

Institute for
Constitutional Advocacy and Protection

GEORGETOWN LAW

VIA EMAIL

Stephanie Reed
Mayor of Lynchburg
900 Church Street
Lynchburg, VA 24504
stephanie.reed@lynchburgva.gov

Ryan M. Zuidema
Lynchburg Chief of Police
905 Court Street
Lynchburg, VA 24504
ryan.zuidema@lynchburgva.gov

Matthew Freedman
Lynchburg City Attorney
900 Church Street
Lynchburg, VA 24504
matthew.freedman@lynchburgva.gov

September 26, 2024

Re: Potential Private Paramilitary Activity in Lynchburg

Dear Mayor Reed, Chief Zuidema, and City Attorney Freedman:

I am the Executive Director of Georgetown University Law Center's Institute for Constitutional Advocacy and Protection (ICAP), a non-partisan institute that uses litigation, strategic policy development, and constitutional scholarship to vindicate individuals' constitutional rights, protect democratic processes, and defend the rule of law. Over the past several years, since bringing successful litigation in 2017 against private paramilitary organizations that participated in the Unite the Right rally in Charlottesville, Virginia,¹ we have developed an expertise in the regulation of public protests in a manner that protects public safety while still respecting individuals' constitutional rights.²

I am writing because we understand that a self-styled private militia group, which calls itself the "Lynchburg Constitutional Militia," is planning to assemble for the first time in early October in

¹ See Inst. for Const. Advoc. & Prot., *City of Charlottesville v. Pa. Light Foot Militia* (accessed Sep. 26, 2024), <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-militias/city-of-charlottesville-v-pennsylvania-light-foot-militia/>.

² See Inst. for Const. Advoc. & Prot., *Protests & Public Safety: A Guide for Cities and Citizens* (accessed Sep. 26, 2024), <https://constitutionalprotestguide.org/>.

Miller Park.³ In promoting the event, the so-called militia organization asks attendees to “bring only sidearms,” because the organizing members of the group apparently did not think that long guns, such as AR-15s, “would be needed for the inaugural event.”⁴ The group’s website emphasizes that this muster will be an opportunity to “sign up to become a member of the militia” before the formation of an “election committee” and “training calendar for 2024/2025.”⁵ The Lynchburg Department of Parks & Recreation has apparently issued the a permit for the event.⁶

This event will take place against a backdrop of continued militia organizing throughout Virginia, which has raised concerns about the possibility of conflict related to the upcoming election.⁷ While local officials and law enforcement consider how to respond to the event, we wanted to share guidance on Virginia laws that relate to private paramilitary activity. We have previously worked with local law enforcement and municipal leaders in multiple states to advise them about legal options for addressing unlawful militia activity.

As you may be aware, several provisions of Virginia law prohibit private paramilitary activity. In particular, the Virginia Constitution’s Strict Subordination Clause forbids private military units from operating outside state authority, providing that “in all cases the military should be under strict subordination to, and governed by, the civil power.” Va. Const. art. I, § 13. Similarly, Virginia’s criminal anti-paramilitary statute prohibits private groups from using “firearm[s] . . . or technique[s] capable of causing injury or death . . . in, or in furtherance of, a civil disorder.” Va. Code § 18.2-433.2. And Virginia’s false-assumption statute prohibits individuals who are not law enforcement officers from exercising law enforcement functions. Va. Code § 18.2-174.

These prohibitions apply *regardless* of whether private militias claim to be acting at the behest of their local communities. Local and county officials have no power to sanction private militia groups.⁸ As we wrote in a 2020 letter to Campbell County officials following the so-called “recognition” of the Campbell County Militia by county supervisors,⁹ several provisions of the Virginia Code make clear that only the Governor, as commander-in-chief, has the power to call forth the unorganized militia. *See* Va. Code. §§ 44-8, 44-86. When called forth, the “unorganized militia” is incorporated into the Virginia Defense Force under the control of the Virginia

³ Mark Hand, *New Militia Group to Hold Inaugural “Muster” in Miller Park*, Lynchburg News & Advance (Sep. 14, 2024), https://newsadvance.com/news/new-militia-group-to-hold-inaugural-muster-in-miller-park/article_e4e84c2e-707f-11ef-95fb-53146d39a7d7.html.

