

Hearing before the House Committee on Oversight and Reform  
Subcommittee on Civil Rights and Civil Liberties

“Confronting Violent White Supremacy (Part V):  
Examining the Rise of Militia Extremism”

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Chairman Raskin, Ranking Member Sessions, and distinguished members of the Subcommittee, thank you for inviting me to testify about the threats posed by private militias to public safety, national security, and constitutional rights.

***Private militias are increasingly engaging in the use of force and shows of force in public.***

Until recently, many people associated private militias primarily with the anti-government armed standoffs against federal agents at Ruby Ridge, Idaho, and Waco, Texas, in the early 1990s; at Bunkerville, Nevada in 2014; and at the Malheur Wildlife Refuge in Oregon in 2016. But the last several years have seen private militias engaging much more frequently and openly with the general public. The Unite the Right rally in Charlottesville, Virginia, in August 2017, was an early example of this trend, as private self-professed militias from across the country self-deployed to the event, ostensibly to “protect” the First Amendment rights of white supremacists, neo-Nazis, neo-Confederates, and other white nationalist organizations. Like others since then, the private militias in Charlottesville were heavily armed with assault rifles and other weapons, and

many were in full military kits including combat helmets and boots, camouflage uniforms, flak jackets, and other garb. Unanswerable to any governmental authority, interposing themselves between protesters and counter-protesters, they alone determined when and under what circumstances to deploy lethal force.

Public deployments of force by private militias have continued since the Unite the Right rally, despite successful litigation by my organization, the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown Law, based on state laws prohibiting unsanctioned paramilitary activity.<sup>1</sup> Operating under a command and control structure, private militias—some of which embrace that label and some of which eschew it in favor of describing themselves as “patriot” organizations—have repeatedly asserted authority over others through armed intimidation and coercion. They have mobilized in opposition to government action—as in the armed assaults on statehouses over pandemic-related public health measures in 2020 and the assault on the U.S. Capitol in an attempt to prevent certification of the presidential election on January 6, 2021. And they have mobilized in purported augmentation of law enforcement—as in the self-deployments to “protect” property and statues during racial justice demonstrations after the killing of George Floyd.

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<sup>1</sup> The case, brought on behalf of the city of Charlottesville and local businesses and residential associations, resulted in court orders against 23 individuals and organizations enjoining them from returning to Charlottesville “as part of a unit of two or more persons acting in concert while armed with a firearm, weapon, shield, or any item whose purpose is to inflict bodily harm, at any demonstration, rally, protest, or march.” *See* Consent Decree, *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657 (Va. Cir. Ct. July 29, 2018), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/08/All-Consent-Decrees-and-Default-Judgments-without-photos.pdf>.

Data analyzed by Princeton University's Bridging Divides Initiative from the Armed Conflict Location and Event Data Project (ACLED) showed that between January 1, 2020, and May 7, 2021, there were over 919 incidents of armed activity during demonstrations and protests, 514 of which involved self-identified or clearly affiliated private militia actors. Most frequently, private militias showed up at Black Lives Matter demonstrations; protests against COVID-19 lockdowns, mask mandates, and vaccines; and "Stop the Steal" rallies.

The threats to public safety are clear. In Kenosha, Wisconsin, a young man who had affiliated with a local private militia shot three racial justice demonstrators, killing two and seriously wounding the third. In Louisville, Kentucky, three people were shot, apparently accidentally, when armed militias from both the right and the left faced off against each other during a demonstration against police brutality. But potentially more dangerous are the sinister plots that have been revealed: Three members of an accelerationist militia group, The Base, which translates into "Al Qaeda" in Arabic, were arrested in January 2020 just days before they intended to use their self-built machine gun and paramilitary training to kick off a civil war during the annual "Lobby Day" in Richmond, Virginia. In October 2020, the FBI and state law enforcement officials in Michigan thwarted a plot by militia extremists and others to kidnap Governor Gretchen Whitmer and try her for treason. And the most significant conspiracy charges so far against those who participated in the insurrection at the U.S. Capitol on January 6, 2021, have been brought against members of a private militia, whose members from multiple states are alleged to have planned the takeover in advance, including by organizing a quick reaction force.

Despite the threat, and despite FBI Director Christopher Wray’s testimony that militia violent extremism is one of the most dangerous extremist threats in the United States, private militias continue to recruit, train, and deploy largely unimpeded. This is so even when they openly acknowledge their intent to serve as an armed counter-force to what they view as tyrannical government action. And this is true when they use paramilitary tactics to intimidate and coerce others from exercising their constitutional rights. From high school students organizing racial justice marches to residents seeking to petition their elected officials on issues of concern at the county and state levels, too often members of the public have had to run the gauntlet of private militia members bearing down on them with assault rifles just to exercise their First Amendment rights. Beyond threatening public safety, private militia activity chills constitutional rights.

