



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION  
GEORGETOWN UNIVERSITY LAW CENTER

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July 28, 2020

**Re: Private Paramilitary Activity in Louisville**

Dear Mayor Fischer, Councilman James, Commonwealth's Attorney Wine, and Chief Schroeder:

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 legal issues related to private paramilitary activity, as well as the regulation of public protests and demonstrations in a manner that protects public safety while respecting individuals' constitutional rights.

I am writing because we understand that members of two opposing, self-styled private militias showed up at a recent demonstration in downtown Louisville, which has been the site of ongoing protest activity following the police shooting of Breonna Taylor. According to media reports, on July 25, the “heavily armed militia groups came within a few dozen yards of each of other in downtown Louisville . . . in a tense standoff that ended without violence, but marked an escalation after two months of ongoing protests.”<sup>1</sup>

Reportedly, members of the “Three-Percenter” militia—some from out of state, and many heavily armed and dressed in military fatigues—marched in downtown Louisville, claiming they were there to “assist police and discourage violence.”<sup>2</sup> The “Three Percenters” have sown chaos at other protests in Kentucky, hanging an effigy of Governor Andy Beshear while chanting “sic semper tyrannis” at a recent demonstration in Frankfort.<sup>3</sup> On July 25, the “Three Percenters” squared off against members of the heavily armed and uniformed “Not F\*\*\*ing Around Coalition” (NFAC), an opposing Atlanta-based militia group, in downtown Louisville.<sup>4</sup> Demanding faster action in the investigation into Breonna Taylor’s death, the NFAC suggested that delay beyond four weeks could result in violence.<sup>5</sup> Earlier in the day, three people were shot when an NFAC member’s gun went off in Baxter Park.<sup>6</sup>

The militia members’ conduct in Louisville appears to have violated Kentucky law, as discussed below. Moreover, as protest activity continues, the potential remains for future confrontations between armed members of opposing militia groups, as well as between militia members and protesters. Such confrontations can lead to tension, the chilling of constitutionally protected speech and assembly, and, in some cases, violent confrontations and destruction of property.

As you may be aware, several provisions of Kentucky law prohibit private paramilitary activity. In particular, the Kentucky Constitution’s Subordination Clause forbids private military units from operating outside state authority, providing that “[n]o standing army shall, in time of peace, be maintained without the consent of the General Assembly; and the military shall, in all cases and at all times, be in strict subordination to the civil power.” Ky. Const. § 12.

Moreover, Kentucky law provides that, with certain exceptions not applicable here, “no persons other than the Kentucky National Guard or Kentucky active militia shall associate

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<sup>1</sup> Chris Kenning, et al., *Opposing armed militias converge in Louisville, escalating tensions but avoiding violence*, Courier-Journal (July 27, 2020), <https://www.courier-journal.com/story/news/local/2020/07/25/louisville-protests-nfac-three-percenters-expected-demonstrate/3288198001/>.

<sup>2</sup> *Id.*

<sup>3</sup> Sam Porter, *I will not be afraid: Gov. Beshear responds to effigy hanging*, LEX18 News (May 26, 2020), <https://www.lex18.com/news/covering-kentucky/beshear-i-will-not-be-afraid-in-response-to-effigy-hanging>.

<sup>4</sup> Kenning, et al., *Opposing armed militias converge in Louisville, escalating tensions but avoiding violence*.

<sup>5</sup> Ryan Van Velzer & Jess Clark, *NFAC Militia Calls for Answers in Taylor Investigation, Threatens Violence*, WFPL (July 25, 2020), <https://wfpl.org/nfac-militia-calls-for-answers-in-taylor-investigation-threatens-violence/>.

<sup>6</sup> Kenning, et al., *Opposing armed militias converge in Louisville, escalating tensions but avoiding violence*.

together as an armed company or drill or parade with arms without permission from the Governor.” KRS § 38.440. Violations of that law are punishable by fines and up to six months of imprisonment in the county jail. KRS § 38.990(4). The Supreme Court has long recognized that such laws are constitutional and do not violate the Second Amendment.<sup>7</sup> In addition, Kentucky law makes it a crime to “bring or cause to be brought into this state any armed person, not a citizen of this state, to preserve the peace, suppress domestic violence or to serve as a deputy of any officer or as a member of a posse comitatus.” KRS § 432.550.

Other provisions of Kentucky law make clear that the Governor of Kentucky, as commander-in-chief, is the state official who has the authority to call the militia into active service. Ky. Const. § 75 (the Governor “shall be Commander-in-Chief of the army and navy of this Commonwealth, and of the militia thereof, except when they shall be called into the service of the United States”); KRS § 37.180 (“The Governor shall be commander in chief of the Kentucky active militia, and the adjutant general shall be the executive officer and shall be responsible to the Governor for the proper functioning of the Kentucky active militia.”); KRS § 37.170(1) (“The Governor is hereby authorized to enlist, organize, maintain, equip, discipline and pay when called into active field service a volunteer state defense force other than the National Guard, which shall constitute the active militia and shall be known as the Kentucky State Defense Force.”); KRS § 38.030 (“Only the Governor shall have the authority to order units and members of the Kentucky National Guard into state active duty.”). 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 private individuals into service.

All fifty states have [similar laws or constitutional provisions](#) that bar private military activity. After the August 2017 Unite the Right rally in Charlottesville, Virginia, ICAP—relying on Virginia’s 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 violence. 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. Similar laws in other states have been used as the basis for time, place, and manner restrictions during public protest events.

Since bringing its successful litigation in Charlottesville, ICAP has consulted free of charge 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. ICAP has developed a toolkit of legal principles, best practices, and creative solutions, titled “Protests and Public Safety: A Guide for Cities and Citizens,” which we are launching with a [virtual event](#) on Wednesday, July 29, and will be available online at [constitutionalprotestguide.org](#). We are also announcing a new coalition of law firms across the country that have pledged to work with local jurisdictions pro bono as they seek to ensure that

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<sup>7</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 620 (2008); *Presser v. Illinois*, 116 U.S. 252, 264-265 (1886).

future protests remain peaceful and free from unlawful militia activity. We would be happy to consult with you about applicable legal authorities in Kentucky and how similar authorities have been used elsewhere, or to connect you with one of the law firms in the coalition.

Sincerely,

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