

Terry McAuliffe, Governor of Virginia

July 17, 2017

Dear Governor McAuliffe:

We write to express concerns over the outsized and militaristic governmental response to those who chose to peacefully exercise their First Amendment rights to assemble in public and engage in peaceful, nonviolent protests. We understand that the issues we bring to your attention are difficult ones, but we hope to prompt a productive dialogue about the role of law enforcement in maintaining community safety and protecting constitutional rights.

On July 8th, the Loyal White Knights of the Ku Klux Klan traveled more than 100 miles to Charlottesville to hold a demonstration in support of the City's confederate monuments. Much to their credit, Charlottesville officials acknowledged that the First Amendment required the issuance of the permit for the Klan's demonstration, while expressing the City's unified opposition to racism, violence and intimidation.

Yet, when many residents of the Charlottesville community chose to voice their strong opposition to the Klan's message of racism and white supremacy by confronting them in Justice Park, they were met with a highly militarized law enforcement presence who, prior to any clear and present danger of violence, descended on the scene dressed in riot gear, driving armored vehicles, and carrying weapons typically used only in war zones. This aggressive display by state and local law enforcement did little to effectively deescalate the tensions between the community and the Klan and implied that the police were not there simply to protect civil liberties and maintain order. Rather, by outfitting, arming, and organizing themselves the way they did from the outset, law enforcement may have played a role in provoking the unrest that ensued, and certainly made those demonstrating against the Klan feel like enemies of the state.

It is our understanding that this militarized force included a large and heavily-armed contingent of Virginia State Police.

As civil rights advocates have long observed, "Peaceful protest is democracy in action... Protesters should not have to face intimidation by weapons of war."¹ Law enforcement's oppositional stance on July 8th led to physical confrontation, numerous arrests, and obstructed the First Amendment rights of those counter-demonstrators. Though Charlottesville officials may have preferred that counter-demonstrators not directly face the Klan, it was their constitutional right to do so. And just as the Constitution protects the free speech rights of the Klan, it also obliges law enforcement to refrain from tactics that intimidate and chill non-violent counter-protest, even when the target of protest is law enforcement itself.

¹ See, e.g., <https://www.usatoday.com/story/opinion/policing/2016/08/25/right-protest-also-means-freedom-militarized-police-column/89365026/>

We appreciate the Commonwealth's strong interest in maintaining the safety of its residents and visitors. We also appreciate that planning went into both the rally in the park and the organized alternative activities. And we commend any effort to manage the crowd and successfully defuse tensions during the day, particularly during the presence of the Klan. However, we have deep concerns, based on the information available to the public so far, about the overall strategy, tactics and rules of engagement employed by law enforcement on that day.

Accordingly, we write to ask you as the Chief Executive Officer of the Commonwealth to:

- i) acknowledge that the deliberate choice to use warzone tactics on July 8th—instead of planning for de-escalation—is inconsistent with the Commonwealth's values and good policing;
- ii) authorize and initiate an independent investigation into the actions of state law enforcement agencies before, during and after the permitted demonstration on July 8th to determine whether any actions were unlawful; and
- iii) ensure accountability for any unlawful tactics used by the Virginia State Police (VSP).

We also strongly encourage you to direct the Commonwealth's law enforcement agencies to work with City officials and the public to articulate a plan for the August 12th "Unite the Right" rally that will seek to de-escalate tensions and respects the free speech rights of protestors and counter-protestors alike.

We will first address what we believe are three major issues with law enforcement actions on July 8th:

1. Police force was oversized and over-militarized: "We don't see no riot here, why are you in riot gear?"

These were the words chanted by peaceful protesters in response to the outsized and intimidating presence of law enforcement that remained on the scene even after the Klan safely left the downtown area. The militarized, aggressive law enforcement presence of July 8th escalated tensions of an already volatile situation, making everyone less safe and discouraging citizens from exercising their First Amendment rights to assemble and demonstrate in public.²

A militarized police response to protesters creates dangers for all those involved, protesters and police alike. In fact, militarization makes police more likely to turn to violence to solve problems.³ As a recent Stanford University study makes clear, "When law enforcement receives more military materials — weapons, vehicles and tools — it becomes ... more likely to jump into high-risk

² As did law enforcement visits to counter demonstrators' homes prior to the rally to question them on their plans.

