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Re: Private Paramilitary Activity and Voter Intimidation in Montgomery, NY

Dear Montgomery officials:

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 Times Herald-Record reports that an American Patriot Council rally is planned for tomorrow, October 24, at Veterans Memorial Park, which is adjacent to an early voting center. The proximity to a voting location is worrisome because the group’s invitation “encouraged participants to carry guns and invoked the upcoming election.”² The group also promoted the rally to “demand emancipation from the bondage of tyranny,” according to the news article. Members of the American Patriot Council were involved in the armed protest inside the Michigan state capitol building earlier this year.

Private groups of armed individuals have no authority under federal or state law to activate themselves as a private militia, whether in opposition to government policies or to engage in duties reserved for law enforcement officers and election officials. Although the state militia (i.e., the National Guard and other state-sanctioned military forces) can play a role in ensuring public safety, they may do so only when called forth by the governor under New York 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 New York law prohibit private militia activity. The New York Code prescribes a comprehensive scheme for the regulation of the militia. It makes clear that the governor is “the commander-in-chief of the militia of the state.” N.Y. Mil. Law § 3, and has the sole authority to call forth the “unorganized militia” – comprised of all able-bodied male residents between certain ages, when authorized under New York Law. *Id.*, see also N.Y. Mil. Law §§ 6-A, 7 Private militia organizations or other armed groups have no authority to self-activate or call themselves forth.

Additionally, New York criminal law broadly prohibits paramilitary activity. State law makes it illegal for any “body of men other than the organized militia and the armed forces of the United States . . . [to] associate themselves together as a military company or other unit or parade in public

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>.

² Chris McKenna & Helu Wang, *Rally planned for Montgomery park next to poll site prompts fears of voter intimidation*, TIMES HERALD-RECORD (Oct. 23, 2020), <https://www.recordonline.com/story/news/2020/10/23/right-wing-group-rally-montgomery-park-near-voting-site/3740063001/>.

with firearms in any city or town of this state.” N.Y. Mil. Law § 240(1). The same statute makes it a felony to “assemble[] or conspire[] to assemble with one or more persons as a paramilitary organization,” with “knowledge of its purpose,” and to “practice with a military weapon to further the purpose of” that organization.³ N.Y. Mil. Law § 240(6)(a). It is also unlawful for any person to “appear in any public place or in the public view attired in any uniform similar to that worn by the military, semi-military, naval, police, storm troop or other official or semi-official forces of any foreign state, nation or government,” or “in any distinctive part” of such uniform, “or to assemble with other persons similarly attired in any camp, drill ground or other place for the purpose of engaging in military drill or training or other military practices.” N.Y. Mil. Law § 238-c.

New York 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.⁴ 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 aiding any person to vote or attempt to vote.” 52 U.S.C. § 10307(b). New York law also prohibits the use of threats, force, violence, or restraint to “inflict any injury, damage, harm or loss” that would “induce or compel” a person to vote or refrain from voting, or to vote for or against any particular person. N.Y. Elec. Law § 17-150(1). It is also unlawful to influence or attempt to influence a voter “[b]y menace or other unlawful or corrupt means, directly or indirectly.” N.Y. Elec. Law § 17-102(8).

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.⁵ 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.⁶

³ A “paramilitary organization” is “an organization of two or more persons who engage or conspire to engage in military instruction or training in warfare or sabotage for the purpose of unlawfully causing physical injury to any person or unlawfully damaging the property of any person.” N.Y. Mil. Law § 240(6)(b)(i).

⁴ 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>.

⁵ See, e.g., N.Y. Elec. Law § 17-152 (Conspiracy to promote or prevent election); N.Y. Elec. Law § 17-154 (Pernicious political activities); N.Y. Elec. Law § 17-168 (Crimes against the elective franchise not otherwise provided for); N.Y. Pen. Law § 195.05 (Obstructing governmental administration in the second degree); N.Y. Pen. Law §§ 120.13, 120.14, 120.15 (first, second, and third-degree menacing).

⁶ 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/>.

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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