***Private Militias are Not Constitutionally Protected.***

As I explain in detail in my paper, *Dispelling the Myth of the Second Amendment*, attached to this written testimony, private militias are not authorized by federal or state law; they are not protected by the Second Amendment; and they are unlawful in all 50 states.

Since before the founding and beyond, “well regulated” has always meant regulated by the government. Historically, the “militia” was the preferred means of defending the colonies (as opposed to standing armies), and it consisted of all able-bodied men who could be called forth by the governor when needed. Militia laws from the 1600s and 1700s confirm the state regulation of the militia and, indeed, insurgencies like Shay’s Rebellion drove the framers, at the Constitutional Convention, to ensure that Congress was given the constitutional authority to

provide for “organizing, arming, and disciplining” the militia. Congress did this through the Militia Act of 1792, which provided for the states to form their militias into what subsequently became the state National Guard units and other state militias reporting to the governors. Nearly every state included in its state constitution an explicit prohibition on rogue militias, requiring instead that the military always be strictly subordinate to the civil authority. State constitutional and statutory schemes enshrine this principle through heavy regulation of the state militia, giving the governor or the governor’s designee the authority to command the militia and call it forth as needed.

Despite the lack of legal authorization for private militia activity, many Americans—not just militia members, but many residents and even some law enforcement officials—wrongly believe that private militia activity is protected by the Second Amendment. But the Supreme Court has been clear since 1886 that the Second Amendment does *not* protect private militias and that the states must have the power to prohibit them as “necessary to the public peace, safety, and good order.” *Presser v. Illinois*, 116 U.S. 252, 268 (1886). More recently, the Supreme Court reiterated this holding in *District of Columbia v. Heller*, in which the Court for the first time held that the Second Amendment protects an individual right to bear arms for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Justice Antonin Scalia, writing for the majority, pointedly contrasted this individual right with paramilitary activity, restating that the Second Amendment “does not prevent the prohibition of private paramilitary organizations” and noting that no one arguing for the individual right had even contended otherwise. *Id.* at 620-21.

Consistent with this understanding, all 50 states prohibit private militias, whether through their state constitutional requirements that all military units be strictly subordinate to the civilian power or through other state laws. Common among these is the anti-militia law upheld by the Supreme Court in 1886, which exists to this day in 29 states and prohibits bodies of men from associating together as military units or parading or drilling in public with firearms. Also common are anti-paramilitary-activity laws that exist in 25 states and generally bar teaching, demonstrating, instructing, training, and practicing in the use of firearms, explosives, or techniques capable of causing injury or death, for use during or in furtherance of a civil disorder. Eleven states prohibit falsely assuming or engaging in the functions of law enforcement officers or public officials—of particular usefulness where private militias seek to usurp the role of law enforcement by purporting to provide security for persons or property. Another nine states have laws that ban wearing the uniforms of, or similar to, the uniforms of the United States military or foreign military.

***Congress should consider federal militia legislation.***

Given the number of state laws prohibiting private militia activity, it is reasonable to ask why these laws are not enforced more frequently. There are likely several reasons: The state constitutional provisions and state anti-militia laws are quite old and not well known to modern law enforcement; some local officials might be unsure of what elements of proof would be required to enforce their criminal anti-militia laws, lack access to adequate information and intelligence to build cases, or mistakenly believe that private militia activity is constitutionally protected; and some local elected officials lack the political will to enforce anti-militia laws, especially in jurisdictions that have a seemingly high

number of pro-militia voters. In many states, the Attorney General lacks general criminal enforcement authority, and the laws generally do not convey explicit civil enforcement authority, so there is no state-level capacity to fill law enforcement gaps at the local level. Instead, at best, we see other charges when plots are thwarted, such as the federal and state kidnaping conspiracy charges brought against the Michigan plotters and the federal firearms charges against the members of The Base. These charges can address an imminent threat, when discovered, but they do not significantly mitigate the longer-term militia threat.

These weaknesses point up the need for Congress to consider a federal anti-militia law. Private militias are not merely a local public safety problem; they frequently travel and transport weapons interstate; combine with other private militias and extremist groups from multiple states; and as the January 6 attack demonstrated, present not only a public safety threat, but also a national security threat. This has been made clear by the connections of some U.S.-based private militias to foreign militia organizations and extremist groups.

