

Institute for
Constitutional Advocacy and Protection

GEORGETOWN LAW

Expert Statement

House Select Committee to Investigate the January 6th
Attack on the United States Capitol

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About the Institute for Constitutional Advocacy and Protection

The Institute for Constitutional Advocacy and Protection (ICAP) uses strategic legal advocacy to defend constitutional rights and values while working to restore confidence in the integrity of our governmental institutions. A non-partisan institute within Georgetown University Law Center, ICAP's experienced attorneys employ novel litigation tools, strategic policy development, and the constitutional scholarship of Georgetown to vindicate individuals' rights and protect democratic processes. ICAP offers vital understandings of the Constitution that draw on a wide range of practical experience, including extensive service in the federal government.

As a result of successful litigation against unlawful private militias and white nationalist paramilitary groups that descended on Charlottesville, Virginia, at the Unite the Right rally in August 2017, ICAP has developed an expertise in using legal tools to combat political violence while protecting constitutional rights.

Introduction

Private militias have existed since the founding of the country, but the modern militia movement arose in the wake of armed standoffs between federal agents and private citizens at Ruby Ridge, Idaho, and Waco, Texas, in the early 1990s.¹ Sharing a common ideology of resistance to federal authority and gun control, their numbers grew before waning under the George W. Bush administration.² When President Barack Obama was elected, the militias rebounded, driven by increasing anti-government sentiment and hyped-up rhetoric that the government was coming for their guns.³ Disputes over the use of federal lands resulted in armed standoffs against federal agents in Bunkerville, Nevada, in 2014,⁴ and at the Malheur Wildlife Refuge in Oregon in 2016,⁵ each involving unauthorized militias that traveled from across the country to join forces in opposition to legitimate governmental authority.

The most recent resurgence came with the 2016 election of Donald Trump, whose “drain the swamp” mantra was popular with the anti-government movement, and whose declared hostility toward Muslims and immigrants gave cover to the open expression of hateful rhetoric by the likeminded, including many militia members.

The “Unite the Right” rally in Charlottesville, Virginia, in August 2017, was a harbinger of increasing unlawful militia activity. When white supremacist, neo-Nazi, neo-Confederate, and other hate groups wreaked havoc in Charlottesville,

¹ Brian Albrecht, *The Rise of Modern Militias*, CLEVELAND.COM (July 28, 2019), <https://www.cleveland.com/news/2019/07/the-rise-of-modern-militias.html>.

² See Anti-Defamation League, *The Militia Movement* (2020), <https://www.adl.org/resources/backgrounders/the-militia-movement-2020>.

³ *Id.*

⁴ See Sarah Childress, *The Battle Over Bunkerville, The Bundys, the Federal Government and the New Militia Movement*, PBS FRONTLINE (May 16, 2017), <https://www.pbs.org/wgbh/frontline/article/the-battle-over-bunkerville>.

⁵ The Oregonian/Oregon Live, *Oregon Standoff Timeline: 41 Days of the Malheur Refuge Occupation and the Aftermath* (Jan. 9, 2019), https://www.oregonlive.com/portland/2017/02/oregon_standoff_timeline_41_da.html.

they had important allies “protecting” them. Operating wholly outside of public accountability, in violation of Virginia’s constitution and state statutes, self-professed militias from as far away as the state of Washington usurped law enforcement authority by purporting to protect the First Amendment rights of those ostensibly protesting the city’s decision to remove Confederate memorials from two city parks.⁶ Just as the rally was an opportunity for newly energized white nationalist groups to step out of the virtual space and into the physical space, it was an opportunity for the militia movement—also newly energized—to stake out its place.

Recognizing the danger posed by unaccountable private militias, ICAP responded to the Unite the Right rally by filing suit against a number of the involved militias on behalf of the City of Charlottesville, local small businesses, and residential associations.⁷ The successful lawsuit relied on state laws prohibiting private paramilitary activity and the false assumption of law enforcement authority, and sought forward-looking injunctive relief to prevent a repeat of the violence and open-air street battles that had occurred.⁸ The case resolved after the court denied the defendant militias’ “demurrers” (the state equivalent of motions to dismiss), writing 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.”⁹ The court entered consent orders against the defendant militias and their leaders, permanently barring them from returning to Charlottesville in groups of two or more, acting in

⁶ See First Amended Complaint, *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, (Va. Cir. Ct. Jan. 4, 2018) [hereinafter Charlottesville Amended Complaint], <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/02/charlottesville-complaint.pdf>.

⁷ *Id.*

⁸ *Id.*

⁹ *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657 (Va. Cir. Ct. July 7, 2018), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/07/2018.07.07-Letter-Opinion-Ruling-on-Defendants-Demurrer-to-Complaint.pdf>.

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.”¹⁰

Notwithstanding the success of the litigation, public deployments of force by private militias have continued beyond Charlottesville since the Unite the Right rally. 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 2020¹¹ and the assault on the U.S. Capitol on January 6, 2021.¹² 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.¹³

ICAP has followed the actions of private militias since 2017, often consulting with state and local government officials that have sought our advice on how to protect public safety while preserving constitutional rights at protests and rallies. In the years since Unite the Right, ICAP has observed the militia

¹⁰ See, e.g., Consent Decrees, *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560 (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>.

¹¹ See, e.g., Rebecca Boone, *Armed Statehouse Protests Set Tone for US Capitol Insurgents*, AP NEWS (Jan. 7, 2021), <https://apnews.com/article/election-2020-coronavirus-pandemic-oregon-elections-idaho-688fc8894f44992487bb6ee45e9abd77> (“In May, armed protesters forced their way into the Michigan Statehouse to object to pandemic-related lockdowns.”).

¹² See, e.g., Audrey Alexander & Kristina Hummel, *A View from the CT Foxhole: Mary McCord, Executive Director, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center*, COMBATING TERRORISM CENTER (Mar. 2021), <https://ctc.usma.edu/a-view-from-the-ct-foxhole-mary-mccord-executive-director-institute-for-constitutional-advocacy-and-protection-georgetown-university-law-center/> (“On January 6, there was a whole spectrum of people participating. . . . There were unlawful private militia groups, including the Oath Keepers—several of whom were the first to be charged with conspiracy related to the insurrection—and violent paramilitary street gangs like the Proud Boys, many of whom are also charged with conspiracy and other crimes arising from the insurrection.”).

¹³ See, e.g., *Jacob Blake: Two Shot Dead in Third Night of Wisconsin Unrest*, BBC (Aug. 26, 2020), https://www.bbc.com/news/world-us-canada-53917170?at_custom4=C540EE4A-E78D-11EA-BBBC-6BF939982C1E (“[V]ideo shows armed civilians, many dressed in military fatigues, congregating outside businesses they said they were protecting.”).

movement taking advantage of increased political polarization in the United States, aligning more and more frequently with other extremist movements, including white nationalists, conspiracy theorists, accelerationists,¹⁴ and the MAGA (Make America Great Again) movement. Working with researchers at the Atlantic Council’s Digital Forensics Research Lab (DFRLab), the Institute for Strategic Dialogue, Princeton University’s Bridging Divides Initiative (BDI), the Armed Conflict Location and Event Data Project (ACLED), and other research organizations, ICAP has seen the militia movement use social media and online private forums to recruit and propagandize; to spread disinformation; and to organize on-the-ground mobilizations. An analysis of ACLED data by BDI showed that between January 1, 2020, and March 25, 2022, there were over 1193 incidents involving armed or unlawful paramilitary groups or individual actors at demonstrations, 793 of which involved communal, self-identified, or clearly affiliated unlawful militias.¹⁵ Most frequently, private militias showed up at racial justice demonstrations; protests against COVID-19 lockdowns, mask mandates, and vaccines; and “Stop the Steal” rallies.¹⁶ It is no surprise that private militia organizations played a role in the January 6 attack on the U.S. Capitol.

¹⁴ Accelerationist white supremacist groups believe in hastening the collapse of society, such as through civil war, in order to preserve the white race. See Institute for Strategic Dialogue, *Accelerationism: An Overview of Extremist Narratives about the Need for Societal Collapse to Preserve the White Race* (May 2021), <https://www.isdglobal.org/wp-content/uploads/2021/09/Accelerationism-External-May-2021.pdf>.

¹⁵ *Overview of Unlawful Paramilitary Activity at Demonstrations: January 1, 2020 to March 25, 2022 (ACLED Data)*, BRIDGING DIVIDES INITIATIVE (Mar. 30, 2022), https://bridgingdivides.princeton.edu/sites/g/files/toruqf246/files/documents/Overview_Unlawful%20Paramilitary%20Activity%20At%20Demonstrations%20%5BUpdated%20March%2030%2C%202022%5D.pdf.

¹⁶ Before Election Day 2020, paramilitary actors were present most often at demonstrations that addressed racial justice, followed by demonstrations about pandemic-related public-health restrictions. Between Election Day and January 6, 2021, the demonstrations that most frequently involved paramilitary actors were "Stop the Steal" demonstrations, with demonstrations about racial justice and the pandemic involving smaller but significant numbers of paramilitary involvement. Finally, from January 7, 2021, to March 25, 2022, pandemic-related protests have drawn the most paramilitary actors, followed by racial justice demonstrations and "Stop the Steal" demonstrations and others calling for the release of those charged with offenses relating to January 6. *Id.*

To understand that role and the nature of the evolving threat that unauthorized private militias continue to pose, it is useful to start with a closer look at the Unite the Right rally.

