

2021 ANNUAL REPORT

Institute for Constitutional Advocacy and Protection

GEORGETOWN LAW





EXECUTIVE DIRECTOR'S LETTER

ICAP's fourth year was no less busy than its first three as our team—working and appearing in court remotely due to the pandemic—challenged the criminalization of poverty; sought transparency in America's courts; supported the rights of immigrants, persons with disabilities, and our youth; preserved the separation of powers; and defended basic constitutional protections for all. It was also a year of unprecedented attacks on our democracy as political violence spurred by disinformation and carried out, too often, by unlawful private militias endangered peaceful protesters and scarred the halls of the Capitol. In these pages, you will see a sampling of ICAP's work to protect our democracy through its litigation, public education and advocacy, and critical efforts to ensure that the 2020 election was not hampered by armed voter intimidation.

ICAP's fourth year was also a time of great change—change in the Administration and changes in ICAP's personnel. Our first Executive Director, Joshua Geltzer, now serves as President Biden's Deputy Homeland Security Advisor. In addition, two of ICAP's attorneys are joining the Civil Rights Division of the Department of Justice. We're of course sad to lose these amazing attorneys, but are proud that ICAP served as a launching pad for them to continue their public service in new and important ways. And we're excited to welcome new attorneys to the team, including our inaugural Supreme Court Director, Kelsi Brown Corkran, eager to build upon the solid foundation that is ICAP. We look forward to sharing our continued successes throughout the coming year!

Sincerely,

Mary B. McCord

Executive Director and Visiting Professor of Law

“Over the four years of the last Administration, it is hard to think of anyone who worked more tirelessly to protect our basic constitutional rights than the team at ICAP. The best of the best people and lawyers.” — Amir Ali, Deputy Director, Supreme Court & Appellate Program, *MacArthur Justice Center*, 3/4/21

OUR MISSION

The mission of the Institute for Constitutional Advocacy and Protection is to use the power of the courts to defend American constitutional rights and values.

The Institute, based at Georgetown University Law Center, draws on expert litigators, novel litigation strategy, and Georgetown's constitutional scholarship to vindicate individuals' rights and protect America's constitutional way of life.

At the heart of ICAP is its high-impact strategic litigation. The Institute develops and brings lawsuits in federal and state courts, often in partnership with community organizations, other legal non-profits, and local governments. It also supports others' litigation efforts through targeted amicus curiae ("friend of the court") briefs. In an era when constitutional discourse, including in the context of litigation, tends to be politically polarized, ICAP offers vital understandings of the Constitution and its protections that draw on scholarship and a wide range of practical experience, including extensive service in the Federal Government.

Critical constitutional dialogue also occurs outside the courts and in the public square. Through direct public engagement, writing, and speaking, ICAP's attorneys elevate and ground today's constitutional conversations to make them accessible to more Americans, enabling a better understanding of what the Constitution says, why it matters, and how it applies to today's political developments. ICAP also engages with government officials at the federal, state, and local levels to build knowledge and awareness of important and timely constitutional principles and to support those officials' efforts to uphold their constituents' constitutional rights in the face of growing political polarization.

The Institute also plays a key role within Georgetown University Law Center by involving law students in ICAP's work. Through a practicum seminar and additional research opportunities, law students offer legal research, factual development, and drafting support to ICAP's litigation efforts. Additionally, the Institute provides litigation assistance to other centers and institutes within Georgetown Law.



OUR WORK: LITIGATION

Now in its fourth year, ICAP concentrates its litigation efforts on seven core issues:

1. Addressing the rise of unlawful private militias;
2. Defending immigrants and sanctuary cities;
3. Opening America's courts;
4. Promoting good government: voting rights, whistleblowers, and transparency;
5. Protecting young people and vulnerable groups;
6. Reforming criminal justice; and
7. Safeguarding First Amendment rights.