To effectively combat this threat will take more than one-off prosecutions at the state and federal level or novel litigation like that brought by my organization after the Unite the Right rally.<sup>2</sup> It requires federal government attention and, critically, a civil enforcement mechanism that would allow the U.S. Department of Justice to seek injunctive relief and civil forfeiture against armed paramilitary actors and their organizations. Providing for both civil and criminal enforcement

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<sup>2</sup> ICAP has since partnered with the District Attorney for Bernalillo County, New Mexico, in an enforcement action against a local private militia that deployed heavily armed to a racial justice demonstration in Albuquerque in the summer of 2020, purporting to protect a statue of a Spanish conquistador. During the tense event, a protester was shot by a counter-protester. *State of New Mexico v. New Mexico Civil Guard*, No. D-202-CV-2020-04051 (2<sup>nd</sup> Judicial District Court, Bernalillo County, filed July 13, 2020).

mechanisms, and a cause of action for those injured by private paramilitary activity, would allow for a more effective, all-tools approach. Legislation must be carefully worded to ensure it does not infringe on constitutional rights and is not susceptible to misuse to target vulnerable populations. This is feasible, and ICAP would be happy to work with Congress in exploring legislative options for countering the threat of unlawful private militias.

Thank you again for the opportunity to address the Subcommittee.

Attachment: Mary B. McCord, *Dispelling the Myth of the Second Amendment*, Brennan Center for Justice at New York University School of Law (forthcoming June 2021).



**PROTESTS, INSURRECTIONS, AND THE SECOND AMENDMENT**

# **Dispelling the Myth of the Second Amendment**

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# Introduction

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If there were ever any doubt about the threat that private paramilitary organizations pose to public safety, national security, and the United States constitutional order, the insurrection at the U.S. Capitol on January 6 should have laid it to rest. The most significant conspiracy charges to be filed have been against members of two private paramilitary organizations — one more traditional in its anti-government views and emphasis on military-style training and military dress,<sup>1</sup> and the other more emphatic about its white male “chauvinism” and willingness to openly encourage violence against perceived ideological enemies.<sup>2</sup> The charging documents make clear that these groups coordinated their activities, including the provision of weapons, and likely were instrumental in influencing the behavior of others who may not have initially intended to assault U.S. Capitol Police, forcibly overrun the U.S. Capitol, and physically prevent the certification of the Electoral College vote.

Although the size of the mob and its temporary success in interfering with government functions was shocking and frightening to watch, that extremist paramilitary organizations would use violence on January 6 was not a surprise, and indeed was an outgrowth of their increasing engagement with the public over the past year. Sometimes amassing to forcibly oppose government policies (as they did when storming statehouses in protest against government-imposed public health orders related to Covid-19)<sup>3</sup> and sometimes claiming to augment legitimate police forces (as they did when self-deploying during racial justice demonstrations, ostensibly to protect property against violent anarchists),<sup>4</sup> private militias have repeatedly used their assault rifles and military gear to intimidate and coerce others. After an election season during which they seeded the false narrative of election fraud and doubled down on it after November 3, far-right paramilitary organizations joined forces with conspiracy theorists and violent extremists to act on these fictitious and baseless claims, radicalizing others along the way.<sup>5</sup> Tragic as the loss of lives, serious injuries, property damage, and undermining of democracy were on January 6, one can only imagine the carnage that likely would have occurred if the District of Columbia allowed the open carrying of firearms like many states do.

The United States must reckon with the growing threat posed by unauthorized private militias, which have been allowed to proliferate for far too long. This essay attempts to correct the widespread mythology that the Second Amendment protects private paramilitary organizations and — even worse — that it protects their right to forcibly oppose whatever they view as government tyranny. To the contrary, there is no authority under federal or state law for private individuals to form their own private armies; the Supreme Court has been clear that the Second Amendment does not prevent states from outlawing private paramilitary organizations; and indeed, all 50 states prohibit them through their state constitutions, state statutes, or a combination of both. Yet such organizations’ continued projection of armed authority over others — sending a clear message of intimidation and coercion — is not just dangerous, it also squelches the First Amendment rights of those seeking to express their views, peaceably assemble, and petition their government.

This essay also briefly responds to suggestions that private force has a role to play when law enforcement fails. To grant such vigilante authority to publicly unaccountable and unregulated private actors would go well beyond the individual right to bear arms for self-defense recognized by the Supreme Court in *District of Columbia v. Heller* (2008).<sup>6</sup> What lines would be drawn for those wielding lethal weapons and arrogating to themselves the supposed authority to determine when to use them? As the Supreme Court explained in the 1886 case of *Presser v. Illinois*, the states’ power to prohibit paramilitary organizations “is necessary to the public peace, safety, and good order.”<sup>7</sup> The January 6 insurrection confirmed as much.

# A “Well Regulated Militia” Means Regulated by the Government

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Private militia organizations sometimes suggest that the Second Amendment’s reference to “a well regulated Militia,”<sup>8</sup> when considered in combination with what they view as the role of the militia in providing a check against tyranny, authorizes their organizing, training, and functioning as military units. But history confirms that “well regulated” has always meant regulated by the government. And although *Federalist* No. 46 refers to the militia as a tool to repel the danger of a tyrannical government,<sup>9</sup> its reference is to the obligation of *state* militias, not *private* militias.