The Unite the Right Rally

The Unite the Right rally was billed as an opportunity to protest the City of Charlottesville’s decision to remove a controversial Confederate statute, although later-discovered private online chats revealed that white nationalist protesters’ true intent was to provoke counter-protesters and rely on the doctrine of self-defense to “crack skulls.”¹⁷

On the morning of the rally, well before protesters and counter-protesters arrived in downtown Charlottesville, the militias showed up. Led by Christian Yingling, the “Commanding Officer” of the Pennsylvania Light Foot Militia, and George Curbelo, the “Commanding Officer” of the New York Light Foot Militia, the coalition of militia units took up positions on the southern border of what formerly had been known as Lee Park (in recognition of the large statue of General Robert E. Lee—the very statue the city council had voted to remove), where the rally was scheduled to take place.¹⁸

The men under Yingling’s command each carried 60 to 80 pounds of military-style equipment, among which were semiautomatic AR-15 assault rifles with spare 30-round magazines; sidearms; tactical shooting glasses; camouflage shirts and pants; Kevlar helmets; Level III body armor; combat boots; gas masks; and personal first-aid kits.¹⁹ They came from the east and west coasts, and included members of not only the Pennsylvania and New York Light Foot Militias,

¹⁷ Charlottesville Amended Complaint, *supra* note 6, at 61.

¹⁸ *Id.* at 20.

¹⁹ *Id.* at 22.

but also the American Freedom Keepers, the 100% People's Militia of Maryland, the Virginia Minutemen Militia, and American Warrior Revolution.²⁰

Standing post on the edge of the park, the private militia members were easily mistaken for the state-sanctioned National Guard. The same was true for other militia members who dispersed across the downtown area under separate commanders. None operated under the authority or with the permission of local, state, or federal officials. Yet as the rally began, they portrayed authority over public safety—issuing orders and forcefully interposing themselves between white nationalist groups and counter-protesters.²¹ Videos and photographs showed militia members with their fingers on the triggers of their assault rifles as violent clashes erupted all around them, arrogating to themselves when and under what circumstances to use lethal force.²² Three stood across from the Congregation Beth Israel synagogue as white nationalist groups marched past shouting anti-Semitic slogans and performing the Sieg Heil Nazi salute.²³ Meanwhile, at a nearby park where counter-protesters had gathered, another armed private militia group formed its own “security” perimeter, refusing to “[l]et[] fascists organize publicly . . . without challenge,” and pledging to “dust[] off the guns of 1921.”²⁴

That no one was shot by a militia member that day is almost miraculous given the massive firepower they wielded and the ineffectiveness of state and local law enforcement in managing the crowd. Officials declared the rally an unlawful assembly and ordered participants to disperse even before it was officially scheduled to begin.²⁵ Militia members, still wielding their weapons, continued to provide protection to the white nationalist organizers and speakers as they made

²⁰ *Id.* at 21.

²¹ *See id.* at 27.

²² *See id.* at 22–23.

²³ *See id.* at 29.

²⁴ *Id.* at 25–30.

²⁵ *Id.* at 37.

their way out of the area, occasionally becoming involved in skirmishes with counter-protesters.²⁶ A few hours later, James Fields, who had marched with the white nationalist group Vanguard America that day, plowed his car into a group of counter-protesters, killing 32-year-old Heather Heyer and seriously injuring dozens of others.²⁷

In the immediate aftermath of the rally, white nationalists cheered after President Trump proclaimed that there were “very fine people, on both sides.”²⁸ Yingling created a GoFundMe crowdfunding account on behalf of the Pennsylvania Light Foot Militia, appealing to those who “support what we do, and would like to see us keep doing it,” and asking for “money to travel to different states to defend people’s constitutional rights.”²⁹ Curbelo described the rally as “a wakeup call for the patriot movement. . . . [A]re you truly willing to stand for the enforcement of everybody’s rights here in the United States?”³⁰

Increased Militia Presence Leading to 2020

The Unite the Right rally, and in particular Trump’s reaction to it, was not only a boost to white supremacist, neo-Nazi, and neo-Confederate organizations; it was also a boost to their allies in the militia movement, cementing relationships that would develop into coalitions coming into 2020. And it solidified the allegiance of some militia organizations to Donald Trump—an allegiance that culminated in the assault on the U.S. Capitol on January 6, 2021.

Anti- “Other” Militia Activity at the Border

Inspired by Trump’s anti-immigrant agenda, private militias were quick to establish unlawful militaristic operations at the southern border.

²⁶ See *id.* at 37–41.

²⁷ *Id.* at 41.

²⁸ Glenn Kessler, *The ‘Very Fine People’ at Charlottesville: Who Were They*, WASH. POST (May 8, 2020), <https://www.washingtonpost.com/politics/2020/05/08/very-fine-people-charlottesville-who-were-they-2/>.

²⁹ Charlottesville Amended Complaint, *supra* note 6, at 82.

³⁰ *Id.*

In November 2018, after Trump pledged to send up to 15,000 U.S. troops to the border to deal with the approaching caravan of Central American migrants, a private militia group, “The Minuteman Project,” published an “URGENT CALL FOR TEXAS BORDER OBSERVATION DUTY” to cover the 2,000-mile border from San Diego to Brownsville, Texas.³¹ According to U.S. Army documents obtained by Newsweek at the time, the military expressed internal concern about the presence of unauthorized militias along the border, warning that protests occurring at points of entry historically had been peaceful, “unless extreme right or left groups attend.”³² The Minuteman Project’s co-founder, Jim Gilchrist, cautioned potential volunteers that their adversaries were “US-based PROPAGANDA organizations like the American Civil Liberties Union, the Southern Poverty Law Center, People without Borders,” and many more groups like them. He further warned members to “use extreme caution when confronted by mainstream media” because “they are not your friends.”³³

In 2019, after Trump’s reelection campaign repeatedly ran ads quoting Trump’s references to the “invasion” on the southern border, the United Constitutional Patriots set up camp at the New Mexico/Mexico border, assuming without authorization the U.S. Border Patrol’s duty to stop and detain migrants, all while heavily armed and dressed in military fatigues.³⁴ In March and April 2019, a spokesperson for the group, Jim Benvie, regularly posted livestream videos on Facebook showing militia members armed with assault rifles, chasing and

³¹ Jim Gilchrist, *URGENT CALL FOR TEXAS BORDER OBSERVATION DUTY*, MINUTEMAN PROJECT (Nov. 3, 2018), <https://web.archive.org/web/20220121154445/http://baesic.net/minutemanproject/urgent-call-for-texas-border-observation-duty/>.

³² James Laporta & Chantal Da Silva, *Migrant Caravan: Border Troops Preparing for Threat of Armed, Unregulated Militias, Leaked Documents Show*, NEWSWEEK (Nov. 1, 2018), <https://www.newsweek.com/trump-administration-migrant-caravan-border-troops-1196855>.

³³ See Gilchrist, *supra* note 31.

³⁴ Patricia Clarembaux & Almudena Toral, *Univision Spent a Day with a Pro-Trump Militia Patrolling the Border. Its Leader Was Arrested on Saturday.*, UNIVISION NEWS (Apr. 22, 2019), <https://www.univision.com/univision-news/immigration/univision-spent-a-day-with-a-pro-trump-militia-patrolling-the-border-its-leader-was-arrested-on-saturday>.

capturing migrants and detaining them until they could be turned over to U.S. officials.³⁵ In other posts, the United Constitutional Patriots described themselves as combatants in a “war” raging along the border due to migrants’ “invasion” of the country and actively sought to recruit people with military or law enforcement experience to join them.³⁶ One such recruit, upon observing migrants while on “patrol” at the border, reportedly grabbed his AR-15 and asked his fellow militia member, “Why are we just apprehending them and not lining them up and shooting them?”³⁷

Unlawful border operations have continued to this day. In Kinney County, Texas, for example, members of the Patriots for America patrol the border, claiming to be working with the local sheriff.³⁸

Coalescence of Far-Right and Anti-Government Ideologies

As private militias continued to feel more emboldened during the Trump era, they began to engage more frequently in public, increasingly taking on “security” roles at far-right rallies like they did in Charlottesville, attempting to drape themselves in a flag of patriotism and adherence to the Constitution.

From early 2017 onward, anti-government private militia organizations such as the Three Percenters and Oath Keepers repeatedly provided armed “security” at rallies on the West Coast led by extremist organizations like Patriot Prayer and often attended by the Proud Boys, a self-described male chauvinist organization.³⁹

³⁵ After significant media attention exposed the militia’s activities, it reconstituted itself as the Guardian Patriots and closed its public Facebook account. Jim Benvie was later convicted of falsely personifying a Border Patrol agent and sentenced to 21 months in prison. *See, e.g.*, Press Release, U.S. Dep’t of Just., Man Sentenced to 21 Months in Prison for Impersonating a Border Patrol Agent (Oct. 20, 2020), <https://perma.cc/728G-453M>.

³⁶ These quotes are from the Facebook pages of Johnny Horton Jr. (March 11, 2019), and Jim Benvie (March 24, 2019), which were viewed by ICAP in 2019 but have since been taken down.

³⁷ This quote is from the Facebook page of Jim Benvie (April 23, 2019), which was viewed by ICAP in 2019 but has since been taken down.

³⁸ PATRIOTS FOR AMERICA, <https://perma.cc/3VSZ-8EH3> (last visited Mar. 29, 2022); Elizabeth Findell, *In a Texas Border Town, Armed Groups Arrive to Look for Migrants*, WALL ST. JOURNAL (Dec. 16, 2021), <https://www.wsj.com/articles/in-a-texas-border-town-armed-groups-arrive-to-look-for-migrants-11639668989>.

³⁹ Jane Coaston, *The Pro-Trump, Anti-Left Patriot Prayer Group, Explained*, VOX (Sept. 8, 2020), <https://www.vox.com/2020/9/8/21417403/patriot-prayer-explained-portland>.

The rallies championed “freedom” and Trump, and were often planned to draw large numbers of counter-protesters that provided opportunities for violent clashes, just as in Charlottesville.

