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Paranoia, Patriotism, and the Citizen Militia Movement: Constitutional Right or Criminal Conduct?

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COMMENT

Paranoia, Patriotism, and the Citizen Militia Movement: Constitutional Right or Criminal Conduct?

I. INTRODUCTION

As this country rushes towards the twenty first century, a growing cloud of civil unrest has found its way into the hearts of many Americans. In a bold move to challenge the power of the federal government, a significant number of American citizens have sought refuge from perceived government injustice by forming citizen militias. These self styled militia groups fear that the liberties guaranteed by the United States Constitution are rapidly evaporating in the wake of a federal government that has grown too large and powerful. For example, while addressing the Senate Subcommittee on terrorism, Norman Olson (Commander of the Michigan Regional Militias) characterized the federal government as the "child of the armed citizen" and stated that "[t]he increasing amount of federal encroachment into our lives indicates the need for parental corrective action."[1] While Olson and other militia

1. Olson Brief of Oral Testimony, at 1, submitted to *The Militia Movement in the United States, 1995, Hearings Before the Subcomm. on Terrorism, Technology, and Government Information of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess.,

activists claim as their purpose restoration of the republican form of government envisioned by the founding fathers, the tragic bombing of the Murrah Building in Oklahoma City has called their methods into question.[2] Conversely, citizen militia groups have denounced the bombing and deny any involvement in the event.[3] In response to the bombing and other alleged acts of violence, two congressional hearings have been conducted in an effort to gather information on the citizen militia movement to determine if they pose a criminal threat to our society.[4] Furthermore, several bills have been proposed to prohibit the formation of citizen militias.[5] Finally, several states have enacted laws

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June 15, 1995) (statement of Norman Olson, Interim Commander, Michigan Regional Militias) [hereinafter *Olson Brief*].

2. Law enforcement agencies and elected officials have called for "increased authority to engage in covert surveillance of domestic terrorist groups and congressional hearings on citizen militias have been scheduled." Randy E. Barnett, *Forward: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 443 (1995).

3. In a joint written statement provided to the Senate Subcommittee, John Trochmann and Bob Fletcher (Militia of Montana) denounced the bombing and offered their assistance to "apprehend all persons that may have planned and/or carried out that dastardly deed at what ever level they may hide." Trochmann Brief of Oral Testimony, at 1, submitted to *The Militia Movement in the United States, 1995, Hearings Before the Subcomm. on Terrorism, Technology, and Government Information of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess., June 15, 1995 (Joint statement of John Trochmann & Bob Fletcher, Militia of Montana) [hereinafter *Trochmann Brief*].

4. The Senate Subcommittee on Terrorism, Technology, and Government Information conducted hearings on the citizen militia movement on June 15, 1995. The House Subcommittee on Crime conducted similar hearings on November 2, 1995. The Senate hearing included testimony from Robert Bryant (Assistant Director National Security Division of the FBI), James Brown (Deputy Associate Director BATF), Colonel Fred Mills (Superintendent Missouri Highway Patrol), Richard Romley (Maricopa County District Attorney, Phoenix, Arizona), John Bohlman (Musselshell County Attorney, Roundup, Montana), John Trochmann (Militia of Montana), Robert Fletcher (formerly of Militia of Montana), Ken Adams (Executive Director of the Confederation of Citizen Militias), James "JJ" Johnson (militia activist), and Norman Olson (Michigan Militia). The House hearing included testimony from Brent Smith Ph. D. (Professor UAB), John George Ph. D. (Professor University of Central Oklahoma), Michael Liberman (ADL), Ken Stern (American Jewish Committee), Brian Levin (Southern Poverty Law Center), Rick Eaton (Simon Wiesnthal Center), Ted Almay (Superintendent Ohio Bureau Investigation), Patrick Sullivan (Sheriff Arapaho County Colorado), Nick Murnion (Garfield County Attorney, Jordan, Montana), Karen Mathews (Recording Clerk, Modesto, Ca.), Greg Nojeim (ACLU), and David Kopel (Cato Institute).

5. H.R. 1899, 104th Cong. 1st Sess. (1995) (bill to amend Title 18 U.S.C. § 231(a) to prohibit certain conduct relating to civil disorders); H.R. 1544, 104th Cong. 1st Sess. (1995) (bill to prohibit the formation of private paramilitary organizations); H.R. 1710, 104th Cong. 1st Sess. (1995) (Comprehensive Antiterrorism Act of 1995); *see also The ADL Anti-Paramilitary Training Statute: A Response to Domestic Terrorism*, The William and Naomi Gorowitz Institute on Terrorism and Extremism (1995) (model statute for the prohibition of citizen militia groups) [hereinafter ADL Statute]. The ADL model statute has been

that regulate or otherwise prohibit the formation of citizen militias, training associated with militia activities, and the participation in such training activities.[6]

At this time an uneasy truce has developed between militia groups and law enforcement agencies. Militia activists continue to preach their interpretation of the Constitution while politicians, law enforcement agencies and various watchdog organizations seek to prohibit the continued existence of the militia movement. The fact that a significant number of American citizens have reached the point of arming themselves to defend against a perceived government threat (whether real or imagined) reflects a current of government suspicion that should not be summarily dismissed. Professor Glenn Harlan Reynolds eloquently makes this point:

> When large numbers of Americans begin arming themselves against their own government and are ready to believe even the silliest rumors about that government's willingness to evade the Constitution, there is a problem that goes beyond gullibility. This country's political establishment should think about what it has done to inspire such distrust—and what it can do to regain the trust and loyalty of many Americans who no longer grant it either.[7]

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widely adopted by several states and is similar to the bills proposed by Representative Jerrold Nadler (H.R. 1899 & 1544).

6. ALA. CODE § 31-2-125 (1973); ARIZ. REV. STAT. ANN. §§ 26-123 (1991), 5-71-301, 03, 03 (1985); CAL. [PENAL] CODE § 11460 (West 1992); COLO. REV. STAT. § 18-9-120 (Supp. 1995); CONN. GEN. STAT. § 53-206b (1994); FLA. STAT. ch. 870.06 (West 1994), ch. 790.29 (West 1992); GA. CODE ANN. §§ 38-2-277 (1955), 16-11-150, 51, 52 (1985, 1987); IDAHO CODE §§ 46-802 (1931), 18-8101, 02, 03, 04, 05 (1987); ILL. REV. STAT. ch. 20, paras. 1805/94a, 94, 95 (1993); IOWA CODE § 29A.31 (West 1995); KAN. STAT. ANN. § 48-203 (1994); KY. REV. STAT. ANN. § 38.440 (Baldwin 1954); LA. REV. STAT. ANN. § 14:117.1 (West 1986); ME. REV. STAT. ANN. § 342 (West 1987); MD. ANN. CODE art. 65, § 35 (1987); MASS. GEN. L. ch. 33, §§ 129 (1985), 30, 31, 32 (1985); MICH. COMP. LAWS ANN. § 750.528a (West 1991); MINN. STAT. ANN. § 624.61 (West 1987); MISS. CODE ANN. § 33-1-31 (1972); MO. REV. STAT. § 574.070 (1983); MONT. CODE ANN. §§ 45-8-107 (1991), 08, 09 (1991, 1995); NEV. REV. STAT. § 2003.080 (1967); N.H. REV. STAT. ANN. § 111:15 (1990); N.J. STAT. ANN. § 2C:39-14 (1988); N.M. STAT. ANN. §§ 30-20A-1, 2, 3, 4 (1990); N.Y. [MILITARY] LAW § 240 (McKinney 1990); N.C. GEN. STAT. §§ 127A-151 (1994), 14-288.20 (1994); N.D. CENT. CODE § 37-01-21 (1975); OKAY. STAT. ANN. 1321.10 (1968); OR. REV. STAT. § 166.660 (1987); PA. STAT. ANN. tit. Crimes and Offenses, 5515 (1983); R.I. GEN. LAWS §§ 30-12-7 (1994), 11-55-1, 2, 3 (1982); S.C. CODE ANN. §§ 16-8-10, 20, 30 (1989); TEX. [EXECUTIVE BRANCH] CODE ANN. § 431.010 (1987); VA. CODE ANN. §§ 18.2-433.1, 2, 3 (Michie 1987); WASH. REV. CODE ANN. § 38.40.120 (West 1983); W. VA. CODE § 15-1F-7 (1963); WYO. STAT. § 19-1-106 (1977).

7. Glenn Harlan Reynolds, *Up in Arms About a Revolting Movement*, CHI. TRIB., Jan. 30, 1995, § 1, at 11; *see also* Smith Brief of Oral Testimony, submitted to *The Nature and Threat of Violent Anti-Government Groups in America, 1995, Hearings Before the Subcomm. on Crime, House Comm. on the Judiciary*, 104th Cong., 1st Sess., Nov. 2, 1995 [hereinafter

Ultimately, resolution of the issues implicated by the citizen militia movement requires a balancing of First and Second Amendment rights against governmental interests in public health and safety. This comment proposes that *armed* citizen militia groups have the right to exist based on a two part theory. First, that the Second Amendment confers (i) an individual right to keep and bear arms, and (ii) a collective right of the people to form citizen militias in order to protect against oppressive and tyrannical government practices. Second, that the First Amendment protects the speech and associational activities of citizen militias. By combining the respective rights enumerated in the First and Second Amendments, citizen militia groups arguably have the constitutional right to associate, and engage in armed activities, so long as their activities are not otherwise unlawful.[8]

The first portion of this Comment will focus on the organization, philosophy, purpose, and activities of the various citizen militias. This background information is necessary to identify the constitutional arguments in support of the movement's continued existence. The second portion of this Comment will identify and discuss state and federal laws prohibiting the formation of citizen militia groups. Pending federal legislation will also be discussed. The third portion will consist of a general summary of the conclusions reached regarding the constitutional implications of laws designed to prohibit the activities of citizen militia groups.

II. THE CITIZEN MILITIA MOVEMENT DEFINED

Citizen militia activists consider the formation of citizen armies as the legitimate exercise of the constitutional right to keep and bear arms. As a result, citizen militia groups have been created in a number of states. In order to determine the validity of claims by militia leaders that the

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Smith Brief). Dr. Smith is a professor at the University of Alabama, Birmingham. Professor Smith stated that:

> [T]he probability that violent, anti-government groups will emerge in any given social setting is directly related to the level of discontent within society. Consequently, levels of anti-government violence or domestic terrorism can be used as a rough gauge of the political instability within a social system. There is some truth to the notion of domestic terrorism as the tip of the iceberg and, as such, changes in levels of violent, anti-government behavior should be given careful consideration instead of merely thinking of it as the ravings of a few deranged madmen.

Id. at 1.

8. In part II of this Comment, *infra*, I will discuss how the individual and collective right to keep and bear arms affects operation of the First Amendment to the activities of the various citizen militia groups.

formation of citizen armies is constitutionally protected, an overview of the types of activities typical of the movement is necessary. It is hoped that by defining the essential structure, philosophy, activities, and objectives of the movement, the constitutional implications of restricting or, alternatively, eliminating citizen militia groups will become clearer.

A. *Structure, Organization, and Numbers*

To date the militia movement has not established nationwide uniformity in the sense of a centralized governing body, but efforts to create a nationwide network are growing. For example, on November 18, 1995, Macon, Georgia was the site of a self proclaimed citizen militia conference where movement notables such as J. J. Johnson,[9] Bob Fletcher,[10] Nancy Lord,[11] and Bob Starr[12] sought to educate the general public as to the activities and goals of the militia movement and recruit militia members. This conference illustrates an effort on the part of militia activists to organize on a national level.

Towards this end an organization known as the National Confederation of Citizen Militias[13] has been created to assist the various local militia groups in organizing, recruiting, and retaining members. In a telephone interview with the executive director of the confederation—Mr. Ken Adams—he stated that the confederation assists persons attempting to establish a citizen militia in their locality as well as providing current documents and other paraphernalia to existing militia groups. The

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9. While introducing Mr. Johnson, Bob Starr sarcastically referred to him as one of the so called racist militia members touted by the press. To the surprise of many, the man walking up to the podium was an African American. Mr. Johnson claims to be the founder of a "patriot group" known as *E Pluribus Unum* which is defined as "one out of many" and "the motto of the United States of America." BLACK'S LAW DICTIONARY 481 (5th ed. 1979). Johnson also claims to be co-founder of the Tri-States Militia, and spokesperson for the Ohio Unorganized Militia.

10. Mr. Fletcher informed the crowd that he was formerly associated with the Militia of Montana but stated that he has since withdrawn from that organization and was setting up residence in Atlanta, Georgia. He indicated that he was involved in the Iran/Contra affair and testified before congressional committees investigating the drugs for arms scandal.

11. Ms. Lord was listed as vice president on the Libertarian ticket during the 1992 presidential election. She is also an attorney residing in the Atlanta, Georgia area.

12. Mr. Starr is a Macon, Georgia resident who holds the position of Major in the 112th Warrior Battalion of the Militia of Georgia.

13. The *NCCM* was founded by Ken Adams and has been in existence approximately two years. The *NCCM* is closely related to the citizen militia movement but is not a militia group. The relationship of the NCCM to actual citizen militia groups is analogous to the NRA's relationship to the various gun rights advocacy groups. *Telephone Interview with Ken Adams, Executive Director, NCCM* (Oct. 26, 1995).

NCCM claims to be a non-denominational, non-political, and non-racial organization constituting an alliance of patriotic defense groups.[14]

In response to efforts by militia leaders and support groups to spread pro militia propaganda, several organizations are attempting to track militia groups. Perhaps the most zealous of these watchdog organization is the Klanwatch project.[15] In June 1995 the Klanwatch Project reported that approximately 131 individual militia groups were present throughout the United States with approximately 23 of those groups possessing racist ties.[16] Brian Levin (Associate Director Klanwatch Project), during testimony before the House Subcommittee on crime, stated that almost 272 militia groups are operating in 48 states, with at least 66 of those groups having ties to the white supremacist movement.[17] Levin informed members of the subcommittee that Klanwatch shares its information with over 6,000 law enforcement agencies

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14. The *NCCM* offers a variety of services to include: (i) intelligence analysis by trained professionals, (ii) communication networking and conferencing, (iii) educational and training material resources, (iiii) pro militia radio programming, (iiiii) clearing house for financial support interests, and (iiiiii) a centralized listing of resources and opportunities. MICHIGAN MILITIA CORPS, INFORMATION MANUAL, at 15 (June 11, 1995) [hereinafter MICHIGAN MANUAL].

15. Klanwatch operates under the umbrella of the Southern Poverty Law Center (SPLC), which is based in Montgomery, Alabama. Responding to white supremacist activity in the late 1970s, the Center established the Klanwatch project to monitor extremist groups and track hate crimes. Klanwatch Brief of Oral Testimony, at 1, submitted to *The Nature and Threat of Violent Anti-Government Groups in America Hearings Before the House Subcommittee on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess., Nov. 2, 1995 [hereinafter *Klanwatch Brief*] (statement of Brian Levin, Associate Director, Klanwatch Project, SPLC). Morris Dees, founder of the SPLC, is noted for his staunch opposition to racist organizations. Mr. Dees representation of the plaintiffs in Vietnamese Fisherman's Ass'n v. Knight Riders of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tx. 1982), reflects his commitment to defend against organized and violent racist activity. In fact, his opposition to such groups resulted in at least one planned attempt on his life by a now defunct white supremacist group sometimes referred to as the Order. For a detailed account of the Order's activities and the targeting of Dees for execution see KEVIN FLYNN & GARY GERHARDT, THE SILENT BROTHERHOOD (Signet Books 1990). Other groups such as the Anti-Defamation League (ADL), the American Jewish Committee (AJC), and the Weisenthal Center (WC) have become active in scrutinizing the growth and activities of the citizen militia movement. Most of these watchdog groups are driven by the fear that the militia movement is a breeding ground for hate groups with a racist agenda.

