

To: Senate Judiciary Committee February 14, 2023

From: William R. Moore, Firearms Policy Analyst, Vermont Traditions Coalition

Re: Recent developments in a Strike All amendment to S.3 An act relating to prohibiting paramilitary training camps.

Chairman Sears, Members of the Senate Judiciary Committee,

What may surprise you is we agree with the Sponsors of the Bill on the stated policy goal if not the terminology.

We also agree in part with Mary McCord who testified earlier on the Bill as well as similar legislation in Oregon February 6<sup>th</sup> of this year (See 1 Below). The Georgetown University Law Center's Institute for Constitutional Advocacy and Protection (ICAP) also summarizes well the nature of Oregon Statute and the (nearly identical to Vermont) language in the Oregon Constitution (in a catalog of various state legal schemes on the issues of paramilitary activity and civil disorder - See 2 Below). I will review these shortly.

**Allow me to state that we take a firm position that all militia *organized and activated* anytime for purposes of "defense of the state" absolutely are and of right ought to be Constitutionally under the civil power as determined by Constitution of the State of Vermont** in Chap. I Art. 16 and as Chap. II Art. 59 states:

Chap. I, Article 16. [Right to bear arms; standing armies; military power subordinate to civil]

*That the people have a right to bear arms for the defence of themselves and the State-- and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.*

Chap. II, Article 59. [MILITIA]

*The inhabitants of this State shall be trained and armed for its defense, under such regulations, restrictions, and exceptions, as Congress, agreeably to the Constitution of the United States, and the Legislature of this State, shall direct.*

On that the Oregon Statute and the ICAP and VT Traditions Coalition agree.

Vermont Statute further locks in the Civil Power as being found in the Executive primarily. It is fair to say all 50 states do so in some statutory form or other.

In Vermont, the "organized militia... shall be organized in accordance with federal regulations and approved by the Governor" according to 20 VSA 361 (See Below).

**When taken with the above Constitutional Articles it is clearly implied the Legislature may take appropriate statutory notice of residents acting outside these clear authorities.** The key points are that any militia activity "organized and activated" for any purpose (i.e. civil disorder) outside these may be defined in statute as a crime. So far so good.

While the Bill does attempt that it does so in ways that will be difficult if not impossible to define. Asking prosecutors and criminal courts to discern, allege and show "if the person knows or reasonably should know that the teaching, training, or demonstrating will be unlawfully employed for use in or in furtherance of a civil disorder" creates a conundrum. First, it describes a conspiracy either way you apply the Subsection 4071 language; yet Conspiracy is already fully defined and proscribed in 13 VSA 1404.

13 VSA 1404 States in part: "No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the defendant or by a co-conspirator".

**V. 1.1 Strike All Amendment as submitted (See Below – Annotated) creates a parallel Statutory Construction of conspiracy that is in contradiction to that existing statute.** It turns on the parallel evidentiary statement "if the person knows or reasonably should know that the teaching, training, or instruction will be unlawfully employed for use in or in furtherance of a civil disorder" and I submit these two cannot co-exist without creating a Constitutional backwash.

The newly proposed language creates a "crime of association" where intent is somehow discerned by a co-conspirator who is responsible criminally for knowing another person's acts will "be unlawfully employed for use in or in furtherance of a civil disorder". Those alleged to this presumed knowledge of who will engage in "furtherance of a civil disorder" are guilty by association and not by any discernible intent.

Second the Strike All amendment fails to elaborate what constitutes "Unauthorized Military Training" or what "Paramilitary Training" is in any significant and meaningful way. Attempts at defining this appear within the description of the offenses but in no direct terms are they described in the Definitions Section. The reason this may be impossible is because all the acts of *teaching, training, to demonstrate, instruct* or practicing referenced are all Constitutionally protected innocent activities on their own. Aggregation of these acts in the context of 2<sup>nd</sup> hand knowledge of the state of mind of

others in the group do not change these acts nature or lawfulness. Making these criminal by the Association or Assembly in groups for these same lawful purposes sets a shaky premise for defining a felony in statute. An elegant alternative is easily at hand. And without being a hazard to the 1<sup>st</sup> Amendment of the U.S. Bill of Rights...

