

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
www.rutherford.org

February 24, 2020

Virginia General Assembly
Senate Finance and Appropriations Committee
14th Floor, Pocahontas Building
900 East Main Street
Richmond, Virginia 23218

Re: House Bill No. 1442 / Authorization of Photo Speed Monitoring Devices

Dear Committee Members:

At a time when the Commonwealth of Virginia is struggling with critical issues on almost every front, it is a poor reflection on the General Assembly that one of its top legislative priorities—authorizing the installation and deployment of automated speed cameras throughout the state—involves a backdoor means of generating revenue for localities and police agencies at the expense of the citizenry’s rights to privacy and due process.

As an organization that continues to sound the alarm over the government’s erection of a surveillance state, especially when it is operated in conjunction with for-profit corporations, and its deleterious effect on civil liberties, The Rutherford Institute¹ is particularly concerned about the overtly negative legal and constitutional ramifications of House Bill No. 1442,² which would empower law enforcement agencies and localities to establish and operate “photo speed monitoring devices” operated by for-profit corporations.³

¹ The Rutherford Institute is a national, non-profit civil liberties organization that educates the public on policy issues of constitutional concern and provides legal representation at no charge to individuals whose civil rights are threatened or infringed.

² Persons cited with speeding under the proposed photo speed monitoring system would be presumed guilty simply by virtue of being the owner of the car captured by devices, a fundamental reversal of traditional rules placing the burden of proof of guilt on the government. Citizens will also face barriers in raising defenses to speeding charges brought under a photo speed monitoring system in that notice of such charges would not be provided until many days after the alleged offense occurred and after the accused’s opportunity to obtain relevant exculpatory evidence has passed.

³ House Bill No. 1442 allows for the prosecution of persons for speeding offenses within work and school crossing zones on the basis of video recordings and radar readings.

Thus, not only will these automated speed cameras provide the government with yet another tool for tracking the movements and activities of citizens of drivers in school and work zones, while doing little to ensure traffic safety, they would also add to the government's already burgeoning arsenal of surveillance devices, including the already omnipresent license plate readers, which it employs *ad hoc* to invade the citizenry's privacy and erode their fundamental right to be free from unreasonable searches and seizures by the government.⁴

For the reasons set forth in more detail below, we urge that House Bill 1442 and the intrusion upon the privacy and liberty it represents be rejected.

House Bill 1442 Offends Legal Norms

House Bill 1442 proposes to establish procedures for proving speeding violations that are contrary to accepted legal standards that normally apply when the government charges a person with an offense.

Mandatory presumption offends standards of due process. For example, it proposes to establish a presumption that the person who was the owner, lessee or renter of the vehicle (the image of which was captured as speeding by the photo speed monitoring device) was the driver of the vehicle and subject to prosecution and a fine.⁵ This kind of mandatory presumption offends generally accepted standards of due process, which require the government to prove each element of an offense,⁶ including the burden of proving that the *accused* was the one who committed the offense, not simply that the accused *property* was involved in an offense.

Assumption about driver identity is insufficient basis for imposing a fine. Moreover, the idea that the owner or lessee of a vehicle is the likely driver at any particular time is not a reasonable assumption. It is common knowledge that many families share vehicles that are only registered in the name of one family member. There is also an ever growing "peer-to-peer" sharing of vehicles. The fact that it is common for a vehicle to be driven by someone other than the registered owner or lessee makes the presumption that the registered owner was the driver unreasonable and an insufficient basis for imposing a fine on the owner/lessee.

Indeed, a pending case before the U.S. Supreme Court will soon decide whether an assumption that the registered owner of a vehicle is the driver is even permissible as a basis for

⁴ John W. Whitehead, "Big Brother Is Still Watching You: Don't Fall for the NSA's Latest Ploy," The Rutherford Institute (May 1, 2017), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/big_brother_is_still_watching_you_dont_fall_for_the_nsas_latest_ploy.

⁵ House Bill 1442, proposed Va. Code § 46.2-882.1(B)(3).

⁶ *Lindsey v. Commonwealth*, 293 Va. 1, 793 S.E.2d 311, 313 (2017).

stopping a vehicle.⁷ If stopping a car based on this assumption is questionable, then surely basing a finding of guilt on such an assumption is clearly improper.⁸

Delay in issuing notice of violation hinders drivers' ability to challenge charges. House Bill 1442's automated system also creates serious problems for drivers in collecting and presenting evidence to defend against a speeding charge. Because a driver is not stopped and notified of the speeding accusation immediately, but receives a summons days later, he or she will not be able to document conditions at the scene or with respect to the equipment that could affect guilt.

For example, the proposed law requires that a "conspicuous sign" be placed within 1,000 feet of a zone monitored by a photo speed monitoring system alerting drivers that the system is being used, and the law provides for a presumption that the sign was in place. If a driver is unaware that he or she has been "caught" speeding by a monitoring system, he or she will not be able to document whether the sign was actually in place or whether it was "conspicuous" at the time of the alleged offense. The delay also limits an accused's ability to determine if the speed detection equipment was properly calibrated or set up at the time it determined the vehicle's speed.