16. Klanwatch Project Intelligence Report, *Citizen Militias & Support Groups In The United States, Special Militia Task Force Edition*, June 1995, at 7, 10 [hereinafter *Klanwatch Report*, June 1995].

17. *Klanwatch Brief*, at 4 (Nov. 2, 1995). It is unclear if Levin's quoted numbers include militia support groups, and the methodology for arriving at those figures was not disclosed during the hearing. In any event, the statistics indicate that the movement is growing rapidly.

including the FBI and ATF.[18] The substantial increase in militia activity, if numerically accurate, could be the result of continuing efforts by militia activists to organize and recruit mainstream Americans to the movement.

Estimates of the actual number of militia members varies. Norman Olson estimates that approximately 4.6 million Americans have signed on to the militia movement.[19] Hard and fast figures concerning the number of militia members nationwide are currently unavailable but government officials are seeking to obtain more hard data on the size and strength of the citizen militia movement. For example, Senator Spectre, Chairman of the Senate Subcommittee on Terrorism, asked militia leaders to provide his committee (in writing) with information regarding, "where the militias are, how many there are in each state, what their names are, what their membership is, what their purposes are, . . . [and] what weapons they have."[20] Conversely, militia activists are not inclined to share what they consider to be tactical information with government agencies or officials. Consider this warning provided to would be militia members during the November 18, 1995 militia conference in Macon, Ga.: "Never divulge firepower, specialties of individuals, *or any information that would breach the security of your unit.*"[21] Thus, efforts to nail down accurate membership figures are speculative at best.

The structure of individual militia groups vary to some degree, but are typically of standard military design. For example, the state of Georgia is divided into six areas, each area consisting of four sections, and each

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18. *Id.* at 1.

19. Letter from Norman Olson, Interim Commander, *Michigan Militia Corps*, to R.J. Larizza, at 2 (Oct. 18, 1995) (on file with author).

20. Transcript of *The Militia Movement in the United States, 1995, Hearings Before the Subcomm. on Terrorism, Technology, and Government Information of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 157, June 15, 1995 [hereinafter *Senate Transcript*, June 1995]. This request was perceived as an attempt to obtain names of individual members of the militia movement. *Id.* at 158. Senator Specter quickly clarified his request by stating that he was not asking for individual names but rather total numbers. *Id.* It is well established that the membership lists of associations are constitutionally protected. *See* NAACP v. Alabama, 357 U.S. 449 (1958) (order requiring association to produce names and addresses of all members is substantial restraint on exercise of right to freedom of association).

21. Letter from Bob Starr, Major, *Warrior Battalion, Militia of Georgia*, To Whom it May Concern (undated) (letter on file with author). This letter was contained in a packet of materials provided to all participants in the November 1995 citizen militia conference held in Macon, Georgia.

section divided up by county.[22] The Michigan Militia has an elaborate organizational scheme. First, the state is physically divided into nine divisions. Each division has a low of seven and a high of thirteen counties within its jurisdiction. The state commander serves as the ultimate authority, with a subordinate command structure consisting of a chief of staff (serving the state commander), divisional officers, and brigade commanders.[23] At this time it appears that centralization of the command structure has been confined to individual states. By limiting its command structure to the state level, autonomy and security concerns are satisfied.

To further the integrity of individual militia groups, militia leaders have set up a scheme designed to protect the identities and numbers of individual members. Members are urged to muster in squad sized community units of eight to ten individuals. The squad leader must appoint a liaison officer, other than him or herself, to communicate with two neighboring squads. The individual members of each squad are not allowed to contact members of other squads, and information concerning other squads and their members is also unavailable. In the event of an attack, the squads would mobilize to defend against the threat and then dissolve back into their ten person squads—melting into the community from which they were formed. This type of organizational scheme has been referred to as leaderless resistance.[24] Militia groups see this organizational scheme as necessary to the security of their organization.

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22. As an illustration, the 112 Warrior Battalion of the Georgia Militia denotes the 1st area, 1st section, 2nd county. *Telephone Interview with Bob Starr, Major, Georgia Militia* (January 6, 1996).

23. MICHIGAN MANUAL, *supra* note 14, at 8-12. This manual was prepared by Norman Olson in his capacity as interim commander of the Michigan Militia. In response to intense media scrutiny in the aftermath of the Oklahoma bombing, the Michigan Militia has created a "public affairs officer" position on the divisional level. The primary function of the PAO will be to report and answer inquiries concerning activities in a particular division and coordinate a unified response to such inquiries as they occur. *Id.* at 8.

24. *See Klanwatch Brief, supra* note 15, at 2. In his brief, Levin argues that "the notion of a violent 'leaderless resistance' has been imported by the extreme anti-government movement from the white supremacists . . . [and] calls for small autonomous bands of terrorists to . . . commit random acts of terror against public institutions, infrastructure targets, and innocent citizens." *Id. See also* Louis R. Beam, *Leaderless Resistance, The Seditionist* (February 1992) (Beam is a notorious white supremacist whose quarterly journal is widely read and distributed among white supremacist groups). Levin's statement implies that the leaderless resistance approach is offensive in nature, but militia activists have advocated its use to avoid detection from government surveillance. *See Olson Letter, supra* note 19, at 1-2.

B. *Philosophy and Purpose of the Citizen Militia Movement*

Militia members claim to be patriots who are fighting for the preservation of the United States Constitution. Militia membership is strictly voluntary and the movement is self supporting. Norman Olson of the Michigan Militia stresses the voluntary nature of the movement stating that "one cannot be forced to be a patriot."[25] Olson lists the groups primary objectives as; "to instruct, to inform and to equip [militia members]," while maintaining a non denominational, non political, and non racial organization that, by its very existence, may enlighten and influence the voting preferences of the general public. He refers to the Michigan militia as a "popular front movement which tries to embrace the people," and likens it to the French resistance during WWII.[26]

Virtually all citizen militia groups I have researched claim as their fundamental purpose the protection and preservation of the United States Constitution.[27] Militia members consider the United States Constitution, and consequently, the American Republic under attack by foreign and domestic forces. For example, citizen militia activists claim that (i) a sinister global alliance has seized control of financial, media, and law enforcement institutions in a effort institute a *New World Order* government,[28] (ii) American military researchers have developed a weather control system that can affect weather patterns and create earthquakes,[29] and (iii) that subversive elements in American government are engaging in psychological warfare tactics designed to pacify and ultimately control, the American people.[30]

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25. *Olson Letter*, *supra* note 19, at 1. Olson goes on to state that there can be no patriotism if the motivation of a patriot is anything other than altruistic ideals. He claims that the best way to keep the militia pure is to require that everyone fund themselves. *Id.*

26. *Id.*

27. MICHIGAN MANUAL, *supra* note 14, at 12; *Manual for the Standardization of the Militia at Large*, at 2 (undated) [hereinafter *Standard Manual*]. Members of the Michigan Militia Corps are required to take an oath that states:

> I _____, do solemnly swear (or affirm) that I will support the Constitution of the United States against all enemies, both foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of those appointed over me, for conscience sake; SO HELP ME GOD.

MICHIGAN MANUAL, *supra* note 14, at 14.

28. David A. Newby, *No More Conspiracy Theory Just Hard, Provable Facts*, THE FREE AMERICAN, Nov. 1995, at 9.

29. Albert Nanomius, *Weather Control—A Figment of our Overworked Imagination or the Ultimate Weapons?*, THE FREE AMERICAN, Nov. 1995, at 6-8.

30. K.M. Heaton, *PsyWar Being Waged Against America*, THE FREE AMERICAN, Nov. 1995, at 17.

In response to what militia members consider ultimate and imminent threats to the American Republic, militia leaders are preparing for potential armed conflict with hostile forces bent on removing our constitutional form of government. Would be militia members are encouraged to stockpile not only weapons, but food and survival gear in an effort to prepare for armed conflict with those in the government who have "betrayed, abused, and ignored their oath of office to protect and uphold the Constitution of the United States."[31] Militia activist J.J. Johnson's ominous statement that "the only thing standing between some of the current legislation being contemplated and armed conflict is time" reflects the serious implications of the citizen militia movement.[32]

C. *Militia Activities*

Identifying the types of activities typical to the various citizen militia organizations depends in large part on who is asked.[33] Norman Olson characterizes the Michigan Militia's training activities as "typically military—the same one would expect at a 'boot camp,'" and he stresses that the "National Patriot Militia Movement does not employ Mid-East brand terrorism."[34] Olson lists the short term goal of the militia as defensive preparedness asserting that the movement is purely defensive in nature. Training members to be competent soldiers equipped with the best firearms and equipment they can afford—in preparation for whatever tomorrow may bring—captures Olson's vision of the short term objectives of the militia movement.[35] Olson points out that the doctrine of deadly force is taught to every soldier. He claims that no offensive military action is planned against the government at this time, but goes on to state that psychological warfare and propaganda will be utilized. He considers the use of force against the government to be dictated by the government itself, and points to the incident at Waco as an example

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31. *Standard Manual*, at 2.

32. *The Militia Movement in the United States, 1995, Hearings Before the Subcomm. on Terrorism, Technology, and Government Information of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 103, June 15, 1995 (statement of J.J. Johnson, Ohio Unorganized Militia) [hereinafter *Senate Militia Transcript*].

33. I did not personally observe any actual training activities staged by citizen militia members. Ultimately, I relied on documents, phone interviews, and transcripts of testimony provided by militia members and other individuals having some knowledge (personal or otherwise) of militia activities. I suspect that the information obtained invariably contains some degree of bias. In an effort to be fair and accurate, information gleaned from all of these sources is included in this Comment.

34. *Olson Letter*, *supra* note 19, at 2.

35. *Id.*

of the justifiable use of force against the government on the grounds that the Branch Davidians acted in self defense.[36]

In an attempt to control individual members and incorporate clearly defined behavioral guidelines, the Michigan Militia has enumerated a code of conduct for its members, and has provided a court martial procedure for those who engage in illegal acts that could taint the purpose and image of the military organization.[37] Militia members are expected to carry "military style firearms" when engaging in military duties, but the use of firearms is somewhat conditioned in the sense that militia members are authorized to discharge their weapons either in self defense or when otherwise ordered to do so.[38] From the preceding statement, it must be assumed that leaders of the Michigan Militia envision situations where the use of deadly force could conceivably be used absent the justification of self defense. Ultimately, it appears that use of force could be ordered based on a subjective determination of the militia hierarchy, and absent a corresponding threat of force and\or violence against the militia group.

In an effort to prepare for armed confrontation with hostile forces, citizen militia groups engage in military training maneuvers designed to simulate battle conditions. For example, in May 1994 members of the Michigan militia requested and obtained permission from Mary Hessell (local official of the village of Pellston Michigan), to use the local park and pavilion. Militia members arrived dressed in fatigues and face paint, and carrying semi-automatic weapons. Sentries were posted, and maneuvers conducted, while a children's baseball game was in progress just a few yards away. Pellston officials objected to the activity and requested that future use of the park by militia members not include the presence of weapons. The maneuvers were allegedly staged by militia leaders as a means to go public.[39] In response to the growing visibility of the movement, public officials and private citizens have voiced concerns regarding the presence of citizen militia groups.

Senate Subcommittee hearings on the militia movement reveal the perception some lawmakers have of the nature and activities of the citizen militia movement. Senator Kohl remarked, while making his

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36. *Id.*

37. MICHIGAN MANUAL, *supra* note 14, at 13-14.

38. *Id.* at 13. The manual does not elaborate on what circumstances, other than self defense, would justify the use of deadly force against government forces. David Trochmann, a co-founder of the Montana Militia, was interviewed on the Alan Handleman radio talk show recently (Mar. 31, 1996), and stated that the use of force against the government would be justified if the government acted illegally.

39. Beth Hawkins, *Patriot Games*, METROTIMES, Oct. 12-18, 1995, at 12-16.

opening statement, that "[t]he hatred some members of these groups harbor for African Americans, foreigners, and government is particularly disturbing in light of the escalating political violence in our country."[40] Senator Kohl's colloquy highlighted militia members participation in questionable activities to include the arrest of militia activists and the seizure of weapons, gas masks, and other military hardware. Kohl discussed the seizure of documents that revealed plans to destroy bridges, radio stations, and other targets, as well as plans to use a lethal poison to kill federal employees and law enforcement agents.[41]

Additionally, Senator Levin's remarks closely tracked those of Kohl. Throughout his commentary were allegations of militia misconduct to include; stalking of law enforcement agents, espousal of "paranoid conspiracy theories" and extreme hate rhetoric, the stockpiling of firearms and explosives,[42] paramilitary training, bail skipping, and death threats against ATF agents. Levin concluded that "[w]e don't need private armies . . . to protect us from government" claiming that the "ballot box" was the proper means to oppose government oppression, and that our independent judiciary is adequate to address alleged constitutional rights violations.[43] During a House Subcommittee Hearing on anti-government groups, Representative Jerrold Nadler made the following comments; "[t]hese private armies are the lawless siblings of

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40. *Senate Militia Transcript*, *supra* note 32, at 5. Compare Kohl's characterization of the militia movement as racially motivated with the following statements of black militia activist J.J. Johnson: "I have never witnessed or even heard of anyone being excluded from the militia based solely on their racial or ethnic ancestry. I have challenged the media to provide me with even one such incident. None have come forward." J.J. Johnson, *A Heartfelt Invitation to BLACK AMERICANS*, MEDIA BYPASS MAGAZINE, Nov. 1995, at 8. Johnson attacks the press claiming that :

> The "angry white male" label has been gratuitously assigned to us by the mainstream press: the same press that has painted black males as illiterates, drug addicts and gang members: the same press that has depicted black women as welfare mothers, prostitutes and junkies: the same press that keeps our focus on such grave national issues as Rodney King and O.J. Simpson: the same press that is desperately trying to convince minorities and ethnic groups to fear and despise the militia.

Id.

41. *Senate Militia Transcript*, *supra* note 32, at 5-7. Kohl also accused "some militias" of engaging in a "gospel of hate" when referring to a Militia of Montana attacks on Hillary Clinton and "her regiment of. . . lesbians, sex perverts, child molesters advocates, christian haters and . . . communists." *Id* at 7. The quoted attack was allegedly contained in the Militia of Montana's newsletter entitled *"Taking Aim."*

42. Weapons are an integral part of the citizen militia movement. For example, militia officials encourage would be members to obtain a variety of weapons to include; M-1 Garands, M-14s, Mini 14s, M-1 carbines, AK-47s, a minimum of 2000 rounds of ammunition, and various handguns. *Standard Manual*, *supra* note 27, at 8.

43. *Senate Militia Transcript*, *supra* note 32, at 18-24.

Hamas and every other criminal band that believes they have the right to bomb, kill and terrorize the public as a means to win the political debate."[44]

Critics of anti-government groups are not confined to government officials. Karen Mathews, Clerk-Recorder for Stanislaus County, California, provided chilling testimony of threats and violent acts directed against her from alleged members of a local tax protester group.[45] Her testimony revealed that her refusal to remove a 416,000 IRS lien against a member of their group, and her subsequent refusal to record so called common law liens[46] against property owned by IRS agents, resulted in verbal threats on her life, the placement of a simulated pipe bomb underneath her vehicle, the firing of shots into a window of her office while occupied by staff members, and finally a personal beating in the garage of her home by two males. Mrs. Mathews testified that she was knocked to the floor, slashed with what she believed to be a knife, repeatedly kicked and punched, and subjected to the dry firing of a gun placed to her head.[47]

While citizen militia groups adamantly deny that they engage in unlawful acts of violence and intimidation, it is likely that some militia members engage in activities that are offensive to many Americans. The critical questions are; what constitutional protections may be afforded to citizen militia groups and what compelling government interests are implicated in response to the formation of such groups? Certainly, the advocation of violence to overthrow the government, reinforced by training activities designed to achieve such a controversial purpose, calls

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44. *Nadler Brief of Oral Testimony*, at 2, submitted to *The Nature and Threat of Violent Anti-Government Groups in America, 1995, Hearings Before the Subcomm. on Crime, House Committee on the Judiciary*, 104th Cong., 1st Sess., Nov. 2, 1995 [hereinafter *Nadler Brief*].