The existing established Conspiracy statute employs the direct and more concrete "substantial overt act in furtherance of the conspiracy is alleged and proved" and the list of offenses includes: Murder, Arson, Sexual exploitation of children and a myriad of illegal drug trafficking offenses (13 V.S.A. § 1404).

In order to clarify the evidentiary standards, avoid the "guilt by association" and third party discernment of intent faults of the Bill, I propose attaching here at 13 VSA 1404 a crime of "organizing and activating a militia" without Civil Authority as described in 20 VSA 361(b) and rules adopted as defined in 13 VSA 361(c). As with the Oregon Statute, that crime should also be defined as "three or more persons" (Or. Rev. Stat. § 166.660 (4)(a)). It may also be appropriate to add 13 V.S.A. § 608 Assaults and Robbery within the Conspiracy list to encapsulate rioting and looting as an active organized group; a tactic sometimes described as typical of illegal militia activity.

**Final Conclusions: There must be a way to articulate the Civil Supremacy clause in activation and organization of the militia, while allowing that the "body of the people" represents an "unorganized militia" ready and constitutionally recognized as such in Presser, Heller, Bruen and several other state's statutory schemes with identical constitutional Articles such as Oregon and Pennsylvania.**

At the same time we must recognize that the possible and likely outcome of a statutory scheme as proposed is eerily familiar to historians of Civil Rights and 20th century law enforcement. That is a history of abuse against unpopular political groups such as the Black Panthers, SDS and leaders like Dr. King and Panthers leader Fred Hampton who was assassinated while being served a Search Warrant at 4:00 AM...

The low level of evidentiary necessity may lead to abuse and a desire to "err on the side of caution" in seeking Injunctive Relief by the Attorney General while also prematurely relieving the pressures to develop the more difficult and significant potential criminal convictions which address true active threats to the State of Vermont. These are best served under the existing Conspiracy Statute with appended crime of "organizing and activating a militia".

**The main issues here are a vague and minimal evidentiary standard for a very serious allegation of planning of violent civil disorder, as well as the exercise of a form of Prior Restraint on the rights of Assembly and**

**Association with a very poorly detailed Civil Enforcement via Injunctive**

**Relief.** That last will preclude the demand for robust evidentiary standards, adequate representation and allowances for Right To Counsel in the preparation of a legal defense. On behalf of those groups that may exist and form in the future of any political stripes we must resist the language and powers this Strike All language represents.

On a personal note and in hopes the Statute of Limitations has run out here is a case in point. During the 1990s I participated in a political direct action whose aim was to block and "Shut Down the NY Stock Exchange". We participated in several organized "affinity group" trainings which explained and allowed us to practice tactics to obstruct police in their efforts to stop the direct action. These were billed as non-violent but the tactics included sabotage of vehicles and mass gathering to obstruct law enforcement in the course of their duties. These "affinity groups" met and used facility spaces at Johnson State College, as well as several Unitarian Universalist church buildings and grounds. My participation was also facilitated by coordinated bus transportation and the overnight stay at sponsor households near the event in New York State.

Which of these events, sponsorship leaders, transportation providers and households would NOT be subject to the vague and constitutionally questionable assaults on Association and Assemblage Rights envisioned here in the S.3 Strike All? I plead the 5th on the answer.

I hope the Judiciary Committee will seek Legislative Counsel and testimony of the Defender General on this proposed inclusion within the Conspiracy Statute. I have made ACLU VT aware of my concerns and they may also want to weigh in if invited. Sheriffs who have experience with allegations of this type may also be of assistance.

I look forward to your questions and feel free to request further detailed links to other sources cited below.

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S.3

Senator Baruth moves that the bill be amended by striking out all after the enacting clause and inserting in lieu thereof the following:

Sec. 1. 13 V.S.A. chapter 85 is amended to read:

CHAPTER 85. WEAPONS

Subchapter 3. **Unauthorized Military Training**

§ 4071. PARAMILITARY TRAINING PROHIBITED

(a) A person shall not:

(1) teach, train, or demonstrate to any other person the use, application, or making of a firearm, explosive, or incendiary device capable of causing injury or death, or in techniques capable of causing injury or death to persons, **if the person knows or reasonably should know that the teaching, training, or demonstrating will be unlawfully employed for use in or in furtherance of a civil disorder**; or

(2) **assemble with one or more other persons** for the purpose of being taught, trained, or instructed in the use, application, or making of a firearm, explosive, or incendiary device capable of causing injury or death, or in techniques capable of causing injury or death to persons, **if the person knows or reasonably should know that the teaching, training, or instruction will be unlawfully employed for use in or in furtherance of a civil disorder.**

(b) A person who violates this section shall be imprisoned not more than five years or fined not more than \$5,000.00, or both.

