



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION  
GEORGETOWN UNIVERSITY LAW CENTER

**VIA EMAIL**

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August 21, 2020

**Re: Private Paramilitary Activity in the Town of Broadway**

Dear Chief Collins:

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, in 2017, 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 militias, specifically the Rockingham County (Rockingham) and East Rockingham/South Page (ERSP or ERSPM) militias, were present at recent protest events in the Town of Broadway. It is concerning that these militias have asserted collaboration with the police departments of both Broadway and Elkton.

Rockingham County Militia leader Brian Robbins, for instance, told a local newspaper that officers were aware of their involvement at recent protests:

[T]he militia had "people carrying open weapons [who] were tucked away in the sidelines. And we had some people that were doing patrolling that were concealed carrying. And the whole time we were in contact with the police force ... we were in coordination

with the police the entire time, before and after the events, both” in Elkton and Broadway.<sup>1</sup>

Robbins, on another occasion, characterized the militia’s involvement in recent protests and their relationship with the Elkton Police Department to you as follows:

The Rockingham County Militia has been following these protests and waiting in the wings in case they devolve. Last Wednesday we worked closely with Elkton PD to keep things safe. The RCM was not made known to the public and was not in view of the protestors, we simply were on standby at a nearby location ready to act if needed.<sup>2</sup>

In the same correspondence, Robbins offered to “connect you to our law enforcement liaison so that we can work together to keep the town safe in a measured way.”<sup>3</sup> “If not,” Robbins warned, “we will still see it as our duty to defend the people and property of the town of Broadway.”<sup>4</sup> Mark Baughan, a leader in the ERSP militia, offered similar assistance. He suggested ERSP could serve as a “Citizen Protection Team” and “really could use some well armed stable law abiding town folks to man posts for us!”<sup>5</sup> In light of the militias’ requests to assist police in executing law enforcement duties, we hope to provide you with information that may assist in dealing with future protest events.<sup>6</sup> We further hope this will avoid situations that can lead to tension, the chilling of constitutionally protected speech and assembly, and, in some cases, violent confrontations and destruction of property.

The U.S. Supreme Court has made clear that the Second Amendment “does not prevent the prohibition of private paramilitary organizations.”<sup>7</sup> And indeed, several provisions of Virginia law prohibit private paramilitary activity. In particular, the Virginia Constitution’s Strict Subordination Clause forbids private military units from operating outside state authority, providing that “in all cases the military should be under strict subordination to, and governed by, the civil power.” Va. Const. art. I, § 13. Key provisions of the Virginia Code make clear that only the Governor, as commander-in-chief, has the power to call forth the unorganized militia.<sup>8</sup> *See* Va. Code. §§ 44-8, 44-86. When called forth, the “unorganized militia” is incorporated into the Virginia Defense Force under the control of the Virginia Department of Military Affairs. *See* Va.

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<sup>1</sup> Randi B. Hagi, *A valley between them: While one group has brought signs to local racial justice rallies, another carried guns*, Harrisonburg Citizen (July 27, 2020), <https://hburgcitizen.com/2020/07/27/a-valley-between-them-while-one-group-has-brought-signs-to-local-racial-justice-rallies-another-carried-guns/>

<sup>2</sup> E-mail from Brian Robbins, Rockingham Cty. Militia, to Randy Collins, Chief, Broadway Police Dep’t (June 19, 7:27 PM).

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

<sup>4</sup> *Id.*

<sup>5</sup> E-mail from Mark W. Baughan, ERSP Militia, to Randy Collins, Chief, Broadway Police Dep’t (July 2, 2020, 2:28 PM).

<sup>6</sup> E-mail from Brian Robbins, Rockingham Cty. Militia, to Randy Collins, Chief, Broadway Police Dep’t (June 19, 7:27 PM).

<sup>7</sup> *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).

<sup>8</sup> Although Commonwealth Attorney Marsha Garst provided you with information about Va. Code. §§ 18.2-411, which permits an “officer or militia” to use reasonably necessary force to disperse an unlawful assembly, the formation and subordination of militia forces is governed by the operative provisions referenced herein. *See* E-mail from Marsha Garst, Commonwealth Attorney, to Randy Collins, Chief, Broadway Police Dep’t (July 3, 2020, 1:32 PM).

Code. §§ 44-54.4, 44-88. As such, local officials are not authorized under Virginia law to direct paramilitary activity.

Additionally, Virginia's criminal anti-paramilitary statute prohibits private groups from using "firearm[s] . . . or technique[s] capable of causing injury or death . . . in, or in furtherance of, a civil disorder." Va. Code § 18.2-433.2. And Virginia's false-assumption statute prohibits individuals who are not law enforcement officers from exercising law enforcement functions. Va. Code § 18.2-174. Accordingly, private militias have no authority to engage in law enforcement or military functions outside of these carefully circumscribed laws.

After the August 2017 Unite the Right rally in Charlottesville turned violent, ICAP, citing these 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.

Shortly thereafter, relying in part on the court's opinion in that case, the Virginia Attorney General opined that "Under the Code of Virginia, the responsibility to 'safeguard . . . life and property' and to 'preserv[e] . . . peace' is vested in the local police and other properly designated law-enforcement personnel. By engaging in crowd control or purporting to secure a public area, private militia members usurp a role specifically reserved to law enforcement, thereby 'assum[ing] or exercis[ing] the functions, powers, duties, and privileges' of law enforcement or peace officers' . . . [in] violation of § 18.2-174 of the Code of Virginia."<sup>9</sup> The opinion concluded that "a group of private militia members coming as a unit, heavily armed with assault-style weapons, dressed in fatigues and other military accessories, and acting in a coordinated fashion" violates Virginia law when it engages in crowd control or other activities reserved for law enforcement.<sup>10</sup>

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<sup>9</sup> Virginia Attorney General Opinion No. 19-039 (Aug. 16, 2019), <https://www.oag.state.va.us/files/Opinions/2019/19-039-C-Herring-issued.pdf>.

<sup>10</sup> *Id.*

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. Last month, we published a legal toolkit, “Protests and Public Safety: A Guide to Cities and Citizens,” which is available at [constitutionalprotestguide.org](http://constitutionalprotestguide.org). We also announced a coalition of national law firms that have committed to assisting communities in preventing unsanctioned paramilitary activity. Please do not hesitate to contact us if you we can be of assistance. Because we and our law firm partners do this work on a pro bono basis, any consultation would be at no cost to you.

Sincerely,

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