

February 15, 2021

Joe Damico
Director of the Department of General Services
100 Bank St., Suite 420
Richmond, VA 23219

RE: Fencing at Lee Monument

Dear Mr. Damico:



701 E. Franklin Street
Suite 1412
(804) 644-8022
Richmond VA 23219
acluva.org

Claire G. Gastañaga
Executive Director
Direct Dial: 804-523-2146
Email: claire@acluva.org

On January 25, 2021, the Department of General Services installed an eight-foot fence around the Robert E. Lee Monument, on Monument Avenue in Richmond, Virginia. According to the Department's spokesperson, this fencing was erected "to ensure the safety of visitors and workers as part of DGS's plan to prepare the site for the removal of the Lee statue."

As you know, the removal of the Lee Monument is far from imminent. After Governor Ralph Northam ordered the statue removed from state property, Circuit Judge W. Reilly Marchant ruled in his favor, but placed an injunction against the statue coming down so residents could appeal the decision. A small group of residents did, in fact, file an appeal last month with the Supreme Court of Virginia. Even if Governor Northam is ultimately successful at the Supreme Court of Virginia, these residents have already pledged to appeal to the United States Supreme Court. While the outcome of this litigation is far from clear, one thing is certain: the Lee Monument is not coming down anytime soon.

The ACLU of Virginia has significant concerns that the fencing erected around the Lee Monument grounds is unnecessarily infringing on the public's First Amendment rights while these legal battles play out in the courtroom. The Lee Monument is a traditional public forum and access is protected under the First Amendment to the United States Constitution. The 4th Circuit has stated, "Traditional public forums—such as streets, sidewalks, and parks—have the characteristics of a public thoroughfare, a purpose that is compatible with expressive conduct, as well as a tradition and history of being used for expressive public conduct." *Davison v. Randall*, 912 F.3d 666, 681-82 (4th Cir. 2019).

The Lee Monument has always been used as a public park and a public gathering space which has routinely held large events including protests, rallies, Easter Parades, and live music events. In the aftermath of George Floyd's murder, the grounds surrounding the Monument have become a national icon of racial reckoning. Case law points to parks as paradigmatic

traditional public forums, and this location in Richmond has served and continues to serve as a locus of community engagement. The state conceded as much when it put in place a process to permit such expressive activity. (1VAC30-150-10 - 1VAC30-150-50).

The U.S. Supreme Court held that the destruction of public forum status is presumptively impermissible. “Traditional public forum property occupies a special position in terms of First Amendment.” *United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983). The fencing around the Lee Monument completely blocks the public’s access and thus, destroys the public forum status of the property. While we understand the need to protect the safety of visitors and workers during the statue’s removal, the grounds surrounding the Lee Monument must continue to operate as a public forum until such time as the removal is imminent.

We ask that you promptly address these concerns by removing the fencing surrounding the Lee Monument until the litigation surrounding its removal is resolved and providing assurances the grounds will continue to serve as a protected space for people who seek to use the area for expressive activities. We welcome the opportunity to speak with you to discuss this issue further. I can be reached at (804) 523-2146 or claire@acluva.org. Thank you for your attention to this matter.



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Virginia

701 E. Franklin Street
Suite 1412
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Richmond VA 23219
acluva.org

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Executive Director
Direct Dial: 804-523-2146
Email: claire@acluva.org

Very truly yours,

A handwritten signature in blue ink, appearing to read "Claire G. Gastañaga", is written over a light blue circular watermark.

Claire G. Gastañaga
Executive Director