45. Ms. Mathews testimony did not allege that her attackers were members of an organized citizen militia.

46. The filing of "common law" liens has become a popular remedy of groups seeking to fight back against perceived government injustices. Liens have been filed against IRS agents, judges, and county officials by groups that have in some way been sanctioned by such agencies or individuals. While the liens are not legally valid, they create title problems that usually require legal assistance in having them removed, thus causing inconvenience and expense to those unfortunate enough to be subject to this practice. *See generally Patrick Brief of Oral Testimony*, Submitted to *The Nature and Threat of Violent Anti-Government Groups in America, 1995, Hearings Before the Subcomm. on Crime*, House Comm. on the Judiciary, 104th Cong., 1st Sess., Nov. 2, 1995 (statement of Sheriff Patrick J. Sullivan, Jr., Arapahoe County Co.).

47. *Mathews Brief of Oral Testimony*, at 1-4, submitted to *The Nature and Threat of Violent Anti-Government Groups in America, 1995, Hearings Before the Subcomm. on Crime, House Comm. on the Judiciary*, 104th Cong., 1st Sess., Nov. 2, 1995 (statement of Karen Mathews, Clerk-Recorder, Stanislaus Co. Ca.).

for governmental action. Conversely, citizen militia groups should not be judged solely on the alleged activities of some self proclaimed militia members. If the movement is designed for the purpose of defending the Constitution and ensuring the continued existence of our democratic republic, the movement may seek to preserve democracy—not destroy it.

Ultimately, militias throughout the country have and will continue to engage in military maneuvers to prepare for the possibility of armed conflict with either foreign or domestic foes. It is also safe to assume that any such maneuvers will involve militia members armed with rifles, handguns, and other military type weapons. Furthermore, militia groups have and will continue to conduct training programs aimed at establishing a proficient and competent class of citizen soldier. In many states all of these activities are classified as criminal conduct punishable as either felony or misdemeanor offenses.[48] And on the federal level at least two proposed bills would make these activities federal crimes.[49] Thus, if militia activity continues in its present form, a showdown between the various militia groups and state and federal law enforcement agencies is inevitable.

III. STATE AND FEDERAL LAW PROHIBITING CITIZEN MILITIAS

Approximately thirty eight states have law(s) on the books that prohibit or otherwise regulate citizen militias and/or activities associated with militia groups.[50] These laws generally criminalize three types of activity. First, the association of two or more individuals in a military capacity, other than military groups authorized by state or federal law, constitutes criminal conduct.[51] The penalty for such associational activities is usually a fine and/or confinement for not more than one year. This particular type of prohibition will be referred to as the *associational ban*.

Second, persons who train militia members in the use of weapons or techniques capable of causing injury or death are guilty of a felony that, in some states, carries a maximum sentence of ten years and/or fines of up to 50,000 dollars.[52] The ban on such training generally requires that the trainer know, have reason to know, or intend for the training

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48. *See supra* note 6.

49. *See supra* note 5.

50. *See supra* note 6. These laws are sometimes titled as anti-paramilitary training statutes.

51. Approximately thirty-one states currently outlaw activity of this type.

52. *See* IDAHO CODE § 18-8103; MONT. CODE ANN. § 45-8-109 (1995). This training is also in violation of federal law and is punishable by up to five years in prison and/or fines. 18 U.S.C. § 231 (Supp. 1995).

to be unlawfully used in furtherance of a civil disorder. This prohibition will be referred to as the *instructional ban.*

Finally, persons assembling for the purpose of participating in training of this nature with the intent to unlawfully use the acquired knowledge in furtherance of a civil disorder are subject to substantial criminal sanctions. This prohibition will be referred to as the *Participatory Ban.* To date the *Participatory Ban* has not made its way into the federal statute books, however, that may soon change. Representative Jerrold Nadler (D N.Y.) has introduced H.R. 1899[53] in an attempt to impose criminal liability on individuals that participate in training sessions with the intent to use the training in furtherance of a civil disorder. This proposed bill was modeled after the Anti-Defamation League's Anti-Paramilitary Training Statute, but contains certain differences that will be discussed later in this comment.

A. The Associational Ban

The Official Code of Georgia contains a provision that is typical of most state prohibitions on the association of unauthorized military organizations, and will serve as the basis for a discussion of the associational ban. The pertinent code section states:

> No body of men other than the organized militia, components of the armed forces of the United States, and bodies of the police and state constabulary and such other organizations as may be formed under this chapter shall *associate themselves together as a military unit or parade or demonstrate in public with firearms.*[54]

This code section constitutes a broadly sweeping ban that prohibits two separate types of activity. First, and most broadly, it proscribes association as a military organization by groups other than those expressly exempt via the statute. The association need not include weapons and is unlawful even if conducted on private land or in the

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53. H.R. 1899, 104th Cong., 1st Sess. (1995). The text of the proposed bill, which seeks to amend 18 U.S.C. § 231, states:

> Whoever trains in the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in or in furtherance of a civil disorder which-(A) may in any way or degree obstruct, delay, or adversely affect- (i) commerce or the movement of any article or commodity in commerce or, (ii) the conduct or performance of any federally protected function; or, (B) is in violation of chapter 13 of this Title [shall be fined under this Title or imprisoned not more than five years, or both].

H.R. 1899, 104th Cong., 1st Sess. (1995).

54. GA. CODE ANN. § 38-2-277(a) (1955) (emphasis added).

homes of individual members. Second, it prohibits parading or demonstrating in public, with firearms, by unauthorized military units.

It should be noted that the Georgia Statute has not been judicially construed. Although *associational ban* legislation is present in most states, to date the *associational ban* has been constitutionally analyzed only once by a federal district court scrutinizing an analogous Texas Statute.[55] For the purposes of this comment, the district court's analysis of the Texas Statute will provide the foundation for discussion of the broad scope of *associational ban* legislation.

1. Construction of Caselaw Supportive of the Associational Ban. In *Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan*,[56] the court was faced with the request for a permanent injunction prohibiting the continued existence of the military arm of the Texas Ku Klux Klan. This private army, known as the Texas Emergency Reserve ("TER"), sought to intimidate and harass Vietnamese fisherman in the area of Seabrook and Kemah Texas. In addition to engaging in a panoply of military training and activities,[57] the TER participated in an armed boat ride through a commercial waterway known as Clear Creek Channel. During the excursion, TER members conspicuously displayed weapons while occupying prominent positions throughout the boat. Most notably, an effigy of a Vietnamese fisherman was hung from a rear deck rigging.[58] Ultimately, the court issued a permanent injunction against the TER enjoining them from associating, parading, or training as a paramilitary organization.[59] The court considered several factors in reaching its decision.

First, the district court was required to construe a Texas statute that states in pertinent part: "a body of persons other than the regularly organized state military forces . . . or the troops of the United States may not associate as a military company or organization *or* parade in

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55. *See infra* note 58 and accompanying text.

56. 543 F. Supp. 198 (S.D. Tex. 1982).

57. Video footage was viewed by the court showing Louis Beam (co-defendant) instructing persons dressed in military garb in the art of various military techniques to include; psychological warfare, ambush and counterambush, and reconnaissance patrol. 543 F. Supp. at 203. Additional evidence revealed that members of the TER maintained a variety of weapons such as, riot shotguns, AR15 semi-automatic rifles, and M-1 carbines. Training activities of the TER were conducted on at least three private parcels of land owned by co-defendant's or sympathizers. Testimony revealed that the TER had been in existence for at least six years. *Id.* at 203-04.

58. *Id.* at 202-07.

59. *Id.* at 219. The court also enjoined the TER from engaging in any other activities that were intended to, or may lead to the use or threatened use of military force in violation of the plaintiff class. *Id.*

public with firearms in a municipality of the state."[60] The court held that the Texas Statute "prohibit[ed] both: (1) a body of men from associating themselves together as a military company or organization; and (2) the parading in public with firearms in any city or town in Texas."[61] The court concluded that the use of the disjunctive "or" in both statutes removed application of the city/town requirement from the first prong of the associational ban.[62] The court reasoned that the use of a disjunctive indicated alternative prohibitions that must be treated separately absent legislative intent to the contrary.[63]

Second, the court concluded that the TER's activities were outside the scope of First and Second amendment protections. Regarding First Amendment rights, the court stated that the TER's military activities involved grave interferences with the public peace and only minimal elements of communication. Consequently, the activities of the TER were regarded as impermissible conduct—not protected speech. Alternatively, the court noted that even if the activities of the TER were characterized as speech they would not be protected. Specifically, the nature of the threats initiated by the TER were "classic examples" of fighting words and thus unworthy of constitutional protection. [64]

Furthermore, the organization's training activities were determined to be outside the scope of the freedom to associate on the grounds that such a right is not a defense to conspiracy or breaches of the peace. The court noted that the TER would be free to associate and express their particular views so long as they did so without the threat of military force. However, the court considered the mere existence of an armed camp militarily threatening in the sense that the TER's military capabilities could intimidate (by implication) would be opponents even if the threat of force was never expressly communicated. Ultimately, the court considered the existence of a private army alone sufficient to prevent our democratic form of government from functioning freely and constitutionally. [65]

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60. Tex. State Military forces and Veterans Code Ann. § 5780(6) (1987). This statute has been renumbered and is currently codified under Tex. State Military and Veterans Code Ann. § 431.010 (1990). *Compare* GA. CODE ANN. § 38-2-277(a) (1955).

61. 543 F. Supp. at 217.

62. *Id.* at 217 and n.22. The court noted that "the use of the disjunctive 'or' between the words 'organization' and 'Parade' . . . demonstrates a legislative intent to proscribe two separate activities . . . ." *Id.*

63. 543 F. Supp. at 217 (citing United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979)).

64. *Id.* at 208. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words are utterances that, in and of themselves, inflict injury or incite immediate breaches of the peace).

65. 543 F. Supp. at 209-10.

Additionally, the district court rejected the TER's assertion that the associational ban offended the Second Amendment. The court reasoned that "[the] Amendment prohibits only such infringement on the bearing of weapons as would interfere with 'the preservation or efficiency of a well regulated militia,' organized by the state."[66] Because the TER was not an authorized by the state, it was not exempt from the statute's prohibition. Ultimately, under the district court's construction of the associational ban, the formation of citizen militias is lawful only if they are duly authorized by express language in the statute.

The Georgia statute exempts several groups from its associational ban, but the Militia of Georgia and other citizen militia groups are outside the scope of the enumerated exceptions. One such exception—the organized militia—is defined as the army, navy, air force, and state defense force.[67] These forces are comprised of units of the Georgia National Guard, or in the case of the state defense force, a duly organized force formed under state or federal constitutional authority.[68] Militia groups such as the Regional Georgia Militia do not fit within the definition of the organized militia because they are not members of the Army or Air National Guard, the Georgia Naval Militia, or the State Defense Force.

Alternatively, some citizen militia groups have sought to justify their formation by claiming membership in the unorganized militia.[69] In Georgia, the unorganized militia is defined as "all able-bodied male residents . . . between the ages of 17 and 45 who are not serving in any force of the organized militia . . . ."[70] It is important to note, however, that the unorganized militia is not expressly exempt from Georgia's associational ban. Furthermore, challenges to the associational ban, on the grounds that membership in the unorganized militia constitutes a "well regulated militia" for purposes of the Second Amendment, have been unsuccessful.[71] As a result, application of the court's holding in

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66. *Vietnamese Fisherman's Ass'n*, 543 F. Supp. at 210 (citing United States v. Miller, 307 U.S. 174, 178 (1939)) (emphasis added)).

67. O.C.G.A. 38-2-277(a), (b). The Georgia Code also exempts components of the United States armed forces, police and state constabulary, other organizations formed under the chapter, and students in ROTC programs offered by educational institutions. *Id.*

68. GA. CODE ANN. §§ 38-2-20, 21, 22, 23 (1995).

69. *See* United States v. Warin, 530 F.2d 103 (6th Cir. 1976) (enrollment in unorganized militia does not confer any Second Amendment right).

70. GA. CODE ANN. § 38-2-3(d) (1955).

71. United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) (technical membership in the Kansas Militia or membership in a nongovernmental organization such as the Posse Comitatus is insufficient to establish membership in the state militia); United States v. Hale, 978 F.2d 1016, 1019-20 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993) (membership in a hypothetical or sedentary militia is

Vietnamese Fisherman's Ass'n to the analogous Georgia Statute serves to validate the *associational ban's* constitutionality under a Second Amendment analysis. Thus, every time militia members assemble as a military unit they are in violation of state law and may be prosecuted accordingly.

2. Constructional Criticisms of the Associational Ban. A careful analysis of the district court's reading of the Texas Statute reveals that the second prong of the statutory prohibition is meaningless. For example, because parading is typically an associational activity, the mere act of parading, with arms, as a military unit, *even if on private land*, would constitute an unlawful association under the first prong of the statutory prohibition. In this context, the second prong of the associational ban becomes meaningless i.e. it is essentially merged into the first prong's general associational prohibition.

Moreover, while the court in *Vietnamese Fisherman's Ass'n* concluded that association as an unauthorized military organization is unlawful, it failed to provide a definition of "military organization." Thus, what constitutes a "military organization" for purposes of the associational ban, is not clear. This begs the question as to whether unarmed groups would constitute an unauthorized military organization for purposes of associational ban legislation. The court's interpretation of the first prong of the statutory prohibition does not expressly require that the association be *armed* to be unlawful.[72] Thus, on its face, associational ban legislation prohibits the mere association of any group, armed or otherwise, that either (i) claims to be military in nature, or (ii) could be characterized by governmental agencies as a military organization.

For example, persons forming a citizen militia that expressly prohibited the use of weapons of any type would be in violation of the first prong of the statutory prohibition. Additionally, if members of a local church , calling themselves soldiers for Christ, conducted unarmed activities aimed at the elimination of criminal acts involving drug abuse and violence in their particular community, such an organization could conceivably be characterized as a military unit and subject to criminal sanctions under the first prong of the associational ban.[73]

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insufficient to establish membership in the state militia); United States v. Warin, 530 F.2d 103 (6th Cir. 1976) (same).

72. The court held that the Texas Statute prohibited a body of men from associating themselves together as a military company or organization. 543 F. Supp. at 217. Additionally, neither the Texas nor the Georgia Statutes define "military organization."

73. While this may appear to be a far fetched hypothetical, "military" may be broadly defined as "[o]f, pertaining to, or associated with soldiers . . . or war." THE AMERICAN HERITAGE DICTIONARY 434 (office ed. 1987). In this context, patrols by church members

Under the broad reading of associational ban legislation created by the district court, government officials would be free to fashion a broad definition of "military organization" to reach the activities of groups that are subjectively determined to be a threat to the status quo or otherwise represent an unpopular or unsavory point of view. Furthermore, absent of a definition of "military organization," the statute fails to provide adequate notice to potential violators of the types of conduct falling within its proscriptions. Essentially, the associational ban is "void for vagueness" in the sense that it "fails to give persons of ordinary intelligence fair notice that their contemplated conduct is forbidden by the statute [citations omitted], and because it encourages arbitrary and erratic arrests and convictions."[74] Arguably, such a broad and unconstitutional reading of the associational ban could be avoided if its prohibitions were narrowly construed to accommodate constitutionally protected activities.

