

**Testimony Submitted to the
Nebraska Unicameral Legislature
Judiciary Committee**

**Hearings on LB 238 – A Bill Relating to
Witnessing Executions**

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Mr. Chairman, Members of the Committee: I want to thank Senator Pansing Brooks and the Committee for providing me this opportunity to testify regarding Legislative Bill 238, regarding proposed changes in Nebraska's provisions relating to witnessing executions.

My name is Robert Dunham. I am the Executive Director of the Death Penalty Information Center.¹ We are a national non-profit organization that provides information and analysis on issues related to capital punishment in the United States. The Center does not take a position for or against the death penalty, though we have been critical of the way it is administered. We serve as a resource for those who are interested in capital punishment.²

One of the issues we have been following closely is transparency — or, more accurately, the lack of transparency — in the execution process in the United States. On November 20th, we published a major report on execution secrecy entitled, [*Behind the Curtain: Secrecy and the Death Penalty in the United States*](#). For your reference, I have provided each member of the Committee a copy of the report and will submit a copy along with my testimony. That report explains in depth why transparency in executions is so important — not just as a vital principle of our democracy, but as a guarantor of good governance.

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² Our website is one of the most widely used by those seeking information on the death penalty. The Library of Congress has chosen it as part of its archive on this issue. Justices of the United States Supreme Court and state supreme courts have cited the website as an authoritative source of death penalty information.

In preparing the report, we found that since January 2011, legislatures in thirteen states have enacted new secrecy statutes that conceal vital information about the execution process. Of the seventeen states that carried out 246 lethal-injection executions between January 1, 2011 and August 31, 2018, all withheld at least some information about the execution process. Fourteen states prevented witnesses from seeing at least some part of the execution. Fifteen prevented witnesses from hearing what was happening inside the execution chamber. None of the seventeen allowed witnesses to know when each of the drugs was administered.

This retreat into secrecy has occurred at the same time that states have conducted some of the most problematic executions in American history. States moved to lethal injection from more overtly violent methods of execution in an effort to make the execution process more humane. But instead, there have been frequent reports of prisoners who were still awake and apparently experiencing suffocation and excruciating pain after they were supposed to be insensate. These problems have intensified with the use of new drug formulas, with numerous eyewitness reports of an execution gone amiss, with problems ranging from labored breathing to gasping, heaving, writhing, and clenched fists. And the state's responses to these problems has undermined public confidence in capital punishment and in whether states can be trusted to competently carry it out.

In a number of recent executions — including the execution of Carey Dean Moore last August here in Nebraska — state officials denied that the execution

was problematic, asserting that all had proceeded according to protocol. In some of these cases, what neutral witnesses observed exposed some of the representations by corrections officials as verifiably false. Coupled with persistent questions about government misconduct and ineptitude in secret government efforts to obtain execution drugs, the misrepresentations about things eyewitnesses could see for themselves raised additional serious questions about what had occurred in portions of the execution process that witnesses were unable to observe.

Now, Nebraska has had its share of questionable conduct in trying to obtain execution drugs, and while that is not the subject of LB 238, it underscores the need for transparency and accountability in the execution process. The state's drug procurement efforts have run the gamut from plainly illegal to comically inept. And they underscore that "Trust me, I'm the government" is not an acceptable substitute for public oversight.

And in some respects, the Carey Dean Moore execution only made things worse. Nobody drops the curtain so that you cannot see the moments when the prisoner dies. That's why you have witnesses, so they can see and report what happens. Because of secrecy, there are unnecessary lingering doubts about what happened during Mr. Moore's execution. How long was Mr. Moore's face discolored before he died? When, after the curtain dropped, did the discoloration change? Did it intensify further and then dissipate?

Don't get me wrong. I'm not saying and do not mean to imply that Secretary Frakes or anyone in the Department of Corrections deliberately misled the public when they said that there was no indication that anything went wrong during Carey Dean Moore's execution. What I'm saying is that lack of transparency makes it impossible to know whether they were right.

I'm also not saying you should disregard what corrections officials say they saw. Their observations are certainly relevant, but they are hardly disinterested parties. Relying solely on their observations, when they have a vested interest in the outcome of an execution and a cognitive bias that may affect how they process what they are seeing, is problematic. That problem, of course, is easily rectified — and LB 238 does so. Let the public and press witness the execution from start to finish. Across the country, there have been problems setting the IV after the prisoner enters the execution chamber. There have been questions about whether a prisoner is gasping, gurgling, sucking for air in the throes of air hunger or snoring. There are questions about the timing and significance of facial discoloration. Was the prisoner spasming in response to the drugs? There have been botched executions that had to be called off after they had begun. That is why good public oversight requires what LB 238 does, mandating that witnesses be able to observe the execution process “from the moment the convicted person enters the execution chamber until the convicted person is declared dead or the execution is halted.”

Good governments embrace the type of oversight that LB 238 would mandate. A democracy of the people, by the people, and for the people requires

open and transparent government. When a state drops a curtain that conceals critical information from the public regarding the most serious criminal sanction it permits, it dishonors these core democratic values.

It is impossible to know whether current execution practices comport with the public's evolving standards of decency if critical portions of executions are kept secret. Instead of concealing execution information from the public, Nebraska should act openly and transparently so that its citizens, legislators, and judges know the facts and can make more fully informed judgments about the death penalty.

Thank you for your time.