



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

VIA EMAIL

Governor Greg Abbott
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January 20, 2021

Re: Unlawful Militia Violence and Legislative Recommendations

Dear Governor Abbott:

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 expertise in strategies to address the dangers created by unauthorized private paramilitary activity, particularly as it occurs during and in response to public demonstrations.¹

I am writing to share ICAP's expertise and urge you and law enforcement officials in Texas to take action to address the growing threat posed by unlawful militia groups in your states. We also urge you to pass legislation to provide additional ways to combat unlawful paramilitary activity, as well as to enact legislation criminalizing domestic terrorism. These measures would give Texas law enforcement officials the tools they need to address the grave risk extremist violence poses to public safety and security regardless of the underlying motivation of the terrorist actor.

Background

Unauthorized private militia groups present a significant threat to public safety when they are present at public demonstrations. Such groups recently organized events in Washington, D.C., and participated in the violent attack on the U.S. Capitol on January 6, 2021. They have also been involved

¹ ICAP has developed guidance for law enforcement on protecting First Amendment rights, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/12/Law-enforcement-First-Amendment-Guidance.pdf>, and responding to paramilitary activity, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/12/Law-Enforcement-Guidance-Paramilitary-Actors.pdf>. ICAP has also produced a 50-state catalog of state laws that bar unauthorized private paramilitary organizations. Inst. for Const. Advocacy & Protection, *Prohibiting Private Armies at Public Rallies: A Catalog of Relevant State Constitutional and Statutory Provisions* (Sept. 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf>.

in dangerous armed events at state capitols throughout the country, and current reporting indicates many of these groups are planning more unlawful armed private paramilitary activity in coming days.²

Whether engaging in their own demonstrations or attending demonstrations purporting to protect persons and property, these groups often are heavily armed, and they often claim either that they will provide back-up for law enforcement or that they have the authority to engage in law enforcement functions on their own. In addition to the violence and destruction witnessed at the Capitol, the presence of armed, coordinated paramilitary groups also has resulted in violent clashes with other demonstrators.³ Their presence also has made it more dangerous for law enforcement officers to maintain public safety—and to keep themselves safe—and has led to confusion as to who is lawfully authorized to keep the peace.⁴

As a recent report from the Texas Department of Public Safety explains, unauthorized paramilitary groups are a significant threat to public safety in Texas.⁵ For example, in September 2018, members of the Texas Patriot Network, an unauthorized militia group, “clashed with counter-protesters during a demonstration at the Islamic Society of North America conference in Houston,” resulting in at least one injury.⁶ Before the event, members of the group “openly discussed online their plans to attack counter-protesters.”⁷

More recently, unauthorized private militia groups have shown up at racial justice- and election-related demonstrations in Texas and have engaged in violence against those with whom they disagree. For example, in July 2020, “hundreds of counterprotesters” descended on a protest against a Confederate monument in Weatherford, Texas, resulting in clashes between the groups and two arrests.⁸ According to media reports, many of the counterprotesters were armed, “a sniper’s nest” was set up on top of a truck and a man squatted “with his rifle aimed at the group of 50 or so protesters.”⁹ After “the Texas Freedom Fighters and the Union of Three Percent American Patriots,” two unauthorized private militia groups, “made a statewide call for people to come to Weatherford to defend the [Confederate] statue and fight ANTIFA leaders,” members of these groups attended the

² Derek Hawkins & Kim Bellware, *After trial runs at statehouses last year, the far-right’s violent tactics erupted at the Capitol*, WASH. POST (Jan. 9, 2021), <https://www.washingtonpost.com/national-security/2021/01/09/capitol-riots-extremists/>; Associated Press, *Armed Statehouse Protests Set Tone for U.S. Capitol Insurgents*, U.S. NEWS (Jan. 7, 2021), <https://www.usnews.com/news/politics/articles/2021-01-07/armed-statehouse-protests-set-tone-for-us-capitol-insurgents>.

³ Tim Craig, *U.S. political divide becomes increasingly violent, rattling activists and police*, WASH. POST (Aug. 27, 2020), https://www.washingtonpost.com/national/protests-violence/2020/08/27/3f232e66-e578-11ea-970a-64c73a1c2392_story.html.

⁴ See Hunton & Williams LLP, *Final Report: Independent Review of the 2017 Protest Events in Charlottesville, Virginia* 123 (2017), <https://www.huntonak.com/en/news/final-report-independent-review-of-the-2017-protestevents-in-charlottesville-virginia.html>.

⁵ Tex. Dep’t of Public Safety, *Texas Domestic Terrorism Threat Assessment* 23–24 (Jan. 2020), https://www.dps.texas.gov/director_staff/media_and_communications/2020/txTerrorThreatAssessment.pdf.