Additional constitutional concerns are implicated by operation of the associational ban. Advocates of the citizen militia movement assert that the Second Amendment grants citizens the right to assemble citizen armies for lawful and defensive purposes. Among those purposes is the right to defend against government overreaching. While the United States Supreme Court has refused to speak regarding the scope of the Second Amendment for more than half a century, lower courts have been more active. Most lower court decisions either (i) deny that the Second Amendment confers an individual right to keep and bear arms or (ii) refuse to extend its application to groups such as the citizen militia.[75]

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calling themselves soldiers for Christ, in a self declared war against community based drug activity, falls within the broad definition of "military" quoted above. It follows that such conduct would be within the associational bans reach if government officials choose to utilize its provisions under such circumstances.

74. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (citing United States v. Harriss, 347 U.S. 612, 617 (1954); Thornhill v. Alabama, 310 U.S. 88 (1940); Herndon v. Lowrey, 301 U.S. 242 (1937)). In *Papachristou* a city ordinance (section 26-57) stated in part that habitual loafers or persons able to work but habitually living upon the earnings of their wives or minor children were guilty of vagrancy and subject to criminal sanctions. 405 U.S. at 156 n.1. The Court noted that "unemployed pillars of the community who have married rich wives" would be in violation of the statute. *Id.* at 163. The Court also noted that the statute would allow law enforcement officers to arrest persons on mere suspicion and without probable cause in an attempt to avoid future criminality. *Id.*

75. United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) (technical membership in the Kansas Militia or membership in a nongovernmental organization such as the Posse Comitatus is insufficient to establish membership in the state militia); United States v. Hale, 978 F.2d 1016, 1019-20 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993) (membership in a hypothetical or sedentary militia is insufficient to establish membership in the state militia); United States v. Warin, 530 F.2d

Given the recent prominence of the citizen militia movement, and the level of civil unrest associated with a general distrust for government in general, it would be prudent to define the scope of the Second Amendment. The right to private ownership of firearms is arguably something most Americans take for granted. However, the recent passage of the assault rifle ban, combined with court decisions denying that an individual right to keep and bear arms resides within the Second Amendment, makes groups such as the Michigan Militia question the motives of government officials. Recent incidents like Waco, Ruby Ridge, and the Oklahoma City bombing reflect the degree to which both anti-government sentiment and government overreaching have affected our society.

The next section of this comment will attempt to define the Second Amendment as conferring (i) an individual right to bear arms, and (ii) the collective right of the people to assemble citizen armies. Consequently, the associational ban will be scrutinized for constitutional infirmities while assuming that a collective and individual right to keep and bear arms is contained in the Second Amendment.

3. The Standard Model Theory of the Second Amendment and the Associational Ban. This Comment proposes that the standard model theory[76] should be the foundation for identifying the scope of Second Amendment protections. Essentially, the standard model theory proposes that the Second Amendment embraces an individual right to keep and bear arms.[77] It is important to note that the standard model theory's claim that the Second Amendment embraces an individual right to keep and bear arms has been either expressly or implicitly recognized by most states that have enacted associational, instructional, and participatory bans.[78] Furthermore, the individual right to keep and bear arms is recognized by most Americans as an important and valuable right. The assertion that the Second Amendment confers an individual right of ownership of firearms has however, raised some

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103 (6th Cir. 1976) (same).

76. Glenn Harlan Reynolds, *A Critical Guide To The Second Amendment*, 62 TENN. L. REV. 461 (1995). An indepth recital of the standard model theory is beyond the scope of this Comment. Professor Reynolds' article provides a comprehensive analysis of the standard model theory and will be used to define its basic design.

77. *Id.* at 466.

78. *See supra* note 6 and accompanying text. Most of these statutes recognize the right of the citizenry to engage in armed recreational activities such as hunting, or target shooting, and some states expressly recognize a constitutional right of individuals to keep and bear arms. *See* IDAHO CODE § 18-8101 (1931); MONT. CODE ANN. § 45-8-107 (1991).

concerns as to the tendency of such ownership to impact negatively upon public health and safety.[79]

For example, medical professionals consider violence as a health crisis that is facilitated by the private ownership of firearms.[80] Some health professionals have gone so far as to state that guns are "a virus that must be eradicated"[81] and that the private ownership of firearms is an evil that should be eliminated to reduce violent activity.[82] But it is questionable that elimination of private ownership of firearms would significantly reduce episodes of violence (criminal or otherwise). The proposition that private ownership of firearms should be outlawed to deter future acts of violence can be attacked on at least four separate grounds.

First, the claim that private ownership of firearms results in criminal acts of violence by law abiding and responsible citizens suffers from a lack of persuasive evidence.[83] Second, the defensive value of firearms to potential crime victims has been greatly underestimated.[84] Third, enforcement of gun control laws is extremely difficult.[85] And fourth, because gun control legislation is difficult to enforce against those most likely to employ firearms for an unlawful or irresponsible purpose, the reduction of violence anticipated by enacting firearm bans is marginal at best.[86] Thus, the assertion that private ownership of firearms should be banned to accommodate the interests of public health and safety is unpersuasive. Moreover, individual possession and use of firearms involves a plethora of legitimate and lawful activities such as self defense and various recreational activities. Thus, recognizing a

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79. Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513 (1995).

80. *Id.* at 523.

81. Janice Sommerville, *Gun Control as Immunization*, AM. MED. NEWS, Jan. 3, 1994, at 6-7.

82. William Raspberry, *Sick People With Guns*, WASH. POST, Oct. 19, 1994, at A23 (quoting Director of CDC's National Center for Injury Prevention and Control as desiring to create the perception that firearms are deadly, dirty, and should be banned).

83. Kates, *supra* note 79, at 526.

84. *Id.*

85. *Id.* (citations omitted). It is important to note that:

> The difficulty of enforcement crucially undercuts the violence-reductive potential of gun laws. Unfortunately, an almost inverse correlation exists between those who are affected by gun laws, particularly bans, and those whom enforcement should affect. Those easiest to disarm are the responsible and law abiding citizens whose guns represent no meaningful social problem. Irresponsible and criminal owners, whose gun possession creates or exacerbates so many social ills, are the ones most difficult to disarm.

Id. at 527.

86. Kates, *supra* note 79, at 527-28.

fundamental right to private ownership of firearms serves valuable social and cultural functions considered by some to be an important part of our history and heritage.

Without doubt, adoption of the standard model theory would drastically change the way in which courts have thus far construed the Second Amendment. But Second Amendment jurisprudence has strayed far and away from the most recent Supreme Court case to consider the scope of Second Amendment protections.[87] Assuming that the Second Amendment embraces an individual right to bear arms, the question then becomes: Does the Amendment have as its underlying purpose the intent to provide the people with a constitutional right to form citizen armies to protect against potential government oppression?[88]

Militia leaders claim that their purpose is rooted in the belief that the citizenry has the unalienable right to form citizen militias to check government oppression and ultimately keep control of the government

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87. I refer to United States v. Miller, 307 U.S. 174 (1939).

88. To answer this question it is prudent if not essential that the Supreme Court provide a comprehensive opinion regarding (i) what is a militia?, (ii) what does it mean to be well regulated?, (iii) what is the right of the people?, (iiii) what does it mean to "keep and bear arms"?, (iiiii) and what sort of infringements on that right are prohibited? Professor Reynolds attempts to answer these questions in his recent article on the Second Amendment. Reynolds, *supra* note 76, at 464. Recognizing that the Second Amendment confers a fundamental right to private ownership of firearms does mean that government regulation is impossible. Under the standard model theory, possession of firearms would be limited to "virtuous citizens" who demonstrate their virtuosity by employing the "defensive use of arms against criminals, oppressive officials, and foreign enemies alike." *Id.* at 480 (citing Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 259 (1983)). Kates notes that under classical republican political philosophy, "the concept of a right to arms was inextricably tied to that of the 'virtuous citizen'" and consequently, that "free and republican institutions were believed to be dependent on civic *virtu* which, in turn, depended upon each citizen being armed-and therefore, fearless, self-reliant, and upright." *Id.* Consequently, the nonvirtuous citizen could be denied the right to possess firearms. For example, convicted felons, because of their documented unlawful behavior, would be considered nonvirtuous, and thus, ineligible for private ownership of firearms. Convicted felons generally do not enjoy the right to vote, at least until that right is reinstated by state or federal officials. Thus if the constitutional privilege of voting is withheld based on a felony conviction, then prohibiting ownership of firearms by convicted felons could logically be banned as well. Furthermore, minors could also be precluded from ownership of firearms. First, it could be argued that children, due to their tender age and lack of maturity, lack the requisite virtuosity necessary to own firearms. Second, a minors lack of maturity would increase the likelihood that firearms would be used irresponsibly, and thus implicate threats to public health and safety sufficient to prohibit ownership. In this context, the mentally ill, mentally impaired, and those suffering from mental infirmities sufficient to demonstrate an inability to responsibly exercise the right to own firearms could be prohibited from owning such weapons.

in the hands of the people. Militia activists point to the Second Amendment as the basis for their right to create and maintain citizen militia units.[89] The standard model theory asserts that the Framers drafted the Second Amendment to insure that the general citizenry could defend itself against a tyrannical government.[90] For example, James Madison considered a standing army a threat to liberty that would be countered by "a militia amounting to near a half a million citizens with arms in their hands."[91] Similarly, Patrick Henry, a staunch anti-federalist, stated that "[t]he great object is that every man be armed . . . [e]very one who is able may have a gun."[92] While it is common knowledge that the Framers divided federal authority into three branches of government, and further divided political power by granting sovereign powers to the various states, under the standard model theory, power is further divided by ensuring that the citizenry possesses adequate military power to offset that of the federal government.[93]

Professor Reynolds and Commander Olson (Michigan militia) share, at least in part, an interpretation of the Second Amendment echoed by our founding fathers. For example, Olson remarked, during testimony before the Senate Subcommittee on Crime, that the federal government was the child of the armed citizen and that due to federal encroachment into the lives of American citizens "parental corrective action" was necessary.[94] Similarly, Professor Reynolds notes that "[i]f the federal and state governments are merely agents of the people, it is logical that the people would be reluctant to surrender a monopoly on military power to their servants, for fear that their servants might someday become their masters."[95]

The text of the Second Amendment is also supportive of the standard model's assertion that it provides citizens with an individual and collective right to keep and bear arms. First, the Amendment's opening clause is an express reference to the security of a free state—not the

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89. The Second Amendment reads: "A well regulated Militia, being necessary to a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II.

90. Additionally, the Second Amendment was adopted to provide individuals with protection from ordinary criminals. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 467 (1995).

91. *Id.* at 468 (citing THE FEDERALIST No. 46, at 299 (James Madison) (Willmore Kendall & George W. Carey eds., 1966)).

92. *Id.* at 469 (citing 1 THE JEFFERSON CYCLOPEDIA 318 (John P. Foley ed., Russell & Russell 1967) (1900)).

93. *Id.* at 469.

94. *See supra* note 1.

95. Reynolds, *supra* note 76, at 470 (citing Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651 (1989)).

state.[96] Second, the words "a well regulated militia" refer to a well trained and equipped force competent in the handling and use of their particular firearms—not a force that is subject to extensive government regulation.[97] Finally, the right enumerated in the Second Amendment is the "right of the *people* to keep and bear arms"—not a right to belong to the militia.[98] The fact that the Second Amendment expressly states "the right of the people . . . shall not be infringed" lends credibility to the conclusion the Second Amendment embraces an individual right to keep and bear arms. Furthermore, Because the First, Fourth, Fifth, Sixth, Ninth, and Tenth Amendments confer individual rights, the Second Amendment should be read in conjunction with its sister Amendments to confer an individual right. Notably, the Supreme Court in *United States v. Verdugo-Urquidez,*[99] stated that the Second Amendment's reference to "the people" should be read in the same manner as in the First, Fourth, and other Amendments.[100]

A recent article documenting the history of the Second Amendment reveals that Federalists and Antifederalists alike perceived a tyrannical government as the main danger to the republic. In fact, both sides agreed that the people had a right to be armed because the existence of an armed populace was necessary to preserve liberty.[101] The Framers feared that a standing army—armed and created by, as well as loyal to, the federal government—would ultimately disarm the citizenry in general, thus paving the way for a tyrannical government to impose its will upon a defenseless constituency.[102] Alternatively, if an individual right to keep and bear arms is not found to exist within the Second Amendment, private ownership of handguns and other firearms could be

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96. *Id.* at 473 (quotations omitted). Professor Reynolds argues that the use of the term *free state* in lieu of *the state* indicates that "the purpose of the Second Amendment is to ensure an armed citizenry, from which can be drawn the type of militia that is necessary to the survival of a *free state.*" *Id.* (emphasis added).

97. *Id.* at 474.

98. *Id.* at 472 (citations omitted). Conversely, critics of an individual right to keep and bear arms assert that the phrase "a well regulated militia, being necessary to the security of a free state" indicates that no individual right was granted. *Id.* The fundamental distinction appears to be whether "well regulated militia" qualifies the "right of the people to keep and bear arms" or vice versa. Reynolds notes that the concept of a well regulated militia is "subordinate to the purpose of having an armed citizenry." *Id.* at 473 (citations omitted).

99. 494 U.S. 259 (1990).

100. *Id.* at 265. *See also* Brief for Appellant at 29-34, United States v. Wright (11th Cir. 1995) (No. 95-8397). *See infra* note 104 and accompanying text.

101. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007, 1027 (1994).

102. *Id.* at 1028-29.

prohibited. In fact such an argument was recently made before the Eleventh Circuit Court of Appeals.

In *United States v. Wright,*[103] the Eleventh Circuit Court of Appeals will rule on a Second Amendment challenge to a conviction for possession of two machine guns and three pipe bombs. The defendant, claiming membership in a North Georgia citizen militia, argues that (i) his possession of those weapons was reasonably related to a well regulated militia and would have the effect of promoting the efficiency that militia, and consequently (ii) that his possession of said weapons is protected under the theory that the Second Amendment confers an individual right to keep and bear arms.[104] Conversely, United States Attorney Kent B. Alexander argued that the Second Amendment confers no individual right to bear arms.[105] Alexander conceded, when pressed during oral argument, that his reading of the Second Amendment would allow Congress to ban even handguns.[106] The citizen militia movement's concern (and that espoused by the Founding Fathers) that the federal government may attempt to disarm the general public does not seem so far fetched in light of Mr. Alexander's interpretation of the Second Amendment.

The most recent, and most often quoted Supreme Court case on the Second Amendment is *United States v. Miller.*[107] In *Miller,* the Court considered whether the possession of a sawed off shotgun was a "militia weapon" protected by the Second Amendment. Ultimately, the case was remanded with instructions for further evidentiary proceedings to determine if the shotgun had some "reasonable relationship to the preservation or efficiency of a well regulated militia."[108] From the Court's holding it appears that Mr. Miller's claim of Second Amendment protection was taken seriously, otherwise the Court would not have remanded the case for further proceedings. If the Court had concluded that the Second Amendment applied only to the states, the case could

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103. No. 95-8397 (11th Cir. filed September 5, 1995). Oral arguments were heard on October 23, 1995 before a three judge panel consisting of Judges Emmett R. Cox, Phyllis A. Kravitch, and Senior Judge Thomas A. Clark.

104. Brief for Appellant at 4-6, United States v. Wright, (11th Cir. 1995) (No. 95-8397) (emphasis added).

105. Brief for Appellees, at ii, 33, United States v. Wright (11th Cir. 1995) (No. 95-8397).

106. Don J. DeBenedictis, *Second Amendment Arguments Crowd Out Commerce Clause,* FULTON COUNTY DAILY REPORT, Oct. 24, 1995 at 1.

