



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION  
GEORGETOWN UNIVERSITY LAW CENTER

**VIA EMAIL**

Jimmy Toler  
Chief of Police  
Tyler Police Department  
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September 2, 2020

**Re: Private Paramilitary Activity in Tyler**

Dear Chief Toler:

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 private militia groups have been present at recent public demonstrations in Tyler. Concerning reports indicate that these often heavily armed groups have clashed, at times violently, with demonstrators.<sup>1</sup> 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 violence.

As you may be aware, several provisions of Texas law prohibit private paramilitary and unauthorized law enforcement activity. In particular, the Texas Constitution's Subordination Clause forbids private military units from operating outside state authority, requiring that "[t]he military shall at all times be subordinate to the civil authority." Tex. Const. art. I, § 24. Texas's Constitution vests the Governor with the "power to call forth the militia to execute the laws of the State, to suppress insurrections, and to repel invasions." Tex. Const. art. IV, § 7.

Additionally, Texas's statutory code prohibits "a body of persons other than the regularly organized Texas military forces, the armed forces of the United States, or the active militia of

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<sup>1</sup> Tim Craig, *U.S. political divide becomes increasingly violent, rattling activists and police*, WASH. POST (Aug. 27, 2020), [https://www.washingtonpost.com/national/protests-violence/2020/08/27/3f232c66-e578-11ea-970a-64c73a1c2392\\_story.html](https://www.washingtonpost.com/national/protests-violence/2020/08/27/3f232c66-e578-11ea-970a-64c73a1c2392_story.html).

another state” from “associat[ing] as a military company or organization or parad[ing] in public with firearms in a municipality of the state.” Tex. Gov’t Code § 437.208(a). The statute’s only exception is for “students in an educational institution at which military science is a prescribed part of the course of instruction,” who are permitted to “drill and perform ceremonies with firearms in public” with the consent of the Governor. Tex. Gov’t Code § 437.208(b). Moreover, Texas law prohibits “knowingly purport[ing] to exercise, without legal authority, any function of a public servant or of a public office.” Tex. Penal Code § 37.11(a)(2). These provisions make clear that private militias, not answerable to any governmental authority and not called forth by the Governor, are prohibited in the State of Texas.

Moreover, the U.S. Supreme Court has held that the Second Amendment “does not prevent the prohibition of private paramilitary organizations.”<sup>2</sup> Consistent with that interpretation, a federal district court in Texas enforced the state’s prohibition on private militias against the militia wing of the KKK in 1982. Noting that “the State of Texas, which absent contrary federal action is ‘the sole judge’ of the steps to be taken to maintain its militia,” had “itself statutorily prohibited the operation of private armies.” *Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982) (citation omitted).<sup>3</sup> The court commented that the statute had been enacted “to further the governmental interest of protecting citizens from the threat of violence posed by private military organizations.” *Id.* at 216. And the court asserted, in enjoining future private militia activity, that “[m]ilitary organizations are dangerous wherever they exist, because of their interference with the functioning of a democratic society and because of their inconsistency with the State’s needs in operating its militia.” *Id.* at 218.

Indeed, all 50 states have laws or constitutional provisions that bar private military activity.<sup>4</sup> 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 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. 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.

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<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).

<sup>3</sup> The court’s ruling was based on the precursor to the current statute, which was substantively the same in all material respects, as it “prohibit[ed] both: (1) a body of men from associating themselves together as a military company or organization; and (2) the parading in public with firearms in any city or town of Texas.” *Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 217 (S.D. Tex. 1982).

<sup>4</sup> *Prohibiting Private Armies at Public Rallies: A Catalog of Relevant State Constitutional and Statutory Provisions*, Institute for Constitutional Advocacy and Protection (July 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf>.

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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