(c) This section shall not apply to:

(1) activity engaged in for legitimate law enforcement purposes by a federal law enforcement officer or a law enforcement officer certified as a law enforcement officer by the Vermont Criminal Justice Council pursuant to 20 V.S.A. § 2358;

(2) lawful activity engaged in by students at Norwich University or any other educational institution where military science is taught as a prescribed part of the course of instruction;

(3) any activity undertaken without knowledge of or intent to cause or further a civil disorder that is intended to teach or practice self-defense or self-defense techniques, including karate clubs, self-defense clinics, and similar lawful activity;

(4) any facility, program, or lawful activity related to firearms instruction and training that is intended to teach the safe handling and use of firearms; or

(5) any lawful sports or activities related to the individual recreational use of possession of firearms, including hunting pursuant to 10 V.S.A. part 4, target shooting, self-defense, and firearms collection.

## § 4072. DEFINITIONS

As used in this chapter:

(1) "Civil disorder" means any public disturbance involving acts of violence by an **assemblage of two or more persons** that causes an immediate danger of or results in damage or injury to the property or person of any other individual.

***NOTE: The assemblage of persons is not attached by intent or "Acts in Furtherance" here to the persons who "knows or reasonably should know that the teaching, training, or demonstrating will be unlawfully employed for use in or in furtherance of a civil disorder." See VT Conctitution Articles 1, 10, 13 and Esp. Article 20.***

(2) "Explosive" has the same meaning as in subdivision 1603(2) of this title.

(3) "Firearm" has the same meaning as in subdivision 4016(a)(3) of this title.

(4) "Incendiary device" means a device so constructed [Note: here described is an "Act in Furtherance" which is not properly established in nexus in the above Subsection 4071(a) where only the Assembly of persons for sharing the methods "of constructing" such are established as the crime.] that an ignition by fire, friction, concussion, detonation, or other method may produce destructive effects primarily through combustion rather than explosion. The term does not include a manufactured device or article in common use by the general public that is designed to produce combustion for a lawful purpose, including matches, lighters, flares, or devices commercially manufactured primarily for the purpose of illumination, heating, or cooking. The term does not include firearms ammunition.

#### § 4073. CIVIL ENFORCEMENT; INJUNCTIVE RELIEF

If the Attorney General or a State's Attorney has reason to believe that a person is violating or is about to violate section 4071 of this title, and that proceedings would be in the public interest, the Attorney General or State's Attorney may bring an action in the name of the State in the Civil Division of the Superior Court to restrain the violation by temporary or permanent injunction. The action shall be brought in the Superior Court of the county in which the person resides, has a place of business, or is doing business. The courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of section 4071 of this title.

***NOTE: Subsection 4073 establishes the weakest evidentiary standard for Injunctive Relief; as in a Reasonable Person, especially in Civil Court where it is not clear in the Bill that the Relief Petition would afford the Plaintiff(s) opportunity to rebut, obtain advice of Counsel etc.***

#### Sec. 2. EFFECTIVE DATE

This act shall take effect on passage.

#### **NOTES & CITATIONS**

1 – INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION

GEORGETOWN UNIVERSITY LAW CENTER

Hearing before the House Committee on the Judiciary February 6, 2023

On House Bill 2572-1; Mary B. McCord, Executive Director, Institute for Constitutional Advocacy and Protection & Visiting Professor of Law, Georgetown University Law Center

In written testimony in part:

“By statute, Oregon’s “militia” is comprised of the “organized” and “unorganized” militia. Or. Rev. Stat. § 396.105(1). The “organized militia” is composed of the Oregon National Guard and the Oregon Civil Defense Force “when duly organized.” Id. § 396.105(2). The “unorganized militia” generally consists of “all able-bodied residents of the state” between certain ages. Id. at § 396.105(3). Only the governor has the power to call forth the unorganized militia. Id. §§ 396.135, 396.140. Private individuals have no authority to form their own militias. Moreover, existing Oregon law makes it a felony to engage in certain paramilitary activity, including training to use firearms, explosives or incendiary devices, or techniques capable of causing injury or death with the intent to unlawfully to use them in a civil disorder.” Or. Rev. Stat. § 166.660.”