107. 307 U.S. 174 (1939).

108. *Id.* at 178. Arguably, citizen militia groups constitute a well trained, well organized body that utilizes weapons typically military in nature.

easily have been disposed of with the simple inquiry—"Is Mr. Miller a state?"[109]

Subsequent cases have not done justice to the Court's holding in *Miller*. For example, in *Vietnamese Fisherman's Ass'n*, the district court distorted the holding in *Miller* by adding the words "organized by the state"[110] to the phrase "reasonable relationship to the preservation or efficiency of a well regulated militia."[111] Essentially, the district court limited application of the Second Amendment to militia groups that are authorized, regulated, and formed by the states. Furthermore, the district court's interpretation of the Second Amendment rejects the notion that the Amendment confers an individual right of the people to keep and bear arms. *Miller* made no such qualifications on the phrase "well regulated militia." Conversely, the court in *Vietnamese Fisherman's Ass'n* adopted what has been referred to as the "states' right" theory of the Second Amendment.[112]

The "states' right" theory can be attacked on several grounds. First, state militias do not provide protection to the general citizenry against federal military might because state militias are ultimately subject to federal authority and control.[113] Furthermore, the states rights argument has been used to disarm minority groups who would claim Second Amendment challenges to laws seeking to prohibit their possession of firearms.[114] Professor Reynolds notes that "[t]he states'

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109. *See* Reynolds, *supra* note 76, at 500. Reynolds suggests that, in taking Mr. Miller's claim seriously, the Court recognized "*some* sort of individual right to keep and bear arms." *Id.*

110. *Vietnamese Fisherman's Ass'n*, 543 F. Supp. at 210.

111. United States v. Miller, 307 U.S. 174, 178 (1939) (citations omitted).

112. The states' right theory asserts that the Second Amendment protects the right of the States to have a well regulated militia. Reynolds, *supra* note 76, at 488. *See also* United States v. Cruikshank, 92 U.S. 542 (1833) (the right to bear arms rests solely with the State); United States v. Warin, 530 F.2d 103 (6th Cir. 1976) (Second Amendment guaranteed collective rather than individual right); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) (*Miller* establishes that the purpose of the Second Amendment was to preserve the effectiveness and assure continuation of the state militia); United States v. Hale, 978 F.2d 1016 (8th Cir. 1016) (Second Amendment does not protect individual possession of military weapons). Professor Reynolds points out that in *Cruikshank*, the Court held that the First Amendment as well as the Second Amendment was inapplicable to the States. He goes on to note that reliance on *Cruikshank* for the proposition that the Second Amendment applies only to congress requires an explanation as to why the First Amendment was subsequently applied to the States while the Second Amendment continues to remain unincorporated into the Fourteenth Amendment. Reynolds, *supra* note 76, at 496-97.

113. Reynolds, *supra* note 76, at 488-90.

114. *Id.* at 494-96. In the early 1900s New York passed a handgun licensing act known as the *Sullivan Law*. Ultimately, over seventy percent of those arrested under its ban were

rights argument was never meant to be taken seriously; it was always simply a justification for statutes aimed at disarming [perceived] untrustworthy segments of our society."[115]

In response to assertions that the Second Amendment confers a collective right to form citizen militias, critics of the militia movement argue that the ballot box is the proper forum for American citizens to respond to unfair, and allegedly unconstitutional, government practices. But the ballot box argument ignores the fact that while the Framers of the Constitution created the right to vote, they also drafted the Second Amendment for the purpose of ensuring that the citizenry would be armed to protect itself against both a tyrannical form of government and roving bands of criminals operating throughout the frontier. If the ballot box were considered sufficient to address government injustices, why did the Framers draft the Second Amendment with the intent that it would grant the citizenry the right to stand in armed opposition to government oppression?

Another popular argument of militia critics is that times have changed since the Framers drafted, and the States ratified, the Second Amendment. Under the "times have changed" argument, the presence of a standing army is considered sufficient to protect the citizenry against hostile forces seeking to replace our constitutional republic with a tyrannical and unconstitutional form of government. In response, it must be noted that the Framers feared the creation a formidable standing army because of the likelihood that it could be used to enforce, not defend against, oppression. Thus, the existence of a substantial and awesomely equipped standing army serves to validate the fear of citizen militia groups that the government, supported by a formidable standing army, may engage in oppressive and unconstitutional acts.

Anti-militia activists also argue that the citizen militia movement would be incapable of prevailing in an armed conflict with governmental forces.[116] As Professor Reynolds notes: "we do not generally require proof of efficacy where other Constitutional rights are concerned, so it seems a bit unfair to demand it solely in the case of the Second Amendment."[117] In other words, principles of free speech and association have not been ignored simply because of a doubtful ability to enforce First Amendment mandates, therefore the principle that the

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Italian Americans. *Id.* at 494. Similar laws and practices were conducted throughout the country to prohibit Asian, African American citizens from possessing firearms. *Id.* at 494-95 (citations omitted).

115. *Id.* at 495.

116. Colonel Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionist Theory of the Second Amendment*, 62 TENN. L. REV. 643, 676-77 (1995).

117. Reynolds, *supra* note 76, at 483.

Second Amendment provides the citizenry with a right to arm themselves against government injustice is not defeated by the possibility that armed resistance would be unsuccessful.[118]

Critics of the citizen militia movement are quick to respond that the United States Constitution is not a suicide pact. In other words, the framers did not intend to protect groups that seek violent overthrow of the government they created. Most Americans would agree that radical groups seeking, by violent means, to replace the American Republic with anarchy, communism, or a totalitarian form of government, pose a threat that should be swiftly and decisively quashed. But assuming that citizen militia groups seek to defend the republic—not destroy it—their mission and purpose would be consistent with the Framer's intent to guard against any threat to our constitutional form of government.

Thus, under the standard model's interpretation of the Second Amendment, citizen militia groups would enjoy constitutional protection based on a two part theory. First, the Second Amendment embraces an individual right to keep and bear arms. Second, because the underlying purpose of the Amendment is to provide citizens with the ability to defend against government oppression, a collateral right of the people to form citizen militias would exist. Consequently, assuming that the militia's ultimate purpose is to defend against government oppression, the formation of a citizen army could not be labeled as criminal in and of itself.[119] In other words, the mere existence of an armed citizen militia, standing ready to defend against perceived government injustice, would not constitute unlawful conduct absent something more.[120]

Ultimately, if citizen militia groups have a constitutionally protected right to arm themselves in anticipation of armed conflict with domestic

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118. Professor Reynolds also notes that citizen revolts in Afghanistan, Chechenia, Chiapas Mexico, as well as in other countries have enjoyed some degree of success. *Id.*

119. This is not to say that the citizen militias could operate free of government regulation. Compelling governmental interests in preserving public safety could overcome the militia's right to arm themselves in anticipation of a tyrannical and oppressive government. A discussion of potential government regulation into the activities of the citizen militia movement is beyond the scope of this Comment.

120. Compare the court's language in *Vietnamese Fisherman's Ass'n* with the proposition that citizen militia organizations have a constitutional right to exist:

> There can be no justification for the *organization* of such an armed force. Its *existence* would be incompatible with the fundamental concept of our form of government. The inherent potential danger of any organized private militia, even if ultimately placed at the disposal of the government, is obvious. *Its existence would be sufficient, without more,* to prevent a democratic form of government, such as ours, from functioning freely, without coercion, and in accordance with the constitutional mandates.

543 F. Supp at 209 (emphasis added) (citations omitted).

or foreign forces, the question then becomes to what extent may their speech and associational activities may be prohibited? Arguably, the extension of Second Amendment protections to militia groups would have a profound influence on the scope of First Amendment protections as applied to the citizen militia movement. The next part of this comment will attempt to address how the standard model theory would effect application of First Amendment safeguards to the various activities of citizen militia groups.

4. Application of First Amendment Principles of Speech and Association in Light of the Standard Model Theory. While the court in *Vietnamese Fisherman's Ass'n* noted that the defendant's were free to express their views if communicated without the threat of military force, the mere possession of military capabilities tainted their freedom to associate.[121] Consequently, the threat of force implicit in the nature of citizen militia organizations—because they engage in armed association—precludes them from invoking First Amendment protections. Under this threat by implication theory, militia groups cannot claim First Amendment principles of speech and association unless they disarm. But assuming that citizen militia groups have a constitutional right to form citizen armies, the threat by implication theory must fail.

A. The Right to Armed Association

The Supreme Court has noted that protecting associational activities "is especially important in preserving and protecting political and cultural diversity and in *shielding dissident expression* from suppression by the majority."[122] Conversely, government regulation of associational activities has been upheld where the nature of the organization involved unlawful acts of intimidation and violence.[123] But accepting, as this comment proposes, that citizens may lawfully form citizen armies, the association as a citizen militia constitutes the lawful exercise of a constitutional right. Consequently, citizen militia groups may not be prohibited on the basis of their mere association as a military organization. Because the associational ban imposes a blanket prohibition on the legitimate and lawful activities of citizen militia organizations it

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121. *See supra* note 119 and accompanying text.

122. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (emphasis added) (citations omitted).

123. People of the State of New York ex. rel. v. Zimmerman, 278 U.S. 63 (1928) requiring KKK to provide list of individual members constitutional in light of nature of KKK's activities).

operates to restrict "legitimate political expression or association" in contravention of the First Amendment.[124]

Granting citizen militias the constitutional right to armed association does not mean that such groups may operate free from government regulation. For example, the activities of the TER in *Vietnamese Fisherman's Ass'n* demonstrated specific acts of intimidation, motivated by racial hatred, for the purpose of denying Vietnamese fishermen the right to fish in public waterways. The TER's overt acts were unlawful in the sense that they were aimed at denying Vietnamese fishermen the right to earn a living by fishing in commercial waterways. Arguably, it was unnecessary for the court to conclude that the mere existence of an armed organization such as the TER was inherently unlawful in light of the fact that the TER's activities were unlawful on other grounds.[125]

The associational ban's blanket prohibition constitutes an impermissible restriction on associational activities for another reason. Specifically, the ban prohibits association as a military unit, in the privacy of ones home or on private property. It is important to note that the court in *Vietnamese Fisherman's Ass'n* initially concluded that the Texas Statute prohibited "only military organizations operating within a town or city" but subsequently reversed itself holding that "the city or town limitation applies only to public parading with firearms."[126] The court credited briefs, presumably provided by the appellees, for its change in position, but neglected to indicate specifically why it was swayed to read the "city or town" requirement out of the first prong of the statutory prohibition.[127] Allowing citizen militia groups to conduct activities on private property would diminish, if not eliminate, the covert threat of violence demonstrated by the TER in *Vietnamese Fisherman's Ass'n*. For example, armed training activities, conducted on remote and private property, would not be subject to view by the general public, and the

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124. Elfbrandt v. Russell, 384 U.S. 11, 15 (1966) (citing Scales v. United States, 367 U.S. 202, 229 (1961)).

125. The plaintiffs alleged that the defendants violated their rights under 42 U.S.C. §§ 1981, 1985-86; the Thirteenth and Fourteenth Amendments to the United States Constitution; 15 U.S.C §§ 1 & 2 (Sherman Act); 15 U.S.C §§ 15 & 26 (Clayton Act); 18 U.S.C. §§ 1962 & 1964 (RICO), in addition to the alleged violation of the Texas Statute. Thus the TER's activities were in violation of various federal civil statutes, as well as constituting an unlawful breach of peace.

126. 543 F. Supp. at 217 n.22. As noted in this comment *supra*, the second prong of the associational ban, as construed by the district court, makes the second prong of the associational ban meaningless. Consequently, the city/town limitation disappears from operation of the associational ban.

127. *Id.*

possibility that such activities would intimidate or injure innocent bystanders would be eliminated.

The standard model's influence on constitutional principles of free speech is also significant in the context of the associational ban's blanket prohibition. For example, if citizen militia groups may lawfully engage in armed association, what effect does the advocacy of violence have on their constitutional right to exist? To answer this question requires a discussion of existing precedent outlining the parameters of constitutionally protected speech.

B. The Imminent Lawless Action Standard Revisited

Proponents of the associational ban point out that citizen militia groups advocate violence as a means to achieve their stated purpose(s). In his written brief of oral testimony, provided to members of the House Subcommittee on Crime, Gregory T. Nojeim (Legislative Counsel for the ACLU, Washington National Office) counters with a strong response to such concerns:

> Potential responses to anti-government groups should start with what we call First Principles: the First Amendment protects speech. It protects provocative speech. It protects racist speech. It even protects advocacy of violence, provided that such advocacy does not cross the line into incitement to *imminent* lawless action.[128]

In *Brandenburg v. Ohio*[129] the Supreme Court held that Ohio's Criminal Syndicalism Act was unconstitutional because "by its own words and as applied, [it] purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate [a] described type of action."[130] In *Brandenburg*, a leader of a Ku Klux Klan group was convicted under Ohio's Criminal Syndicalism Act for "advocat[ing] the duty, necessity, or propriety of crime, or unlawful methods of terrorism as a means of accomplishing . . . political reform and for voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[131] The evidence adduced at trial revealed that the a television crew was allowed to film two Klan rallies. During these rallies several racist statements were made concerning Jews and African

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128. *Nojeim Brief of Oral Testimony*, at 1-2, submitted to *The Nature and Threat of Violent Anti-Government Groups in America, 1995, Subcomm. on Crime, House Comm. on the Judiciary*, 104th Cong., 1st Sess., Nov. 2, 1995 (statement of Gregory T. Nojeim, Legislative Counsel, ACLU Washington Nat'l Office) [hereinafter Nojeim Brief].

129. 395 U.S. 444 (1969).

130. *Id.* at 449.

131. *Id.* at 444-45.

Americans. Specifically, comments were made, and captured on tape, advocating violence against both ethnic groups.[132]

The defendant appealed his conviction to the United States Supreme Court which reversed, holding that the Act violated the First Amendment. The Court, in so holding, modified the clear and present danger test previously applied to advocacy of violence, concluding that "constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action."[133] Under the *Brandenburg* standard, citizen militias would be free to conduct activities that advocate the use of violence to achieve political reform so long as such activities are not likely to produce or incite imminent lawless action. In contrast, under associational ban legislation, the activities of the militia group are irrelevant in the sense that there is no analysis regarding the possibility, much less probability, of imminent lawless action flowing from the groups activities. The mere formation of a citizen militia group, not authorized by state or federal authority, is prohibited. Thus, associational ban legislation would fail to meet the *Brandenburg* test.

Conversely, the mere existence of an armed citizen militia could be viewed as likely to produce or incite imminent lawless action. For example, in *Vietnamese Fisherman's Ass'n*, the district court asserted that the presence of an armed citizen group, in and of itself, would intimidate would be opponents by the implicit threat of force inherent in its military capabilities.[134] Similarly, the presence of armed citizen militias, threatening the use of force to achieve political reform, could increase the likelihood of armed conflict and, ultimately, civil war. However, under this line of reasoning, the possession of firearms by the citizenry as a whole could arguably be seen as likely to incite imminent lawless action in the sense that such citizens would have the ability to commit acts of armed violence against the government. Moreover, assuming that citizen militia groups have a constitutional right to exist, the associational ban's prohibition could not be imposed on groups solely because they constitute a citizen army.

The proper application of the *Brandenburg* standard depends on how one defines the likelihood of "imminent lawless action." Specifically, what do the terms "imminent" and "lawless" mean?, or more to the point

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132. *Id.* at 445-47. Statements captured on tape included; "save America . . . bury the nigger, we intend to do our part, send the Jews back to Israel, nigger will have to fight for every inch he gets from now on." *Id.* at 446 n.1.