With limited enforcement to dissuade them, militias saw opportunities to try and legitimize and ingratiate themselves with Trump and his supporters. In August 2018, the Oath Keepers announced its “Spartan Training Group program,” with the goal of “forming training groups in as many states as possible” to create “a pool of trained, organized volunteers who will be able to serve as the local militia under the command of a *patriotic* governor loyal to the Constitution, or if called upon by President Trump to serve the nation.”⁴⁰ The Oath Keepers—whose leader, Stewart Rhodes, has been indicted on seditious conspiracy and other charges arising from his role in the January 6 attack⁴¹—self-describes as “a non-partisan association of current and formerly serving military, police, and first responders . . . who pledge to fulfill the oath all military and police take to ‘defend the Constitution against all enemies, foreign and domestic,’” while declaring that they “will not obey unconstitutional orders.”⁴²

According to a since-deleted page on their website, by August 2019, the Oath Keepers sought “security volunteers” from their membership and “other capable patriots” to escort Trump supporters attending a New Mexico rally “to protect them from potential leftist violence.”⁴³ They also provided private security

⁴⁰ Dan Griffiths, *Help Us Launch the Oath Keepers Spartan Training Group Program*, OATH KEEPERS (Aug. 20, 2018), <https://web.archive.org/web/20190918001708/https://oathkeepers.org/2019/09/alert-volunteers-needed-to-protect-trump-supporters-at-nm-trump-rally/>.

⁴¹ Press Release, U.S. Dep’t of Just., *Leader of Oath Keepers and 10 Other Individuals Indicted in Federal Court for Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach* (Jan. 13, 2022), <https://www.justice.gov/opa/pr/leader-oath-keepers-and-10-other-individuals-indicted-federal-court-seditious-conspiracy-and>.

⁴² *About Oath Keepers*, OATH KEEPERS (last visited Mar. 29, 2022), <https://perma.cc/K9X5-4BUL>.

⁴³ Stewart Rhodes, *Oathkeepers.org Alert: Volunteers Needed to Protect Trump Supporters at NM Trump Rally*, OATH KEEPERS (Sept. 11, 2019), <https://web.archive.org/web/20190918001708/https://oathkeepers.org/2019/09/alert-volunteers-needed-to-protect-trump-supporters-at-nm-trump-rally/>.

at pro-Trump rallies in Tupelo, Mississippi; Lexington, Kentucky; Monroe, Louisiana; and Minneapolis, Minnesota.

In October 2019, as the U.S. House of Representatives was investigating the events that led to the first impeachment of President Trump, the Oath Keepers publicly announced their intent to come to Trump's defense should there be an attempt to remove him from office. Oath Keepers' founder Stewart Rhodes told the Oath Keepers' 24,000 Twitter followers that all the president needed to do was call them up: "We WILL answer the call," he tweeted. He also hinted at violence, stating that the Oath Keepers' "favorite rifle is the AR 15." When Trump suggested in a tweet that his removal could cause a civil war and that the impeachment proceedings were a "COUP," Rhodes urged Twitter followers to read Trump's tweets, arguing: "This is where we are. We ARE on the verge of a HOT civil war."⁴⁴

Meanwhile, as alliances with far-right extremist groups and civil war rhetoric were growing, private militias were also actively working to appeal to the gun rights lobby. In July 2019, when Virginia governor Ralph Northam called a Special Legislative Session to consider gun safety legislation, private militia members carrying assault-style weapons and wearing military fatigues and accessories patrolled the line of constituents seeking to meet with their state representatives.⁴⁵ The militia members' massive display of weaponry and confusing appearance—some bearing badges that said "U.S." and wearing military-style camouflage that looked like that of the National Guard—not only intimidated gun safety advocates, including survivors of gun violence, but also

⁴⁴ Mary B. McCord, *Armed Militias Are Taking Trump's Civil War Tweets Seriously*, LAWFARE (Oct. 2, 2019), <https://www.lawfareblog.com/armed-militias-are-taking-trumps-civil-war-tweets-seriously>.

⁴⁵ See Mary B. McCord, *Private Militias Must Stop Pretending to Have Authority They Don't Have*, RICHMOND TIMES-DISPATCH (Aug. 18, 2019), https://richmond.com/opinion/columnists/mary-b-mccord-column-private-militias-must-stop-pretending-to-have-authority-they-don-t/article_f3bda4e6-39a6-5079-b145-395157a51fa5.html.

apparently made some gun rights advocates uncomfortable. One posted on Facebook that he “witnessed something while standing in line today that I hope I never see again,” describing a young woman “visibly shaken” by the appearance of militia members “in military style apparel and armed to the teeth.”⁴⁶ The Virginia Attorney General thereafter issued an opinion that such false assumption of law enforcement functions is in violation of state law, noting that “[t]he improper assumption of law enforcement authority can be used to intimidate or chill the exercise of rights reserved to our citizens, such as the rights to speak, assemble, and petition the government.”⁴⁷

Notwithstanding this early criticism, the effort to use gun rights to gain power and acceptability hit full stride after Democrats won a majority in both of Virginia’s legislative bodies in the November 2019 election. Although Supreme Court precedent makes clear that the Second Amendment right is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,”⁴⁸ gun rights activists in Virginia deemed “unconstitutional” all gun safety legislation. Trumpeting their purported fear that the newly “blue” Virginia state legislature would take their guns away, some gun rights activists called for local governments to stand up their own militias to defend their absolutist vision of Second Amendment rights.⁴⁹

Taking advantage of this movement, the Oath Keepers announced in January 2020 that it was deploying to Virginia to “focus on helping Sheriffs raise and train an official armed posse in each county, under command of the Sheriff, and on

⁴⁶ *Id.*

⁴⁷ Letter from Mark R. Herring, Attorney General, Va., to Charniele L. Herring, Member, House of Delegates of Va. (Aug. 16, 2019), <https://www.oag.state.va.us/files/Opinions/2019/19-039-C-Herring-issued.pdf>.

⁴⁸ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

⁴⁹ Ned Oliver & Grant Moomaw, *As Virginia Democrats Advance New Gun Restrictions, Militias Organize, Promising to Resist*, VIRGINIA MERCURY (Jan. 13, 2020), <https://www.virginiamercury.com/2020/01/13/as-virginia-democrats-advance-new-gun-restrictions-militias-organize-promising-to-resist/>.

organizing, training, and equipping official county militia, under the authority of the county government.”⁵⁰ On another since-deleted web page, the Oath Keepers claimed they were doing this in “resistance to the unconstitutional and danger[ous] actions of the Governor” and urged the same in every county because “when a town or county government stands up, that pits one government entity against another.”⁵¹ Indeed, by early 2020, a number of Virginia counties had announced “musters” to organize and train a voluntary militia to be ready to defend against what they deemed the tyranny of the state.⁵²

Extremists, drawn to the cause, terrorized gun safety advocates—from suburban homemakers to state lawmakers—by tracking down and publishing their addresses and mercilessly trolling them with threatening social media posts, including photos of gallows and armed mobs.⁵³ The violent commentary posted by members of numerous out-of-state, heavily armed militias planning to attend the annual “lobby day” in Virginia’s capitol in early 2020 so concerned state and federal law enforcement that the governor declared a state of emergency and banned firearms and other weapons from the capitol grounds.⁵⁴ Gun safety groups advised their members not to attend out of fear for their safety, silencing those who

⁵⁰ Stewart Rhodes, *URGENT! Call To Action in Virginia! We Need Boots on the Ground and Trainers*, OATH KEEPERS (Dec. 31, 2019), <https://web.archive.org/web/20211010195400/https://oathkeepers.org/2019/12/urgent-call-to-action-in-virginia-we-need-boots-on-the-ground-and-trainers/>.

⁵¹ *Id.*

⁵² Richard Chumney et al., *Gun Rights Advocates Urge Local Governments to Back Militias*, THE NEWS & ADVANCE (Feb. 13, 2020), https://www.newsadvance.com/news/local/gun-rights-advocates-urge-local-governments-to-back-militias/article_b7b3d83c-ec91-5ecf-a8ab-c4339edbac6.html?fbclid=IwAR0uFS65E44byvQFk9_5zeAQR32s9j4IQv0ARZ61W9NNSxReuX2IogUfgek.

⁵³ Andrew Beaujon, *Mark Levine on What It’s Like to Have an Armed Protester Show Up at Your House*, WASHINGTONIAN (Feb. 21, 2020), <https://www.washingtonian.com/2020/02/21/mark-levine-on-what-its-like-to-have-an-armed-protester-show-up-at-your-house/>.

⁵⁴ Ivan Pereira, *Virginia Governor Declares State of Emergency Following Militia Threats Over Gun Reforms*, ABC NEWS (Jan. 15, 2020), <https://abcnews.go.com/US/virginia-governor-declares-state-emergency-militia-threats-gun/story?id=68299433>.

had for decades traveled to Richmond to exercise their First Amendment rights on lobby day.⁵⁵

And just days before the event on January 20, the FBI arrested three members of an accelerationist white supremacist militia, “The Base,” who were planning to use lobby day and the presence of so many assault-rifle-toting gun rights activists to trigger a civil war. According to documents filed by the government in the criminal case, The Base (an English translation of “al Qaeda”) is an organization that promotes the creation of a white ethno-state through terrorist acts of violence against minority communities.⁵⁶ It recruits from other white supremacist groups and is especially interested in recruiting those with military, explosives, and engineering training. It runs paramilitary training camps in Georgia where members participate in tactical training and firearm drills.⁵⁷

Three members of The Base, Brian Lemley, Patrik Mathews, and William Bilbrough, saw Virginia’s lobby day as an opportunity. Speaking of the upcoming event, one of them said “you want to create fucking some instability, while the Virginia situation is happening, make other things happen, derail some rail lines, fucking like shut down the highways, . . . you can kick off the economic collapse of the U.S. within a week, after the boog starts.”⁵⁸ Comparing it to the Unite the Right rally, Mathews told his fellow militia members, “you know what, Virginia will be our day . . . Now the end goal is this, is to incite leftist violence prior to [] January 20th in Virginia. We want the left in America to become violent. We have

⁵⁵ Cameron Thompson, *Moms Demand Action Leader: ‘Virginians Overwhelmingly Support Gun Safety Laws*, WTVR NEWS (Jan. 20, 2020), <https://wtvr.com/2020/01/20/moms-demand-action-leader-virginians-overwhelmingly-support-gun-safety-laws/>.

