bringing the two ends of the political spectrum together again.

[During an interview on WTOP radio's "Ask the Governor" program](#), Governor McDonnell made what some have called "off the cuff" remarks seemingly supporting the use of drones domestically. When asked by the show's host for his views on the use of drones to patrol the skies of Virginia, McDonnell responded:

I think it's great. I think we ought to be using technology to make law enforcement more productive — it cuts down on manpower in the air — and more safe. That's why we use it on the battlefield.

We need to address civil liberties like privacy, but I believe if you're keeping police officers safe, making it more productive and saving money ... it's absolutely the right thing to do.

McDonnell's apparent endorsement of domestic drones — off the cuff or not — is similar to [statements of the police chiefs of Fairfax County and Washington, D.C.](#), who are openly campaigning for the right to use drones to assist with traffic management and surveillance.

For his part, Delegate Gilbert reckons that McDonnell was caught flat-footed by the question. "It was an unguarded moment," Gilbert said, "but I don't think the governor would disagree with the notion of any use [of drones] by law enforcement being consistent with constitutional principles."

A spokesman for the governor's office [confirmed to the Washington Post](#) Gilbert's assessment of the governor's position on police-controlled Predators:

Virginia is continually exploring law enforcement technology and techniques that can keep citizens and officers safe while making it more cost effective to conduct law enforcement activities. State Police do not currently use drones for law enforcement activities. If State Police were to add drones to its law enforcement tools, the State Police would first ensure that such use was consistent with all relevant constitutional protections, laws and policies related to their use at that time.

Despite these assurances of constitutional fidelity, there are critical questions of constitutional importance that must be addressed by McDonnell, the police chiefs, and anyone who is shilling for the launch of these unmanned surveillance aircraft. For example, what guarantees are there that all drone missions will be conducted so as not to violate the Fourth Amendment's prohibition on warrantless searches and seizures? Will police officers be required to submit an affidavit "particularly describing the place to be searched and the persons or things to be seized" in advance of deploying the drone?

Delegate Gilbert promises that his bill will address these issues of personal liberty in the following ways:

- Usage restrictions. Drones should be subject to strict regulation to ensure that their use by government, law enforcement, and private entities does not trample individual privacy rights. For example, legislation should prohibit the use of drones for indiscriminate mass surveillance or for monitoring protected First Amendment activities. In general, legislation should ban all government and government-sponsored use of drones except where:

there are specific and stated reasons to believe that a drone will collect evidence relating to a specific instance of criminal wrongdoing and where the government has obtained a warrant based on probable cause; or

there is a geographically confined, time-limited emergency situation in which particular



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people's lives are at risk, such as a fire, hostage crisis, or land- or water-based search and rescue operation; or

the drone is used for reasonable non-law enforcement purposes by non-law enforcement agencies, where privacy will not be substantially affected, such as geological inspections or environmental surveys, and where the surveillance will not be used for secondary law enforcement purposes or enforcement of administrative regulations.

- **Image retention restrictions.** Images of identifiable individuals captured by aerial surveillance technologies should not be retained or shared unless there is reasonable suspicion that the images contain evidence of criminal activity or are relevant to an ongoing investigation or pending criminal trial.
- **Public notice.** The policies and procedures for the use of aerial surveillance technologies should be explicit, written, and public. While it is legitimate for the police to keep the details of particular investigations confidential, overall policies governing deployment of drones — including the privacy tradeoffs they may entail — are a public matter that should be subject to public oversight and accountability.
- **Democratic control.** Policy decisions regarding the purchase and deployment of drones should be democratically decided by appropriate legislative bodies (e.g., city councils, county boards, or the General Assembly) based on publicly available information and in open meetings — not made administratively by police departments or other law enforcement or regulatory agencies (e.g., through receipt of federal grants, purchasing decisions, or by inclusion in the general orders of law enforcement agencies).
- **Auditing and effectiveness tracking.** Public agencies should not invest in drones without a clear, systematic, and public examination of the costs and benefits involved. If aerial surveillance technology is deployed, independent audits should track the use of drones by all government agencies, so that all Virginians can tell generally how and how often they are being used, whether their use is consistent with the original rationale for their deployment and whether they represent a worthwhile public expenditure.

We will follow Delegate Gilbert's bill as it works its way through the Virginia state legislature.

Photo of Virginia Delegate Todd Gilbert: AP Images



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