

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

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

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May 26, 2021

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

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

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

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

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

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

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

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

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

Private Militias are Not Constitutionally Protected.

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

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

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

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

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

Congress should consider federal militia legislation.

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

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

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

To effectively combat this threat will take more than one-off prosecutions at the state and federal level or novel litigation like that brought by my organization after the Unite the Right rally.² 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

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

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

Thank you again for the opportunity to address the Subcommittee.

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