⁴ *Id.*

⁵ Lynchburg Const. Militia, *Join the Lynchburg Constitutional Militia* (accessed Sep. 26, 2024), <https://www.lyncburgmilitia.com/1st-muster>.

⁶ Hand, *supra* n. 3.

⁷ Isabela Lisco & Sophia Didinova, *Virginia Militias Continue to Organize Locally as Experts Worry Over Elections*, VPM (Jul. 22, 2024), <https://www.vpm.org/news/2024-07-22/militia-paramilitary-election-violence-virginia>. New reporting also suggests that another self-styled militia in Campbell County, which calls itself the Campbell County Militia, is being operated by two noncommissioned officers in the Virginia National Guard. Steven Beynon, *2 Virginia Guardsmen Are Running a Rural Anti-Government Militia*, Military.com (Sep. 5, 2024), <https://www.military.com/daily-news/2024/09/05/2-virginia-guardsmen-are-running-rural-anti-government-militia.html>.

⁸ *See* Inst. for Const. Advoc. & Prot., *Fact Sheet: Local Governments and Militias* (accessed Sep. 26, 2024), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2024/08/Local-Governments-and-Militias-Fact-Sheet.pdf>.

⁹ Letter from Mary B. McCord to Charlie A. Watts, Chairman of the Campbell County Board of Supervisors, and Frank J. Rogers, Campbell County Administrator, re: Private Paramilitary Activity in Campbell County (Jun. 18, 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/06/2020.06.18-ICAP-Letter-Campbell-County.pdf>.

Department of Military Affairs. *See* Va. Code. §§ 44-54.4, 44-88. At no point are members of the unorganized militia authorized to report to city or county officials or to their own, self-appointed civilian commanders.

Taken together, these laws make clear that private militias have no authority to engage in law enforcement or military functions outside of carefully circumscribed situations where the Governor calls them into service. Despite its claims to be a “friendly neighborhood militia” whose activities are in keeping with the “liberties and responsibilities” of the Virginia Code and the U.S. Constitution,¹⁰ any purported law enforcement or paramilitary activity by the “Lynchburg Constitutional Militia” would be in violation of core principles of government control of the military and contrary to clearly established state law.

After the August 2017 Unite the Right rally in Charlottesville turned violent, ICAP, citing these laws, filed a successful lawsuit on behalf of the city, small businesses, and residential associations against a number of militia organizations involved in the unrest.¹¹ The Charlottesville Circuit Court agreed in a written ruling that the city could invoke the provisions of Virginia’s Constitution and state laws to seek court orders prohibiting the private paramilitary conduct.¹² The case resulted in court orders against 23 individuals and organizations barring them from returning to Charlottesville in groups of two or more acting in concert while armed with anything that could be used as a weapon during any rally, protest, demonstration, or march.¹³

Shortly thereafter, relying in part on the court’s opinion in that case, the Virginia Attorney General opined that “[u]nder the Code of Virginia, the responsibility to ‘safeguard ... life and property’ and to ‘preserv[e] ... peace’ is vested in the local police and other properly designated law-enforcement personnel. By engaging in crowd control or purporting to secure a public area, private militia members usurp a role specifically reserved to law enforcement, thereby ‘assum[ing] or exercis[ing] the functions, powers, duties, and privileges’ of law enforcement or peace officers’ ... [in] violation of § 18.2-174 of the Code of Virginia.”¹⁴

In seeking to maintain civilian governmental control over military and law enforcement activity, Virginia law is well aligned with federal precedent, as well as the laws in other states. Indeed, all 50 states have laws or constitutional provisions that bar private military activity.¹⁵ The U.S. Supreme Court has been clear since 1886 that the Second Amendment “does not prevent the prohibition of private paramilitary organizations.”¹⁶ Consistent with that interpretation, a federal

¹⁰ Lynchburg Const. Militia, *The Lynchburg Constitutional Militia* (accessed Sep. 26, 2024), <https://www.lyncburgmilitia.com/>. In attempting to justify its activities, the organization references Va. Code § 44-1, which establishes the different classes of the state militia, including the unorganized militia. As discussed, subsequent provisions of the Virginia Code state that unorganized militia can *only* be called into service by the Governor.

