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July 8, 2013

The House Police, Militia and Public Safety Committee
Virginia General Assembly
1000 Bank Street
Richmond, VA 23219

Re: *April 2013 ABC Enforcement Officer Incident*

Dear Members of the House Police, Militia and Public Safety Committee:

Despite a public outcry that has gone national in scope over an April 2013 incident that occurred in Charlottesville, Virginia, neither J. Neal Insley, chairman of the Virginia Alcohol Beverage Control, nor Governor McDonnell, who appointed Insley to his post, have taken appropriate steps to mitigate the situation. The incident involved a college student who was targeted and terrorized by ABC agents after she purchased sparkling water at a grocery store. She was eventually jailed for daring to evade her accosters, who failed to identify themselves or approach her in a non-threatening manner. Indeed, the ABC's recent policy change, allowing for "one ABC Agent in a police uniform to act as a contact person once the plain clothes agent has developed reasonable suspicion and/or probable cause to approach individual(s) they believe have violated the law," is no change at all.¹

Moreover, a slap on the wrist to the ABC agents involved and a superficial policy change intended to mollify an outraged public will do little to address the underlying causes of such clearly systemic problems within the ranks of our law enforcement. Thus, I am calling on our elected representatives within the General Assembly to take the lead in this matter by ensuring that ABC agents are operating within the parameters of the Constitution, requiring them to abide by the higher standard of probable cause (as opposed to the lesser standard of reasonable suspicion) when carrying out investigations, reminding them that they are public servants *in service to the taxpayers of this state* rather than commanders directing underlings who must obey without question, and

¹ "Procedure change statement from ABC," *Daily Progress* (July 5, 2013), http://www.dailyprogress.com/news/procedure-change-statement-from-abc/article_abdd16bc-e5e8-11e2-8b06-0019bb30f31a.html.

certifying that ABC agents—and all state law enforcement officials—are properly trained in how to handle encounters with civilians without resorting to intimidation tactics, overt aggression and threats of violence.

As president of The Rutherford Institute² and a constitutional attorney who has spent the greater part of his career defending American citizens against government abuses and violations of their rights, I can personally vouch for the fact that this is not an isolated incident. Due in large part to the militarization of the police and the equipping of other government agencies with weaponry, we are moving into a culture in which law enforcement agencies have developed a sense of entitlement that is at odds with the spirit of our Constitution—in particular, the Fourth Amendment.³

Details of the April 11, 2013 incident

Late in the evening of April 11, 2013, several University of Virginia college students, including 20-year-old Elizabeth Daly, were leaving the Harris Teeter grocery store parking lot after having purchased a variety of foodstuffs for an Alzheimer's Association sorority charity benefit that evening, including sparkling water, ice cream and cookie dough, when they noticed a man staring at them as they walked to their car in the back of the parking lot.

According to a local newspaper account:

Daly said she and her friends were “terrified” when a man and woman in street clothes began knocking on her car windows in the darkened Harris Teeter parking lot... When Daly slipped her keys into the ignition to crack the windows, a male agent yanked at the door handle, banged on the window and yelled at the women to exit the vehicle... When he began to yell, other men positioned themselves around the car and the woman yelled at Daly to “go, go go,” court records state. One drew a gun. Another jumped onto the hood of the car as Daly and her friends dialed 911 to report the incident, according to the records. The women apologized repeatedly minutes later when they stopped for a car with lights and sirens on, prosecutors said. Daly's passenger said she was handcuffed without explanation and did not get one until a Charlottesville police officer arrived.⁴

² The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened and infringed.

³ This matter is further addressed in my new book, *A Government of Wolves: The Emerging American Police State* (SelectBooks, 2013).

⁴ K. Burnell Evans, “Outcry over ABC bust of UVA student grows,” *Daily Progress* (July 1, 2013), http://www.dailyprogress.com/news/local/outcry-over-abc-bust-of-uva-student-grows/article_4eccc878-e2b7-11e2-a2b2-001a4bcf6878.html.