Concerned about the dangers of standing armies, the colonies adopted militia laws long before the drafting of the Second Amendment. The militia consisted of able-bodied men between certain ages who could be called forth in defense of the state. The need for them to be “well regulated” was well recognized. As far back as 1647, Massachusetts recognized that “the well managing of the Militia of this Common-wealth is a matter of great concernment, therefore that it may be carried an end with the utmost safety and certaintie for the best benefit of the Countrie.”<sup>10</sup> In 1724, New York’s militia law provided that “an orderly and well disciplin’d Militia is justly esteemed to be a great Defence and Security to the Welfare of this Province.”<sup>11</sup>

Early state constitutions made clear that the militia was always to be under civilian governmental control. Virginia’s 1776 Bill of Rights provided that “a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that *in all cases the military should be under strict subordination to, and governed by, the civil power.*”<sup>12</sup> In conjunction with the constitutional designation of the governor as commander in chief, this “strict subordination” clause provided for military authority to be “integrated with the popular will as expressed through the elected officials of the Commonwealth.”<sup>13</sup> Moreover, it “ensure[d] the right of all citizens to fight in the defense of their nation and to live free from the fear of an alien soldiery commanded by men who are not responsible to law and the political process.”<sup>14</sup>

At the federal level, by the time of the Constitutional Convention in 1787, insurgencies like Shay’s Rebellion and other armed uprisings against the states gave the founders good reason to ensure that only the government could call forth the militia, not rebel leaders deciding when and under what circumstances to take up arms against the state. Thus, Article I, Section 8 of the U.S. Constitution gives Congress the authority “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”<sup>15</sup> and “[t]o provide for organizing, arming, and disciplining, the Militia,” while reserving the appointment of officers and training to the states.<sup>16</sup> Article II, Section 2 makes the president the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into actual service.”<sup>17</sup>

Congress exercised its authority by passing the Militia Act of 1792, which provided for the states to form their militias into what subsequently became the state National Guard units and other state militias reporting to the governors.<sup>18</sup> The Militia Act also gave the president the authority to call forth the state militias as necessary to repel invasion or suppress insurrection. And within the states, Virginia’s “strict subordination” clause became the model for a substantively identical provision in the constitutions of nearly every state to join the Union.<sup>19</sup> Similarly, the states’ constitutional and statutory schemes provide for the governor — not private vigilantes — to call forth the militia.<sup>20</sup>

So, what of *Federalist* No. 46 and its suggestion that armed citizen militias must be empowered to oppose a tyrannical government? James Madison’s language gives no credence to private armies. Instead, it makes clear that it is the *states* that have the power, through the *state militias*, to be a counter to a traitorous leader who would “pursue some fixed plan for the extension of the military establishment.”<sup>21</sup> In Madison’s words, “Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.”<sup>22</sup>

## The Second Amendment Does Not Protect Private Paramilitary Organizations

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Private paramilitary organizations, whether they identify as “militias” or deny that characterization, uniformly argue that their activity is protected by the Second Amendment. The mythology that the U.S. Constitution protects armed private militias is so widespread that it is sometimes repeated by law enforcement officers themselves. When a young man shot and killed two racial justice demonstrators after joining forces with a citizen militia that deployed to “protect” private property in Kenosha, Wisconsin, in the summer of 2020, the local police chief referred to the armed vigilantes as “exercis[ing] their constitutional right.”<sup>23</sup> But for all of the gray areas that remain about the scope of the Second Amendment’s protections, this is not one of them. The Supreme Court has been clear since 1886 that states must be able to prohibit private paramilitary organizations as “necessary to the public peace, safety, and good order.”<sup>24</sup>

*Presser v. Illinois* involved a challenge to a state law — one of 29 similar state laws that remain on the books to this day — that made it unlawful “for any body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this state, without the license of the governor thereof.”<sup>25</sup> Although the Second Amendment had not yet been held applicable to the states in 1886, the Supreme Court nevertheless did not equivocate on the limit of its protections: “We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law *do not infringe the right of the people to keep and bear arms.*”<sup>26</sup> The Court further explained (while rejecting a First Amendment argument that the state’s anti-militia statute infringed the right to peaceably assemble):

Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the state and federal governments, acting in due regard to their respective prerogatives and powers.<sup>27</sup>

More than 120 years later, recognizing for the first time that the Second Amendment protects an individual right to bear arms for self-defense, the Supreme Court restated what it had made clear in *Presser*: the Second Amendment “does not prevent the prohibition of private paramilitary organizations.”<sup>28</sup> Indeed, Justice Antonin Scalia, writing for the majority in *District of Columbia v. Heller*, noted that no one supporting the individual rights interpretation of the amendment had even contended that states could not ban such groups.<sup>29</sup>