2 – Georgetown University Law Center’s Institute for Constitutional Advocacy and Protection (ICAP); A Catalog of Relevant Constitutional & Statutory Provisions -

Oregon

“Or. Const. art. I, § 27. Right to bear arms; military subordinate to civil power The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.

Or. Rev. Stat. § 166.660. Unlawful paramilitary activity

(1) A person commits the crime of unlawful paramilitary activity if the person:

(a) Exhibits, displays or demonstrates to another person the use, application or making of any firearm, explosive or incendiary device or any technique capable of causing injury or death to persons and intends or knows that such firearm, explosive or incendiary device or technique will be unlawfully employed for use in a civil disorder; or

(b) Assembles with one or more other persons for the purpose of training with, practicing with or being instructed in the use of any firearm, explosive or incendiary device or technique capable of causing injury or death to persons with the intent to unlawfully employ such firearm, explosive or incendiary device or technique in a civil disorder.

(2) (a) Nothing in this section makes unlawful any act of any law enforcement officer performed in the otherwise lawful performance of the officer's official duties.

(b) Nothing in this section makes unlawful any activity of the State Department of Fish and Wildlife, or any activity intended to teach or practice self-defense or self-defense techniques, such as karate clubs or self-defense clinics, and similar lawful activity, or any facility, program or lawful activity related to firearms instruction and training intended to teach the safe handling and use of firearms, or any other lawful sports or activities related to the individual recreational use or possession of firearms, including but not limited to hunting activities, target shooting, self-defense, firearms collection or any organized activity including, but not limited to any hunting club, rifle club, rifle range or shooting range which does not include a conspiracy as defined in ORS 161.450 ("Criminal conspiracy" described) or the knowledge of or the intent to cause or further a civil disorder. [See at: [https://oregon.public.law/statutes/ors\\_161.450](https://oregon.public.law/statutes/ors_161.450)]

(3) Unlawful paramilitary activity is a Class C felony.

(4) As used in this section:

(a) "Civil disorder" means acts of physical violence by assemblages of three or more persons which cause damage or injury, or immediate danger thereof, to the person or property of any other individual.

(b) "Firearm" has the meaning given that term in ORS 166.210 (Definitions).

(c) "Explosive" means a chemical compound, mixture or device that is commonly used or intended for the purpose of producing a chemical reaction resulting in a substantially instantaneous release of gas and heat, including but not limited to dynamite, blasting powder, nitroglycerin, blasting caps and nitrojelly, but excluding fireworks as defined in ORS 480.111, black powder, smokeless powder, small arms ammunition and small arms ammunition primers."

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Georgetown University Law Center's Institute for Constitutional Advocacy and Protection (ICAP); A Catalog of Relevant Constitutional & Statutory Provisions -

### **Vermont Fact Sheet: Unlawful Militias in Vermont**

What is a militia?

Federal and state laws generally use the term "militia" to refer to all able-bodied residents between certain ages who may be called forth by the government to defend the United States or an individual state. See 10 U.S.C. § 246.

When not called forth, they are sometimes referred to as the "unorganized militia." A group of people who consider themselves part of the able-bodied residents referred to



as members of the militia under state or federal law is not legally permitted to activate itself for duty. A private militia that attempts to activate itself for duty, outside of the authority of the state or federal government, is illegal.

How do I know if a group of armed people is an unauthorized private militia?

Groups of armed individuals that engage in paramilitary activity or law enforcement functions without being called forth by a governor or the federal government and without reporting to any government authority are acting as unauthorized private militias. They sometimes train together and respond to events using firearms and other paramilitary techniques, such as staking out tactical positions and operating in military-style formations. They often purport to have authority to engage in military and law enforcement functions such as protecting property and engaging in crowd control.