⁶ *Id.* at 23.

⁷ *Id.*

⁸ Eric Griffey, *A Weatherford, Texas Protest Turned Violent*, SPECTRUM NEWS (July 29, 2020), <https://spectrumlocalnews.com/tx/san-antonio/news/2020/07/28/a-weatherford-protest-turned-violent->; see also Tim Craig, *U.S. Political Divide Becomes Increasingly Violent, Rattling Activists and Police*, WASH. POST (Aug. 27, 2020), https://www.washingtonpost.com/national/protests-violence/2020/08/27/3f232e66-e578-11ea-970a-64c73a1c2392_story.html (describing another confrontation with armed counterprotesters carrying military-style rifles at a demonstration and Democratic voter registration drive).

⁹ Griffey, *supra*.

counterprotests, increasing the risk of violence.¹⁰ Absent a serious response to this kind of dangerous activity, the potential remains for future confrontations between militia groups and protesters, resulting in the chilling of constitutionally protected speech and assembly, the destruction of property, and serious violence. And of course, as demonstrated in Washington, D.C., on January 6, the involvement of armed paramilitary actors in demonstrations against government actions and officials heightens the risk for serious physical harm, both to demonstrators and to law enforcement.

This threat remains serious as unauthorized private militia groups have begun to shift their focus to challenging public health measures in response to the coronavirus pandemic. As the U.S. Department of Homeland Security has recognized, anti-government groups like unauthorized private militias may be motivated to engage in violence by “perceived infringement of liberties and government overreach as all levels of government seek to limit the spread of the coronavirus.”¹¹ Such activity has occurred in Texas. For instance, purporting to guard a bar that was operating in contravention of state health orders, “[p]rotesters armed with modern semiautomatic rifles lined up across the sidewalk, some displaying white supremacist and extremist militia symbols.”¹² On another occasion, “C.J. Grisham, the president of Open Carry Texas and a strident Texas gun right activist,” called for “reinforcements” and urged followers to “outnumber the police” in a video posted on YouTube opposing Governor Abbott’s executive order.¹³

Although much unauthorized private militia activity does not rise to the level of domestic terrorism, the extremist worldviews that undergird unauthorized militia activity also can give rise to acts of domestic terrorism. For example, as the Texas Department of Public Safety noted, in January 2017, Marq Perez, who “had prior suspected involvement with an online militia group,” “burglarized and burned a Victoria, Texas mosque to send a message to the Muslim community.”¹⁴ Just last month, Michael Hari, who established a “terrorist militia group called ‘The White Rabbits,’” was convicted of multiple federal crimes for his role in firebombing the Dar al-Farooq Islamic Center in Bloomington, Minnesota, in 2017.¹⁵ Thirteen people are facing state or federal charges relating to a plot among unauthorized militia groups to kidnap Michigan Governor Gretchen Whitmer that was motivated by opposition to the Governor’s public health measures.¹⁶ And yesterday, the Department of Justice announced conspiracy and other charges against three members of unauthorized private militia

¹⁰ *Id.* The call to confront “ANTIFA leaders” is an example of another phenomenon driving private paramilitary violence. As the U.S. Department of Homeland Security has recognized, anti-government violence, of which unauthorized militia extremism is one type, is often “reinforced by a variety of online content, including conspiracy theories and political commentary they view as controversial. Current events that [extremists] perceive as infringing on their worldviews often contribute to periods of increased ideologically motivated violence, including recently during the COVID-19 pandemic and nationwide lawful protests.” U.S. Dep’t of Homeland Sec., *Homeland Threat Assessment* 19 (Oct. 2020), https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf.

¹¹ U.S. Dep’t of Homeland Sec., *supra*, at 19.

¹² Bud Kennedy, ‘Open Texas’ stunts get publicity for gun activists—and put pressure on Gov. Abbott, FORT WORTH STAR-TELEGRAM (May 17, 2020), <https://www.star-telegram.com/opinion/bud-kennedy/article242784711.html#storylink=cpy>.

¹³ Will Sommer, *Anti-Lockdown Protesters Are Now Facing Down Cops Outside of Bars*, DAILY BEAST (May 7, 2020), <https://www.thedailybeast.com/anti-lockdown-protesters-are-now-facing-down-cops-over-covid-safety-measures-outside-of-bars?ref=scroll>.

¹⁴ Tex. Dep’t of Public Safety, *supra*, at 24. Perez was sentenced to a 24-year prison term on federal hate crime charges.