The result is the same under state constitutional provisions protecting the right to keep and bear arms. Just 10 years after *Presser* was decided, the Supreme Judicial Court of Massachusetts concluded that the state’s declaration of rights, which provided that “the people have a right to keep and bear arms for the common defense,” did not include “the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized to do so by law.”<sup>30</sup> Citing *Presser*, the Massachusetts court referred to the matter as “affecting the public security, quiet, and good order,” and within the police powers of the legislature to regulate.<sup>31</sup>

The State of Washington left nothing to doubt in its Declaration of Rights, providing that “[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, *but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.*”<sup>32</sup> Upholding a state statute effectuating the constitutional provision by explicitly prohibiting organizations from associating as military companies, the Washington Supreme Court in 1907 elaborated on the threat posed by such groups: “Armed bodies of men are a menace to the public. Their mere presence is fraught with danger, and the state has wisely reserved to itself the right to organize, maintain, and employ them.”<sup>33</sup>

## All 50 States Prohibit Private Paramilitary Organizations

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Whether by virtue of state constitutional provisions, anti-militia statutes like the one at issue in *Presser*, or other state statutes, all 50 states have at least one prohibition on private paramilitary organizations. Following the Virginia model, 48 state constitutions contain a clause requiring the subordination of the military to civilian authorities.<sup>34</sup> In addition, 29 states have anti-militia statutes similar to the one upheld in *Presser*,<sup>35</sup> and 25 states have laws that generally prohibit teaching, demonstrating, instructing, training, and practicing in the use of firearms, explosives, or techniques capable of causing injury or death, for use during or in furtherance of a civil disorder.<sup>36</sup> Of particular usefulness where private militias seek to usurp the role of law enforcement by purporting to provide security for persons or property, 11 states prohibit falsely assuming or engaging in the functions of peace officers, law enforcement officers, or public officials.<sup>37</sup> Another nine states have laws that ban wearing the uniforms of, or similar to, the uniforms of the United States military or foreign military.<sup>38</sup>

Although infrequently enforced, there is precedent for the use of these state law provisions beyond the late 19th and early 20th centuries. In 1982, a federal district court in Texas enforced that state’s anti-militia law to permanently enjoin the Ku Klux Klan (KKK) and its militia unit, the Texas Emergency Reserve, from associating as a private military or paramilitary organization, carrying on military or paramilitary training, and parading in public with firearms.<sup>39</sup> The KKK and its militia arm had engaged in numerous deployments to “protect” property, patrol the border, and intimidate the plaintiff class of Vietnamese fishermen.<sup>40</sup>

The court rejected both First and Second Amendment challenges to the statute. As to the former, it held that the Texas Emergency Reserve’s military operations were impermissible “conduct” not “speech,” and that even if the conduct contained elements of protected expression, the state could regulate it under *United States v. O’Brien* (1968),<sup>41</sup> because the Texas law’s restriction on First Amendment freedoms was no greater than necessary to further an important governmental interest.<sup>42</sup> The court articulated that interest as

“protecting citizens from the threat of violence posed by private military organizations,” which it described as “vital” because the proliferation of such organizations “threatens to result in lawlessness and destructive chaos.”<sup>43</sup>

As to the latter, the court followed the prevailing school of thought at the time that the Second Amendment prohibited only infringement of the right to bear arms when associated with the state militia, an interpretation later rejected by the Supreme Court in *Heller*.<sup>44</sup> But the court also recognized *Presser*’s teaching that “[i]t cannot be successfully questioned that the state governments, unless restrained by their own constitutions, have the power to . . . control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States.”<sup>45</sup> The court concluded that equitable principles dictated that it could enforce the Texas statute through injunctive relief, emphasizing 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.”<sup>46</sup>

The Fourth Circuit weighed in on the enforcement of state anti-militia and anti-paramilitary-activity laws in *Person v. Miller* in 1988.<sup>47</sup> In that case, the leader of the Carolina KKK challenged a judgment of contempt for violating a court order (obtained as a result of the settlement of a class action brought by Black citizens who had been targeted for violence and intimidation by the Carolina KKK) prohibiting him from operating a military organization and engaging in paramilitary activity in violation of the state’s laws.<sup>48</sup> The Fourth Circuit upheld the contempt conviction, concluding that the evidence was sufficient to establish that the KKK leader had organized a military organization with the goal of overthrowing the government and had directed and engaged in exercises involving weapons and tactical training in furtherance of that objective.<sup>49</sup>

