



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

VIA EMAIL

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Re: Private Paramilitary Activity and Voter Intimidation in Ada County

Dear Sheriff Bartlett, Chief Lee and Chief Allen:

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 in 2017 against militia organizations that participated in the Unite the Right rally in Charlottesville, Virginia, we have developed an expertise in the regulation of public protests and demonstrations in a manner that protects public safety while respecting individuals' constitutional rights. Most recently, we have been working with jurisdictions across the country to combat unlawful militia activity and safeguard the electoral process.¹

¹ See, e.g., ICAP has produced fact sheets for every state explaining the laws that bar unauthorized private paramilitary organizations and what to do if groups of armed individuals are near a polling place, <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-paramilitaries/state-fact-sheets/>. ICAP also has produced a fact sheet on voter intimidation, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/Voter-Intimidation-Fact-Sheet.pdf>, guidance for law enforcement, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-General-Law-Enforcement-Guidance.pdf>, and a resource for election officials

I am writing to address two issues that have come to our attention related to voter intimidation and possible unlawful private militia activity in Ada County. First, ICAP has received reports that during a training for volunteer poll workers in Ada County this month, volunteers were told that they should call law enforcement only if they feel that their lives are threatened. However, both federal and state laws prohibit voter intimidation broadly, and are not limited to threats of personal harm. In addition to other federal provisions, Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. § 10307(b), provides that:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any persons to vote or attempt to vote

Idaho law also prohibits any direct or indirect effort to influence, “restrain, hinder, or disturb any elector in the free exercise of the right of suffrage” by use of “force, threats, menaces, bribery, or any corrupt means.” Idaho Code § 18-2305. Accordingly, federal and state law protect against both intimidation and attempts to intimidate, even in the absence of physical danger or threats, and poll workers should be instructed accordingly.

Second, we want to call to your attention statements made by Eric Parker, a founding member of the Real 3%ers Idaho and participant in the 2014 Bundy Ranch standoff. According to news reports, Mr. Parker has heard of “unseen mobilizing” and “[w]hispers of offensive operations” within the Idaho private militia movement, asserting that “it’s going to get crazy.”² Because Ada County is the location of the capital of Idaho and the most populous county in the state, we wanted to ensure that you are aware of this statement, as it suggests the potential for future unlawful private paramilitary activity in Idaho that could entail intimidation attempts, violence, or the destruction of property.

Private group of individuals have no authority under state or federal law to activate as a militia or engage in the coordinated, armed enforcement of public safety or election law. Indeed, several provisions of Idaho law prohibit such activity. In particular, the Idaho Constitution’s Subordination Clause forbids private military units from operating outside state authority, providing that “[t]he military shall be subordinate to the civil power.” Idaho Const. art. I, § 12. Other provisions of Idaho law make clear that the Governor of Idaho, as commander-in-chief, is the state official who has the authority to call the unorganized militia (all able-bodied Idaho citizens between the ages of 18 and 45) into active service. Idaho Code § 46-106 (“Whenever the governor as commander-in-chief, shall call into the active service of the state the unorganized militia . . . [t]he officers thereof, shall be appointed and commissioned by the governor under such rules and regulations as he may deem expedient to promulgate.”); *see also* Idaho Code § 46-110 (“The governor of the state by virtue of his office, shall be commander-in-chief of the national guard, except of such thereof, as may be at times in the service of the United States.”); Certificate of Review, Initiative Regarding Volunteer Militia Organizations,

<https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-Election-Official-Guidance-10-27-20.pdf>.

² Hannah Allam & Jim Urquhart, *Militia Leader Known As The ‘Bundy Ranch Sniper’ Seeks A New Title: State Senator*, NPR (Oct. 22, 2020), <https://www.npr.org/2020/10/22/926279072/militia-leader-known-as-the-bundy-ranch-sniper-seeks-a-new-title-senator>.