“They were showing unidentifiable badges after they approached us, but we became frightened, as they were not in anything close to a uniform,” stated Daly. “I couldn’t put my windows down unless I started my car, and when I started my car they began yelling to not move the car, not to start the car. They began trying to break the windows. My roommates and I were ... terrified.”⁵

It wasn’t until police arrived with flashing sirens and lights that Elizabeth finally learned the identity of her attackers – they were Virginia Alcohol Beverage Control Enforcement Officers. Likewise, it wasn’t until the arrival of the police that the ABC agents were able to delve into the contents of the girls’ groceries, revealing their suspected contraband to be cans of LaCroix sparkling water. Nevertheless, Daly and her friends were handcuffed and forced to spend the night in jail, with Daly being charged with three felonies—two counts of assaulting a law enforcement officer and one count of eluding police—carrying a potential of fifteen years in jail. Prosecutors eventually withdrew the charges two months later.

Reasonable suspicion vs. probable cause

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.—Fourth Amendment to the U.S. Constitution

According to the ABC’s procedure change statement, “In the future, when conducting these types of operations, there will be at least one ABC Agent in a police uniform to act as a contact person once the plain clothes agent has developed reasonable suspicion and/or probable cause to approach individual(s) they believe have violated the law.”⁶

Either ABC officials are being deliberately disingenuous or they don’t understand that there is a distinct difference between reasonable suspicion and probable cause, the latter of which is required by the Constitution before any government official can search an individual or his property.

⁵ K. Burnell Evans, “Bottled-water purchase leads to night in jail for UVa student,” *Daily Progress* (June 27, 2013), http://www.dailyprogress.com/news/bottled-water-purchase-leads-to-night-in-jail-for-uva/article_b5ab5f62-df9b-11e2-81c4-0019bb30f31a.html.

⁶ “Procedure change statement from ABC,” *Daily Progress* (July 5, 2013), http://www.dailyprogress.com/news/procedure-change-statement-from-abc/article_abdd16bc-e5e8-11e2-8b06-0019bb30f31a.html.

In the context of police encounters with citizens in public places, *probable cause* is required in order for police to conduct surveillance or search an American citizen. The standard of probable cause requires that government agents and/or police have reliable evidence making it probable, i.e., more likely than not, that a crime has been committed by the person to be searched. *Reasonable suspicion*, in contrast, requires less in terms of evidence and allows an officer to rely upon his experience and instincts, which, as we have seen, can often be wrong. As the U.S. Supreme Court noted in *U.S. v. Sokolow*: “In *Terry v. Ohio*, we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity is afoot, even if the officer lacks probable cause.” (*U.S. v. Sokolow*). Even at the lowest “reasonable suspicion” standard, an officer must have *specific articulable facts* supporting his belief that criminal activity is being engaged in – mere hunches or “good faith on the part of the arresting officer” is never sufficient. (*Terry v. Ohio*).

According to what we know, in the case of the Harris Teeter sting operation that targeted Daly, agents operated on the “reasonable suspicion” that Daly and her friends had illegally purchased alcohol based upon the fact that: 1) they were underage; 2) alcohol is sold at that particular grocery store; and 3) they happened to walk out of the store carrying something that appeared to be a beverage in a cardboard box. Of course, this was based entirely on hunches and suppositions and not reliable factual evidence of any wrongdoing whatsoever; thus, the ABC agents’ actions were unsupported even by a reasonable suspicion standard and clearly violated the Fourth Amendment.

Do one’s groceries deserve Fourth Amendment protection?

A little-reported fact is that the “sting” which resulted in the targeting, pursuit and arrest of these college students for what turned out to be nothing more than sparkling water was part of a larger two-day “enforcement” operation in that same shopping center in which approximately 10 arrests were made.⁷ Thus, we now have a fourth factor to add to the picture: *anyone* shopping at the Harris Teeter during those two days, especially if they appeared to be underage, were immediately classified as suspects to be monitored and investigated by the ABC police.