More recently, a Virginia state court denied “demurrers” (the state equivalent of motions to dismiss) sought by defendant militia and paramilitary organizations and their leaders in a lawsuit brought after the 2017 Unite the Right rally in Charlottesville. The suit, on behalf of the city of Charlottesville, local businesses, and local residential associations, sought declaratory and injunctive relief under the state constitution’s strict subordination clause, state statutes banning paramilitary activity and the false assumption of the functions of law enforcement, and the common law of public nuisance.<sup>50</sup> The court concluded that “[t]here appears to be no place or authority for private armies or militia apart from the civil authorities and not subject to and regulated by the federal, state, or local authorities.”<sup>51</sup> It rejected First and Second Amendment arguments made by the defendants, holding:

No one is being denied their right to speak, to assemble and protest, or even to bear firearms. But when a group comes as a unit, in uniform, with military or law enforcement weapons, equipment, tactics, and appearance, under a clear chain of command authority, looking like the police or military, and they are neither a part of or subject to the local, state, or federal military or police, and are subject to neither, this is a legitimate concern.<sup>52</sup>

## Conclusion

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Against the backdrop of 2020, and in particular what some perceive as the failure of law enforcement to adequately keep the peace during racial justice demonstrations, some scholars have suggested a useful role for “private force” in filling this gap.<sup>53</sup> Some analogize to the victimization of southern Black Americans and

Unionists by violent Confederate factions after the Civil War,<sup>54</sup> and to collective armed defense during the civil rights movement when law enforcement largely failed to protect against KKK attacks on nonviolent protestors and the shootings of Black leaders.<sup>55</sup> It is argued that decentralizing the use of force is preferable to a government monopoly on the use of force, particularly when “those of unequal strength, power, and numbers” are overcome by adversaries acting illegitimately against the public peace and when “government agents are unable or unwilling to supply the necessary police protection.”<sup>56</sup> It is posited that armed self-defense is the only practical mechanism citizens have to protect themselves and their businesses in the absence of effective police presence.<sup>57</sup> The common law right of citizen’s arrest is also held up as an example of America’s historical reliance on private force.<sup>58</sup>

Although collective self-defense against murder and physical injury is a far cry from collective self-defense against looting and property damage — the former possibly warranted even if not sanctioned by law — America’s long history of violent white supremacy does not itself support an ahistorical view of private militias and the scope of the Second Amendment. And although the scholars discussing alleged police failures during 2020’s racial justice demonstrations do not directly advocate for an interpretation of the Second Amendment that protects private militias, some of their arguments extend dangerously close. But just as the common law tradition of citizen’s arrest — historically understood as the right to arrest another for a crime committed in one’s presence<sup>59</sup> — does nothing to support the right of armed groups to usurp law enforcement’s role and proactively seek out law violators, neither does the Second Amendment’s *individual* right to bear arms for self-defense support armed private militias *collectively* engaging in the functions of properly authorized law enforcement.

The insurrection on January 6 establishes the fallacy of any effort to support a legitimate role for private militias. In the eyes of the members of private paramilitary groups who violently overran the U.S. Capitol Police and delayed the counting of the Electoral College votes, they were simply stepping in where law enforcement had abdicated its role to “stop the steal.” Similarly, in the eyes of the private militia members who plotted to kidnap Michigan Governor Gretchen Whitmer and put her on trial for treason,<sup>60</sup> they were simply exercising their right to make a citizen’s arrest. These may be extreme examples, but they illustrate the dangerous line-drawing that any acceptance of private paramilitary activity would entail. And they illustrate why, since well before the founding, a “well regulated militia” has always meant regulated by the government, not private actors.

# Endnotes

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<sup>1</sup> See Third Superseding Indictment, *United States v. Caldwell*, Criminal No. 21-cr-28-APM (D.D.C. Mar. 31, 2021).

<sup>2</sup> See First Superseding Indictment, *United States v. Nordean*, Criminal No. 21-cr-175 (TJK) (D.D.C. Mar. 10, 2021).

<sup>3</sup> See, e.g., Paulina Firozi, *Anti-Government Activist Ammon Bundy Arrested After Maskless Protesters Storm Idaho Capitol*, WASH. POST (Aug. 25, 2020), <https://www.washingtonpost.com/nation/2020/08/25/ammon-bundy-idaho/>; Kathleen Gray, *In Michigan, a Dress Rehearsal for the Chaos at the Capitol on Wednesday*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/politics/michigan-state-capitol.html>.

<sup>4</sup> See DFRLab, *Armed Militias Mobilize on Social Media Hours Before Deadly Kenosha Shooting*, MEDIUM (Aug. 26, 2020), <https://medium.com/dfrlab/armed-militias-mobilize-on-social-media-hours-before-deadly-kenosha-shooting-1ee5925a035f>; Matt Zapotosky et al., *Former City Council Candidate Arrested After Man Is Shot at New Mexico Protest with Militia Group*, WASH. POST (June 16, 2020), <https://www.washingtonpost.com/nation/2020/06/16/albuquerque-militia-shooting-protest/>.

<sup>5</sup> See DFRLab, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SECURITY (Feb. 10, 2021), <https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/>.