133. *Id.* at 447 (emphasis added).

134. 543 F. Supp. at 198, 209.

what types of behavior demonstrate "imminent" and "lawless" action?[135] Subsequent Supreme Court decisions are helpful in determining the types of speech that would fall within the realm of "directed at or producing imminent lawless action." For example, in *Healy v. James*,[136] the Court applied the *Brandenburg* standard holding that a state college impermissibly rejected a group of students' request to form an association known as "Students for a Democratic Society." The Court reasoned that, even though the group advocated disruption and violence on a national level, an "undifferentiated fear or apprehension of disturbance" was insufficient to justify rejection of the groups application.[137] Additionally, in *Hess v. Indiana*[138] the Court held that the mere "tendency to lead to violence" was insufficient to impose criminal sanctions unless the threat of violence was imminent.[139] When reading *Brandenburg* in conjunction with *James* and *Healy*, advocacy of violence does not meet the *Brandenburg* standard on the basis of (i) an undifferentiated fear or apprehension of disturbance, or (ii) the mere tendency to lead to violence. Thus, assuming that the militia's ultimate aim is to be prepared for acts of violence directed specifically at them, or alternatively against the citizenry as a whole, the likelihood that their existence will incite or produce imminent lawless action is doubtful.

For example, citizen militia leaders assert that their weapons would be used for defensive purposes only. By acknowledging that citizen militia organizations have the inherent constitutional right to exist under the Second Amendment, their presence alone could not be used as the basis for an assumption that violence was imminent. In other words, a distinction must be made between being imminently prepared for violence and engaging in activities that are likely to incite or produce imminently violent or otherwise unlawful behavior. Consequently, absent expressions advocating specific and unprovoked acts of violence by militia groups, the threat of imminent lawless action would be too nebulous to meet the *Brandenburg* standard.

Additionally if citizen militia groups advocated specific and offensive acts of violence under circumstances other than to defend against physical force, they would not only be engaging in acts likely to incite imminent lawless action—they could be guilty of criminal conspiracy. Arguably, government officials could seek criminal sanctions based on

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135. It must be noted that under the standard model theory, the mere armed association as a military unit would not constitute "lawless action." *Compare supra* note 119 and accompanying text.

136. 393 U.S. 503 (1969).

137. *Id.* at 508.

138. 414 U.S. 105 (1993).

139. *Id.* at 109.

conspiracy law in lieu of associational ban legislation.[140] The determination of whether specific and offensive acts of violence were advocated, or alternatively, if the accused citizen militia organization acted in self defense, would be left for the trier of fact to decide.

In some cases individual members of citizen militia groups may engage in unconstitutional and thus unlawful forms of speech such as "fighting words."[141] Members engaging in this provocative form of speech could be held personally liable for the consequences flowing from their inciteful rhetoric, however liability would not necessarily be imputed to all members of the particular citizen militia group. For example, in *NAACP v. Clairborne Hardware Co.*[142] black citizens of Port Gibson Mississippi provided white elected officials with specific demands to address alleged racial inequalities existing in the community. In retaliation for what black citizens considered an inadequate response to their demands, a boycott of white merchants in the area was planned and executed. To enhance the boycotts effectiveness "store watchers" and persons known as the "Black Hats"[143] acted as boycott enforcers by engaging in acts of intimidation against black citizens that ignored the boycott.[144]

As a result, white merchants sought damages flowing from the boycott, alleging in part that the boycott was tainted by the presence of violent and intimidating acts directed at black citizens who would not have honored the boycott otherwise. The Court held that individuals engaging in unlawful acts could be held personally liable but refused to extend liability to the NAACP and the bulk of black citizens that participated in the boycott. The Court noted that:

> A massive and prolonged effort to change the social, political, and economic structure of a local government cannot be characterized as a violent conspiracy simply by reference to the empheral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for

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140. Because associational ban legislation typically carries a penalty of one year or less, criminal conspiracy laws, and the substantially greater sanctions they impose, would be preferable as a means to punish militia groups that engage in such acts.

141. *See supra* note 62.

142. 458 U.S. 886 (1981).

143. These individuals allegedly engaged in acts of violence against black citizens who did not honor the boycott. Testimony revealed that (i) in two instances shots were fired at a house, (ii) a brick was thrown through a windshield, (iii) a flower garden was damaged, (iiii) and one person was beaten. All of these alleged acts of violence were directed at black citizens who continued to purchase goods from white business that were subject to the boycott. *Id.* at 897, 904-05.

144. *Id.*

> concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.[145]

The court noted that the taint of violence, while coloring the conduct of some participants in the boycott, did not taint the collective efforts of the defendants simply by proving that violence occurred, or even that violence contributed to the boycott's success.[146]

The *Brandenburg* standard must be read in conjunction with *Clairborne* in order to justify a blanket prohibition on speech and associational activities. For example, in order to prohibit the collective exercise of constitutionally protected speech and association, it must be established that (i) the alleged activities implicated imminent lawless action (*Brandenburg*), and (ii) the use of violence and/or intimidation was sufficient to taint the collective effort of all members (*Clairborne*).[147] But the associational ban operates to prohibit the formation of citizen militias irrespective of (i) the likelihood that armed association as a citizen militia would incite or produce imminent lawless action, and (ii) absent a determination that the unlawful behavior tainted the collective efforts of the entire movement. Consequently, officials seeking to enforce the associational ban would be unable to meet either the *Brandenburg* or *Clairborne* standard.[148]

Under the *Brandenburg* and *Clairborne* standards the mere existence of an armed citizen militia could not, by itself, pose a threat to public safety sufficient to justify the associational ban's blanket prohibition. Absent specific unlawful acts attributable to militia members, the associational ban operates to impose guilt by association. Furthermore,

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145. *Id.* at 933-34.

146. *Id.* at 933.

147. This is true because associational ban legislation would punish all members of a particular citizen militia individually, but not for individual acts. In other words, the associational ban is a membership crime that imposes criminal sanctions for nothing more than belonging to a citizen militia group.

148. In *NAACP v. Patterson* the Supreme Court recognized the relationship between freedoms of speech and assembly stating: "Effective advocacy of both public and private points of view, *particularly controversial ones*, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." 357 U.S. 449 (1958). Arguably, the language in *Patterson* adds further support for the proposition that citizen militia groups are entitled to constitutional protection.

as previously noted in this comment, if citizen militia groups planned or engaged in offensive and unprovoked acts of violence, state prosecutors could seek criminal sanctions under alternative criminal or civil statutes. Thus, the associational ban would be unnecessary to address the unlawful activities of citizen militia groups.

In summary, the associational ban is unconstitutional for several reasons. First it offends First Amendment principles of speech and association by (i) restricting the free exercise of speech without requiring that the targeted speech is likely to incite or produce imminent lawless action, and (ii) imposing criminal sanctions on the mere association as a citizen militia absent the presence of unlawful and intimidating acts that taint the collective efforts of the movement as a whole. Second, the associational ban offends the Second Amendment's guarantee that "the right of the people to keep and bear arms shall not be infringed," by imposing criminal sanctions on the exercise of the citizen militia movement's constitutional right to keep and bear arms in an attempt to defend against unconstitutional and oppressive government conduct. Finally, associational ban legislation is unconstitutionally overbroad and vague because it does not adequately define "military organization," and as such (i) fails to give notice of the types of conduct deemed unlawful, and (ii) provides law enforcement with excessive discretion in the application of its prohibitions.

6. Enforcement Concerns. Even though the associational ban exists in Georgia, enforcement has been either very discreet or nonexistent. It cannot be said that the apparent paucity of enforcement is due to a lack of opportunity. At least three militia groups have been documented in Georgia,[149] and my research has revealed that perhaps as many as five such groups are currently in operation. Moreover, the citizen militia conference held in Macon, Georgia last November was aggressively advertised and covered by the local media, giving law enforcement agencies ample opportunity to respond. At the conference, Bob Starr, militia activist and conference organizer, was conspicuously dressed in a uniform of the Regional Georgia Militia. If any local or federal law enforcement agents were present at the meeting they did not identify themselves or otherwise interfere with conference activities. There may be good reasons for law enforcement's lack of response.

Perhaps the fact that Georgia's associational ban makes such activity a misdemeanor offense explains the tendency not to enforce its provisions i.e. the penalty for violation of the ban is overshadowed by the consequences of enforcing its prohibitions. It is also possible that local

149. *Klanwatch Report*, *supra* note 16, at 8-9.

authorities are tolerant of, if not sympathetic to, the patriotic tenor of the movement. More likely however, is the possibility that efforts to enforce the prohibition on unauthorized military organizations have taken a (temporary) back seat to efforts to gather intelligence on the various militia groups operating throughout the state and country. Regardless of the reasons for failure to currently enforce the associational ban, militia activists continue to ignore such laws claiming them to be unconstitutional. The reluctance to enforce the ban on unauthorized military organizations tends to legitimize their existence and will make enforcement difficult. If and when enforcement of the associational ban is attempted, it is sure to cause violent reaction from advocates of and participants in the citizen militia movement.

B. The Instructional Ban

In addition to the *associational ban* on unauthorized militia groups, several states have enacted a ban on the training of individuals for paramilitary purposes. The federal government has enacted similar legislation known by its short title as the "Civil Disobedience Act of 1968."[150] Additionally, the ADL has drafted a model instructional ban statute known as the "Anti Paramilitary Training Statute (ADL Statute)."[151] The ADL Statute was modeled after the Civil Disobedience Act, and provides a typical example of what I have referred to as the *instructional ban*. Consequently, the ADL Statute will provide the basis for an analysis of the types of conduct prohibited under instructional ban legislation. The ADL Statute states in pertinent part:

> Whoever teaches or demonstrates to any other person the use, application, or making of any firearm, explosive, or incendiary device, or technique capable of causing injury or death to persons, knowing, or having reason to know or intending that same will be unlawfully employed for use in, or in furtherance of, a civil disorder . . . shall be fined or imprisoned or both.[152]

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150. *See* 18 U.S.C. § 231-233 (1994). This legislation was enacted in 1968 and amended in 1994. Violation of its provisions is punishable by imprisonment for up to five years or a fine or both. 18 U.S.C. § 231(a)(3).

151. *ADL Anti-Paramilitary Training Statute: A Response to Domestic Terrorism*, The William and Naomi Gorowitz Institute on Terrorism and Extremism, at 6 (1995) (model statute for the prohibition of paramilitary training) [hereinafter ADL Statute]. The ADL initially proposed this model statute more than a decade ago. Because of the bombing in Oklahoma City, the ADL has renewed efforts to seek enactment of its model statute by state and federal legislators in an attempt to deter future acts of domestic terrorism. *Id.* at 1.

152. *ADL Statute*, at (A)(1). *Compare* 18 U.S.C. § 231. The federal version of the instructional ban legislation has additional language that could render it unconstitutional.

The ADL statute defines civil disorder as "any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual."[153]

The instructional ban prohibits two distinct types of training. First, it prohibits demonstrations on the use, application, or making of devices such as firearms or bombs, if those devices are capable of causing personal injury or death and are unlawfully used in furtherance of a civil disorder. Second, and more broadly, the ban prohibits the teaching of techniques that do not necessarily incorporate the use of firearms or other weapons. Arguably, the art of hand to hand combat, if properly applied, is capable of causing personal injury or death. Thus, the demonstration of any technique capable of causing personal injury or death would fall within the scope of the instructional ban's prohibition so long as the trainer knew or intended[154] that the acquired training would be used in furtherance of a public disturbance that (i) involved acts of violence (armed or otherwise), and (ii) caused immediate danger of personal injury or property damage.

The drafters of the ADL Statute were aware of the constitutional implications raised by instructional ban legislation. As a result, the ADL Statute was couched in terms of three primary objectives; (1) to avoid violation of any constitutional guarantees (notably First Amendment and Due Process concerns), (2) to deal directly with the issue of paramilitary training, and (3) to be narrowly drafted so as not to

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Specifically, the federal statute makes paramilitary training a criminal offense if the training is "in furtherance of, a civil disorder *which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce . . . .*" *Id.* at (a)(1) (emphasis added). In a recent ruling by the United States Supreme Court in *United States v. Lopez*, the court held that congress could regulate certain activities if they "substantially affect[]" interstate commerce. ___ U.S. ___ (1995), 115 S. Ct. 1624, 1630-31 (1995). Arguably the language "in any way or degree obstruct, delay, or adversely affect commerce" would reach activity that does not substantially affect interstate commerce. Because of the implications of the *Lopez* holding, this comment will focus on the ADL Statute which does not contain language offensive to its holding. *See ADL Law Report: The ADL Anti-Paramilitary Training Statute: A Response To Domestic Terrorism*, at 4 & n.1 (recognizing the limitations placed on the federal government's ability to prohibit paramilitary training activities in light of the decision in *Lopez*).

153. *ADL Statute*, at (C)(1). *Compare* 18 U.S.C. § 232(1). The federal definition of civil disorder is virtually identical to that of the ADL Statute.

154. The *having reason to know* phrase has been effectively written out of the instructional ban's training prohibition. The rationale for removing the *having reason to know* mens rea will be discussed in this Comment *infra*.

prohibit legitimate lawful activities.[155] In assessing the constitutionality of the ADL Statute's instructional ban, the drafters relied on two federal circuit cases that held the analogous federal statute to be within constitutional boundaries. The following is an overview of the cases supportive of the ADL's proposed instructional ban legislation.

1. Case Law Supportive of the Instructional Ban. In *National Mobilization Committee To End The War In Viet-Nam v. Foran*,[156] the plaintiffs were charged with teaching others in the use or making of incendiary devices intending that the devices be unlawfully used in furtherance of a civil disorder.[157] The plaintiffs instituted a class action suit seeking a declaratory judgment holding that section 231 of the Civil Disobedience Act was unconstitutional on its face and as applied.[158] Specifically, the plaintiffs based their constitutional challenge on two grounds; (1) that section 231(a)(1) makes constitutionally protected activities such as techniques of self defense or sporting activities unlawful, and (2) the requirement that the instructor know whether the trainees will use their acquired skills unlawfully in furtherance of a civil disorder is overbroad and vague.[159] The court concluded that the challenge to section 231(a)(1) did not pose a "substantial constitutional question" reasoning that the knowing, having reason to know, or intending language of section 231 "'narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription.'"[160] Arguably, the court's analysis of section 231(a)(1) is incomplete and therefore provides questionable support for the ADL's assertion that the model statute will survive constitutional scrutiny.

Most notably, the plaintiffs in *Foran* were indicted for *intending* that their teaching the use, application or making of an incendiary device be unlawfully used in furtherance of a civil disorder. Consequently, the court confined its analysis to intentional conduct (as alleged in the indictment) and did not consider the implications of the phrase *having reason to know*. The court rightly limited its analysis to the facts of the

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155. *ADL Law Report: ADL Anti-Paramilitary Training Statute: A Response to Domestic Terrorism*, The William and Naomi Gorowitz Institute on Terrorism and Extremism, at 3 (1995) [hereinafter ADL Report].

156. 411 F.2d 934 (7th Cir. 1969).

157. *Id.* at 935. The plaintiffs also raised challenges to sections 2101-02. These sections of Title 18 deal with federal charges of inciting to riot and will not be discussed in this Comment.

158. *Id.* at 936-37.

159. *Id.* at 938. Thus the plaintiff's attack on section 231(a)(1) is based on both the First Amendment (freedom of association) and Fifth Amendment (due process void for vagueness doctrine).