During the past year alone, we:

- obtained a preliminary injunction against the [use of cash bail in Hamblen County, Tennessee](#), to detain individuals before trial solely on account of their poverty;
- secured, after years of litigation, revocation of the [federal government's "public charge" rule](#), under which the government could have denied admission and permanent residency to many lower-income noncitizens;
- obtained a favorable settlement in a [challenge to the Idaho Legislature's refusal to ensure proper COVID-19 precautions](#) to allow individuals with disabilities to exercise their First Amendment right to petition their government during the most recent legislative session, resulting in meaningful options for virtual participation;
- represented the House Judiciary Committee in its lawsuit to [compel the former White House Counsel to testify on matters and information discussed in Special Counsel Robert Mueller's Report](#), ultimately leading to an interview with the Committee;
- litigated on behalf of the House of Representatives in [multiple challenges](#) to an [executive memo calling](#) for the apportionment of the House of Representatives to exclude undocumented immigrants, a position that was reversed by the Biden Administration;
- prompted courts in Pittsburgh, Pennsylvania, to [provide online public access to remotely conducted criminal proceedings](#), ensuring that court watchers were not forced to choose between their health and their First Amendment right to observe court proceedings;
- ensured, after the defendants withdrew their appeal of ICAP's trial-court win, that Pennsylvania court administrators are obligated to either [provide court-produced records of bail hearings or allow members of the public to audio-record hearings](#), paving the way for bail-reform advocates to access critical information to hold judges and prosecutors accountable;
- secured a reversal in the Fourth Circuit of the dismissal of a [First Amendment challenge to a Maryland rule that bans broadcasting recordings of criminal court proceedings](#), including those provided by the courts;
- prompted a Pennsylvania prosecutor to withdraw criminal charges against a defendant for the "unlawful use of an audio or video device in court" through a [First Amendment-based challenge to the prosecution](#);
- obtained, on behalf of a local public defender's office, the [unsealing of an expert report](#) exposing widespread misconduct committed by the Prince George's County Police Department;
- secured, on behalf of a teenage girl who had been subjected to emotionally degrading treatment by church elders after she was raped by a fellow church member, a [favorable decision in the Utah Supreme Court throwing out a lower-court decision dismissing her case on Establishment Clause grounds](#); and
- obtained the [reversal on appeal of the dismissal of a middle-school student's claim under Title IX](#) of the Civil Rights Act after school administrators acted with total indifference to her sexual assault by other students.

ICAP currently represents clients in a wide range of lawsuits fighting to defend key constitutional rights and values. For example, we are:

- working with the district attorney in Albuquerque, New Mexico, [to bar a heavily armed vigilante private militia from usurping the role of law enforcement](#) by purporting to "protect" property from unsupported threats during racial justice demonstrations;
- [challenging a predatory scheme](#) for collecting fines and fees from indigent individuals caught in the criminal justice system in Oklahoma;
- bringing [civil rights claims against a police officer in New Jersey](#) who filed baseless criminal charges against two protesters in retaliation for exercising their First Amendment rights to photograph him engaged in public duties and post the photograph online;

- seeking records under the Maryland Public Information Act [to shed light on the Baltimore Police Department's compliance](#) with legally mandated transparency practices;
- representing an [attorney threatened with contempt of court and disciplinary action in violation of her First Amendment rights](#) for seeking to ensure that indigent criminal defendants receive constitutionally adequate representation;
- challenging the [discriminatory exclusion of U.S. citizen children](#) with at least one undocumented immigrant parent from the benefits of emergency cash assistance distributed in response to the COVID-19 pandemic;
- defending [two cities in Indiana](#) against claims that their welcoming city ordinances violate state law;
- challenging a [State Department rule](#) requiring nearly all applicants for the Diversity Visa Program to have a valid passport, which effectively bars applicants from developing countries where getting a passport can be prohibitively costly and time-consuming;
- seeking records under the Freedom of Information Act [to uncover details regarding the expulsion of unaccompanied and undocumented children](#) without legal process during the COVID-19 epidemic;
- defending the Board of Education of Howard County, Maryland, against [state](#) and [federal](#) lawsuits seeking to strip the Board's student member of voting power because of the student's voting record; and
- intervening on behalf of the South Carolina State Conference of the NAACP and the Orangeburg County School District [to defend a provision of the South Carolina constitution that safeguards public-school funding](#) in the state after the governor failed to mount a full defense of the provision.