<sup>6</sup> *Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

<sup>7</sup> *Presser v. Illinois*, 116 U.S. 252, 268 (1886).

<sup>8</sup> U.S. CONST. amend. II.

<sup>9</sup> THE FEDERALIST NO. 46 (James Madison) [hereinafter FEDERALIST NO. 46].

<sup>10</sup> THE BOOK OF THE GENERAL LAUUES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETS 39 (Cambridge, Mass. 1647).

<sup>11</sup> AN ACT FOR SETTLING AND REGULATING THE MILITIA 269 (New York, William Bradford 1724).

<sup>12</sup> VA. CONST. art. I, § 13 (1776) (emphasis added).

<sup>13</sup> A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 274 (1974).

<sup>14</sup> *Id.* at 277.

<sup>15</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 16.

<sup>17</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>18</sup> Act of May 8, 1792, 1 Stat. 271.

<sup>19</sup> *Prohibiting Private Armies at Public Rallies: A Catalog of Relevant State Constitutional and Statutory Provisions*, INST. FOR CONST. ADVOC. & PROTECTION (Sept. 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf> [hereinafter ICAP 50-State Catalog].

<sup>20</sup> Virginia's constitutional and statutory scheme is typical: the governor is the commander in chief. VA. CONST. art. V, § 7, cl. 2; VA. CODE ANN. § 44-8. The state's militia is subdivided into three classes: (1) the National Guard, which is composed of the Army National Guard and Air National Guard; (2) the Virginia Defense Force; and (3) the unorganized militia. VA. CODE ANN. § 44-1. All three classes are strictly regulated. The "unorganized militia" consists of all able-bodied residents between certain ages who are citizens of the United States or intend to become citizens and are residents of the commonwealth. *Id.* §§ 44-1, 44-4. Only the governor has the power to call forth the militia, which he may do for purposes established by statute. *Id.* § 44-86; and when so called forth, the unorganized militia is incorporated into the Virginia Defense Force, which reports through the Virginia Department of Military Affairs to the adjutant general, who reports to the governor. *Id.* §§ 44-11, -54.4, -88.

<sup>21</sup> FEDERALIST NO. 46.

<sup>22</sup> *Id.*

<sup>23</sup> Jeremy Stahl, *Kenosha Police Chief Blames Protesters for Their Own Deaths, Defends Vigilante Groups*, SLATE (Aug. 26, 2020), <https://slate.com/news-and-politics/2020/08/kenosha-police-chief-daniel-miskinis-blames-protesters-for-own-deaths.html>.



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<sup>24</sup> *Presser*, 116 U.S. at 268.

<sup>25</sup> *Id.* at 253.

<sup>26</sup> *Id.* at 264–65 (emphasis added). Even before *Presser*, the Illinois Supreme Court had rejected a challenge to the same state statute, holding that there was no right “to bodies of men organized into military companies, under no discipline by the United States or State authorities, ‘to parade with arms’ in any city or public place as their inclination or caprice may prompt them.” *Dunne v. People*, 94 Ill. 120, 140 (1879). According to the court, the matter was “within the regulation and subject to the police power of the State.” *Id.* at 141.

<sup>27</sup> *Presser*, 116 U.S. at 267.

<sup>28</sup> *Heller*, 554 U.S. at 621.

<sup>29</sup> See *id.* It was not until two years later that the Supreme Court conclusively held that the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

<sup>30</sup> *Commonwealth v. Murphy*, 166 Mass. 171, 172 (1896).

<sup>31</sup> *Id.*

<sup>32</sup> WASH. CONST. art. 1, § 24 (emphasis added).

<sup>33</sup> *State v. Gohl*, 46 Wash. 408, 412 (1907).

<sup>34</sup> See ICAP 50-State Catalog, *supra* note 19. Only Georgia and New York do not contain such a provision. Georgia’s constitution does, however, provide that “The civil authority shall be superior to the military,” GA. CONST. art. I, sec. II, para. VI. Georgia also has both a state anti-militia statute like the one upheld in *Presser*, GA. CODE ANN. § 38-2-277, and an anti-paramilitary activity statute, GA. CODE ANN. § 16-11-151. New York has an anti-militia statute similar to the one upheld in *Presser*, N.Y. MIL. LAW § 240(1), and also bans paramilitary organizations from practicing 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). Moreover, New York law bars wearing uniforms similar to that worn by the military or police forces of a foreign state, N.Y. MIL. LAW § 238-c(a).

<sup>35</sup> States with anti-militia laws are Alabama, Arizona, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Texas, Washington, West Virginia, and Wyoming. See ICAP 50-State Catalog, *supra* note 19. Michigan’s law is much more limited than the others, as it applies only to societies confined to members of a certain race and only when the governor so orders. MICH. COMP. LAWS § 750.402.