Apart from the fact that 10 people were arrested, we know nothing about the ABC agents’ activities during that two-day period. Did they approach other shoppers and demand to review the contents of their bags? How many such “investigations” were necessary to yield 10 arrests? Did they base their assessment of who to approach solely on whether they happened to look young? What about if someone refused to reveal the

⁷ K. Burnell Evans, “Outcry over ABC bust of UVA student grows,” *Daily Progress* (July 1, 2013), http://www.dailyprogress.com/news/local/outcry-over-abc-bust-of-uva-student-grows/article_4eccc878-e2b7-11e2-a2b2-001a4bcf6878.html.

contents of their grocery bag, knowing quite clearly that it would be a violation of their Fourth Amendment rights?

In an age in which the line demarcating bodily integrity and privacy is constantly being redrawn to allow police greater access to our persons and our property, it may seem frivolous to talk about one's groceries as deserving of Fourth Amendment protections, and yet the contents of one's grocery bag can be as telling as a phone conversation or an email, revealing private, intimate information about one's bathroom habits, hygiene, intimate relations, medical state, etc.

The dangers of militarized law-enforcement agencies

While the Harris Teeter incident did not end in senseless violence, it very easily could have if Elizabeth Daly had confronted her pursuers with any of the legally available non-lethal weapons young women are encouraged to carry today as a defensive measure. Indeed, as incidents across the nation make clear, law enforcement officials are increasingly responding to challenges to their "authority" by using their weapons. For example, in Long Beach, California, police responded with heavy firepower to a perceived threat by a man holding a water hose.⁸ The 35-year-old man had reportedly been watering his neighbor's lawn when police, interpreting his "grip" on the water hose to be consistent with that of someone discharging a firearm, opened fire.⁹ The father of two was pronounced dead at the scene.¹⁰

These are not isolated overreactions on the part of rogue officers. As I document in my new book, *A Government of Wolves: The Emerging American Police State*, they are emblematic of a growing tension over the use of militarized police to perform relatively routine tasks, resulting in situations fraught with danger to both civilians and police alike. From full tactical SWAT teams executing no-knock search warrants on the homes of law-abiding citizens over nothing more than a suspicion that the occupant owns a gun¹¹ to the unlawful arrest and forced institutionalization of decorated military

⁸ "Police officers admit shooting dead father who was holding a GARDEN HOSE nozzle after mistaking it for a gun," *Daily Mail* (Dec. 14, 2010), <http://www.dailymail.co.uk/news/article-1338571/Douglas-Zerby-shot-dead-police-holding-GARDEN-HOSE-nozzle-gun-chief-admits.html#ixzz2YO9Fbgvq>.

⁹ "Forced to fire?" KTLA, <http://www.youtube.com/watch?v=Ow8bJ14VEvY#at=94>.

¹⁰ "Police officers admit shooting dead father who was holding a GARDEN HOSE nozzle after mistaking it for a gun," *Daily Mail* (Dec. 14, 2010), <http://www.dailymail.co.uk/news/article-1338571/Douglas-Zerby-shot-dead-police-holding-GARDEN-HOSE-nozzle-gun-chief-admits.html#ixzz2YO9Fbgvq>.

¹¹ "Texas Gunowner Appeals No-Knock Raid On His Home," *The Rutherford Institute* (June 24, 2013), https://www.rutherford.org/publications_resources/tri_in_the_news/texas_gunowner_appeals_no_knock_raid_on_his_home.

veterans over Facebook posts critical of the government¹², the events described above are becoming all too familiar in cities and towns across the country.

Moreover, in light of shooting incidents across the country involving unarmed citizens and heavily armed police, increasing numbers of Americans are understandably concerned about whatever factors, whether it's an arsenal of militarized weapons and an increasing reliance on lethal weapons or insufficient training in nonviolent conflict resolution, are contributing to a seemingly "trigger happy" tendency on the part of some law enforcement officials.

What constitutes a threat to an officer or resisting arrest?