⁵⁶ Motion for Detention Pending Trial at 2, United States v. Lemley, Jr., No. 20 Crim. 33 (D. Md. Jan. 21, 2020).

⁵⁷ *Id.*

⁵⁸ *Id.* at 20–21. As the government’s detention memo explained, Base members use the term “boogaloo” or “boog” to refer to the collapse of the United States.

three weeks to do it.”⁵⁹ Members of The Base packed rations, gas masks, and other equipment to survive the civil war, wholly unaware that the FBI was onto them.⁶⁰

2020 and the Road to January 6

By the time the COVID-19 pandemic had arrived in the U.S. in early 2020, anti-government, anti-other, and pro-gun ideologies had already proved to be catalyzing for private militias, but what was yet to come ultimately proved even more so. The pandemic, racial justice demonstrations, and the 2020 elections gave private militias additional causes to resist. They continued the call-and-response relationship with Trump that had begun in the previous years, sometimes deploying in opposition to government actions with which Trump disagreed, and sometimes deploying in purported augmentation of law enforcement where Trump indicated there was a need. Their heavily armed presence at public demonstrations heightened tensions, intimidated both elected officials and the electorate, and often resulted in violence.

In the face of stay-at-home orders and other public health measures taken to mitigate the pandemic’s spread, armed militias and others stormed the statehouse in Lansing, Michigan, in the spring of 2020.⁶¹ Trump responded with a series of tweets urging supporters to “LIBERATE MICHIGAN!” “LIBERATE MINNESOTA!” “LIBERATE VIRGINIA, and save your great 2nd Amendment. It

⁵⁹ *Id.* at 24.

⁶⁰ Mathews and Lemley were each sentenced to nine years in federal prison after pleading guilty to firearms and immigration charges. See Katie Mettler & Paul Duggan, *Two Accused of Plotting Racial ‘Civil War’ Are Sentenced to 9 Years Each in Federal Prison*, WASH. POST (Oct. 28, 2021), https://www.washingtonpost.com/local/public-safety/base-white-supremacist-case-sentencing/2021/10/28/2dc41a60-3746-11ec-9bc4-86107e7b0ab1_story.html. Billbrough, the first to plead guilty, was sentenced to five years’ imprisonment. See Paul Duggan, *Man Tied to White-Supremacist Group Suspected of Planning Violence at Va. Gun Rights Rally Gets 5-year Sentence*, WASH. POST (Dec. 8, 2020), https://www.washingtonpost.com/local/public-safety/guilty-plea-base-gun-rally/2020/12/08/2c31bb46-367d-11eb-b59c-adb7153d10c2_story.html.

⁶¹ David Eggert & Mike Householder, *GOP Lawmakers Reject Michigan’s Virus Order; Whitmer Unfazed*, AP NEWS (Apr. 30, 2020), <https://apnews.com/article/health-us-news-ap-top-news-lansing-virus-outbreak-a2aea0faacadbd3b9f5c9238d7bc6e72>.

is under siege!”⁶² Trump’s rhetorical stamp of approval was followed by additional armed militia activity at statehouses elsewhere, including Boise, Idaho,⁶³ and Salem, Oregon.⁶⁴ And it led to the disrupted plot by a group of militia members to kidnap Michigan Governor Gretchen Whitmer and overthrow the government.⁶⁵ This early mobilization and plotting in response to public health orders has sustained itself well beyond 2020, morphing into opposition to masking and vaccination requirements that continue to prompt armed demonstrations in the U.S. and elsewhere.

Racial justice demonstrations in response to the murder of George Floyd provided yet another opportunity for private militia organizations to join forces with other extremists. As protests erupted in Minneapolis, Trump blamed “antifa” for incidents of violence and property damage that occurred during the protests, and indicated he would declare it a terrorist organization.⁶⁶ Trump and his attorney general criticized state and local law enforcement for not doing enough.⁶⁷ Although the vast majority of racial justice demonstrations across the country were peaceful, Trump’s tweets and other public statements were dog-whistles to private

⁶² See Mary B. McCord, *Trump’s ‘LIBERATE MICHIGAN!’ Tweets Incite Insurrection. That’s Illegal*, WASH. POST (Apr. 17, 2020), <https://www.washingtonpost.com/outlook/2020/04/17/liberate-michigan-trump-constitution/>.

⁶³ See James Dawson, *Unmasked Protesters Push Past Police into Idaho Lawmakers’ Session*, NPR (Aug. 25, 2020), <https://www.npr.org/2020/08/25/905785548/unmasked-protesters-push-past-police-into-idaho-lawmakers-session>.

⁶⁴ See Azmi Haroun, *Anti-Lockdown Protesters Storm Oregon Capitol Building, Clashing with Police Officers*, BUS. INSIDER (Dec. 22, 2020), <https://www.businessinsider.com/far-right-protesters-storm-oregon-state-capitol-building-2020-12>.

⁶⁵ See Nicholas Bogel-Burroughs et al., *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html>.

⁶⁶ Meg Kelly & Elyse Samuels, *Who Caused the Violence at Protests? It Wasn’t Antifa*, WASH. POST (June 22, 2020), <https://www.washingtonpost.com/politics/2020/06/22/who-caused-violence-protests-its-not-antifa/>.

⁶⁷ Press Release, U.S. Dep’t of Just., Attorney General William P. Barr’s Statement on Riots and Domestic Terrorism (May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism>.

militias. From small towns in Virginia⁶⁸ and Idaho⁶⁹ to larger cities like Louisville, Kentucky;⁷⁰ Kenosha, Wisconsin;⁷¹ and Albuquerque, New Mexico,⁷² armed private militias self-deployed—standing guard over private property and public statues, usurping legitimate law enforcement authority, intimidating others in the exercise of their constitutional rights, and heightening the risk of violence. The results were sometimes tragic: two were killed and another injured in Kenosha, and a person was shot in Albuquerque. In Louisville, the heavily armed far-right Three Percenters, who claimed to be there to “assist police and discourage violence” during protests over the police shooting of Breonna Taylor, squared off against the equally heavily armed “Not Fucking Around Coalition,” an out-of-state Black militia organization.⁷³

Private militias also used (and continue to use) racial justice demonstrations to recruit, propagandize, and organize. In Provo, Utah, members of the “Utah Citizens’ Alarm” showed up heavily armed at a demonstration in the summer of

⁶⁸ Letter from Mary B. McCord, Legal Director, ICAP, to David B. Harris, Chief of Police, Elkton Police Department, Va. (Aug. 21, 2020), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/08/2020.08.21_Elkton-letter.pdf.

⁶⁹ Letter from Mary B. McCord, Legal Director, ICAP, to Dan McDonald and Shelby Rognstad, Commissioner and Mayor, Bonner County, Idaho (June 19, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/06/2020.06.19-ICAP-Letter-Bonner-County.pdf>.

⁷⁰ Letter from Mary B. McCord, Legal Director, ICAP, to Greg Fischer et al., Mayor and other officials, Louisville, Ky. (July 28, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/07/2020.07.28-ICAP-Letter-Louisville.pdf>.

⁷¹ Letter from Mary B. McCord, Legal Director, ICAP, to John Antaramian et al., Mayor and other officials, Kenosha, Wis. (Aug. 26, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/08/Kenosha-Letter-ICAP-08.26.20.pdf>.

⁷² ICAP is co-counsel with Bernalillo County, New Mexico, District Attorney Raúl Torrez in an enforcement action against the New Mexico Civil Guard arising from a deployment of the private militia organization to a racial justice demonstration opposing a statue of a Spanish conquistador. That case, seeking injunctive relief like that obtained in ICAP’s Charlottesville litigation, also relies on state law prohibiting private paramilitary activity and the false assumption of the functions of law enforcement. See *State v. New Mexico Civil Guard*, ICAP (last updated Nov. 17, 2021), <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-militias/state-v-new-mexico-civil-guard/>.

⁷³ Chris Kenning et al., *Opposing Armed Militias Converge in Louisville, Escalating Tensions But Avoiding Violence*, LOUISVILLE COURIER-JOURNAL (July 27, 2020), <https://www.courier-journal.com/story/news/local/2020/07/25/louisville-protests-nfac-three-percenters-expected-demonstrate/3288198001/>.

2020, purporting to protect Provo against rioting and destruction of property.⁷⁴ They also claimed to have “built relationships” with police, while asserting that they don’t have the same “red tape” as legitimate law enforcement. Their founder described the group by saying, “We’re trained, we’re scary, and we want to be.”⁷⁵

As extremist ideologies converged in 2020, they became fertile ground for Trump and his surrogates to seed the narrative of electoral fraud well before the election itself, providing another opportunity for militia activity. In April 2020, in response to state efforts to expand mail-in and absentee voting due to the pandemic, Trump urged supporters to fight these efforts, claiming their “[t]remendous potential for voter fraud.”⁷⁶ He continued this false narrative through Election Day, which was widely amplified over social media and cable news. Combined with Trump’s continued demonization of the left and refusal to disavow conspiracy theories, there was ample fodder for armed militias to feel justified in taking their own actions.

As researchers at DFRLab reported, in September 2020, *The Gateway Pundit*, a pro-Trump blog, published several articles highlighting “Stop the Steal” efforts.⁷⁷ Shortly thereafter, during the first televised presidential debate, Trump responded to a request to denounce white supremacist and militia groups that had shown up at racial justice protests by saying “Proud Boys, stand back and stand by,” before continuing, “But I’ll tell you what . . . somebody’s got to do something

⁷⁴ Letter from Mary B. McCord, Legal Director, ICAP, to Mike Smith and Rich Ferguson, Sheriff and Chief of Police, Provo, Utah (Oct. 30, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-Provo-letter-10-30-2020.pdf>.

