



TO: House Policy and Legislative Oversight Committee  
FROM: Mike Brickner, Senior Policy Director, ACLU of Ohio  
DATE: November 18, 2014  
RE: House Bill 663

To Chairman Dovilla, Vice Chair Buchy, Ranking Minority Member Gerberry, and members of the House Policy and Legislative Oversight Committee, my name is Mike Brickner, Senior Policy Director for the American Civil Liberties Union of Ohio ("ACLU of Ohio") and I appear to present opponent testimony on House Bill 663.

The public's right to know is critical to ensure that our government works. Transparency and accountability protect against corruption, abuse, negligence, and incompetence. The death penalty is the most severe punishment that may be administered. Given the gravity of an execution, the public must have access to information about how lethal injections are conducted and assurance that they conform to our Constitution and basic standards of human rights. The US Supreme Court has found the death penalty itself to be constitutional – any potential constitutional issue would be in the application and implementation of this extreme and final punishment, which is at the heart of the procedures impacted by this legislation. HB 663 would make such critical knowledge and assurance impossible, and instead would cloak Ohio's death penalty in dangerous secrecy.

Everyone is well aware that Ohio's lethal injections have been riddled with problems. Since 2006, the state has conducted four appallingly botched executions. These persistent problems have left many in the public deeply concerned with how executions are conducted. Secrecy will only increase the public's distrust of lethal injections, as it will inevitably lead to new troubles. Whenever the government operates in the shadows, problems follow.

This is especially true given the likely sources of the drugs that the Ohio Department of Rehabilitation and Corrections (ODRC) will use. Compounding pharmacies are substantially unregulated by the Food & Drug Administration. The drugs they create are made in small batches, and due to the lack of regulation and standardization, batches may be more or less potent. As a result, drugs in one batch may work well, while the next batch is inadequate. In the context of lethal injections, there is a considerable risk that unregulated drugs will lead to more botched executions. Without proper oversight of these drug companies by the public, media, government watchdogs, and the courts, it will be a matter of when, not if, yet another botched execution happens.

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The ramifications of the extreme secrecy imposed by HB 663 go much farther than simply keeping out the public. The secrecy also undermines the due process rights of condemned prisoners and ties the hands of the courts that would hear legal challenges to lethal injection protocols. The proposed legislation would prevent courts from ever adequately assessing an execution because it would prevent even the most basic discovery request for information or deposition of anyone with knowledge. HB 663's infringements upon the Constitutional powers of the judicial branch of government, and upon the rights of the condemned, are so severe that, if the legislature persists in enacting this bill, it will very likely be challenged on these bases in court, at significant cost to the state.

Another extreme and legally questionable provision of HB 663 is its attempted interference with private corporations' ability to enter into contracts and control their own products. HB 663 declares void any contract, whether foreign or domestic, that prevents the state from obtaining execution drugs. This is in response to several drug manufacturers, mostly based in Europe, that have consciously chosen to not sell their products to state Departments of Correction because the death penalty either violates their ethics or the local laws of their nation. But the Contracts Clause of the federal Constitution will not permit a state to impair existing contractual obligations, and the federal Commerce Clause provides that only the federal government can impose regulations on interstate and foreign commerce. Ohio would be overreaching its Constitutional power if it attempts to interfere with existing contracts, with interstate commerce, and with international commerce.

Finally, HB 663 inappropriately infringes upon professional codes of conduct for medical professionals. The proposed legislation provides blanket professional immunity and anonymity for those individuals who participate in executions. Professional organizations that license doctors, pharmacists, and nurses are best positioned to determine whether a colleague has violated his or her oath or ethics, yet HB 663 takes this ability away from them.

Whether a person agrees with the death penalty should not matter in regards to HB 663. If we are to have a death penalty, we must ensure that it complies with the rule of law and basic human standards of decency. HB 663 makes this nearly impossible by eliminating all accountability and transparency in the lethal injection process. For those who support the death penalty, secrecy will, ironically, only corrode any public trust that executions are conducted properly. And this distrustfulness will only be exasperated by the rapid manner in which this bill is being ushered through the legislature with little public dialogue on this critical issue.

As always, if the ACLU of Ohio can be of further assistance please let us know. We expect to follow this bill closely, and welcome any questions from legislators on this issue.