



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

VIA EMAIL

David B. Harris
Chief of Police
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August 21, 2020

Re: Private Paramilitary Activity in the Town of Elkton

Dear Chief Harris:

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 Elkton. It is concerning that these militias have asserted collaboration with the police departments of both Elkton and Broadway.

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.¹

¹ 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/>

Robbins, on another occasion, characterized the militia's involvement in recent protests and their relationship with the Elkton Police Department 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.²

In another such example, Mark Baughan, a leader in the ERSF militia, posted the following statement on Facebook:

We The People in the town of Elkton, Virginia have reason to believe that BLM may be sending in outside people to wreak havoc in our town We need as many law abiding 2A Supporter Patriots to help us guard our town. ... We have already met with town police and they appreciate our support.³

We recognize that you publicly stated that the Town of Elkton “has coordinated exclusively with sworn police departments to assist us with the planned protest,” but the militias’ representations remain troubling.⁴ In light of the militias’ requests to defend the people and property of the town, we hope to provide you with information that may assist in dealing with future protest events. 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.”⁵ 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. *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. Code. §§ 44-54.4, 44-88. As such, local officials are not authorized under Virginia law to direct paramilitary activity.

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

³ Mark Baughan, Facebook (June 14, 2020), [insert link- currently only have screenshot].

⁴ Memorandum of Dave Harris, Police Chief, to residents and friends of Elkton (June 15, 2020), <https://www.facebook.com/104271512958691/photos/a.106062849446224/3528204080565400/?type=3&theater>.

⁵ *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).

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.”⁶ 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.⁷

⁶ 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>.

⁷ *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. 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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