160. *Id.* at 937 (citing Landrey v. Daley, 280 F. Supp. 938, 939 (N.D. Ill. 1968)).

case, however, the ADL's assertion that its model statute is justified under the decision in *Foran* ignores the fact that the court did not consider the constitutional implications of labeling conduct as criminal under the *having reason to know* standard. For example, if the plaintiffs had been charged with having reason to know that the techniques taught would be unlawfully used in furtherance of a civil disorder, the government need only prove that the plaintiffs could have *foreseen* that their pupils would unlawfully use the acquired knowledge in furtherance of a civil disorder. Imposition of criminal sanctions based on a foreseeability/negligence standard runs the risk of criminalizing innocent or inadvertent acts contrary to the void for vagueness doctrine.[161] Issues of vagueness flowing from the language *having reason to know* were addressed in a subsequent circuit court decision.

In *United States v. Featherston,*[162] the plaintiffs alleged that the *having reason to know* language in (a)(1) "creates criminal liability in terms so broad and vague that men of common intelligence must guess at its meaning and application."[163] The plaintiffs in *Featherston* were members of the *Black Afro Militant Movement* ("BAMM"). In May 1970 members of BAMM were instructed on how to make and assemble explosive and incendiary devices with the express purpose of preparing for "'the coming revolution.'"[164] In upholding the constitutionality of section 231(a)(1), the court concluded that the statute requires proof that alleged violators *knew or intended* that the disseminated information would be used in furtherance of a civil disorder.[165] The court noted that virtually identical language had been similarly construed by the United States Supreme Court in *Gorin v. United States.*[166] The Court in *Gorin* held that the delimiting language of the Act required that those charged must act in bad faith in order for sanctions to apply.[167] Under

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161. *See supra* note 72 and accompanying text.

162. 461 F.2d 1119 (5th Cir. 1972).

163. *Id.* at 1121.

164. *Featherston*, 461 F.2d at 1121.

165. *Id.* at 1122 (emphasis added). The court in *Featherston* read the Fifth Circuit's holding in *Foran* as construing section 231(a)(1) to require intentional conduct. *Id.* at 1121. My reading of *Foran* suggests that the court did not consider possible application of the phrase "having reason to know" as the indictment in that case alleged intentional conduct only. Assuming that the court in *Foran* had construed section 231(a)(1) to require intentional conduct, such a conclusion would have been dicta, and not an essential holding based on the facts of the case.

166. 312 U.S. 19 (1940). The Court in *Gorin* considered the constitutionality of the Espionage Act of 1917, subsequently incorporated into 18 U.S.C. § 793. The language at issue in *Gorin* stated "with intent or reason to believe." *Featherston*, 461 F.2d at 1121.

167. *Gorin*, 312 U.S. at 27-28. Bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . and contemplates a state of mind

the construction of 18 U.S.C § 231(a)(1) provided by the court in *Featherston*, *having reason to know* merges into *knowing* conduct, thus removing negligent or reckless acts from the instructional ban.

In addition to the Due Process violation alleged in *Featherston*, an attack based on First Amendment grounds was raised by the plaintiffs and rejected by the court. The Plaintiffs asserted that the statute was unconstitutional as applied because the government failed to show "the happening or pendency of a particular civil disorder."[168] This challenge refers to the clear and present danger test typically applied to governmental prohibitions on constitutionally protected speech. The court relied upon language from *Dennis v. United States*[169] for its conclusion that the clear and present danger test does not require the government to wait for the planned event to occur where the evidence showed that BAMM was ready to strike transportation, communication, and law enforcement targets at a moments notice.[170]

Most recently, the Fourth Circuit has scrutinized a North Carolina statute that tracks the language of the ADL's instructional ban. In *Person v. Miller & Carolina Knights of the Ku Klux Klan*[171] Bobby Person (an African American) filed a class action against the Carolina Knights of the Ku Klux Klan (CKKKK), its leader (Glen Miller), and other unnamed associates of the organization. Person alleged that the defendants participated in acts of violence and intimidation aimed at preventing black citizens (and sympathizers) from exercising their rights under applicable state and federal law. A class consisting of all black citizens of the State of North Carolina was certified, and in January 1985 a consent decree was joined by the parties prohibiting the CKKKK from "'operat[ing] as a paramilitary organization and do[ing] other acts

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affirmatively operating with furtive design or will." *Black's Law Dictionary* 127 (5th ed. 1979).

168. 461 F.2d at 1122.

169. 341 U.S. 494 (1951). The relied upon language states:

> [T]he words [clear and present danger] cannot mean that before the government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and attempt to commit them to a course whereby they will strike when the feel the circumstances permit, action by the government is required.

Id. at 509.

170. *Featherston*, 461 F.2d at 1122. The court also noted that BAMM was a "cohesive and organized group . . . [consisting of] a force regularly trained in explosives and incendiary devices." *Id.* The court subsequently held that "there was a sufficient showing of clear and present danger to justify governmental intervention . . . ." *Id.* at 1123.

171. 854 F.2d 656 (4th Cir. 1988).

prohibited by North Carolina Statutes . . . .'"[172] This case is of little value for purposes of construing the constitutionality of instructional ban legislation because Miller based his appeal on the ground that there was insufficient evidence to establish a violation of the North Carolina Statutes.[173] Thus, the court did not address potential constitutional challenges based on First Amendment freedoms of speech and association.

Instructional ban legislation has so far survived constitutional challenges based on First Amendment principles of assembly and association. The statutory prohibition has also survived void for vagueness challenges based on the Due Process Clause.[174] There are however, constitutional implications associated with the instructional ban's application to citizen militia groups that are worthy of mention.

2. Criticisms and Constitutional Concerns. Ultimately, the constitutionality of instructional ban legislation hinges on two separate issues. First, what part does the Second Amendment play in protecting armed citizen militia organizations from government intervention into their training activities? Second, what effect does the *Brandenburg* standard exert over the instructional ban's application to the conduct of armed groups that (i) espouse anti-government rhetoric, and (ii) engage in training activities designed to enhance their proficiency, and ultimately their ability, to engage in armed conflict with governmental forces?

A. The Second Amendment and the Instructional Ban

This Comment proposes that the Second Amendment, when read in tandem with First Amendment principles of free speech and association,

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172. *Id.* at 658-59. North Carolina Statute § 14-288.20(b)(1) incorporates the instructional ban language of the ADL Statute. The court determined that Miller was in violation of the instructional ban under an agency theory. *Id.* at 661. Specifically, the court found that Miller's cohorts conducted weapons and tactics training, in preparation for Miller's plan to overthrow the government. *Id.* at 660.

173. *Id.* at 660.

174. Several states have enacted instructional ban legislation that includes the phrase *having reason to know*. To make the instructional ban consistent with the court's interpretation of identical language in *Featherston* and *Gorin*, States should remove the phrase *having reason to know*, thus making the ban consistent with Title 18 § 231. The instructional ban has been read to require knowing or intentional conduct. Consequently, the phrase *having reason to know* has been read out of 18 U.S.C. § 231(a)(1). Deleting the offensive language would ensure that prosecutors seeking to enforce the instructional ban would not mistakenly apply a negligence standard to an alleged wrongdoers state of mind. Removing the *having reason to know* mental state would also serve to avoid constitutional challenges based on the "void for vagueness" doctrine.

qualifies the scope of instructional ban legislation. By acknowledging that the Second Amendment recognizes an individual right to keep and bear arms, and further acknowledging that the underlying policy of that right is to provide citizens with the ability to defend against tyrannical and unconstitutional government practices, the instructional ban is substantially limited in its scope and application.

For example, training activities designed to enhance the proficiency of individual militia units would be protected under the standard model's assertion that the policy underlying the Second Amendment right to keep and bear arms is to provide an avenue for the people to defend themselves against government oppression. In order for citizen militia groups to provide (i) a bona fide check on government oppression, and (ii) protect and preserve our constitutional form of government, they must be receive adequate military training. Otherwise, by allowing the instructional ban to prohibit the militia's training activities, the movement would be incapable operating as a viable defensive force. Consequently, the purpose underlying the Second Amendment -the right of the citizenry to stand in opposition to unfair government practices—would be undermined.[175]

Moreover, the Second Amendment, as interpreted under the "standard model theory," recognizes that citizen groups may *lawfully* arm themselves in anticipation of armed conflict with oppressive and tyrannical governmental forces. Consequently, the instructional ban cannot prosecute alleged violators on the assertion that the paramilitary training of militia members, for the purpose of defending against government tyranny, is unlawful in and of itself. Essentially, a successful prosecution under the instructional ban would require a showing that the trainer knew or intended that the training would be used to further an imminent threat of violence that was prosecutable under an alternative criminal or civil statute.

For example, in *United States v. Nichols*[176] the defendant is charged with (i) aiding and abetting the commission of a crime of violence, and (ii) maliciously damaging and destroying by means of fire and explosive a building, vehicle, and other personal and real property in whole or in part owned, possessed and used by the United States.[177] Assuming,

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175. Furthermore, allowing armed citizen militias to exist yet prohibiting them from being adequately trained in the proper handling and care of small arms would increase the likelihood of injury or death to militia members and the public at large. Specifically, if militia members are not trained in how to handle their weapons safely, the possibility of accidental injury is enhanced. The right to conduct training activities is essentially a *collateral right*, flowing from the Second Amendment right to create citizen armies.

176. No. M-95-105-H, 1995 WL 500306 (W.D. Okla. June 6, 1995).

177. *Id.* at 1.

for the sake of argument, that Nichols conducted training with the alleged bomber Timothy Mcveigh, for the purpose of bombing the Murrah Building in April 1995, then Nichols would be subject to prosecution under the instructional ban. Essentially, the "unlawfully used in furtherance of a civil disorder" provision of the instructional ban would be met because Nichols "aided or abetted" Mcviegh in the commission of a crime of violence.[178] Conversely, if an individual conducted training activities on the use, application, or making of a firearms, for the purpose of enhancing the overall proficiency of militia members in handling such weapons, the instructional ban would not reach his/her conduct because no underlying unlawful act could be established.[179]

Advocates of the instructional ban assert that training activities designed to enhance citizen militia group's overall ability to engage in armed conflict with governmental forces poses a grave and imminent danger of violence. But such an assumption would require more than the mere abstract teaching of military techniques where the formation of armed citizen militia groups is considered to be the exercise of constitutional privilege under the Second Amendment. Therefore, what types of training activities are likely to incite or produce imminent lawless action must be defined in light of the inherent constitutional right of the people to form citizen militia organizations.

B. The "Imminent Lawless Action" Standard and the Instructional Ban

Application of the *Brandenburg* standard to the training activities of citizen militia groups requires some clarifications as to exactly what falls within the ban's proscriptions. Accepting that the ban requires the trainer *know* or *intend* that the acquired knowledge be unlawfully used in furtherance of a civil disorder, the mere teaching, without a simultaneous intent or knowledge that such training will be unlawfully used in furtherance of a civil disorder, cannot be prosecuted. Under *Brandenburg's* imminent lawless action standard, the Ban's prohibition is further qualified in the sense that the alleged civil disorder must be (i)

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178. *See* 18 U.S.C. § 3156(4).

179. The underlying unlawful act would not be limited to criminal violations. For example, the activities of the TER in *Vietnamese Fisherman's Ass'n* amounted to civil rights violations that are both unlawful and punishable under federal law. The plaintiffs in *Vietnamese Fisherman's Ass'n* alleged criminal and civil rights violations under 42 U.S.C §§ 1981, 1985(3), 1986; 15 U.S.C. §§ 15, 26; 18 U.S.C §§ 1962, 1964.

imminent, and (ii) likely to be incited or produced by the training itself.[180] Thus, if the disseminated information did not result in the likelihood of inciting or producing imminent lawless action, such activity would be outside the scope of the instructional ban's prohibition.

The court in *Featherston* provides little guidance in determining the scope the instructional ban in light of the "imminent lawless action" standard articulated in *Brandenburg*. For example, the court chose to rely on the "clear and present danger" standard articulated in *Dennis* in lieu of the "imminent lawless action" standard created in *Brandenburg*. While *Brandenburg* protects advocacy of violence unless such advocacy is likely to incite imminent lawless action, in *Dennis* the Court made no such distinction.

In *Dennis*, several defendants questioned the constitutionality of the Smith Act[181] alleging that the Act violated the First and Fifth Amendments. The defendants were charged, under the Act, with knowingly conspiring to organize a communist party while teaching and advocating the overthrow of the United States government, by means of force and violence.[182] The Court, in holding that the Act was constitutional, reasoned that "the words [clear and present danger] cannot mean that before the government may act, it must wait until . . . the plans have been laid and the signal is awaited."[183] Conversely, Justice Douglas' concurrence in *Brandenburg* criticizes *Dennis* as "opening wide the door [to government intrusion], [while] distorting the 'clear and present danger' test beyond recognition." Justice Douglas favored a narrow application of the "imminent lawless action" standard that would require "speech [ ] brigaded with action."[184] Furthermore, the per curiam opinion in *Brandenburg* noted that "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."[185]

Arguably, the imminent lawless action standard articulated in *Brandenburg* is more forgiving of advocacy of violence than the language contained in *Dennis*. For example, under the *Dennis* standard, anti-

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180. In fact the definition of "civil disorder" requires acts that cause "*immediate* danger of or results in damage or injury to the property or person of any other individual." ADL Model Statute (C)(1); 18 U.S.C § 232(1) (emphasis added). In this context, the definition of civil disorder lends support to the proposition that the consequences of the training activity be imminent.

181. 18 U.S.C § 2385 (1946 ed.).

182. 341 U.S. at 495-97.

183. *Id.* at 509.

184. *Id.* at 453 (Douglas, J., concurring).

185. 395 U.S. at 448 (citing Noto v. United States, 367 U.S. 290, 297-98 (1961)).

government groups that conduct abstract paramilitary training activities, but have not planned *specific* and *imminent* acts of violence could not claim First Amendment protection. Consequently citizen militia officials who provide abstract training to individual members in the use and application of firearms, would be subject to instructional ban prohibitions, including substantial fines and incarceration. Conversely, the "imminent lawless action" standard articulated in *Brandenburg* requires more than the abstract teaching of force and violence to remove First Amendment protections. As noted previously in this comment, when reading *Brandenburg* in conjunction with *James* and *Healy*, training activities of citizen militia groups cannot be prohibited on the basis of (i) an undifferentiated fear or apprehension of disturbance, (ii) the mere tendency of military training to lead to violence, or (iii) activities that are not likely to produce or incite imminent lawless action.

In justifying its conclusion that the training activities engaged in by BAMM members were not constitutionally protected, the court in *Featherston* noted that BAMM was a "cohesive and organized group . . . [consisting of] a force regularly trained in explosives and incendiary devices."[186] Furthermore, oral testimony revealed that the members of BAMM were told to have the ingredients necessary to configure incendiary devices in their homes in order to prepare for the "coming revolution." Members were also told to be ready to use the devices "at a moments notice." Finally, testimony revealed that no date had been set for the coming revolution as trainers noted that there was "no telling when the revolution might come."[187]

On the one hand, BAMM's training in the use and application of incendiary devices, in preparation of the coming revolution, posed a significant threat to public safety, thus raising a potentially compelling governmental interest sufficient to restrict (if not prohibit) their training activities. But application of the "imminent lawless action" standard would require a more detailed analysis than the one provided by the circuit court in *Featherston*. Specifically, was the coming revolution imminent or was the court's analysis tainted by an undifferentiated fear or apprehension of disturbance? Moreover, did the conduct at issue in *Featherston* reflect a mere tendency towards violence or conversely indicate an imminent threat that violence would occur?[188]

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186. 461 F.2d at 1122.

187. *Id.* at 1122 n.4.

