



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION  
GEORGETOWN UNIVERSITY LAW CENTER

**VIA EMAIL**

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Shelby Rognstad  
Mayor  
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June 19, 2020

**Re: Private Paramilitary Activity in Bonner County**

Dear Commissioner McDonald and Mayor Rognstad:

I am the Legal Director of Georgetown University Law Center's Institute for Constitutional Advocacy and Protection (ICAP). At ICAP, our mission is to defend American constitutional rights and values in and out of court. Over the past several years, as a result of successful litigation we brought against militia organizations that participated in the Unite the Right rally in Charlottesville, Virginia, we have developed an expertise in the regulation of public protests in a manner that protects public safety while respecting individuals' constitutional rights.

I am writing because we understand that self-styled private militia members showed up at a recent Black Lives Matter protest in Sandpoint in response to a request from Commissioner McDonald.<sup>1</sup> This protest reportedly consisted primarily of high school students and other young people marching peacefully.<sup>2</sup> They were tailed by a group of heavily armed men, who then made their way downtown to "patrol" the streets that night.<sup>3</sup> According to news reports, the militia members' presence "scared" some protesters and their parents, and "several citizens

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<sup>1</sup> Kip Hill & Chad Sokol, *Armed presence in North Idaho towns questioned by some politicians, business owners*, The Spokesman-Review (June 5, 2020), <https://www.spokesman.com/stories/2020/jun/04/armed-presence-in-north-idaho-downtowns-questioned/>; Isaac Stanley-Becker, *As protests spread to small-town America, militia groups respond with armed intimidation and online threats*, Washington Post (June 18, 2020), [https://www.washingtonpost.com/national/as-protests-spread-to-small-town-america-militia-groups-respond-with-online-threats-and-armed-intimidation/2020/06/18/75c4655e-b0a1-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/national/as-protests-spread-to-small-town-america-militia-groups-respond-with-online-threats-and-armed-intimidation/2020/06/18/75c4655e-b0a1-11ea-8f56-63f38c990077_story.html).

<sup>2</sup> Zach Hagadone, *Area youths protest George Floyd killing*, The Sandpoint Reader (June 4, 2020), <https://sandpointreader.com/area-youths-protest-george-floyd-killing/>.

<sup>3</sup> *Id.*

expressed their distress at being confronted with heavily armed people . . . when they visited downtown.”<sup>4</sup>

The militia members’ conduct in Sandpoint appears to have violated Idaho law, as discussed below. We wanted to call this to your attention in light of Commissioner McDonald’s express request to the militia members to attend the protest, what appears to be Commissioner McDonald’s continued solicitation on Facebook of militia members to attend additional protests, and the suggestion by some Idaho officials that no state law prohibits such conduct.<sup>5</sup> In addition, the potential remains for future confrontations between protesters and armed militia members as protest activity continues. As you know, such confrontations can lead to tension, the chilling of constitutionally protected speech and assembly, and, in some cases, violence and destruction of property.

As you may be aware, several provisions of Idaho law prohibit private paramilitary activity. In particular, the Idaho Constitution’s Strict Subordination Clause forbids private military units from operating outside state authority, providing that “[t]he military shall be subordinate to the civil power.” Idaho Const. art. I, § 12. Moreover, Idaho’s statute prohibiting “unorganized associations” from engaging in paramilitary activity states, “[n]o body of men, other than the regularly organized national guard, the unorganized militia when called into service of the state, or of the United States . . . shall associate themselves together as a military company or organization, or parade in public with firearms in any city or town of this state.” Idaho Code § 46-802. The Supreme Court has long recognized that such laws are constitutional and do not violate the Second Amendment.<sup>6</sup>

Other provisions of Idaho law make clear that the Governor of Idaho, as commander-in-chief, is the state official who has the authority to call the unorganized militia into active service. Idaho Code § 46-106 (“Whenever the governor as commander-in-chief, shall call into the active service of the state the unorganized militia or any part thereof, it shall be organized into such units and shall be armed and equipped in such manner as the governor in his discretion shall deem proper. The officers thereof, shall be appointed and commissioned by the governor under such rules and regulations as he may deem expedient to promulgate.”); *see also* Idaho Code § 46-110 (“The governor of the state by virtue of his office, shall be commander-in-chief of the national guard, except of such thereof, as may be at times in the service of the United States.”). Accordingly, private militias have no authority to deploy to engage in law enforcement or military functions outside of these carefully circumscribed laws, and no official other than the governor has authority to call into service private militias (or what the statutes refer to as the “unorganized militia”).

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<sup>4</sup> *Id.*; *see also* Mayor Shelby Rognstad, Facebook (June 3, 2020) (“None of the young protesters I spoke with felt any safer in the presence of these armed vigilantes. Rather, they felt scared, intimidated and in some cases harassed. None of the downtown business owners I have since spoken to felt any safer from the militant presence.”), [https://www.facebook.com/electshelby/posts/3169835166370944?\\_\\_tn\\_\\_=K-R](https://www.facebook.com/electshelby/posts/3169835166370944?__tn__=K-R).

<sup>5</sup> *See* Isaac Stanley-Becker, *As protests spread to small-town America, militia groups respond with armed intimidation and online threats*, Washington Post (June 18, 2020), [https://www.washingtonpost.com/national/as-protests-spread-to-small-town-america-militia-groups-respond-with-online-threats-and-armed-intimidation/2020/06/18/75c4655e-b0a1-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/national/as-protests-spread-to-small-town-america-militia-groups-respond-with-online-threats-and-armed-intimidation/2020/06/18/75c4655e-b0a1-11ea-8f56-63f38c990077_story.html).

<sup>6</sup> *See District of Columbia v. Heller*, 554 U.S. 570, 620 (2008); *Presser v. Illinois*, 116 U.S. 252, 264-265 (1886).

All 50 states have similar laws or constitutional provisions that bar private military activity, and state courts are beginning to take notice. After the August 2017 Unite the Right rally in Charlottesville, Virginia, turned violent, ICAP, citing Virginia antiparamilitary laws, filed a successful lawsuit on behalf of the city, small businesses, and residential associations against a number of militia organizations involved in the unrest. The Charlottesville Circuit Court agreed in a written ruling that the city could invoke the provisions of Virginia's Constitution and state laws to seek court orders prohibiting the private paramilitary conduct. The case resulted in court orders against 23 individuals and organizations barring them from returning to Charlottesville in groups of two or more acting in concert while armed with anything that could be used as a weapon during any rally, protest, demonstration, or march.

Since bringing its successful litigation in Charlottesville, ICAP has consulted with municipalities large and small across the country seeking advice on how to protect public safety while preserving constitutional rights during public protests and demonstrations. We would be happy to consult with you or other Bonner County or Sandpoint officials about how best to ensure that future protests remain peaceful and free from unlawful militia activity. Because we conduct all of our work on a pro bono basis, any consultation would be at no cost to you.

Sincerely,

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