<sup>36</sup> States with anti-paramilitary-activity laws are Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington. See ICAP 50-State Catalog, *supra* note 19.

<sup>37</sup> These states are Idaho, Iowa, Michigan, New Hampshire, New Mexico, Nevada, Oklahoma, Texas, Virginia, Washington, and Wisconsin. See ICAP 50-State Catalog, *supra* note 19; see, e.g., NEV. REV. STAT. § 197.120 (prohibiting the willful exercise of any of the functions or performance of any of the duties of a public officer without legal authorization). Federal law also prohibits falsely assuming the functions of an officer or employee of a U.S. department or agency. See 18 U.S.C. § 912. In 2020, James Benvie, the leader of a private militia that set up camp on the southwest border between New Mexico and Mexico and unlawfully detained migrants entering the country, was convicted of violating 18 U.S.C. § 912 and sentenced to 21 months in prison. See News Release, *Man Sentenced to 21 Months in Prison for Impersonating a Border Patrol Agent*, U.S. DEPT. JUSTICE U.S. ATTORNEY’S OFFICE DIST. NEW MEXICO (Oct. 20, 2020), <https://www.justice.gov/usao-nm/pr/man-sentenced-21-months-prison-impersonating-border-patrol-agent#:~:text=October%2020%2C%202020-.Man%20sentenced%20to%2021%20months%20in%20prison%20for%20impersonating%20a,of%20a%20Border%20Patrol%20agent.>

<sup>38</sup> These states are Alabama, Arizona, California, Florida, Maine, Michigan, New York, Rhode Island, and Virginia. See ICAP 50-State Catalog, *supra* note 19.

<sup>39</sup> *Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 219-20 (S.D. Tex. 1982).

<sup>40</sup> *Id.* at 205–06.

<sup>41</sup> *United States v. O’Brien*, 391 U.S. 367 (1968).

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<sup>42</sup> Vietnamese Fishermen's Ass'n, 543 F. Supp. at 209.

<sup>43</sup> *Id.* at 216.

<sup>44</sup> *Id.* at 210.

<sup>45</sup> *Id.* at 216 (quoting *Presser*, 116 U.S. at 267–68).

<sup>46</sup> *Id.* at 218.

<sup>47</sup> *Person v. Miller*, 854 F.2d 656 (4th Cir. 1988).

<sup>48</sup> *Id.* at 659–60.

<sup>49</sup> *Id.* at 660–61.

<sup>50</sup> *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657 (Va. Cir. Ct. July 7, 2018).

<sup>51</sup> *Id.* at \*4.

<sup>52</sup> *Id.* at \*12. After the court's ruling, the parties resolved the case through consent decrees entered by the court that permanently prohibited the defendants and their successor organizations from returning to Charlottesville "as part of a unit of two or more persons acting in concert while armed with a firearm, weapon, shield, or any item whose purpose is to inflict bodily harm, at any demonstration, rally, protest, or march." See Consent Decree, *Pa. Light Foot Militia*, No. CL 17-560, at 1 (Va. Cir. Ct. July 29, 2018), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/08/All-Consent-Decrees-and-Default-Judgments-without-photos.pdf>.

<sup>53</sup> See generally Nicholas James Johnson, *Private Arms and Civil Unrest: Lessons from the Black Freedom Movement* (Liberty & Law Center Rsch. Paper No. 20-09, Nov. 10, 2020).

<sup>54</sup> See Patrick M. Garry, *The Second Amendment as a Guard Against Government-Sanctioned Tyrannous Factions* 17 (Liberty & Law Center Rsch. Paper No. 20-06, Oct. 28, 2020).

<sup>55</sup> See Ryan Davis, *Neo-Republicanism, Nondomination, and Gun Rights in Uncertain Times* 26–27 (Liberty & Law Center Rsch. Paper No. 20-08, Nov. 6, 2020).

<sup>56</sup> See Robert Leider, *The State's Monopoly of Force and the Right to Bear Arms* 5 (Liberty & Law Center Rsch. Paper No. 20-05 Oct. 16, 2020), 116 NW. U. L. REV. (forthcoming).

<sup>57</sup> See David E. Bernstein, *The Right to Armed Self-Defense in the Light of Law Enforcement Abdication* 40 (Liberty & L. Ctr. Rsch. Paper No. 20-03, Oct. 14, 2020).

<sup>58</sup> See Leider, *supra* note 56, at 16.

<sup>59</sup> See Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J.L. & PUB. POL'Y 557, 564 (2016).

<sup>60</sup> See Criminal Complaint, *United States v. Fox*, Case 1:20-mj-00416-SJB, (W.D. Mich. Oct. 6, 2020), <https://www.justice.gov/usao-wdmi/press-release/file/1326161/download>. The defendants were opposed to Governor Whitmer's public health orders during the Covid-19 pandemic.