Among the charges levied at Daly were that she allegedly assaulted an officer and attempted to elude police, never mind that the "assault" constituted her car brushing against plainclothes, unidentifiable officers who had been banging on the windows and climbing on her car. It is particularly telling that ABC officials believe "[t]his whole unfortunate incident [involving Daly] could have been avoided had the occupants complied with law enforcement requests."¹³

The key word here is *comply* meaning to obey, submit or conform. Increasingly, law enforcement officials operate under the assumption that their word is law and that there is no room for any form of disagreement or even question. Anything short of compliance is now perceived as resistance and a potential threat.

For example, Miami-Dade police slammed a 14-year-old boy to the ground, putting him in a chokehold and handcuffing him after he allegedly gave them "dehumanizing stares" and walked away from them, which the officers found unacceptable. According to Miami-Dade Police Detective Alvaro Zabaleta, "His body language was that he was stiffening up and pulling away. Now you're resisting officers at that point and when the hands are swinging and you are resisting officers, at that point you have to be taken into custody. When you have somebody resistant to them and pulling away and somebody clenching their fists and flailing their arms, that's a threat. Of course we have to neutralize the threat."¹⁴

¹² "VICTORY: Circuit Court Orders Brandon Raub Released, Dismisses Case Against Marine Arrested, Detained in Veterans Admin. Psych Ward over Political Views, Song Lyrics Posted on Facebook," *The Rutherford Institute* (August 23, 2012), https://www.rutherford.org/publications_resources/on_the_front_lines/victory_circuit_court_orders_brandon_raub_released_dismisses_case_against_m.

¹³ Liana Bayne, "ABC says it's reviewing arrest of UVa student who bought bottled water," *Daily Progress* (June 28, 2013), http://www.dailyprogress.com/news/local/abc-says-it-s-reviewing-arrest-of-uva-student-who/article_1e7dd982-e057-11e2-b032-0019bb30f31a.html.

¹⁴ "Teen Says Police Overreacted To Incident," CBS Miami (May 28, 2013), <http://miami.cbslocal.com/2013/05/28/teen-says-police-overreacted-to-incident/>.

This mindset that any challenge to police authority is a threat that needs to be “neutralized” is a dangerous one that needs to be addressed and curtailed. Unfortunately, it is part of a greater nationwide trend that sets law enforcement officers beyond the reach of the Fourth Amendment. It also serves to chill the First Amendment’s assurances of free speech, free assembly and the right to petition the government for a redress of grievances.

The need for better training of law enforcement as peace officers and public servants

The ABC is “a public safety agency with law enforcement responsibilities.”¹⁵ According to its website, “ABC special agents have full police powers with a diverse range of duties — from investigating license applicants and conducting underage sale compliance checks, to enforcing criminal and ABC laws in more than 17,000 licensed establishments. ABC violations investigated by special agents are reported to the Hearings and Appeals Division to be scheduled for an administrative hearing.”¹⁶

As the ABC noted in its recent statement:

ABC agents are trained to Virginia state law enforcement certification standards, as are all law enforcement officers in Virginia. In fact, ABC generally hires experienced police officers from local and state agencies. They have received their law enforcement training at the State Police Academy, at city and county police academies, and at the regional criminal justice academies where all other police officers in Virginia are trained. Agents apply exactly the same standards for investigative detentions and use of force as most other police agencies in the United States.¹⁷

Therein lies much of the problem confronting communities today, not only with militarizing government agencies but also entrusting them with police powers. While the ABC seems to suggest that its agents’ conduct is acceptable because they are trained at various police and justice academies, I would counter that any conduct that resorts to intimidation tactics, overt aggression and threats of violence to American citizens is problematic and in dire need of scrutiny and an overhaul.

¹⁵ “About ABC,” Virginia Department of Alcohol Beverage Control, <http://www.abc.virginia.gov/admin/aboutabc.html>. Accessed on July 7, 2013.

¹⁶ “About ABC,” Virginia Department of Alcohol Beverage Control, <http://www.abc.virginia.gov/admin/aboutabc.html>. Accessed on July 7, 2013.

