



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

VIA EMAIL

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Re: Private Paramilitary Activity and Voter Intimidation in Provo

Dear Sheriff Smith and Chief Ferguson:

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 on Election Day or engage in the armed usurpation of law enforcement authority after Election Day. Members of the "Utah Citizens' Alarm" showed up heavily armed at a demonstration this past summer, purporting to protect Provo against rioting and

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 <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-Election-Official-Guidance-10-27-20.pdf>. We have also developed law enforcement guidance for demonstrations following the 2020 election <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-Post-Election-Law-Enforcement-Guidance-Final.pdf>.

destruction of property without any authority to do so. They also claim to have “built relationships” with police, while asserting that they don’t have the same “red tape” as legitimate law enforcement. Their founder recently described the group by saying, “We’re trained, we’re scary, and we want to be.” You may have seen the recent *Washington Post* piece featuring Utah Citizens’ Alarm, which is available at https://www.washingtonpost.com/video/national/readying-for-war-inside-an-armed-right-wing-group-in-utah/2020/10/28/4c412d87-fba5-4dac-b603-b545749cc498_video.html.

Neither Utah Citizens’ Alarm nor any other private group of individuals has authority to engage in the coordinated, armed enforcement of public safety or 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 Utah 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 Utah law require all militia activity to be under the control and authority of the state. In particular, the Utah Constitution mandates that “[t]he military shall be in strict subordination to the civil power.” Ut. Const. Art. I, § 20. The Utah Constitution also bestows authority to organize, equip and discipline a militia solely with the legislature and requires that any such militia “conform as nearly as practicable to the regulations of the government of the armies of the United States.” *Id.* Art. XV, § 2. Additionally, the Utah Constitution and statutes make clear the governor is the commander-in-chief and has the power to call forth the militia of the state in times of emergency. *Id.* Art. VII, § 4, and Utah Code Ann. § 39-1-5. Relevant statutes further provide that the militia serves with the Utah National Guard under the command of the governor. Utah Code Ann. § 39-1-3. 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.

Utah 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.² 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). Utah law also prohibits intimidation or coercion “to persuade persons from voting,” or to vote for or against any particular person or issue. Utah Code Ann. § 20A-3a-501(2)(a)(i) and § 20A-3a-502(1). Obstructing entry to a polling place is also prohibited. *Id.* § 20A-3a-501(3)(a). Further, Utah law prohibits “threatening to

² 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>.

inflict injury, damage, harm or loss” or to otherwise intimidate anyone from voting. *Id.* § 20A-3a-502(1) and (2).

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.³ 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.⁴

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, including 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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³ *See, e.g.*, Utah Code Ann. § 20A-3a-501 (prohibiting electioneering with 150-feet of polling site and permitting regulation of “the place and manner” of electioneering outside of that zone “to protect the public safety”); Utah Code Ann. § 76-9-903 (prohibiting loitering of three or more persons to cause an individual to act or refrain from acting) *and* (enhancing the penalty for such actions where the actions obstruct government operations); Utah Code Ann. § 76-8-313 (prohibiting any attempt or threat of force or violence against an elected official in the performance of official duties); Utah Code Ann. § 76-10-506 (prohibiting threats with or use of a dangerous weapon in fight or quarrel).

⁴ 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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