⁷⁵ *Readying for War: Inside an Armed Right-Wing Group in Utah*, WASH. POST (Oct. 28, 2020), https://www.washingtonpost.com/video/national/readying-for-war-inside-an-armed-right-wing-group-in-utah/2020/10/28/4c412d87-fba5-4dac-b603-b545749cc498_video.html.

⁷⁶ Yelena Dzhanova, *Trump Slams Mail-in Voting, Says It ‘Doesn’t Work Out Well for Republicans’*, CNBC (Apr. 8, 2020), <https://www.cnbc.com/2020/04/08/trump-slams-mail-in-voting-says-it-doesnt-work-out-well-for-republicans.html>.

⁷⁷ Atlantic Council’s 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/>.

about antifa and the left because this is not a right-wing problem.”⁷⁸ By October, in a televised town hall, Trump refused to disavow QAnon.⁷⁹ Almost immediately, chatter in the online platform MeWe began discussing civil war.⁸⁰ Oath Keepers leader Stewart Rhodes told conspiracy theorist radio host Alex Jones that his militia had plans to station at polling places across the country to protect Trump voters, and also mentioned that they would be near Washington, D.C., on Election Day to protect Trump.⁸¹

As November 3 neared, ICAP learned of numerous militia organizations planning mobilizations related to the election. An armed group in Erie, Pennsylvania, made plans to station themselves outside voting centers to protect against election interference and looting.⁸² In Montgomery, New York, a rally planned adjacent to an early-voting center invited attendees to carry guns and “demand emancipation from the bondage of tyranny.”⁸³ Some of the organizing groups’ members had been involved in the armed assault on the Michigan statehouse earlier in the year.⁸⁴ In southern Utah, members of the “Civil Ground Patrol”⁸⁵ announced their intention to station themselves while armed outside

⁷⁸ Kathleen Ronayne & Michael Kunzelman, *Trump to Far-Right Extremists: ‘Stand Back and Stand Bye,’* AP NEWS (Sept. 30, 2020), <https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f>.

⁷⁹ Adam Gabbatt & Julia Carrie Wong, *Trump Refuses to Disavow QAnon Conspiracy Theory During Town Hall*, THE GUARDIAN (Oct. 15, 2021), <https://www.theguardian.com/us-news/2020/oct/15/qanon-trump-refuses-disavow-conspiracy-theory-town-hall>.

⁸⁰ Atlantic Council’s DFRLab, *supra* note 77.

⁸¹ Timothy Johnson, *Militia Leader Stewart Rhodes Says That His Group Will Be at Polling Locations and Is Ready to Kill Democrats*, MEDIA MATTERS (Oct. 28, 2020), <https://www.mediamatters.org/infowars/militia-leader-stewart-rhodes-says-his-group-will-be-polling-locations-and-ready-kill>.

⁸² Letter from Mary B. McCord, Legal Director, ICAP, to Daniel Spizarny and John Loomis, Chief of Police and Sheriff, Erie, Pa. (Oct. 23, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-Erie-letter-pdf10-23-2020.pdf>.

⁸³ Letter from Mary B. McCord, Legal Director, ICAP, to L. Stephen Brescia et al., Mayor and other officials, Montgomery, N.Y. (Oct. 23, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-Letter-Montgomery-NY-10-23-20.pdf>.

⁸⁴ Chris McKenna & Helu Wang, *Breaking: Right-wing rally moved away from Montgomery voting site*, TIMES HERALD-RECORD (Oct. 23, 2020), <https://www.recordonline.com/story/news/2020/10/23/right-wing-group-rally-montgomerypark-near-voting-site/3740063001/>.

⁸⁵ CIV. GROUND PATROL (last visited Mar. 29, 2022), <https://perma.cc/4FGA-3LUQ>.

voting centers to protect against election interference and rioting.⁸⁶ In Lane County, Oregon, voters attempting to deposit their ballots in a drop box were confronted and questioned by groups of armed individuals in military attire blocking their way.⁸⁷ In Spokane, Washington, an individual posted in an online Three Percenters forum a call for a group “to stand against antifa/blm on election night and +1 in Spokane.”⁸⁸ And in Rome, Georgia, Democrats abandoned a rally due to local “militia” presence.⁸⁹

Fortunately, many of the militia groups were dissuaded from patrolling the polls on Election Day by concerns about possible voter intimidation charges. ICAP worked with other election protection advocates and elected officials to widely distribute fact sheets and guidance documents explaining laws against voter intimidation, unauthorized militia activity, and threats.⁹⁰ ICAP wrote to local jurisdictions where we saw militia planning to advise officials of the laws prohibiting such activity.⁹¹ State attorneys general and local district attorneys made strong statements about their intent to enforce voter intimidation laws, including against armed groups.⁹² Just before the election, the national council of

⁸⁶ Letter from Mary B. McCord, Legal Director, ICAP, to Cory C. Pulsipher et al., Sheriff and other police officials, Utah (Oct. 27, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/ICAP-Washington-County-letter-10-27-2020.pdf>.

⁸⁷ Letter from Mary B. McCord, Legal Director, ICAP, to Clifton G. Harrold et al., Sheriff and other officials, Or. (Nov. 2, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/11/ICAP-Lane-County-OR-letter-11-2-2020.pdf>.

⁸⁸ Letter from Mary B. McCord, Legal Director, ICAP, to Ozzie Knezovich, Sheriff and other police officials, Wash., Nov. 2, 2020, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/11/ICAP-Spokane-County-letter-11-2-2020.pdf>.

⁸⁹ David Child, *Georgia Democrats Abandon Rally Due to Concerns About ‘Large Militia Presence’*, NEWSWEEK (Nov. 2, 2020), <https://www.newsweek.com/georgia-democrats-rally-cancelled-militia-presence-1543948>; see also Letter from Mary B. McCord, Legal Director, ICAP, to Sherry Boston et al., District Attorneys, Ga., (Nov. 2, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/11/ICAP-Letter-to-Georgia-District-Attorneys-11-2-2020.pdf>.

⁹⁰ *Guidance Related to Elections and Polling Places*, ICAP (last updated Dec. 3, 2020), <https://www.law.georgetown.edu/icap/our-work/guidance-related-to-elections-and-polling-places/>.

⁹¹ *Addressing the Rise of Unlawful Private Militias*, ICAP (last updated Feb. 7, 2022), <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-militias/>.

⁹² See VPP Blog: *State Attorney General Counter Voter Intimidation 101*, STATES UNITED DEMOCRACY CENTER (Oct. 13, 2020), <https://statesuniteddemocracy.org/2020/10/13/ags-actions-to-counter-intimidation/>; Ximena Conde, *Krasner Says Anyone Who Tries to Intimidate Philly Voters Will ‘Find Themselves in Jail,’* THE PHILADELPHIA

The Three Percenters-Original put out a directive to its members “that no one from our organization is allowed to congregate around any polling place during an election,” because doing so could violate federal voter intimidation laws.⁹³ The directive linked to ICAP’s voter intimidation fact sheet.

In contrast to the relative calm on Election Day, the post-election period was rife with tension. In the early morning hours of November 4, Trump falsely declared victory and made multiple unsubstantiated claims of voter fraud.⁹⁴ As these false claims spread through social media and private internet forums, militia activity picked up. In Arizona, militias joined extremists and QAnon supporters in protest outside the Maricopa County Elections Department.⁹⁵ As various rallies and marches took place around the country, Oath Keepers’ leader Stewart Rhodes said in an interview that he had men stationed outside Washington, D.C. to be available if Trump called them up, further claiming that if there were an “attempt to remove the president illegally, we will step in and stop it.”⁹⁶ In Georgia—where Trump exerted intense pressure on the secretary of state and governor to conduct recounts, audits, and ultimately to “find” the votes he needed to win the state—the III% Security Force put out a request for “patriot groups,” “militias,” and “hardcore” Georgia residents to come to the capitol to take up a “defensive

TRIBUNE (Oct. 7, 2020), https://www.phillytrib.com/krasner-says-anyone-who-tries-to-intimidate-philly-voters-will-find-themselves-in-jail/article_a2c3cdc9-39cb-5fea-b2a1-b69241e56c9d.html.

⁹³ *Voter Intimidation Directive*, THE THREE PERCENTERS - ORIGINAL (last visited Jan. 7, 2021), <https://web.archive.org/web/20210107190049/https://www.thethreepercenters.org/single-post/voter-intimidation-directive>.

⁹⁴ *With Results from Key States Unclear, Trump Declares Victory*, REUTERS (Nov. 4, 2020), <https://www.reuters.com/article/us-usa-election-trump-statement/with-results-from-key-states-unclear-trump-declares-victory-idUSKBN27K0U9?edition-redirect=ca>.

⁹⁵ Jerod MacDonald-Evoy, *Far-Right Protesters Demand Ballots Be Counted, Spread Misinformation*, AZ MIRROR (Nov. 5, 2020), <https://www.azmirror.com/2020/11/05/far-right-protesters-demand-ballots-be-counted-spread-misinformation/>.

⁹⁶ Timothy Johnson, *Oath Keepers Leader Stewart Rhodes Says He Has Men Stationed Outside of D.C. Ready to Engage in Violence on Trump’s Order*, MEDIA MATTERS (Nov. 12, 2020), <https://www.mediamatters.org/infowars/militia-leader-stewart-rhodes-says-he-has-men-stationed-outside-dc-ready-engage-violence>.

position” to protect a Stop the Steal rally.⁹⁷ American Patriots III% organized an “armed march[.]” on the Georgia State Capitol to protest “election fraud” and “to demand that riots, looting, and violence be immediately dealt with.”⁹⁸ Militias marched on state capitols in Pennsylvania and Virginia.⁹⁹ Although not a major presence at the first MAGA March in Washington, D.C. on November 14, the Oath Keepers issued a call for action to attend the second MAGA March in Washington on December 12, as did other militias, including the American Patriots III%.¹⁰⁰ Stewart Rhodes encouraged Trump to invoke the Insurrection Act, pledging that the Oath Keepers and their allies would otherwise have to take matters into their own hands.¹⁰¹

By early December, Trump’s surrogates were urging Trump to declare martial law¹⁰² and openly speaking about the potential for civil war.¹⁰³ On December 16, the national council of The Three Percenters-Original issued a statement proclaiming widespread election fraud and announcing “[w]e stand ready and are standing by to answer the call from our President should the need arise that We The People are needed to take back our country from the pure evil that is conspiring to steal our country away from the American people.”¹⁰⁴ On

⁹⁷ Letter from Mary B. McCord, Legal Director, ICAP, to Brian P. Kemp and Keisha Lance Bottoms, Governor and Mayor of Atlanta, Ga. (Nov. 20, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/11/2020.11.20-ICAP-Letter-to-Georgia-and-Atlanta-officials.pdf>.