Since its inception, ICAP also has submitted 66 amicus briefs to federal and state courts on issues ranging from freedom of the press to fundamental criminal procedural rights to limiting local entanglement with federal immigration enforcement to free expression on social media: 12 in the U.S. Supreme Court; 28 in federal courts of appeals; 18 in federal district courts; and 8 in state courts.





OUR WORK: ICAP'S RESPONSE TO THREATS TO OUR DEMOCRACY

Often coalescing around disinformation about racial justice demonstrations, the pandemic, and election fraud, unlawful private militias posed an unprecedented threat to our democracy over the past year, sometimes deploying ostensibly to “protect” property or “augment” legitimate law enforcement and sometimes deploying in armed opposition to government policies and proceedings, including during the January 6 attack on the U.S. Capitol. The threat to our elections was particularly acute, as the nation braced for the possibility of armed voter intimidation at the polls. Because of its expertise in addressing the danger of unlawful militias, ICAP played a leading role in protecting against these threats:

- ICAP created a series of fact sheets addressing unauthorized [private militias](#); [voter intimidation](#); and [policing best practices](#), leading over 750,000 users to visit ICAP's website during the 2020 election season. The fact sheets achieved such widespread circulation that a nationwide unlawful private militia linked to them in a directive to its members not to congregate around polling places for fear of being arrested for voter intimidation.
- ICAP assembled a team of researchers and non-profit experts to share information about potential armed voter intimidation. ICAP is particularly grateful to the Atlantic Council's Digital Forensic Research Lab, which continues to house an expert researcher funded by ICAP. Since summer 2020, ICAP has worked with this research team to share information with federal, state, and local officials to protect public safety.
- ICAP sent dozens of letters to jurisdictions around the country to encourage them to take action against unlawful paramilitary activity and the threat of armed voter intimidation, often resulting in ICAP providing behind-the-scenes legal advice that led to a decrease in unlawful militia activity. ICAP also partnered with local law enforcement, including Philadelphia District Attorney [Larry Krasner](#), to take a stand against voter intimidation.
- ICAP's leadership regularly spoke about the threat of armed voter intimidation and unlawful militia activity, and what communities can do to stop it. These engagements ranged from meetings with government officials through the U.S. Conference of Mayors, Major City Chiefs Association, and National Association of Attorneys General, to presentations and trainings for law enforcement, election officials, and advocacy groups like the League of Women Voters and NAACP.
- ICAP convened a coalition of volunteer law firms that were prepared to bring emergency litigation in multiple states against armed voter intimidation on Election Day. ICAP monitored reports of voter intimidation from the opening of the polls on the East Coast to their close on the West Coast, with no significant armed activity reported and no litigation needed.

Ultimately, Election Day 2020 passed with no known complaints of private militia activity at the polls. ICAP was proud to play a role in that success. Unfortunately, the events of January 6 demonstrate that unauthorized militia actors continue to pose a serious threat to our democracy, and ICAP is continuing to work to protect the constitutional rights of all of America's residents from this danger.

OUR WORK: PUBLIC ENGAGEMENT

ICAP attorneys have participated in a wide array of conferences, symposia, podcasts, and panels on a variety of topics, including:

- testifying at a hearing before the House Committee on Oversight and Reform Subcommittee on Civil Rights and Civil Liberties [about the threat posed by private militias](#);
- speaking on a [panel on nationwide injunctions](#) with the Law & Economics Center at George Mason University School of Law;
- participating in a conversation with the “Vital Interests” Podcast of the Center on National Security at Fordham Law on [rehabilitating the Office of Legal Counsel](#);
- speaking on a [panel on Section 1983 litigation](#) with the Institute for Justice;
- participating in panels hosted by the Atlantic Council on the future of [combating domestic terrorism](#) and [fighting online extremism](#);
- engaging in conversations with [Diane Rehm of “On my Mind,” NPR’s “1A,”](#) and [PBS Newshour](#) about private militia activity across the nation;
- discussing with NPR’s “On Point” the importance of [ensuring the integrity of elections against voter intimidation](#);
- speaking on PBS Newshour about the [Biden Administration’s rollout of a new domestic-terrorism strategy](#);
- taking part in a panel with the Carnegie Endowment for International Peace to discuss [strategies against right-wing extremism](#);
- participating in a conversation with the Combating Terrorism Center at West Point on [law and domestic terrorism](#);
- joining a panel with the Duke Center on Firearms Law on [the impact of firearms on election-related activities and democratic institutions](#);
- holding a conversation with Georgetown Law Professor Paul Butler on [race, extremism & accountability after the Capitol Siege](#);
- speaking on a panel with the Institute of Politics at the University of Chicago on [combating violent domestic extremism](#); and
- engaging in a discussion with the Giffords Law Center to Prevent Gun Violence on the [use of guns to intimidate voters](#).

“Private militias want us to think the Second Amendment protects them, and they’re just wrong. ‘Well regulated’ has always meant ‘regulated by the state.’” — ICAP Executive Director Mary McCord, *FiveThirtyEight*, 5/18/21



OUR WORK: PUBLIC EDUCATION

This past year, ICAP co-hosted with the Georgetown Journal of Legal Ethics a discussion of contemporary challenges to government ethics and the rule of law and their implications for the 2020 election and beyond.

Additionally, the ICAP team has added their voices to a wide range of public debates on the Constitution, with op-eds and scholarly pieces appearing in the *New York Times*, *Yale Law Journal*, *The Atlantic*, and elsewhere, including:

- an [essay](#) in a Brennan Center symposium on Protests, Insurrection, and the Second Amendment, aimed at dispelling the myth that the Second Amendment protects private militia activity;
- an [article](#) in *The Atlantic* arguing for a criminal investigation into former President Trump's actions leading up to the Capitol siege;
- an [op-ed](#) in the *Los Angeles Times* arguing for greater use of legal tools to crack down on unlawful private militias, including those that participated in the January 6 insurrection;
- an [op-ed](#) in the *New York Times* spotlighting how the plot against Michigan Governor Gretchen Whitmer shows the danger of private militias, which are not authorized by federal or state law, are not protected by the Second Amendment, and are unlawful in every state;
- an [op-ed](#) in the *New York Times* discussing what high-profile resignations from the Trump Administration Justice Department mean for the rule of law;
- an [op-ed](#) on WisPolitics decrying private militia activity in Kenosha, Wisconsin, and highlighting legal tools available to law enforcement to curtail future similar actions;
- an [op-ed](#) in the *Milwaukee Journal-Sentinel* highlighting Wisconsin state statutes and constitutional provisions against private militias;
- an [article](#) in the *Yale Law Journal* laying out how actions by the Office of Legal Counsel (OLC) at the Justice Department under the Trump administration threaten the separation of powers by exalting the executive branch at the expense of Congress;
- an [issue brief](#) with the American Constitution Society and an [article](#) in *Just Security* outlining key steps that the Biden administration should take to restore the Office of Legal Counsel's independence and credibility; and
- an [op-ed](#) in *USA Today* discussing Justice Ruth Bader Ginsburg's legacy.

"[A] presumption in favor of publishing [Office of Legal Counsel] final opinions – especially when the administration relies on OLC advice to justify major policy decisions – will help Congress and the public understand the legal basis for executive actions and hold the executive branch and OLC accountable." —ICAP Senior Counsel Annie Owens, *Just Security*, 12/16/20

The background of the page is a photograph of a clock tower, likely the Old Chapel at Georgetown University, seen through the branches and pink blossoms of a magnolia tree. The sky is a clear, bright blue. The text is overlaid on a white rectangular area in the upper left portion of the image.

