

June 18, 2018

The Hon. Ralph Northam
Governor of Virginia
Office of the Governor
Patrick Henry Building, Third Floor
1111 E. Broad Street
Richmond, Va. 23219

Dear Gov. Northam:

I am writing on behalf of the American Civil Liberties Union of Virginia and its nearly 30,000 members in the Commonwealth on the topic of secrecy in Virginia's process of executions.



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As you may know, the ACLU of Virginia is firmly opposed to the death penalty for many reasons, not the least of which is that the government simply should not be in the business of killing people. While there may be reasoned disagreement on that issue, however, there should be no argument whether the government should be allowed to take such action – the most final, irreversible act a government can take – in secret. To the contrary, government should and must be required to administer the death penalty in a transparent process fully open to public view.

There are three key aspects of the death penalty in Virginia that currently are hidden from the public. In each case, you, as governor, can make changes to death row policies and procedures that would restore public oversight to the administration of the death penalty. These are:

- **You can direct the Department of Corrections (DOC) to make its “Execution Manual” available to the public.** The Execution Manual is an 18-page protocol for carrying out executions. While this is a public document available for disclosure under the Virginia Freedom of Information Act (FOIA), the DOC has never released a full copy of the protocol. The most recent version obtained by the ACLU of Virginia in February 2017 (solely because its release was mandated by a court in a pending case) includes 39 redactions, ranging from single words to entire paragraphs, making it impossible to discern certain action steps in the process or title and function of DOC staff responsible for doing them. The DOC's refusal to release this document unredacted means that not even those people whom the state intends to kill, nor their attorneys, are able to know and fully understand the process of execution the DOC uses.
- **You can require the DOC to follow procedures that ensure that witnesses who are required by law to be present as stand-ins for the public can view the entire**



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procedure from its start to its deadly end. Virginia's death penalty statute requires that, in addition to DOC staff including the director and a physician, at least six witnesses who are not DOC employees be present to observe each execution. Traditionally, these are in addition to members of the victim's family, members of law enforcement or prosecutors who worked on the case, representatives of the news media, and attorneys for the person being put to death. Yet, the DOC's "Execution Manual" includes procedures that are designed to obscure critical parts of the process from the view of the witnesses the law requires. Specifically, the manual states that, prior to bringing the person about to be killed into the chamber, "The curtains to the Witness Room and Non-contact Visiting Room will be in the closed position. The Non-contact Visiting Room entrance hall window blinds will be in the closed position. The Execution Chamber microphone will be turned off." The manual then outlines five activities to be done while the curtain is closed; however, these are heavily redacted in the ACLU of Virginia's copy of the manual. Following completion of those activities, the manual calls for the curtain to be drawn back so witnesses can see the rest of the execution, and the chamber microphone is turned back on. The time when the person about to be killed is brought into the chamber is of critical importance, because that is the only opportunity for the public to observe the inmate's condition, e.g., whether he is malnourished, bruised, scarred, ambulatory, aware of his surroundings, heavily medicated, etc. Essentially, witnesses are deprived of the ability to confirm that the inmate has not been maltreated prior to execution, as well as being able to witness the setting of IVs. In fact, media witnesses to an execution under the current restricted-viewing protocol noted that they could not even confirm that the person laying in the execution table was, in fact, the person to be executed.

- **You can advocate for repeal of legislation that prohibits the DOC from making public information about the drugs used in lethal injections and their sources.** Based on the Virginia Department of Corrections' unsubstantiated claims that it could not otherwise obtain chemicals for use in executions, the state legislature in 2016 approved an end-around proposed by then-Gov. Terry McAuliffe. That law allows the director of the DOC to enter into contracts with compounding pharmacies to manufacture drugs for the sole purpose of killing people in the name of the state. It also requires that the identities of those pharmacies and everyone who works for them be held in secret and not disclosed publicly, even as part of discovery or evidence in a civil lawsuit except in restricted circumstances. Not only that, the law specifically excludes the manufacturing of those drugs from oversight or regulation by

the state Board of Pharmacy, the Board of Medicine and the Board of Health Professions. With neither transparency nor oversight, there is no way for the public to be assured of the integrity of pharmacies with which the state has contracted, including whether they have ever been sued or disciplined for malpractice.

We raise these issues today not because we believe the death penalty is inhumane torture and needs to be abolished in Virginia, which we do. We do so because we believe that, if a government is going to continue to be allowed to engage in state-sanctioned killing, it must be held accountable to the public for every aspect of the process.



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Accordingly, we would urge you to direct the DOC to revise its execution protocols immediately to conform fully to standards of the American Bar Association's (ABA) Death Penalty Representation Project before any additional executions are carried out. The ABA's 2015 Execution Transparency Resolution reads:

RESOLVED, That the American Bar Association urges federal, state, and territorial legislative bodies and governmental agencies, including departments of corrections, and the military that impose or implement capital punishment, to:

- (1) promulgate execution protocols in an open and transparent manner and allow public comment prior to final adoption; and,
- (2) require disclosure to the public, to condemned prisoners facing execution, and to courts all relevant information regarding execution procedures, including but not limited to:
 - a. the steps to be followed in preparation for, during, and after an execution,
 - b. the qualifications and background of execution team members, and
 - c. details about any drugs to be used, including the names, manufacturers or suppliers, doses, expiration date(s), and testing results concerning use of the drugs.
- (3) require that an execution process, including the process of setting IVs, be viewable by media and other witnesses from the moment the condemned prisoner enters the execution chamber until the prisoner is declared dead or the execution is called off;
- (4) create and maintain contemporaneous records of what transpires during the execution, including but not limited to the drugs administered, the timing of administration, and any complications, errors or unanticipated events;

(5) disclose the entirety of records and logs on the execution process upon order of the court or as otherwise required in discovery or by law upon request of a death-sentenced prisoner, the prisoner's counsel, or successors; and,

(6) provide an immediate, thorough, and independent review of any execution where the condemned prisoner struggles or appears to suffer, where the execution is otherwise prolonged, or where the execution deviates from the adopted protocols and regulations concerning the execution process.

We urge you to act with dispatch to ensure that Virginia's protocols for administering the death penalty exemplify the highest standards of transparency and accountability. Your failure to act would confirm that, only by keeping the process shrouded in secrecy, you and your administration can avoid the opprobrium, shame and public condemnation that would come with greater public awareness of the inhumanity and cruelty of each execution. It is time to open wide rather than close the curtains on these public killings.

Finally, as an empathetic human being and a physician bound by an oath to do no harm, we respectfully request that you lead a re-examination of Virginia's gruesome past and present regarding the death penalty and join us in advocating for its repeal.

Very truly yours,



Claire Guthrie Gastañaga
Executive Director

Enclosure: American Bar Association Death Penalty Representation
Project 2015 Execution Transparency Resolution

cc: Mr. Clark Mercer, Chief of Staff to the Governor
Mr. Brian Coy, Press Secretary to the Governor
The Hon. Brian Moran, Secretary of Public Safety & Homeland
Security
Mr. Harold Clarke, Director, Virginia Department of
Corrections



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