Law wholly eliminates any requirement that the speed detection equipment used was accurate and reliable for that purpose. As Richard Diamond noted in *The Washington Post* about last year's substantially similar photo speed monitoring legislation, "[t]he proposed Virginia law states that whatever the camera says is presumed accurate, with no requirement that the system's integrity be independently verified."⁹ Diamond also pointed out that after it was determined that an automated system used in Baltimore had been issuing speeding tickets to parked cars, an audit of that system determined that 10 percent of tickets were based on bogus readings that affected tens of thousands of drivers.¹⁰

House Bill 1442 Violates the State Constitution

In refusing to sign last year's photo speed monitoring legislation, Gov. Northam raised concerns regarding "the legal and constitutional implications of dedicating civil penalties to any

⁷ Nina Totenberg, "Supreme Court Hears Police Traffic Stop Case From Kansas," *NPR* (Nov. 5, 2019), <https://www.npr.org/2019/11/05/776270497/supreme-court-hears-police-traffic-stop-case-from-kansas>.

⁸ Although House Bill 1442 would allow an owner or lessee to rebut the presumption that he or she was driving at the time, the proposal would require the owner/lessee to accuse someone else of having been the driver, forcing the owner to effectively act as the prosecutor of a family member or friend.

⁹ Richard Diamond, "Stop the speed camera shakedown in Virginia," *The Washington Post* (March 15, 2019), https://www.washingtonpost.com/opinions/local-opinions/stop-the-speed-camera-shakedown-in-virginia/2019/03/15/7ef2fd60-4041-11e9-922c-64d6b7840b82_story.html.

¹⁰ *Id.*, citing Luke Broadwater and Scott Calvert, "Secret audit found city speed cameras had high error rates," *The Baltimore Sun* (Jan. 22, 2014), <https://www.baltimoresun.com/news/investigations/bs-md-ci-speed-camera-audit-20140122-story.html>.

fund other than the Literary Fund.”¹¹ The concerns relate to Va. Const. Art. VIII, § 8, which establishes the Literary Fund to benefit education, and further provides that “all fines collected for offenses committed against the Commonwealth” be set aside for the Fund.

House Bill 1442 raises the same problems the Governor identified last year. Instead of dedicating monies collected using photo speed monitoring systems to the Literary Fund, the proposed legislation would allow the localities and law enforcement agencies to collect and benefit from those funds.¹² The legislation further attempts to evade the requirements of Va. Const. Art. VII, § 8, by calling the fines imposed as a result of an offense detected using a photo speed monitoring system “civil penalties.” But the underlying offenses that are the basis for the so-called “civil penalties” are violations of Va. Code §§ 46.2-873 and 47.2-878.1, and each of those statutes provides that a violation is punishable by a “fine.”

The General Assembly cannot avoid the requirements of the fundamental law set forth in the Virginia Constitution by the expediency of changing the label on what is in substance a “fine” that should be dedicated to the Literary Fund.

House Bill 1442 Suffers From a Lack of Transparency

Although Virginia’s Constitution requires that all fines be dedicated to a fund for educational purposes,¹³ House Bill 1442 attempts to skirt this fundamental law by diverting fines to the localities and law enforcement agencies that operate photo speed monitoring programs. This constitutional problem was supposed to have been examined and the subject of a report prepared by the Secretary of Public Safety and Homeland Security for four committees of the General Assembly. Yet one searches in vain for any indication that such a report was prepared and presented as required by Gov. Northam’s statement regarding last year’s photo speed monitoring bill.

That the results of any investigations into this constitutional issue have not been made public raises an even more fundamental problem with the secretive manner in which this legislation has been pursued. Despite the significant effects this legislation will have on the daily lives of drivers within the Commonwealth, House Bill 1442 has been scarcely mentioned by members of the General Assembly.¹⁴ While it is not surprising that the General Assembly would keep quiet about legislation that has proved hugely unpopular around the nation but which would benefit private corporations and government coffers, this kind of stealth legislation is offensive to our democratic institutions.

¹¹ “Final (for now) Disposition of Virginia SB 1521 – a speed camera bill,” National Motorists Association Alerts, April 4, 2019, <https://www.motorists.org/alerts/final-for-now-disposition-of-virginia-sb-1521-a-speed-camera-bill/>.

¹² House Bill 1442, proposed Va. Code § 462.-882.1(B)(1).

¹³ Va. Const. Art. VII, § 8.

¹⁴ “Virginia House Passes Speed Camera Bill: Virginia House of Delegates quietly adopts legislation giving any jurisdiction in the state the authority to set up speed cameras,” *TheNewspaper.com* (Feb. 12, 2020), <https://www.thenewspaper.com/news/68/6888.asp>.