These groups often engage in behaviors that show their intent to act as a private militia, such as wearing military style uniforms, tactical gear, or identifying insignia; wielding firearms or other weapons; and operating within a coordinated command structure. Other factors—such as statements by leaders or members' efforts to direct the actions of others—also may suggest that a group is acting as a private militia.

Groups of armed individuals may engage in unauthorized militia activity even if they do not consider themselves to be "members" of a paramilitary organization.

Does the Second Amendment protect private militias?

No. In fact, the Supreme Court decided in 1886—and repeated in 2008—that the Second Amendment "does not prevent the prohibition of private paramilitary organizations." *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).

Is it legal to act as a private militia in Vermont?

No. All 50 states prohibit private, unauthorized militias and military units from engaging in activities reserved for the state militia, including law enforcement activities. The Vermont Constitution forbids private military units from operating outside state authority, providing that "[t]he military should be kept under strict subordination to and governed by the civil power." *Vt. Const. ch. 1, art. XVI.*

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Title 20 : Internal Security And Public Safety

Chapter 021 : General Provisions 20 VSA 361

Military Department; National Guard

(a) The Military Department, created by 3 V.S.A. § 212, shall be administered by the Adjutant and Inspector General and shall include the National Guard and all military components of the State.

(b) The organized militia shall be known as the National Guard, and shall consist of the organizations and personnel of any arm, service, corps, or department that the federal government requires to be maintained in the State. The National Guard shall be organized in accordance with federal regulations and approved by the Governor. The Governor may alter, divide, annex, consolidate, disband, or reorganize the Vermont National Guard and create new organizations as necessary to ensure that the Vermont National Guard conforms to federal regulations and any system of drill, discipline, administration, and instruction prescribed for the U.S. Armed Forces.

(c) The Adjutant and Inspector General shall adopt all necessary rules for the government of the National Guard pursuant to this chapter. (Amended 1959, No. 329 (Adj. Sess.), § 34, eff. March 1, 1961; 1973, No. 223 (Adj. Sess.), § 2, eff. April 4, 1974; 2017, No. 113 (Adj. Sess.), § 113; 2021, No. 10, § 1.)

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Title 13 : Crimes And Criminal Procedure

Chapter 029 : Conspiracy

(Cite as: 13 V.S.A. § 1404)

§ 1404. Conspiracy

(a) A person is guilty of conspiracy if, with the purpose that an offense listed in subsection (c) of this section be committed, that person agrees with one or more persons to commit or cause the commission of that offense, and at least two of the co-conspirators are persons who are neither law enforcement officials acting in official capacity nor persons acting in cooperation with a law enforcement official.

(b) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the defendant or by a co-conspirator, other than a law enforcement official acting in an official capacity or a person acting in cooperation with a law enforcement official, and

subsequent to the defendant's entrance into the conspiracy. Speech alone may not constitute an overt act.

(c) This section applies only to a conspiracy to commit or cause the commission of one or more of the following offenses:

(1) murder in the first or second degree;

(2) arson under sections 501-504 and 506 of this title;

(3) sexual exploitation of children under sections 2822, 2823, and 2824 of this title;

(4) receiving stolen property under sections 2561-2564 of this title; or

(5) an offense involving the sale, delivery, manufacture, or cultivation of a regulated drug or an offense under:

(A) 18 V.S.A. § 4230(c), relating to trafficking in cannabis;

(B) 18 V.S.A. § 4231(c), relating to trafficking in cocaine;

(C) 18 V.S.A. § 4233(c), relating to trafficking in heroin;

(D) 18 V.S.A. § 4234(b)(3), relating to unlawful selling or dispensing of a depressant, stimulant, or narcotic drug, other than fentanyl, heroin, or cocaine;

(E) 18 V.S.A. § 4234a(c), relating to trafficking in methamphetamine; or

(F) 18 V.S.A. § 4233a(b), relating to trafficking in fentanyl. (Added 1985, No. 183 (Adj. Sess.), § 1; amended 1989, No. 100, § 14; 2003, No. 54, § 2; 2011, No. 121 (Adj. Sess.), § 2, eff. May 9, 2012; 2013, No. 34, § 8; 2017, No. 62, § 6.)