³ <https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/30/does-military-equipment-lead-police-officers-to-be-more-violent-we-did-the-research/>

situations. Militarization makes every problem — even a car of teenagers driving away from a party — look like a nail that should be hit with an AR-15 hammer.”⁴

Nevertheless, with substantial assistance from the VSP, the CPD organized a show of force that appeared to be premised on intimidation, rather than de-escalation. Beginning hours before the permitted rally began and continuing throughout the day, the law enforcement presence at Justice Park included VSP officers in full riot gear, with multiple armored vehicles, pepper-spray projectile weapons, tear gas canisters, and visible semi-automatic weapons (AR-15). In addition, although it is unclear whether deployed by law enforcement, there were drones,⁵ helicopters, and surveillance cameras evident in the area of the permitted demonstration and the counter protests.⁶ Despite the lack of any widespread physical confrontation during the Klan rally, this heavy-handed demonstration of force did not end upon the exit of the Klan. Given the focus of the crowd on the police response after the Klan left, it seems likely that had the militarized police force left with the Klan—leaving in place only local police in regular duty uniform—the crowd would have dissipated as well over time and without incident.

It appears to us that this oppositional and aggressive style of policing exacerbated an already difficult circumstance, and led to several avoidable incidents, such as mass arrests, which occurred only after the permitted rally had ended and the Ku Klux Klan had safely left the area. Furthermore, numerous allegations of excessive force by law enforcement and resulting injuries have surfaced. Regardless of whether some protesters voiced anti-police viewpoints, the law has recognized that when properly trained, police officers are expected to exercise greater restraint in their responses than the average citizen when confronted with what might otherwise be “fighting words.”⁷

The Virginia State Police should strive to be a leader in common-sense, humane policing. There are far better models that should have and must be followed in situations like those that arose on July 8th. For instance, in 2011, St. Louis police employed a passive response to Occupy St. Louis activists. Police gave protesters nearly 36 hours’ notice to clear the area. When the police arrived to clear the streets, they did not show up in riot gear and helmets; they appeared in short sleeves with their faces showing, carrying standard, non-military weapons, which were securely holstered. They politely asked which demonstrators intended to be arrested, lined them up, and escorted them away. The rest were advised where they could continue to protest.⁸

⁴ *Id.*

⁵ If drones were deployed by CPD or the VSP without a warrant, it would appear under the circumstances as we know them that such deployment would be in violation of Virginia law. See <http://law.lis.virginia.gov/vacode/title19.2/chapter5/section19.2-60.1/>

⁶ If any of these technologies were equipped with cell site simulators or similar technology, it would appear that use of such technologies in the absence of a warrant would violate Virginia law. See <http://law.lis.virginia.gov/vacode/19.2-70.3>

⁷ *Marttila v. City of Lynchburg*, 33 Va. App. 592, 535 S.E.2d 693 (2000)

⁸ <http://www.forbes.com/sites/erikkain/2011/12/08/how-to-break-up-a-peaceful-protest-peacefully/>

As *Forbes* concluded, “This is a more humane, less costly, and ultimately more productive way to handle a protest. This is great proof that police can do it the old-fashioned way—using their brains and common sense instead of tanks, SWAT teams, and pepper spray—and have better results.”⁹

It can be done.

2. *Declaration of “Unlawful Assemblies”*

We are also troubled by law enforcement's reliance on what has also been called the anti-riot statute to justify its actions related to mass arrests. One need not have a permit to exercise his or her First Amendment right to assemble for the purpose of expression.¹⁰ However, an assembly can become unlawful if the threat of violence is so near that one fears for the public's safety. For an assembly to be unlawful under the law, there must be a finding of “clear and present danger of violent conduct.” *Owens. v. Com.*, 211 Va. 633, 636-38 (Va. 1971). It is not sufficient that there be an intention to “disturb the peace” or “excite public alarm” or “disorder”—there must be a clear and present danger of violent conduct. *Id.*

On a number of occasions, local and/or state law enforcement officials declared gatherings of people to be “unlawful assemblies,” and threatened arrest for failure to disperse. Many of these declarations occurred after the Klan had safely exited the area. There was no variation in instruction. People were not told where to move to or how to remain peacefully assembled. Officers read the unlawful assembly declaration over megaphones (“This gathering has been declared an unlawful assembly. In the name of the Commonwealth, you are ordered to immediately disperse. If you do not disperse immediately, you will be arrested.”) without further guidance. Sometimes no arrests followed at all; other times arrests did not proceed until sometime later, seemingly at random and without additional warning.

In a number of instances on July 8th, people exercising their First Amendment rights were ordered to disperse despite the lack of any evidence that three or more people shared an intent to advance some purpose by the use of unlawful force or violence, which was clear and present. We are deeply concerned that the threat to arrest under these circumstances may not only be a direct violation of the First Amendment, but also serves to chill the exercise of free speech rights by others.

3. *The use of tear gas*

We have serious questions about whether the use of chemical agents to clear the streets was a justified use of force.