¹⁵ See U.S. Dep’t of Justice, Press Release: Federal Jury Convicts Illinois Man for Bombing the Dar Al-Farooq Islamic Center (Dec. 9, 2020), <https://www.justice.gov/usao-mn/pr/federal-jury-convicts-illinois-man-bombing-dar-al-farooq-islamic-center>.

¹⁶ Bill Chappell, *Militia Members Plotted To Kidnap Michigan Gov. Whitmer, FBI Says*, NPR (Oct. 8, 2020), <https://www.npr.org/2020/10/08/921655143/militia-members-plotted-to-abduct-michigan-gov-whitmer-fbi-says>.

organizations for conspiring to violently obstruct the U.S. Congress’s certification of the Electoral College Vote.¹⁷

This threat is not new. In the early 1980s, a group of Vietnamese fishermen sued the Knights of the Ku Klux Klan (KKK) and its militia wing, the Texas Emergency Reserve, to obtain an injunction preventing the KKK from operating as a private military unit, in violation of Texas law, and from engaging in operations intended to intimidate and coerce the plaintiffs from operating their fishing businesses.¹⁸ In enjoining the KKK’s unlawful paramilitary activities, the court explained that “[m]ilitary organizations are dangerous wherever they exist, because of their interference with the functioning of a democratic society and because of their inconsistency with the State’s needs in operating its militia.”¹⁹

Legal Framework & Recommendations

In order to effectively respond to the threat of unlawful private militia activity, we wish to call your attention to existing Texas laws that restrict militia conduct—and to encourage you to pass new legislation that could fill gaps within the existing legal framework. Incorporating both domestic terrorism and anti-paramilitary-activity statutes into Texas law could help ensure that the state has the tools it needs to ensure that militarized conduct remains under official supervision.

All 50 states, including Texas, have laws or constitutional provisions that bar private military activity.²⁰ The Texas Constitution’s Strict Subordination Clause forbids private military units from operating outside state authority, requiring that “[t]he military shall at all times be subordinate to the civil authority.” Tex. Const. art. I, § 24. Texas’s Constitution vests the Governor with the “power to call forth the militia to execute the laws of the State, to suppress insurrections, and to repel invasions.” Tex. Const. art. IV, § 7.

Texas is one of 29 states that prohibit groups of people from organizing as private military units without the authorization of the state government.²¹ Texas bans “a body of persons other than the regularly organized Texas military forces, the armed forces of the United States, or the active militia of another state” from “associat[ing] as a military company or organization or parad[ing] in public with firearms in a municipality of the state.” Tex. Gov’t Code § 437.208(a).²² The statute’s only exception is for “students in an educational institution at which military science is a prescribed part of the course of instruction,” who are permitted to “drill and perform ceremonies with firearms in public” with the consent of the Governor. Tex. Gov’t Code § 437.208(b). These laws are consistent with the Second Amendment, which, as the U.S. Supreme Court has twice held, “does not prevent the prohibition of private paramilitary organizations.”²³

¹⁷ See *United States v Thomas Edward Caldwell, et al.*, No. 21-119 (D.D.C. Jan. 19, 2021), available at <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Thomas%20Caldwell%20Donovan%20Crowl%20Jessica%20Watkins%20Affidavit%20in%20Support%20of%20Amended%20Criminal%20Complaint.pdf>

¹⁸ See *Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982).

¹⁹ *Id.* at 218.

²⁰ See *supra*, n.1.

²¹ *Id.*

²² An earlier version of this statute was at issue in *Vietnamese Fisherman’s Association*, 543 F. Supp. at 211 & n.14 (discussing Tex. Rev. Civ. Stat. Ann. art. 5780, § 6). That statute was largely the same as the current version.

²³ *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).

Although Texas’s anti-militia law is an important step in prohibiting dangerous unauthorized militias, the state should also consider adopting a statute that criminalizes paramilitary activity, whether or not as part of a “private military unit.” Twenty-five states have laws that make it illegal for individuals to teach, demonstrate, instruct, train, or practice in the use of firearms, explosives, or techniques capable of causing injury or death, knowing and intending that they be used in or in furtherance of a civil disorder.²⁴ The term “civil disorder” is defined as “any public disturbance within the United States or any territorial possessions thereof involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.”²⁵