Indeed, the lack of any public statements regarding a report on photo speed monitoring legislation or the legislation is but one example of the total lack of transparency among all those involved in the lawmaking process regarding this proposal. Commentators have noted that both last year¹⁵ and this year, lawmakers have assiduously avoided mentioning the photo speed monitoring legislation as among legislation poised for enactment by the General Assembly.¹⁶

This is not surprising given that this kind of automated enforcement of speeding laws is highly unpopular with voters. As noted in one report, “[w]hen judged by votes cast at the ballot box, automated ticketing machines have proved unpopular throughout the country. In thirteen states, members of the public turned to the petition process to set up community votes to overturn the decisions of local politicians who signed deals with private companies to install the devices.”¹⁷

The manner in which Virginia lawmakers have advocated for photo speed monitoring through the lawmaking process is a disservice not only to the citizens they are supposed to represent, but to the democratic process. Legislating by “stealth” deprives citizens of their ability to participate in their government and to exercise their First Amendment right to petition their representatives. When citizens learn that laws having profound effects on their daily lives have been enacted in virtual secrecy, it only reinforces their distrust and resentment of government.

House Bill 1442 Would Extend the Surveillance State

House Bill 1442 will increase the ability of the government to monitor citizens and their movements, a power that has become frighteningly extensive. License plate readers already are posted on traffic lights throughout the Commonwealth, capturing virtually every vehicle license numbers that passes by. Based on this information, “it’s easy for the police or a repo company to pinpoint where you’ve been, what you do, and where you’ll be.”¹⁸

¹⁵ Richard Diamond, “Stop the speed camera shakedown in Virginia,” *The Washington Post* (March 15, 2019) (noting that the 2019 speed camera “plan was rushed through the legislative process so fast that there was no media coverage, news release or other announcement until after it was far too late for the public to weigh in.”) https://www.washingtonpost.com/opinions/local-opinions/stop-the-speed-camera-shakedown-in-virginia/2019/03/15/7ef2fd60-4041-11e9-922c-64d6b7840b82_story.html.

¹⁶ “Virginia House Passes Speed Camera Bill: Virginia House of Delegates quietly adopts legislation giving any jurisdiction in the state the authority to set up speed cameras,” *TheNewspaper.com* (Feb. 12, 2020), <https://www.thenewspaper.com/news/68/6888.asp>.

¹⁷ *Id.*; see also “List of Public Votes Against Red Light Cameras and Speed Cameras,” *The Newspaper.com* (Dec. 2019), <https://www.thenewspaper.com/news/36/3655.asp>.

¹⁸ Clifford Atiyeh, “License-Plate Readers Are Dealt a Blow in Virginia, but Privacy Is Still a Rare Commodity Nationwide,” *Car and Driver* (April 19, 2019), <https://www.caranddriver.com/news/a27059427/license-plate-readers-lpr-driver-privacy/>.

Additionally, thousands of high-tech cameras have been installed in public spaces throughout the country that can capture images of people as they walk down the street, lounge in a public park, or engage in any of the common activities of life.¹⁹ Using facial recognition technology and motor vehicle department databases of digital photographs, law enforcement agencies now have a comprehensive system for identifying and tracking people whenever and wherever they go out in public.²⁰

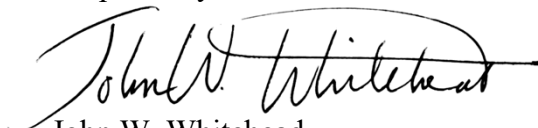
When combined with other technologies, we have come to the point that whenever you're walking through a store, driving your car, checking email, or talking to friends and family on the phone, it is likely that some government agency is tracking and monitoring your behavior.²¹ House Bill 1442 will further extend this pervasive and oppressive surveillance of citizens by the government.

Conclusion

In a rush to obtain revenue at taxpayer expense, House Bill 1442 upends bedrock legal principles that are meant to protect citizens accused of misconduct. This affront to traditional notions of fairness should not become law in a state that claims to be a functioning part of a constitutional republic.

We urge all Virginia lawmakers to prevent any further extension of the surveillance state that will result if photo speed monitoring systems are authorized. Enactment of any such program imposing fines procedures that are slanted in favor of the government and against the accused should occur only after a legislative process that has been fully transparent and subject to public scrutiny. Because that has not occurred here, the legislation must be rejected.

Respectfully,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John W. Whitehead
President

¹⁹ Sara Schwartz, "9 Ways You're Being Spied On Every Day," *HuffPost* (Dec. 6, 2017), https://www.huffpost.com/entry/government-surveillance_n_5084623.

²⁰ Nicole Martin, "The Major Concerns Around Facial Recognition Technology," *Forbes* (Sept. 25, 2019), <https://www.forbes.com/sites/nicolemartin1/2019/09/25/the-major-concerns-around-facial-recognition-technology/#1e751eb14fe3>.

²¹ John W. Whitehead, "Big Brother Is Still Watching You: Don't Fall for the NSA's Latest Ploy," The Rutherford Institute (May 1, 2017), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/big_brother_is_still_watching_you_u_dont_fall_for_the_nsas_latest_ploy.