⁹⁸ *Id.*

⁹⁹ Atlantic Council’s DFRLab, *supra* note 77.

¹⁰⁰ *Id.*

¹⁰¹ Adele M. Stan, *Oath Keepers’ Stewart Rhodes Calls for ‘Bloody War’ if Trump Doesn’t Invoke Insurrection Act*, RIGHT WING WATCH (Dec. 14, 2020), <https://www.rightwingwatch.org/post/oath-keepers-stewart-rhodes-calls-for-bloody-war-if-trump-doesnt-invoke-insurrection-act/>.

¹⁰² Sonam Sheth, *Trump’s Former National Security Advisor Shared a Message Asking the President to Suspend the Constitution, Impose Martial Law, and Hold a New Election*, BUS. INSIDER (Dec. 2, 2020), <https://www.businessinsider.com/michael-flynn-shares-message-trump-martial-law-2020-12>.

¹⁰³ @patriottakes, TWITTER (Dec. 1, 2020, 11:32 am), <https://twitter.com/patriottakes/status/1333811302939037696?s=20> (“Lin Wood, a member of Trump’s legal team, stating we are headed for civil war and calling for martial law.”).

¹⁰⁴ *TTPO Stance on Election Fraud*, THE THREE PERCENTERS - ORIGINAL (last visited Dec. 13, 2020), https://web.archive.org/web/20201213220912/https://www.thethreepcenters.org/single-post/ttpo-stance-on-election-fraud?utm_campaign=f6efcc95-dea7-4915-968a-6dbe70798231&utm_source=so&utm_medium=mail&cid=309057b9-a05e-407c-8406-cf15be3c5cd6.

December 19, Trump called for his supporters to protest in Washington, D.C., on January 6, tweeting “Be there, will be wild!”¹⁰⁵ According to court filings in several criminal cases arising from January 6, this tweet triggered immediate action by extremist groups, including militias, preparing for a mass mobilization to Washington.¹⁰⁶

Trump loyalists engaged in near non-stop posting on social media and private forums about the protest, with varying degrees of threatened violence. The Oath Keepers, Three Percenters, and Proud Boys began planning their military-style operations in earnest, making clear their intent to be armed and prepared for insurrection.¹⁰⁷ They and other militias circulated advice for carrying firearms in D.C., which has strict gun laws prohibiting open carrying and most concealed carrying.¹⁰⁸ ICAP’s research partners at DFRLab observed logistical planning, including a graphic circulating among unlawful militias and conspiracy groups with instructions for joining caravans to the January 6 protest.¹⁰⁹ An infographic with directions for surrounding the Capitol Complex was also circulated.¹¹⁰ Stewart Rhodes announced that the Oath Keepers would have “boots on the ground” to provide security, adding that they would “show Congress that we the people will not stand for the election to be stolen to plant an imposter Chicom puppet in the White House. Stand now, or kneel forever.”¹¹¹

¹⁰⁵ *Red Flags*, WASH. POST (Oct. 31, 2021), <https://www.washingtonpost.com/politics/interactive/2021/warnings-jan-6-insurrection/>.

¹⁰⁶ See Alan Feuer, Michael S. Schmidt, & Luke Broadwater, *New Focus on How a Trump Tweet Incited Far-Right Groups Ahead of Jan. 6*, N.Y. TIMES (Mar. 29, 2022), <https://www.nytimes.com/2022/03/29/us/politics/trump-tweet-jan-6.html?referringSource=articleShare>.

¹⁰⁷ *See id.*

¹⁰⁸ Atlantic Council’s DFRLab, *supra* note 77.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

Militia Involvement in January 6 and Thereafter

The horrific events of January 6 have been fully described elsewhere. The most significant charges to come from the attack thus far are the well-publicized seditious conspiracy charges against 11 members of the Oath Keepers, including its leader, Stewart Rhodes.¹¹² The charging documents tell a vivid story that had been foreshadowed by the many public statements of Rhodes and the organization since early in the Trump administration. Oath Keepers from Texas, Florida, Ohio, Alabama, Georgia, Virginia, and Arizona trained for, traveled to, and carried out the assault on the U.S. Capitol.¹¹³ The indictment describes how the group used encrypted communications to plot and plan, including the establishment of a Quick Reaction Force stationed just outside D.C., which was prepared to rapidly transport firearms and other equipment into the city if necessary.¹¹⁴ It also describes their continued plotting to prevent a peaceful transfer of power after the attack failed to permanently halt the counting of Electoral College votes, including by purchasing large quantities of firearms and related equipment in the weeks after January 6.¹¹⁵

Besides the 11 Oath Keepers charged with seditious conspiracy, a number of other individuals affiliated with private militias were involved in the January 6 attack. According to the George Washington University Program on Extremism, at least 27 people charged have ties to the Oath Keepers and 16 to the Three Percenters.¹¹⁶ Another 51 have ties to the Proud Boys, which, although not a traditional private militia organization, has often engaged in coordinated paramilitary activity and security operations, and is known to coordinate with

¹¹² U.S. Dep't of Just., *supra* note 41.

¹¹³ Indictment at 6–7, *United States v. Rhodes*, No. 22 Crim. 15 (D.D.C. Jan. 12, 2022), <https://www.justice.gov/opa/press-release/file/1462481/download>.

¹¹⁴ *Id.* at 2–5.

¹¹⁵ *Id.* at 30–32.

¹¹⁶ *Capitol Hill Siege*, GEORGE WASHINGTON UNIVERSITY PROGRAM ON EXTREMISM (last visited Mar. 29, 2022), <https://extremism.gwu.edu/Capitol-Hill-Siege>.

private militias.¹¹⁷ Many of these individuals face conspiracy charges, although some do not.¹¹⁸ The first jury trial related to the January 6 attack resulted in Guy Reffitt, a Texas recruiter for the Three Percenters, being found guilty of five counts, including transporting a firearm for use in a civil disorder and obstruction of an official proceeding.¹¹⁹ Reffitt was an early responder to Trump’s tweet calling on supporters to be in Washington on January 6, communicating to other Three Percenters that “Our President will need us. ALL OF US...!!!”¹²⁰ As he began making arrangements for what he called “Armageddon,” he explained that he planned to drive to D.C. because he wouldn’t be able to fly with “all the battle rattle” he intended to bring, a reference to weapons and body armor.¹²¹

Beyond Washington, D.C., private militias were involved in Stop the Steal protests elsewhere in the country on January 6.¹²² In Colorado, “dozens of men in military-style gear provided security” for a rally at the state capitol, including some who wore patches with the “III%” logo.¹²³ United Citizens Alarm, still operating in Utah, deployed to provide armed security at the state capitol on January 6 and has organized and provided security at events since then, including a WeCANAct Liberty Conference in October 2021, where speakers promoted election fraud conspiracy theories, including talking points from QAnon. On a militia podcast,

¹¹⁷ *Id.*; Sheera Frenkel, *Proud Boys Regroup, Focusing on School Boards and Town Councils*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/2021/12/14/us/proud-boys-local-issues.html>.

¹¹⁸ GEORGE WASHINGTON UNIVERSITY PROGRAM ON EXTREMISM, *supra* note 116.

¹¹⁹ Spencer S. Hsu & Tom Jackman, *Guns, Radicalization and a Father’s Alleged Threat: First Jan. 6 Trial Begins*, WASH. POST (Feb. 28, 2022), <https://www.washingtonpost.com/dc-md-va/2022/02/28/guy-reffitt-first-jan-6-trial/>; Ryan J. Reilly & Pete Williams, *Guy Reffitt, First Jan. 6 Rioter to Go to Trial, Found Guilty on All Counts*, MSNBC (Mar. 8, 2022), <https://www.nbcnews.com/politics/justice-department/guy-reffitt-first-jan-6-rioter-go-trial-found-guilty-counts-rcna19041>.

¹²⁰ Feuer, Schmidt, & Broadwater, *supra* note 106.

¹²¹ *Id.*

¹²² Fabiola Cineas, *The Insurrection Is Happening at State Capitols, Too*, VOX (Jan. 6, 2021), <https://www.vox.com/2021/1/6/22217736/state-capitol-stop-the-steal-protests-rallies>.

