



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

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VIA EMAIL

Josh Kaul
Attorney General
Wisconsin Department of Justice
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Re: Paramilitary Activity in Kenosha

Dear Attorney General Kaul:

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 private self-styled militias have appeared at recent demonstrations in downtown Kenosha, which has been the site of ongoing protest activity following the police shooting of Jacob Blake, Jr. According to media reports, a group called the Kenosha Guard called for "patriots willing to take up arms and defend our city . . . from evil thugs" to attend the protest that occurred at Civic Center Park on the evening of August 25, 2020.¹ This call to arms specifically described the group's activity as augmenting local law enforcement, stating that "law enforcement is outnumbered."² A post from the so-called "commander" of the Kenosha Guard further indicates that the group attempted to coordinate its activities with the Kenosha Police Department and the Kenosha County Sheriff's

¹ Kristin T. Harris, *Wisconsin Militia Recruiting Citizens to Patrol Kenosha After 2nd Night of Riots*, InfoWars (Aug. 25, 2020), <https://www.infowars.com/wisconsin-militia-recruiting-citizens-to-patrol-kenosha-after-2nd-night-of-riots/>.

² *Id.*

Department.³ In addition, members of another militia that is part of the extremist Boogaloo movement have attended the protests in recent days.⁴

Tragically, three individuals were shot—two fatally—during the August 25 demonstration.⁵ It remains unclear from public reporting whether the individual charged for the shooting was formally a member of either of the militias or a fellow traveler emboldened by the presence of other armed individuals. Regardless, the bloodshed that occurred throws into sharp relief the danger posed when private and unaccountable militia groups take the law into their own hands. As Kenosha County Sheriff David Beth aptly noted, “This is why you don’t deputize citizens with guns to protect Kenosha.”⁶ As protest activity continues, the potential remains for future confrontations between militia members and protesters. Such confrontations can lead to tension, the chilling of constitutionally protected speech and assembly, the destruction of property, and, as last night painfully demonstrated, violent confrontations.

As you may be aware, several provisions of Wisconsin law prohibit private paramilitary and unauthorized law enforcement activity. In particular, the Wisconsin Constitution’s Subordination Clause forbids private military units from operating outside state authority, providing that “[t]he military shall be in strict subordination to the civil power.” Wis. Const. art. I, § 20. In addition, Wisconsin law makes it a felony to “[a]ssume to act in an official capacity or to perform an official function, knowing that he or she is not the public officer . . . that he or she assumes to be.” Wis. Stat. § 946.69(2)(a).

Other provisions of Wisconsin law make clear that the Governor of Wisconsin, as the commander-in-chief, is the state official who has the authority to call the militia into active service. Wis. Const. art. 5, § 4 (“The governor shall be commander in chief of the military and naval forces of the state.”); Wis. Stat. § 321.39 (authorizing the governor to “order into state active duty members of the national guard” under limited enumerated circumstances); *id.* § 321.51 (authorizing the governor to “organize the state defense force” as “a uniformed force distinct from the national guard” and to “prescribe regulations, instructions, and policies . . . governing the enlistment, organization, administration, equipment, uniforms, maintenance, training, and discipline of the state defense force”). The legislature is the entity that has authority to determine which individuals are part of the militia and to regulate its activities. Wis. Const. art. 4, § 29 (“The legislature shall determine what persons shall constitute the militia of the state, and may provide for organizing and disciplining the same in such manner as shall be prescribed by law.”). 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.

³ Gina Barton & Bruce Vielmetti, *Kyle Rittenhouse, Charged in Kenosha Protest Homicides, Considered Himself Militia*, Milwaukee J.-Sentinel (Aug. 26, 2020), <https://www.jsonline.com/story/news/2020/08/26/kyle-rittenhouse-charged-kenosha-protest-shootings-militia/5634532002/>.

⁴ *Id.*

⁵ *Id.*

⁶ Julie Bosman & Sarah Mervosh, *Arrest in Overnight Shooting During Unrest in Kenosha, Wis.*, N.Y. Times (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/us/kenosha-shooting-protests-jacob-blake.html>.

All 50 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. ICAP also recently partnered with the District Attorney for Bernalillo County, New Mexico, to bring a [lawsuit](#) against a local militia there that usurped law-enforcement and military authority in violation of similar laws in New Mexico. Other states have relied on these authorities 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](#). We also have convened 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 future protests remain peaceful and free from unlawful militia activity. We would be happy to consult with you about applicable legal authorities in Wisconsin 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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