¹¹ *City of Charlottesville v. Pa. Light Foot Militia*, 2018 WL 4698657 (Va. Cir. Ct. July 7, 2018).

¹² *Id.* at *4 (holding that Virginia’s Strict Subordination Clause is “self-executing”).

¹³ Consent Decree, *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17000560-00 (Va. Cir. Ct. July 24, 2018), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/08/All-Consent-Decrees-and-Default-Judgments-without-photos.pdf>

¹⁴ Va. Attorney General Op. No. 19-039 (Aug. 16, 2019), <https://www.oag.state.va.us/files/Opinions/2019/19039-C-Herring-issued.pdf>.

¹⁵ Inst. for Const. Advoc. & Prot., *Prohibiting Private Armies at Public Rallies: A Catalog of Relevant State Constitutional and Statutory Provisions* (Sept. 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf>.

¹⁶ *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).

district court in Texas enforced the state's prohibition on private militias against the militia wing of the KKK in 1982. The court emphasized that Texas's anti-militia statute helped to ensure governmental authorities' monopoly over the use of force, which is a foundational democratic principle. Moreover, the court asserted, in enjoining future private militia activity, 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."¹⁷ Virginia's constitutional and statutory provisions that govern its militia and other armed forces seek to address a similar concern.

Since the Charlottesville lawsuit, ICAP has consulted with municipalities large and small across the country seeking advice on how to protect public safety while preserving constitutional rights during public protests and demonstrations. In 2019, ICAP consulted with officials in Dayton, Ohio, regarding their lawsuit against the Honorable Sacred Knights (HSK), a white supremacist organization affiliated with the KKK.¹⁸ Dayton was able to obtain a consent decree to enjoin the HSK from participating in paramilitary actions during a planned march.¹⁹ In 2021, ICAP also partnered with the District Attorney for Bernalillo County, New Mexico, to bring a successful lawsuit against a local militia there that usurped law-enforcement and military authority in violation of anti-paramilitary laws in New Mexico.²⁰

ICAP has worked with other local officials to help them rely on their own state-law authorities as the basis for content-neutral time, place, and manner restrictions during public events. ICAP's online legal toolkit, *Protests and Public Safety: A Guide for Cities and Citizens*, available at <https://constitutionalprotestguide.org/>, describes the authorities for and limits on such restrictions, as well as best practices for preventing violence. Please do not hesitate to contact us if we can be of assistance. ICAP's work is performed on a pro bono basis.

Sincerely,



Mary B. McCord

Executive Director
Institute for Constitutional Advocacy & Protection
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
mbm7@georgetown.edu

¹⁷ *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 218 (S.D. Tex. 1982).

¹⁸ Complaint, *City of Dayton v. Honorable Sacred Knights*, Case No. 2019 CV 01109 (Ct. Com. Pl., Montgomery Cty., Mar. 13, 2019), available at <https://perma.cc/YC93-JF7R>.

¹⁹ Consent Decree, *City of Dayton v. Honorable Sacred Knights*, Case No. 2019 CV 01109 (Ct. Com. Pl., Montgomery Cty., May 13, 2019).

²⁰ Inst. for Const. Advoc. & Prot., *State v. New Mexico Civil Guard* (accessed Sep. 26, 2024), <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-militias/state-v-new-mexico-civil-guard/>

cc:

Chris Faraldi
Vice Mayor of Lynchburg
900 Church Street
Lynchburg, VA 24504
chris.faraldi@lynchburgva.gov

Wyatt Woody
Director of Lynchburg Dep't of Parks & Recreation
301 Grove Street
Lynchburg, VA 25401
wyatt.woody@lynchburgva.gov

Bethany A.S. Harrison
Lynchburg Commonwealth's Attorney
bharrison@ocalynchburg.com
901 Church Street
Lynchburg, VA 24504