¹²³ Elise Schmelzer, “Aggressive” Rise of Colorado’s Extremist Militia Groups Follows Long History in State, DENVER POST (Jan. 24, 2021), <https://www.denverpost.com/2021/01/24/colorado-militia-three-percenter/>; Elise Schmelzer, *Hundreds of Coloradans Rally in Support of Trump as Rioters Storm Capitol*, DENVER POST (Jan. 6, 2021), <https://www.denverpost.com/2021/01/06/denver-trump-rally/>.

former Trump National Security Advisor Michael Flynn urged the organization to work with local sheriffs.¹²⁴

As DFRLab has reported, although private militias and other extremists initially exulted in what they had accomplished on January 6 and began planning for follow-up rallies, they soon became dissuaded as arrests of attackers started to pile up.¹²⁵ They worried that announced events were “honey pots” planned by law enforcement or antifa and that their social media was being monitored.¹²⁶ Some militias lost access to online payment providers and hosting services.¹²⁷

The lull in militia activity was a time for regrouping, rebranding, and revisionism. The national council of The Three Percenters-Original announced the dissolution of the group a little more than a month after the attack on the Capitol, but decentralized spin-off groups remain active.¹²⁸ The Proud Boys also dissolved its national leadership, leaving management to local chapters.¹²⁹ Some militias have sought to push into the mainstream, both by injecting their propaganda into online “culture war” debates and by becoming politically active at the local and state levels, including obtaining positions as election officials and running for elected office.¹³⁰ Web pages of private militias tout their civic engagement, including providing assistance with disaster recovery, while denying any intent to commit acts of violence.¹³¹ They claim to have working relationships with local

¹²⁴ Eric S. Peterson, *A Year After Jan. 6 Protests, Utah Law Enforcement Is Still Trying To Navigate Armed Protests*, DESERET NEWS (Jan. 5, 2022), <https://perma.cc/3ZDD-L4VX>.

¹²⁵ Jared Holt, Atlantic Council’s DFRLab, *After the Insurrection: How Domestic Extremists Adapted and Evolved After the January 6 US Capitol Attack* 10 (2022), <https://www.atlanticcouncil.org/wp-content/uploads/2022/01/After-the-Insurrection.pdf>.

¹²⁶ *Id.* at 14–16.

¹²⁷ *Id.* at 17.

¹²⁸ Tess Owen, *This Three Percenter Militia Group Just Cancelled Itself Because of the Capitol Riots*, VICE (Feb. 26, 2021), <https://www.vice.com/en/article/3anmkv/this-three-percenter-group-just-cancelled-itself-because-of-the-capitol-riots>.

¹²⁹ Frenkel, *supra* note 117.

¹³⁰ Holt, *supra* note 125, at 21.

¹³¹ FRANKLIN CNTY. MILITIA (last visited Mar. 29, 2022), <https://perma.cc/N5VB-XDK8>.

government and law enforcement officials and advertise their tax-exempt non-profit status.¹³² They emphasize their careful vetting and background checks.¹³³

Militias have been aided in their rebranding by elected officials and far-right influencers who are willing to engage in revisionist history about January 6 and who suggest ideas such as a “national divorce,” or a “cold civil war.”¹³⁴ The acquittal of Kyle Rittenhouse, the vigilante militia member who killed two people and injured another during racial justice demonstrations in Kenosha, Wisconsin, also provided some perceived legitimacy to the militia movement.¹³⁵ Renewed confidence can be seen in militia efforts to influence local politics, including by packing school board meetings in opposition to mask mandates and teaching about race and diversity.¹³⁶ And once again, the coalescence of extremists of multiple ideologies has inured to the militias’ benefit, as they rally support for the recent “trucker” convoys in Canada and the U.S. using notions of being a bulwark against tyranny.¹³⁷

Evaluating Militia Extremism Going Forward

More than a year after the January 6 attack, the United States remains politically and culturally polarized. Recent polling suggests alarming numbers of Americans believe that violence against the government may be justified.¹³⁸ The

¹³² *About Us*, CIV. GROUND PATROL (last visited Mar. 29, 2022), <https://perma.cc/D74U-FDRF>.

¹³³ *Become A Member*, 1ST AMENDMENT PRAETORIAN (last visited Mar. 29, 2022), <https://perma.cc/TMB5-QFZN>.

¹³⁴ Holt, *supra* note 125, at 35.

¹³⁵ Kelly Weill, *GOP Lawmakers Fall Over Each Other to Offer Jobs to Kyle Rittenhouse*, DAILY BEAST (Nov. 19, 2021), <https://www.thedailybeast.com/kyle-rittenhouse-is-acquitted-republican-lawmakers-fall-over-each-other-to-offer-him-a-job>.

¹³⁶ *See, e.g.*, Erik Maulbetsch, *Militia Calls on Members to Pack Colorado Springs School Board Meeting Tonight*, COLORADO TIMES RECORDER (Oct. 21, 2021), <https://coloradotimesrecorder.com/2021/10/militia-calls-on-members-to-pack-colorado-springs-school-board-meeting-tonight/40461/>; Frenkel, *supra* note 117.

¹³⁷ *On Facebook, Far-Right Militias Stoke Trucker Convoy Headed to D.C.*, TECH TRANSPARENCY PROJECT (Feb. 28, 2022), <https://www.techtransparencyproject.org/articles/facebook-far-right-militias-stoke-trucker-convoy-headed-dc>.

¹³⁸ Meryl Kornfield & Mariana Alfaro, *1 in 3 Americans Say Violence Against Government Can Be Justified, Citing Fears of Political Schism, Pandemic*, WASH. POST (Jan. 1, 2022), <https://www.washingtonpost.com/politics/2022/01/01/1-3-americans-say-violence-against-government-can-be-justified-citing-fears-political-schism-pandemic/>.

involvement of armed, unaccountable private militias in the current culture wars is not only a threat to public safety; it also chills 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 menacing them with assault rifles just to exercise their First Amendment rights. Evaluating the militia extremist threat going forward requires more than understanding the public safety risks; it requires understanding how private militias infringe on these and other constitutional rights.

The militia movement's continued alliances with extremists and conspiracy theorists, including election deniers, also threaten functional democracy. A list of more than 35,000 members of the Oath Keepers, obtained by an anonymous hacker and analyzed by ProPublica, revealed 48 current and former state and local government officials.¹³⁹ More than 400 people who had signed up for Oath Keepers membership used government, military, or political campaign addresses.¹⁴⁰ Militia members, including at least one who participated in the January 6 assault, have recently run or are now running for office in multiple states.¹⁴¹ Militias have been instrumental in recall elections of moderate Republicans in favor of election deniers and extremist opponents of public health

¹³⁹ Isaac Arnsdorf, *Oath Keepers in the State House: How a Militia Movement Took Root in the Republican Mainstream*, PROPUBLICA (Oct. 20, 2021), <https://www.propublica.org/article/oath-keepers-in-the-state-house-how-a-militia-movement-took-root-in-the-republican-mainstream>.

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., Lorien Nettleton, *Hailey Man Takes Second Run for Idaho Senate*, LONGVIEW NEWS-JOURNAL (Mar. 18, 2022), https://www.news-journal.com/hailey-man-takes-second-run-for-idaho-senate/article_29fa6f45-ecf6-54cc-83a0-15c60eb3038e.html (Eric Parker, founder of Idaho's Real 3%ers, running for state senate); Sergio Olmos, *Republicans to Field More than 100 Far-Right Candidates This Year*, THE GUARDIAN (Feb. 2, 2022), <https://www.theguardian.com/world/2022/feb/02/republicans-100-far-right-candidates-2022> (noting, among others, Oath Keeper member Wendy Rogers running for reelection as Arizona state senator; Three Percenters members in the Pacific Northwest running for or elected to dozens of offices including mayor, county commissioner, and school boards; militia leader Ammon Bundy running for governor in Idaho); Tracey Tully, *An Oath Keeper Was at the Capitol Riot. On Tuesday, He's on the Ballot.*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/10/27/nyregion/oath-keeper-nj-assembly.html> (Oath Keeper Edward Durfee Jr. running for New Jersey State Assembly).

measures.¹⁴² A large number of election deniers are seeking to replace election officials and other elected officials from the precinct level to the state level, including by running for governor, attorney general, and secretary of state.¹⁴³ Whether running themselves or allied with election deniers, conspiracy theorists, and other extremists running for office, militia involvement significantly increases the potential for both political violence associated with democratic processes and the infringement of constitutional rights.

Other alliances could also prove dangerous to democracy. After the plot to kidnap Michigan Governor Whitmer was thwarted, a West Michigan sheriff suggested that the plotters, including militia members, might have been attempting to make a citizens' arrest.¹⁴⁴ The sheriff, Dar Leaf, had previously spoken out against the governor's health safety restrictions alongside one of the plotters at a rally earlier in the year.¹⁴⁵ Leaf considers himself a "constitutional sheriff" and is a prominent supporter of the Constitutional Sheriffs and Peace Officers Association (CSPOA).¹⁴⁶ The CSPOA believes that sheriffs are the highest law enforcement officers in the land, answerable to no governmental authority except the U.S. Constitution itself.¹⁴⁷ They claim their powers "even supersede[] the powers of the

¹⁴² See Scott Wilson, *How Far-Right Militia Groups Found a Foothold in Deep-Blue California*, WASH. POST (Mar. 7, 2022), <https://www.washingtonpost.com/nation/2022/03/07/california-far-right-militia/>.

¹⁴³ Amy Gardner et al., *Trump Allies Work to Place Supporters in Key Election Posts Across the Country, Spurring Fears about Future Vote Challenges*, WASH. POST (Nov. 29, 2021), https://www.washingtonpost.com/politics/trump-allies-election-oversight/2021/11/28/3933b3ce-4227-11ec-9ea7-3eb2406a2e24_story.html; Miles Parks, *Here's Where Election-Denying Candidates are Running to Control Voting*, NPR (Feb. 3, 2022), <https://www.npr.org/2022/01/04/1069232219/heres-where-election-deniers-and-doubters-are-running-to-control-voting>; *Replacing the Refs*, STATES UNITED DEMOCRACY CENTER (last updated Mar. 1, 2022), <https://statesuniteddemocracy.org/resources/replacingtherefs/>.

¹⁴⁴ Alan Stamm, *Michigan Sheriff Claims Citizens Can 'Make A Felony Arrest' Of Whitmer (No Way, Nessel Says)*, DEADLINE DETROIT (Oct. 9, 2020), https://www.deadlinedetroit.com/articles/26378/michigan_sheriff_claims_citizens_can_make_a_felony_arrest_of_w_hitmer_no_way_nessel_says.