OUR WORK: TEACHING

In both the fall and spring semesters, ICAP offers a practicum seminar in which Georgetown University Law Center students learn the strategy and legal considerations involved in bringing constitutional impact litigation and receive credit for contributing to ICAP's work.

ICAP makes sure that its practicum students and student interns are exposed to a broad range of subject areas and are incorporated into its litigation teams. Students help with a range of tasks, including gathering facts in support of potential litigation; providing research support in developing legal theories; producing first drafts of motions and sections of legal briefs; and participating in meetings with clients and partner organizations. Practicum students contributed 3,197 hours to the Institute's work over the past year alone, and have contributed more than 7,200 hours since 2018.

Many Georgetown Law alumni who participated in the ICAP practicum have gone on to careers in support of the public interest. Practicum alumni have secured clerkships in a number of federal and state courts, have been selected for fellowships at public-interest organizations, and have embarked on careers within the U.S. Department of Justice and other federal departments and agencies. Empowering the next generation of public-interest legal leaders has always been a critical part of the Institute's mission, and ICAP is proud to have been a valuable part of its students' education as they begin their legal careers.



OUR COVERAGE

ICAP's work regularly receives national and local news coverage:

- 6/16/21 – [Reuters](#) covers Fourth Circuit opinion vacating dismissal of ICAP's case challenging Maryland's ban on broadcasting criminal court proceedings and remanding to the district court for further proceedings.
- 5/4/21 – [Pittsburgh Tribune-Review](#) covers voluntary dismissal of lawsuit after policy changes in Pennsylvania's Fifth Judicial District mandate remote access to court proceedings.
- 2/23/21 – [Knoxville News Sentinel](#) covers ICAP's suit challenging Hamblen County, Tennessee's wealth-based approach to pretrial detention.
- 2/16/21 – [National Law Journal](#) covers Kelsi Corkran's move to ICAP.
- 1/12/21 – [Legal Intelligence](#) covers decision of Third Circuit to grant rehearing en banc on challenge of a Philadelphia, Pennsylvania, ban on recording bail hearing proceedings.
- 10/21/20 – [New York Times](#) interviews Mary McCord on an increase in unauthorized private militia groups around the country.
- 10/6/20 – [CNN.com](#) covers ICAP's fact sheets for all 50 states explaining the laws barring unauthorized private militia groups and what to do if groups of armed individuals are near a polling place or voter registration drive.
- 10/5/20 – [Solitary Watch](#) covers ICAP's brief in the Fifth Circuit challenging Texas's improper use of solitary confinement.
- 9/30/20 – [Washington Post](#) covers ICAP's fact sheets for all 50 states explaining the laws barring unauthorized private militia groups and what to do if groups of armed individuals are near a polling place or voter registration drive.

"Even more encouraging, [Albuquerque District Attorney Raúl] Torrez is joining with local lawyers and the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center to address a bigger issue — how to manage so-called militias made up of armed civilians who believe they have the right to take the law into their own hands." [Santa Fe New Mexican, 7/14/20](#)

OUR TEAM

Professor Neal Katyal

*Faculty Chair
Paul and Patricia Saunders Professor of National Security Law*

Professor Mary B. McCord

Executive Director and Visiting Professor of Law

Amy Marshak

Managing Director and Senior Lecturer

Kelsi Brown Corkran

Supreme Court Director

Elizabeth Cruikshank

Senior Counsel

Joseph Mead

Senior Counsel

Annie Owens

Senior Counsel

Seth Wayne

Senior Counsel

Jonathan Backer

Counsel

Shelby Calambokidis

Counsel

Jennifer Safstrom

Counsel

Jonathan de Jong

Litigation and Operations Clerk

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A stylized, high-contrast illustration of the Statue of Liberty. The central figure is a woman's face with dark hair, looking directly forward. She is wearing a crown with spikes. Her hands are positioned as if holding a tablet, which is depicted as a white starburst shape. The background consists of a large white circle with a vertical line through it, set against a blue and red background with sharp, angular shapes. The overall style is reminiscent of pop art or graphic design.

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YOUR VOTE IS YOUR VOICE