¹⁷ “Procedure change statement from ABC,” *Daily Progress* (July 5, 2013), http://www.dailyprogress.com/news/procedure-change-statement-from-abc/article_abdd16bc-e5e8-11e2-8b06-0019bb30f31a.html.

Not only do the police now look like the military—with their foreboding uniforms and phalanx of lethal weapons—but they function like them, as well. No longer do they act as peace officers guarding against violent criminals. And no more do we have a civilian police force entrusted with serving and protecting the American people and keeping the peace. If we are to reverse this trend, it will take a far-reaching commitment to training all law enforcement officials in the fundamentals of the Constitution and how to abide by the rule of law and not, as is often the case, how to rely on technicalities to sidestep the law.

The need for a formal investigation

Equally problematic in these types of incidents is the response to them. In the aftermath of such incidents, there is never any significant effort to investigate them or to institute any sort of reforms to prevent them from reoccurring. The events involving Elizabeth Daly took place in April 2013, yet there was absolutely no discussion of them until the story broke in June, after the charges against Elizabeth were being dropped. There has still been no acknowledgment of wrongdoing on the part of the ABC.

While the public outrage over this incident continues to grow by the day, the response by those in power has been completely dismissive.¹⁸ Only after the story went national was a response forthcoming from ABC representatives and Governor McDonnell's office,¹⁹ yet even these responses have been politically expedient and lacking in substance.

ABC representatives have promised to undertake a “second review” of the case to “make sure nothing happened.” Similarly, Governor McDonnell has assured the public that his office is “monitoring the matter closely” and “awaiting the conclusions” of the ABC's review. As is usually the case with internal review procedures completely devoid of any public accountability, the result is already a foregone conclusion. There is little doubt that the second review will not be any different than the first, and will result in nothing more than a complete validation of the actions of the ABC Special Agents. History and experience have shown that investigations into incidents such as the Daly arrest should be independently conducted and subject to the complete and open scrutiny of the public in order to be truly accountable. In other words, police should not be policing themselves.

What we are dealing with is an agency that has clearly lost sight of its overarching duty: to abide by the dictates of the U.S. and Virginia Constitutions. Thus, I would ask

¹⁸ One ABC official was quoted as saying “this whole unfortunate incident could have been avoided had the occupants complied with law enforcement requests.”

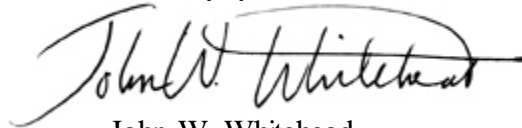
¹⁹ “Outcry over ABC bust of UVa student grows” *Daily Progress* (July 1, 2013), http://www.dailyprogress.com/news/local/outcry-over-abc-bust-of-uva-student-grows/article_4eccc878-e2b7-11e2-a2b2-001a4bcf6878.html

that the General Assembly initiate a thorough investigation of the individuals responsible for this incident. Further, I would ask that the General Assembly completely reevaluate the policies and practices of the Alcohol Beverage Control's Special Agent program. Originally created to enforce Prohibition era laws, the ABC Special Agent program itself is a relic of a different era and the extent of its powers are in desperate need of comprehensive review, as this incident demonstrates.

In conclusion, it is imperative that ABC agents be made to operate within the parameters of the Constitution, abide by the higher standard of probable cause (as opposed to the lesser standard of reasonable suspicion) when carrying out investigations, act as public servants *in service to the taxpayers of this state* rather than commanders directing underlings who must obey without question, and be properly trained in how to handle encounters with civilians without resorting to intimidation tactics, overt aggression and threats of violence.

If I can be of assistance to you in this matter, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in cursive script that reads "John W. Whitehead". The signature is written in black ink and is positioned above the printed name and title.

John W. Whitehead
President

cc: Governor Robert McDonnell
J. Neal Insley, Chairman of the Virginia Alcohol Beverage Control
Delegate David J. Toscano
Senator R. Creigh Deeds