Letter from Attorney General of Idaho to Secretary of State of Idaho (Oct. 13, 1995) (declaring as unconstitutional proposed legislation that would have allowed citizens to organize and train as private militias without government oversight, and concluding that the Idaho Constitution requires control of the state militia by the governor and through laws passed by the legislature”). Accordingly, private militias have no authority to deploy and engage in law enforcement or military functions outside of these carefully circumscribed laws, and no official other than the governor has authority to call into service private militias or to activate the “unorganized militia.”

Moreover, Idaho law prohibits “unorganized associations” from engaging in paramilitary activity: “[n]o body of men, other than the regularly organized national guard, the unorganized militia when called into service of the state, or of the United States . . . shall associate themselves together as a military company or organization, or parade in public with firearms in any city or town of this state.” Idaho Code § 46-802. It is also a felony in Idaho to: (1) conspire “to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitutions or laws of the United States or the state of Idaho, by the use of violence against the person or property of such citizen”; (2) go on the highway or the premises of any citizen, with another person, “with the intent by use of violence against such citizen or his property, to prevent or hinder his free exercise or enjoyment of any right or privilege so secured”; or (3) assemble “with one (1) or more persons for the purpose of training or instructing in the use of, or practicing with, any technique or means capable of causing property damage, bodily injury or death with the intent to employ such training, instruction or practice in the commission of a civil disorder.” Idaho Code § 18-8103. Moreover, it is a crime under state law for any person to “unlawfully exercise or attempt to exercise the functions of . . . a deputy sheriff, marshal, policeman, constable or peace officer” or bring into the state “any armed or unarmed body of men for the suppression of domestic violence.” Idaho Code § 18-711.

Idaho law is in keeping with the Second Amendment, which does not protect private, unauthorized paramilitary organizations that are dangerous to public safety and good order. The Supreme Court decided in 1886—and repeated in 2008—that the Second Amendment “does not prevent the prohibition of private paramilitary organizations,” *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)). Indeed, all 50 states have laws or constitutional provisions that bar private paramilitary activity.³ After the August 2017 Unite the Right rally in Charlottesville, Virginia, turned violent, ICAP—citing Virginia anti-paramilitary laws—filed a successful lawsuit on behalf of the city, small businesses, and residential associations against a number of unlawful 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. Although individuals have a Second Amendment right to bear arms for individual self-defense, they have no constitutional right to organize themselves as private military units projecting public authority wholly outside of governmental accountability.

³ Institute for Constitutional Advocacy and Protection, *Prohibiting Private Armies at Public Rallies* (Sept 2020), available at <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf>.

In addition to restrictions on paramilitary activity and voter intimidation, other election-specific provisions and generally applicable criminal laws might also apply to armed intimidation near polling places.⁴ ICAP has developed several resources that may be of further help, including our voter intimidation fact sheet, guidance to law enforcement and election officials, and toolkit for constitutional protest.⁵

Since bringing its successful litigation in Charlottesville, ICAP has advised municipalities both large and small across the country on how to protect public safety while preserving constitutional rights during elections and public demonstrations. We would be happy to consult with you or other officials about how best to ensure that Ada County voters and poll workers are protected from illegal intimidation tactics and that any future illegal activities by private paramilitary groups are prevented. ICAP has brought together a coalition of national law firms that have committed to assisting communities in preventing unsanctioned paramilitary activity, including Jones Day and Stoel Rives LLP. Because we and our law firm partners do this work on a pro bono basis, any consultation would be at no cost to you. Thank you in advance for your efforts to safeguard voters' rights this election.

Sincerely,

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⁴ See, e.g., Idaho Code § 18-2318 (prohibiting electioneering within 100 feet of polling site); Idaho Code § 18-2315 (establishing that election offenses not otherwise provided for may be “punishable by fine not exceeding \$1,000, or by imprisonment in the state prison not exceeding five (5) years, or by both”); Idaho Code § 18-3303 (banning use of “any deadly weapon in a rude, angry and threatening manner”).

⁵ ICAP, *supra* note 1; Institute for Constitutional Advocacy and Protection, Georgetown Law, Protests & Public Safety: A Guide for Cities and Citizens, available at <https://constitutionalprotestguide.org/>.

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