

## Fact Sheet on Threats and Incitement to Violence Related to the Election

The 2020 presidential election has spurred much public discussion about election integrity. Some people have gone beyond questioning the security of our voting systems to threatening or encouraging harm to public officials and others they view as responsible for the problems they perceive. In the United States, the First Amendment guarantees the freedom to express one's views, to peacefully assemble with others who share those views, and to petition the government for redress of grievances. But these rights are not boundless— attempts to intimidate and coerce through threats of violence, stalking, and armed paramilitary activity are *not* constitutionally protected.

- The First Amendment does *not* protect violent or unlawful conduct, even if the person engaging in it intends to express an idea. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).
- The First Amendment does *not* protect speech that incites imminent violence or lawlessness. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
- Threats of violence, stalking, and harrasing people, whether private individuals or public officials, are not protected by the First Amendment and may violate multiple federal and state criminal laws.
  - It is is felony under federal law to communicate a threat to injure or kidnap another person online, by phone or mail, or using other interstate channels. 18 U.S.C. § 875(c).
  - It is a felony under federal law to engage in stalking, defined as a course of conduct conducted online, through the mail, or traveling across state lines, which would put a person in reasonable fear of death or serious bodily injury or cause substantial emotional distress, when done with the intent to kill, injure, harass, intimidate, or surveil that person. 18 U.S.C. § 2261A.
  - State criminal laws penalize threats to injure or kill another person as well as stalking, which generally refers to a course of conduct that involves repeated harassment or threats that would cause a reasonable person to feel terrorized, frightened, or intimidated. *See, e.g.*, Ariz. Rev. Stat. § 13-2923; Ga. Code § 16-5-90; Mich. Comp. Laws § 750.411i.; 18 Pa. C.S.A. § 2709.1; Wis. Stat. §§ 947.0125, 947.013.
- Crimes of violence intended to intimidate and coerce are considered terrorism under federal law, *see* 18 U.S.C. § 2331, and the laws of many states, and threats to commit such crimes are not protected by the First Amendment.
  - “Terroristic threats,” generally defined as a threat to commit a crime of violence with the purpose of terrorizing another person or causing public panic, fear, or serious public inconvenience, or in reckless disregard of the risk of causing terror or public panic, fear, or inconvenience, are prohibited in many states and often have penalties greater than the penalties for other threats. *See, e.g.*, Ga. Code §§ 16-11-37, 16-11-37.1; 18 Pa. C.S.A. § 2706; Wis. Stat. § 947.019.

- Many states make it a felony to commit an act of terrorism or threaten to commit an act of terrorism, which generally is defined as a crime of violence with the intent to intimidate or coerce a civilian population or induce the policy of the government through intimidation or coercion. *See, e.g.*, Ariz. Rev. Stat. §§ 13-2301, 13-2308.01, 13-2308.02; Ga. Code § 16-11-221; Mich. Comp. Laws §§ 750.543b, 750.543f & 750.543m; 18 Pa. C.S.A. § 2717.
- It is a felony under federal law to intentionally “solicit, command, induce, or otherwise endeavor to persuade” another person to engage in a crime of violence against a person or property. 18 U.S.C. § 373. Many states have similar laws.
- Neither the First nor Second Amendment protects private armed paramilitary organizations.
  - The Second Amendment protects an individual right to bear arms for self defense, but does not protect private paramilitary organizations. *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).
  - Collective armed action by private paramilitary organizations is unauthorized in every state and violates criminal laws in many states. *See, e.g.*, Ga. Code §§ 38-2-277, 16-11-151; Mich. Comp. Laws §§ 70.528a; 750.215; 18 Pa. C.S.A. § 5515; Wis. Stat. § 946.69; *see also Prohibiting Private Armies at Public Rallies* (Sept. 2020), available at <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/ProhibitingPrivate-Armies-at-Public-Rallies.pdf>.

*This Fact Sheet has been prepared by the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center. ICAP’s mission is to use the power of the courts to defend American constitutional rights and values. Visit us at <https://www.law.georgetown.edu/icap/>. Contact us at [reachICAP@georgetown.edu](mailto:reachICAP@georgetown.edu).*