Moreover, we urge you to consider enacting a law that criminalizes domestic terrorism in order to directly address the serious harms to public safety and security posed by acts of terrorism, regardless of the underlying motivation of the terrorist actor. Half of all states and the District of Columbia either criminalize domestic terrorism or impose a sentencing enhancement for acts of terrorism.²⁶ Federal law defines domestic terrorism as criminal conduct in violation of federal or state law that is “dangerous to human life” and “appear[s] to be intended” to (a) “intimidate or coerce a civilian population,” (b) “influence the policy of a government by intimidation or coercion,” or (c) “affect the conduct of a government by mass destruction, assassination, or kidnapping.”²⁷ State domestic-terrorism statutes generally mirror the federal definition’s language regarding intent, but vary in the types of predicate criminal conduct they deem to be “acts of terrorism.” Louisiana’s anti-terrorism law, for instance, enumerates “killing a human being,” inflicting “serious bodily injury upon a human being,” “kidnapping,” engaging in “[a]ggravated arson upon any structure, watercraft, or movable,” and committing “[i]ntentional aggravated criminal damage to property” as predicate offenses that would qualify as domestic terrorism if committed with the requisite intent.²⁸

Finally, we urge you to ensure that state law provides sufficiently robust enforcement mechanisms to ensure that these laws protect public safety as intended. Although Texas Code § 402.028 permits the Attorney General to assist in the prosecution of criminal cases, he may only do

²⁴ See *supra*, n.1. For example, Virginia’s anti-paramilitary-activity law prohibits “[t]each[ing] or demonstrate[ing] to any other person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that such training will be employed for use in, or in furtherance of, a civil disorder; as well as “[a]ssembl[ing] 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 to persons, intending to employ such training for use in, or in furtherance of, a civil disorder.” Va. Code. Ann. § 18.2-433.2. Virginia also recently added a provision prohibiting pointing, holding, or brandishing a firearm “while assembled with one or more persons for the purpose of and with the intent to intimidate any person or group of persons.” *Id.*

²⁵ Va. Code. Ann. § 18.2-433.1.

²⁶ See Inst. for Const. Advocacy & Protection, *Protests and Public Safety: A Guide to Cities and Citizens* 39-40, <https://constitutionalprotestguide.org/> (listing state domestic-terrorism statutes). Texas does criminalize the making of terroristic threats. See Tex. Penal Code § 22.07 (prohibiting “threat[s] to commit any offense involving violence to any person or property” with one of a series of enumerated terroristic intents).

²⁷ 18 U.S.C. § 2331(5).

²⁸ La. Stat. § 14:128.1; see also Ga. Code §§ 16-11-220 (characterizing “domestic terrorism” as any felony or attempted felony in violation of state law “which, as part of a single unlawful act or a series of unlawful acts which are interrelated by distinguishing characteristics, is intended to cause serious bodily harm, kill any individual or group of individuals, or disable or destroy critical infrastructure, a state or government facility, or a public transportation system when such disability or destruction results in major economic loss”).

so upon “the request of a district attorney, criminal district attorney, or county attorney.”²⁹ Providing for direct enforcement of the state’s anti-militia law by the Attorney General would allow the state to address this harmful conduct when local law enforcement is unable or unwilling to do so.³⁰ Additionally, enhancing the Attorney General’s authority to civilly enforce these provisions would provide another valuable tool where criminal prosecution might not be the best response.³¹

Conclusion

ICAP stands at the ready to assist you in your efforts to protect against the threat posed by unauthorized paramilitary activity and domestic terrorism more broadly. We have also formed a coalition of national law firms that have committed to assisting communities in preventing unsanctioned paramilitary activity while protecting constitutional rights. Please do not hesitate to contact us if we can be of assistance. Because we and our law firm partners do this work on a pro bono basis, any consultation would be at no cost to you.

Sincerely,

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²⁹ Compare with N.J. Stat. Ann. § 52:17B-98 (recognizing “Attorney General as chief law enforcement officer of the State”) and *In re Attorney Gen. Law Enf’t Directive Nos. 2020-5 & 2020-6*, 465 N.J. Super. 111, 129, 240 A.3d 419, 430 (App. Div. 2020) (describing “the Attorney General [as] New Jersey’s chief law enforcement officer tasked with the general supervision of criminal justice”).

³⁰ Cf., e.g., Tex. Gov’t Code §§ 402.0231; 402.038; 402.035 (establishing the Corporate Integrity Unit, Transnational and Organized Crime Division, and Human Trafficking Prevention Task Force, respectively).

³¹ Cf. Tex. Gov’t Code § 341.012 (“If the public health nuisance is not abated within the time specified by the notice, the local health authority shall notify the prosecuting attorney who received the copy of the original notice. The prosecuting attorney: (1) shall immediately institute proceedings to abate the public health nuisance; or (2) request the attorney general to institute the proceedings or provide assistance in the prosecution of the proceedings, including participation as an assistant prosecutor when appointed by the prosecuting attorney.”).

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