¹⁴⁵ *Id.*

¹⁴⁶ Michael Krafcik, *Barry County Sheriff Promotes Course Against Tyranny, COVID-19 Orders and Biden*, NEWS CHANNEL 3 (Michigan), <https://wwmt.com/news/local/barry-county-sheriff-promotes-course-against-tyranny-covid-19-orders-and-biden>.

¹⁴⁷ *About CSPOA*, CONST. SHERIFFS & PEACE OFFICERS ASS'N (last visited Mar. 29, 2022), <https://perma.cc/69FX-SE85>.

President,” and they refuse to enforce laws they believe are unconstitutional.¹⁴⁸ Their founder, a long-time board member of the Oath Keepers, has called the federal government “the greatest threat we face today.”¹⁴⁹ After the January 6 attack, the CSPOA issued a statement blaming antifa for the violence.¹⁵⁰ Sheriff Leaf sought to obtain information from Trump allies that would justify seizing voting machines in his county, and to share it with other like-minded sheriffs in other Michigan counties.¹⁵¹ Although the effort was unsuccessful, the CSPOA remains actively involved in recruiting more sheriffs into its movement¹⁵² and training its members on the “Constitution and the Citizen Posse,”¹⁵³ raising serious concerns about the potential deputization of militia members should a “constitutional” sheriff deem it necessary in the future.

In short, evaluating the militia extremist threat going forward requires a recognition of the militias’ role in broader anti-democracy efforts.

Legal Principles Applicable to Unauthorized Militias

As the House Select Committee continues its investigation into the January 6 attack, its consideration of the militia extremist threat should be guided by a proper understanding of how the law applies to private militias. As I explain in detail in my essay *Dispelling the Myth of the Second Amendment*, attached to this written

¹⁴⁸ *Id.*

¹⁴⁹ Julia Harte & R. Jeffrey Smith, ‘*The Army to Set Our Nation Free*’, THE CENTER FOR PUBLIC INTEGRITY (Apr. 18, 2016), <https://publicintegrity.org/national-security/the-army-to-set-our-nation-free/>.

¹⁵⁰ Jessica Pishko, *Sheriffs Helped Lead This Insurrection*, SLATE (Jan. 15, 2021), <https://slate.com/news-and-politics/2021/01/constitutional-sheriffs-white-supremacists-capitol-riot-insurrection.html>.

¹⁵¹ Jonathan Oosting, *Emails: Michigan Sheriff Sought to Seize Voting Machines amid Trump Claims*, BRIDGE MICHIGAN (July 2, 2021), <https://www.bridgemi.com/michigan-government/emails-michigan-sheriff-sought-seize-voting-machines-amid-trump-claims>.

¹⁵² *The Constitutional Sheriffs and Peace Officers Association (CSPOA) and Richard Mack: How Extremists Are Successfully Infiltrating Law Enforcement*, ADL (last visited Mar. 29, 2022), <https://www.adl.org/resources/reports/the-constitutional-sheriffs-and-peace-officers-association-csboa-and-richard-mack#training-law-enforcement->.

¹⁵³ *Upcoming Events*, CONST. SHERIFFS & PEACE OFFICERS ASS’N (last visited Mar. 29, 2022), <https://perma.cc/LY8F-XLN7>.

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.¹⁵⁴

Since before the founding, “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 states intended to regulate the militias 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, especially “constitutional” sheriffs—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

¹⁵⁴ Mary B. McCord, *Dispelling the Myth of the Second Amendment*, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW (June 29, 2021), <https://www.brennancenter.org/our-work/research-reports/dispelling-myth-second-amendment>. Extensive source citations are included in the essay and are not duplicated here.

“necessary to the public peace, safety, and good order.”¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷

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 the unauthorized wearing of United States military or foreign military uniforms, or close imitations thereof.¹⁵⁸

¹⁵⁵ *Presser v. Illinois*, 116 U.S. 252, 268 (1886).

¹⁵⁶ *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

¹⁵⁷ *Id.* at 620–21.

¹⁵⁸ See generally ICAP, PROHIBITING PRIVATE ARMIES AT PUBLIC RALLIES: A CATALOG OF RELEVANT STATE CONSTITUTIONAL AND STATUTORY PROVISIONS (3d ed. 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf>.

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 or rely on a so-called “constitutional sheriff” for law enforcement. In most 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 non-militia charges used after plots are thwarted, such as the federal and state kidnaping conspiracy charges brought against the Michigan plotters and the federal firearms charges brought 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 recruit, propagandize, and coordinate their activity using the internet; they travel and transport weapons across state lines; they combine with other private militias and extremist groups from multiple states; they have connections to foreign militia organizations; and as the January 6 attack demonstrated, they present threats to our national security and democratic processes.

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 ICAP after the Unite the Right rally. 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 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. We are convinced that this can be done. ICAP would be happy to work with Congress in exploring legislative options for countering the threat of unlawful private militias.

In closing, we have seen from the experiences of too many other countries how dangerous unregulated, heavily armed militias can be—engaging in acts of political violence, intimidating the population, and destabilizing governments. Recent events have shown that the United States is not immune from these harms. We urge Congress to act quickly to address this growing threat.

Thank you for the opportunity to provide this Statement to the Committee.

Attachment: Mary B. McCord, *Dispelling the Myth of the Second Amendment*, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW (June 29, 2021), <https://www.brennancenter.org/our-work/research-reports/dispelling-myth-second-amendment>.

PROTESTS, INSURRECTION, AND THE SECOND AMENDMENT

Dispelling the Myth of the Second Amendment

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Introduction

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,¹ and the other more emphatic about its white male “chauvinism” and willingness to openly encourage violence against perceived ideological enemies.² 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)³ 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),⁴ 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.⁵ 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).⁶ 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.”⁷ The January 6 insurrection confirmed as much.

A “Well Regulated Militia” Means Regulated by the Government

Private militia organizations sometimes suggest that the Second Amendment’s reference to “a well regulated Militia,”⁸ 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,⁹ 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.”¹⁰ 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.”¹¹

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.*”¹² 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.”¹³ 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.”¹⁴

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,”¹⁵ and “[t]o provide for organizing, arming, and disciplining, the Militia,” while reserving the appointment of officers and training to the states.¹⁶ 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.”¹⁷

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.¹⁸ 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.¹⁹ Similarly, the states’ constitutional and statutory schemes provide for the governor — not private vigilantes — to call forth the militia.²⁰

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.”²¹ 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.”²²

The Second Amendment Does Not Protect Private Paramilitary Organizations

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.”²³ 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.”²⁴

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.”²⁵ 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.*”²⁶ 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.²⁷

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.”²⁸ 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.²⁹

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.”³⁰ 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.³¹

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.*”³² 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.”³³

All 50 States Prohibit Private Paramilitary Organizations

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.³⁴ In addition, 29 states have anti-militia statutes similar to the one upheld in *Presser*,³⁵ 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.³⁶ 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.³⁷ Another nine states have laws that ban wearing the uniforms of, or similar to, the uniforms of the United States military or foreign military.³⁸

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.³⁹ 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.⁴⁰

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),⁴¹ because the Texas law’s restriction on First Amendment freedoms was no greater than necessary to further an important governmental interest.⁴² 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.”⁴³

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*.⁴⁴ 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.”⁴⁵ 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.”⁴⁶

The Fourth Circuit weighed in on the enforcement of state anti-militia and anti-paramilitary-activity laws in *Person v. Miller* in 1988.⁴⁷ 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.⁴⁸ 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.⁴⁹

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.⁵⁰ 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.”⁵¹ 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.⁵²

Conclusion

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.⁵³ Some analogize to the victimization of southern Black Americans and

Unionists by violent Confederate factions after the Civil War,⁵⁴ 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.⁵⁵ 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.”⁵⁶ 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.⁵⁷ The common law right of citizen’s arrest is also held up as an example of America’s historical reliance on private force.⁵⁸

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 presence⁵⁹ — 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,⁶⁰ 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

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

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

³ 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>.

⁴ 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 Zaptosky 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/>.

⁵ 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>.

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

⁷ *Presser v. Illinois*, 116 U.S. 252, 268 (1886).

⁸ U.S. CONST. amend. II.

⁹ THE FEDERALIST NO. 46 (James Madison) [hereinafter FEDERALIST NO. 46].

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

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

¹² VA. CONST. art. I, § 13 (1776) (emphasis added).

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

¹⁴ *Id.* at 277.

¹⁵ U.S. CONST. art. I, § 8, cl. 15.

¹⁶ U.S. CONST. art. I, § 8, cl. 16.

¹⁷ U.S. CONST. art. II, § 2, cl. 1.

¹⁸ Act of May 8, 1792, 1 Stat. 271.

¹⁹ *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].

²⁰ 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.

²¹ FEDERALIST NO. 46.

²² *Id.*

²³ 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>.

²⁴ *Presser*, 116 U.S. at 268.

²⁵ *Id.* at 253.

²⁶ *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.

²⁷ *Presser*, 116 U.S. at 267.

²⁸ *Heller*, 554 U.S. at 621.

²⁹ 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).

³⁰ *Commonwealth v. Murphy*, 166 Mass. 171, 172 (1896).

³¹ *Id.*

³² WASH. CONST. art. 1, § 24 (emphasis added).

³³ *State v. Gohl*, 46 Wash. 408, 412 (1907).

³⁴ 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).

³⁵ 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.

³⁶ 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.

³⁷ 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>.

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

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

⁴⁰ *Id.* at 205–06.

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

⁴² *Vietnamese Fishermen’s Ass’n*, 543 F. Supp. at 209.

⁴³ *Id.* at 216.

⁴⁴ *Id.* at 210.

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

⁴⁶ *Id.* at 218.

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

⁴⁸ *Id.* at 659–60.

⁴⁹ *Id.* at 660–61.

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

⁵¹ *Id.* at *4.

⁵² *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>.

⁵³ 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).

⁵⁴ 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).

⁵⁵ 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).

⁵⁶ 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).

⁵⁷ 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).

⁵⁸ See Leider, *supra* note 56, at 16.

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

⁶⁰ 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.