⁹ <https://www.forbes.com/sites/erikkain/2011/12/08/how-to-break-up-a-peaceful-protest-peacefully/>

¹⁰ There are several types of forums, including the traditional public forum: “places [such as in this case] which by long tradition or by government fiat have been devoted to assembly and debate,” such as streets and parks. *See Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch.*, 457 F.3d 376, 381 (2006) (internal citations and quotations omitted). In this forum, “the rights of the State to limit expressive activity are sharply circumscribed; the state may only enact content-neutral “time, place, and manner” restrictions or content-based rules that are necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Id.*

Around 5:00pm, three tear gas grenades were deployed in front of Juvenile & Domestic Relations Court on East High Street. The canisters appear to have been deployed by Virginia State Police, though the CPD has taken responsibility for giving the order. Immediately before the tear gas was fired, photo and video evidence show demonstrators on High Street standing a good distance away from the line of riot police, with their backs turned and in peaceful assembly. Whether or not the police properly declared the assemblies to be unlawful, we are highly concerned about the use of chemical agents to facilitate the dispersal of demonstrators, particularly those who showed no sign of posing an immediate threat.

Further, three people were charged with wearing masks in violation of Virginia Code § 18.2-422 (a Class 6 felony), for protecting their faces after tear gas had been deployed. These charges are deeply ironic considering that the original purpose of the law was to combat Klan violence that was often committed under cover of hoods and masks.¹¹

The use of tear gas and such aggressive charges also serve to chill First Amendment activity and discourage Charlottesville residents and the broader community from participating in future demonstrations that may be perceived as contentious.

Conclusion

We call on you, as Governor, to take the following steps to investigate the events of July 8th and prepare for the permitted August 12 “Unite the Right” rally:

1. Authorize and initiate an independent investigation of the events of July 8th, including allegations of violence by law enforcement against civilians. Such an investigation should not be conducted by those local or state agencies participating in the law enforcement response on that day, should include multiple opportunities for public input, and should further address such topics as:
 - a. Why/Who requested the Virginia State Police? On what terms were they requested? What conversation was there about the show of force requested?
 - b. Whose police officers were dressed in riot gear and why were those officers sent to the area?
 - c. Who declared Saturday’s counter protest an “unlawful assembly,” and why? What factors about the counter protest warranted this declaration?
 - d. Who ordered the deployment of tear gas and what was the reason for that decision?
2. Commit, if invited to participate in providing security for the August 12th “Unite the Right” rally, to plan for de-escalation of tension and the least aggressive means for maintaining safety. Commit to a clearly articulated plan for August 12th that protects the rights of

¹¹ Note, *Klan, Cloth & Constitution: Anti-Mask Laws & the First Amendment*, 25 Ga.L.Rev. 819 (1991); Rey, *Antimask Laws: Exploring the Outer Bounds of Protected Speech Under the First Amendment State v. Miller*, 260 GA. 669, 398 S.E.2d 547 (1990), 66 Wash.L.Rev. 1139 (1990). In fact, one or more legal observers witnessed a Klan member in violation of this ordinance, and rather than arresting him, a law enforcement officer simply asked him to remove the white hood.

counter-demonstrators and provides detailed de-escalation procedures for law enforcement.

We call on you to direct any state law enforcement agency invited to assist on August 12th to de-escalate tense situations, employ non-confrontational tactics, and refrain from actions that intimidate people participating in First Amendment activities in a public forum. We see a commitment to de-escalation and non-confrontation on the part of the police as a foundational principle of rule by consent, not rule by fear. This is an opportunity for the Commonwealth to show the country the kind of state we strive to be—one where free speech of all people is protected.

We look forward to working with you to ensure that First Amendment rights are fully respected on August 12th and beyond.

Sincerely,



Mary Bauer
Legal Aid Justice Center



John Whitehead
The Rutherford Institute



Claire Guthrie Gastanaga
ACLU of Virginia



Andrew Mahler
National Lawyers Guild Central Virginia Chapter

cc: Brian Moran, Virginia Secretary of Public Safety
Colonel W. Steven Flaherty, Virginia State Police Superintendent
Mark Herring, Attorney General of Virginia
Michael Westfall, Acting State Inspector General
Mike Signer, Mayor for the City of Charlottesville
Wes Bellamy, Vice-Mayor for the City of Charlottesville
Kristin Szakos, Charlottesville City Council
Kathy Galvin, Charlottesville City Council
Bob Fenwick, Charlottesville City Council
Maurice Jones, Charlottesville City Manager
Al S. Thomas Jr., Charlottesville Chief of Police
Sheriff J.E. “Chip” Harding, Albemarle County Sheriff
Warner D. “Dave” Chapman, Commonwealth’s Attorney for the City of Charlottesville
Robert Niera Tracci, Albemarle Commonwealth’s Attorney for the County of Albemarle