



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

VIA EMAIL

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October 23, 2020

Re: Private Paramilitary Activity and Voter Intimidation in Erie

Dear Chief Spizarny and Sheriff Loomis:

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 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

I am writing because of increasing public concern that armed groups or self-styled private militias may position themselves at polling places during early voting or on Election Day, which has the potential to intimidate voters and result in violent confrontations. The Washington Post recently

¹ See, e.g., Ximena Conde, *Krasner says anyone who tries to intimidate Philly voters will find themselves in jail*, PHILA. TRIBUNE (Oct. 7, 2020), https://www.phillytrib.com/krasner-says-anyone-who-tries-to-intimidate-philly-voters-will-find-themselves-in-jail/article_a2c3cdc9-39cb-5fea-b2a1-b69241e56c9d.html#/questions. 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>, and a guide for actions that law enforcement can take to address and prevent voter intimidation, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-General-Law-Enforcement-Guidance.pdf>.

reported that members of Open Carry Pennsylvania plan to station themselves while armed outside voting centers in the Erie area to protect against election interference and looting² One of their members said that “[c]itizens at some point have to take matters into their own hands.”

Neither Open Carry Pennsylvania nor any other private group of individuals has authority to engage in the coordinated, armed enforcement of public safety and election law. These duties are reserved for law enforcement officers and election officials. The state militia (i.e., the National Guard and other state-sanctioned military forces) also can play a role in ensuring public safety, but only when called forth by the governor under Pennsylvania law. We hope that the following information will help you prepare to protect against voter intimidation, as well as armed intimidation post-election, while preserving and fostering constitutional rights.

Several provisions of Pennsylvania law prohibit private paramilitary activity. In particular, the Pennsylvania Constitution mandates that “the military shall in all cases and at all times be in strict subordination to the civil power.” Pa. Const. art. I, § 22. Key provisions of the Pennsylvania Code make clear that the governor is the commander-in-chief and has the power to call forth the militia of the state in times of emergency. 51 Pa. Stat. Ann. §§ 501, 507. When so called forth, the militia serves with the Pennsylvania Guard under the command of the governor. 51 Pa. Stat. Ann. § 507. Private militia organizations or other armed groups have no authority to self-activate or to engage in functions reserved to the state militia or law enforcement.

Additionally, Pennsylvania criminal law broadly prohibits paramilitary activity. State law makes it unlawful to either (1) teach or demonstrate the use of “any firearm, explosive or incendiary device or technique capable of causing injury or death” for unlawful use during or in furtherance of a civil disorder, or (2) assemble “with one or more persons for the purpose of training with, practicing with or being instructed in the use of any firearm, explosive or incendiary device or technique capable of causing injury or death” for unlawful use during or in furtherance of a civil disorder. 18 Pa. Stat. Ann. § 5115.

Pennsylvania 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)), and indeed all 50 states prohibit them.³ Accordingly, although individuals have a constitutional 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.

Moreover, both federal and state laws prohibit voter intimidation. In addition to other federal provisions, Section 11 of the federal Voting Rights Act makes it unlawful to “intimidate, threaten, or coerce” another person, or attempt to do so, “for voting or attempting to vote” or “for urging or

² Marc Fisher, *Amid fears of Election Day chaos, one county prepares for anxious days after the vote*, WASH. POST (Oct. 18, 2020), https://www.washingtonpost.com/politics/amid-fears-of-election-day-chaos-one-county-prepares-for-anxious-days-after-the-vote/2020/10/17/c2c9e928-0a60-11eb-a166-dc429b380d10_story.html.

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>.

aiding any person to vote or attempt to vote.” 52 U.S.C. § 10307(b). Pennsylvania law also prohibits intimidation or coercion “to induce or compel” a person to vote or refrain from voting, or to vote for or against any particular person. 25 Pa. Stat. Ann. § 3547. And it is a felony to “use or practice any intimidation, threats, force or violence with design to influence unduly or overawe any elector, or to prevent him from voting or restrain his freedom of choice.” 25 Pa. Stat. Ann. § 3527.

In addition to these 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 toolkit for constitutional protest.⁵

Please do not hesitate to reach out if ICAP can assist you in protecting against armed unauthorized activity during and after the election. ICAP has brought together a coalition of national law firms that have committed to assisting communities in preventing unsanctioned paramilitary activity and voter intimidation. 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., 18 Pa. Cons. Stat. § 2701(a)(3) (criminalizing threatening behavior with a firearm); 25 Pa. Stat. Ann. § 3527 (making it a felony to “use or threaten any violence” against an election officer, or to “improperly interfere” with an election officer “in the execution of his duty”); 25 Pa. Stat. Ann. § 3508 (prohibiting “violence or intimidation” toward election officers and machine inspectors).

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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