188. It is in this context that the distinction between being "imminently prepared" and "likely to incite or produce imminent acts of violence" becomes important. As noted in this Comment *supra*, making such a distinction would tend to remove training activities

The court in *Featherston* expressed a valid concern when noting that governmental agencies should not be forced to wait until an actual event of violence has occurred before responding to the threat posed by groups such as BAMM. The fact that BAMM constituted a "cohesive and well organized" group increased the likelihood that they would ultimately use the knowledge acquired during training sessions in furtherance of their rebellious purpose. Furthermore, members regularly engaged in training activities designed to enhance their proficiency in the use and application of explosive devices. The frequency of training reflected a deep commitment to prepare for the coming revolution, and thus increased the likelihood of violence. Finally, the desire of BAMM members to respond at "a moments notice" further demonstrated the potential for imminent violent conduct.

Under a strict First Amendment analysis, the threshold question is whether the training activities were likely to produce or incite imminent lawless action? Considering the nature and extent of BAMM's activities it is unfair to say that the court was tainted by an undifferentiated fear or apprehension that violence was likely. However, the record does not reflect that BAMM members had (i) set a specific date, (ii) for specific acts of violence, (iii) directed at specific targets. Arguably, the government's compelling interest in public safety is weakened by the fact that the threat of violence, inherent in the activities of BAMM members, involved some degree of speculation. In other words, absent a specific threat, to a specific target, confined to a certain time frame, the imminent nature of a generalized threat to governmental authority cannot be measured with a reasonable degree of certainty.[189]

Arguably, if activities of certain members of a particular citizen militia group, or of the group as a whole, reflect the planning or execution of specific acts of imminent violence, then operation of the instructional ban would comply with the *Brandenburg* standard. For example, if the Oklahoma City bombing had been (i) planned by a particular citizen militia group, (ii) with training activities designed to carry out the unlawful act in the near future, those conducting the training would be subject to the instructional ban's sanctions.[190] On the other hand, criminalization of the mere teaching of bomb making, absent an

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designed to prepare militia members for the possibility of armed conflict from the instructional ban's training prohibition.

189. Arguably, violent acts resulting from training BAMM members in the making of explosive devices could have been months or even years away based on the equivocal statement "we must get our heads and minds and bodies right for the revolution, no telling when the revolution might come." *Featherston*, 461 F.2d at 1123 n.4.

190. They would also be punishable under a criminal conspiracy theory and subject to substantial criminal sanctions.

imminent threat to a specific target, makes application of the imminent lawless action standard more problematic.

In order to square the court's analysis in *Featherston* with the *Brandenburg* standard several assumptions must be made. First, that anti-government groups will inevitably wage war against government forces because they engage in rebellious rhetoric reinforced by specific paramilitary training exercises. Second, that it is unreasonable to require government officials to predict the pendency, nature, or target of potential acts of violence directed against governmental authority. Concerning the assumption that armed conflict is an inevitable consequence of the existence of armed citizen militia groups, it is important to define the nature of the citizen militia movement's activities. Defining their activities demonstrates that the inevitability of armed conflict is debatable.

Assuming that (i) the training activities of citizen militia groups are confined to defensive preparedness, and (ii) citizen militia groups conduct training for the purpose of defending against the potential use of force by governmental agencies, the imminent nature of the threat of armed conflict initiated by militia members cannot be determined. The equivocal statement of BAMM members that there was "no telling when the revolution might come" reveals the dilemma inherent in determining when training activities are likely to incite imminent lawless action. If the instructional ban were read to require proof of specific acts of violence, directed at specific targets, within a discernible time frame, application of the *Brandenburg* standard would be relatively easy.

But requiring such particularity of proof may place an unreasonable burden on law enforcement agencies seeking to enforce the instructional ban. Proponents of the instructional ban point out that the covert nature of citizen militia groups makes it difficult, if not impossible, for law enforcement agencies to infiltrate and subsequently discover plans for specific unlawful acts.[191] Ultimately, the aim of instructional ban advocates, as well as the ban itself, is to criminalize paramilitary training activities that may encourage future and unspecified acts of violence against governmental agencies.[192]

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191. Specifically, the presence of a *leaderless resistance* organizational scheme (discussed in part I *supra*) would operate to make infiltration of citizen militia groups extremely difficult.

192. Michael Liberman (Washington Counsel for the ADL) states that the instructional ban (as well as the participatory ban) requires law enforcement officers prove that "the goal of the individuals participating in these paramilitary programs is to create or foster illegal civil disorders." Liberman, submitted to *The Nature and Threat of Violent Anti-Government Groups in America, 1995, Hearings Before the Subcomm. on Crime, House Comm. on the Judiciary*, 104th Cong., 1st Sess., November 2, 1995 (Statement of Michael

As previously noted, if militia members engaged in training for specific unlawful acts in furtherance of a civil disorder, such behavior could be addressed under alternative federal or state criminal law. For example, the act of planning a specific act of violence, such as the bombing of the federal building in Oklahoma City, could be reached under a criminal conspiracy theory.[193] And if the act was ultimately carried out, then state and federal laws prohibiting such acts of violence could be the basis for criminal charges. But advocates of the instructional ban want to go one step further and create a ban that would diminish the likelihood of violent acts against governmental agencies by prohibiting abstract training activities.

Reasonable application of the instructional ban, in light of the *Brandenburg* standard, requires a balancing of the right of citizen militia groups to conduct training activities against the governmental interest of protecting or enhancing public safety. Any attempt to accommodate these competing interests, requires defining the term "imminent" in such a way as to allow militias to engage in training activities while recognizing that government regulation of paramilitary training furthers a compelling governmental interest in public safety. On the one hand, requiring that the instructor know or intend that the training would be used to destroy or attack specific targets, arguably imposes an impermissible restriction on the governmental interest in public safety. On the other hand, allowing the instructional ban to criminalize abstract paramilitary training where the acquired information would be used to imminently prepare militia members against potential acts of violent aggression would arguably constitute an impermissible restriction on their right to engage in defensive training activities.

One way to resolve the conflict between the right of citizen militia groups to train individual members and the governmental interest in public safety is to define *nondefensive* acts of violence, planned or otherwise, as (i) unlawful, and (ii) likely to incite or produce imminent lawless action. In other words, training that was designed solely for the purpose of defending against an actual attack by foreign or domestic forces would be defensive in nature and outside the scope of instructional ban legislation. Conversely, training activities that are designed to enhance, encourage or ultimately incite nondefensive acts of violence

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Liberman, Washington Counsel, ADL). Fostering civil disorders is a broad prohibition that would not require the existence of a specific and imminent threat to a specific target.

193. Under a conspiracy theory, the overt act requirement would be met by establishing that the instructor and participants engaged in said training for the specific purpose of executing the bombing.

against the Republic would be under the instructional ban's training prohibition.

Adoption of a "nondefensive" gloss on the training activities of the citizen militia movement would comply with both the standard model theory's interpretation of the Second Amendment, and *Brandenburg's* qualification on First Amendment principles of speech and association. First, the right of citizen militia groups to conduct training activities implicit in the standard model's interpretation of the Second Amendment would be respected so long as the training was strictly defensive in nature. Consequently, because nondefensive training activities would be unlawful, training that encouraged, incited or produced "nondefensive" acts of violence would meet the instructional ban's requirement that the training be *unlawfully* used in furtherance of a civil disorder. Second, the instructional ban's training prohibition would not meet the *Brandenburg* standard where training activities embraced a strictly defensive purpose. Conversely, nondefensive training activities would pose an *imminent* threat of lawless action and would be subject to the instructional ban's training prohibition.

C. The Participatory Ban

Several states have enacted legislation prohibiting persons from participating in paramilitary training activities with the intent to unlawfully use the fruits of such training in furtherance of a civil disorder.[194] The ADL Statute includes a participatory ban provision, and will provide the foundation for discussion of participatory ban legislation. The ADL Statute states in pertinent part:

> Whoever *assembles* with one or more 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, intending to employ unlawfully the same for use in, or in furtherance of, a civil disorder—Shall be fined not more than $____ or imprisoned not more than ____ years, or both.[195]

While participatory ban legislation has been enacted in several states, it has not been tested in court. Advocates of the participatory ban argue that it is necessary to prevent planned violence against the elected government. By analogy, the same arguments in support of the instructional ban can be applied to the participatory ban. The fact that

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194. As mentioned in this comment at note 5 *supra*, a bill has been introduced into the House of Representatives to amend 18 U.S.C § 231 by incorporating a participatory ban into the Statute. At this time the there is no federal law prohibiting such conduct.

195. *ADL Statute* (A)(2).

the constitutionality of the 18 U.S.C § 231 (Civil Disobedience Act) has been upheld by the Seventh Circuit in *Foran* and the Fifth Circuit in *Featherston* denotes the likelihood that participatory ban legislation would survive constitutional attacks grounded on First and Second Amendment principles.

The participatory ban is not unconstitutional on its face. Under its provisions, the participatory ban operates to impose criminal sanctions on individuals who (i) participate in paramilitary training designed for an unlawful purpose, and (i) intend to use the acquired knowledge in furtherance of the unlawful purpose. Depending on how the participatory ban is applied, it may or may not comply with constitutional commands enumerated in the First and Second Amendments.

For example, under the standard model theory of the Second Amendment, participation in paramilitary training for the purpose of creating a well regulated citizen militia would not constitute unlawful conduct. Furthermore, the participatory ban could not be applied to citizens participating in paramilitary training for the purpose of standing ready to defend against government oppression. Ultimately, an underlying unlawful act, based on an alternative criminal of civil statute would be necessary to establish a violation of the participatory ban. Similarly, the participatory ban's restriction on associational activities must be narrowly applied to avoid an impermissible restriction on the associational rights of citizen militia members who participate in paramilitary training activities. Specifically, under *Clairborne*, the ban cannot operate to impose criminal sanctions on all alleged participants in unlawfully designed training activities unless most if not all of the trainees have adopted, and seek to further, the unlawful purpose.[196]

IV. CONCLUSION

Citizen militias claim as their purpose to protect and preserve the United States Constitution from threats, both foreign and domestic. Militia leaders point to the Second Amendment as granting them the collective right to form citizen armies as a means to overcome government oppression and tyranny. Moreover, militia activists view the existence of a formidable standing army on the federal level—reinforced by state maintained national guards—as a force capable of disarming the American people and ultimately assisting in the imposition of an unconstitutional form of government. Consequently, citizen militias conduct military training activities designed to enhance their proficiency

196. *See supra* note 144 and accompanying text. Issues of free speech are not generally implicated by operation of the participatory ban, and thus are not addressed in the discussion of the participatory ban.

as a viable military organization. Additionally, militia leaders disseminate a wide variety of anti-government/pro-militia propaganda—in the form of written and verbal speech—to educate and recruit mainstream America to the movement.

Several aspects of the citizen militia movement are troubling. Perhaps most troubling is the possibility that militia leaders will instigate violence against government forces based on subjectively determined threats that are grounded in unsubstantiated fears and suspicions. For example, militia units may attempt to justify attacks on government institutions based on exotic conspiracy theories that are neither accepted by the majority of the American public nor sufficiently documented by credible evidence. In this sense the militia movement can be viewed as a loose cannon lurking in the shadows of American society.

Additionally, the citizen militia movement has not been embraced by even a simple majority of the American people. While some of the views espoused by the militia movement are shared by the American people—namely the protection and preservation of the United States Constitution—most Americans are not prepared to engage in armed conflict with governmental forces. And arguably, the conduct of state and federal officials, while the object of much debate and criticism, has not risen to a level of discord that would justify outright rebellion. Given the current state of affairs, the most immediate, and perhaps most important question is how should the government deal with the implications of the citizen militia movement. The recent standoff with the Freemen in the remote Montana landscape is providing the federal government with an opportunity to demonstrate that it has learned a lesson from the recent tragedies in Waco and Ruby Ridge. The media, and more importantly, the American public, are watching this confrontation closely.

In an effort to determine the validity of citizen militia groups, this comment approached the issue of whether citizen militia groups, and their activities, are constitutionally protected by adopting the standard model theory of the Second Amendment. Essentially, the standard model theory points to the text of the Second Amendment, the Framer's intent when drafting and approving the Amendment, and the Supreme Court's decision in *Miller v. United States*, as supportive of the proposition that the Second Amendment was enacted to serve a twofold purpose. First, to ensure that a fundamental right to keep and bear arms be incorporated into the United States Constitution. And second, that because the underlying purpose of the Second Amendment was to provide the people with a means to defend against oppressive and tyrannical government practices, a collective right to form citizen militias was created to provide the people with the means to defend

against, and ultimately eliminate, oppressive and unconstitutional governmental acts.

On the other hand, some public officials, law enforcement agencies, and watchdog organizations perceive the citizen militia movement, and other alleged extremist groups, as a criminal threat to American society. Arguing that the United States Constitution is not a suicide pact, advocates of laws designed to eliminate citizen militias are lobbying hard to see that associational, instructional, and participatory ban legislation becomes the law of the land. Essentially, anti-militia groups consider the ballot box as the proper means to exorcise oppressive and unconstitutional practices from our political system. Anti-militia groups also point out that times have changed since the Second Amendment was created. They advocate a dynamic interpretation of the Amendment that would not allow the people to summon citizen armies in response to perceived government injustice.

At the risk of oversimplification, the debate surrounding the Second Amendment, and consequently the citizen militia movement, revolves around how the constitution should be interpreted. If using a static approach to interpreting the Second Amendment, its text, as well as Framer's intent when drafting the Amendment's language, supports both an individual and collective right of the people to arm themselves against threats both foreign and domestic. Conversely, under a dynamic approach, the Amendment could be considered obsolete and inapplicable to modern day society in the sense that the formation of citizen armies is unnecessary to preserve and maintain the Republic, and furthermore that citizen militia groups are incapable of such a task even if allowed to exist. The ultimate danger of adopting a dynamic approach to the Second Amendment, thus removing protections its Framers intended to extend to the people, is that the door will be open to interpret away other constitutional safeguards that are expressly or implicitly contained within the Constitution.

As the law now stands, the associational, instructional, and participatory bans may be utilized to (i) prohibit the formation of citizen militia groups, and (ii) prohibit paramilitary training activities designed to prepare for conflict with governmental forces. This Comment has attempted to define the scope of associational, participatory, and instructional ban legislation in light of federal district and circuit court decisions construing the associational and instructional bans.[197] Arguably, courts construing these bans have been less than fair in their treatment of constitutional challenges based on the First and Second

197. As noted in this Comment *supra*, the participatory has not been judicially construed.

Amendments, as well as the Due Process Clause. Additionally, courts construing the associational and instructional bans rejected an interpretation of the Second Amendment that would recognize a collective right to form citizen militias. From a constitutional perspective, the scope of associational ban legislation suffers from numerous infirmities. For example, the associational ban criminalizes mere association as a military unit not authorized by state or federal law. The ban does not require the association to be armed. The ban prohibits associational activities on private land. The ban, in most jurisdictions, does not define "military organization." The ban does not give persons of ordinary intelligence fair notice that their contemplated conduct is unlawful. The ban encourages arbitrary and erratic arrests and convictions. The ban operates to prohibit the formation of citizen militias irrespective of the likelihood that the association as a citizen militia would incite or produce imminent lawless action. The ban imposes a blanket prohibition on all members of the military organization absent a determination that unlawful behavior tainted the collective efforts of the entire organization.

For all of the reasons stated in the preceding paragraph, the associational ban is unconstitutional on its face. It is important to note that, with the exception of the ban's self proclamation that formation of citizen armies is unlawful in and of itself, the remaining restrictions are unconstitutional even if the collective right to form citizen militias is not found in the Second Amendment. On the other hand, the instructional and participatory bans are not facially unconstitutional, but both run the risk of being unconstitutional as applied. Assuming, as this comment proposes, that the Second Amendment confers a collective right to form citizen militias, the scope of the instructional and participatory bans is substantially limited.

For example, defensive paramilitary training activities designed to prepare for an attack by oppressive government forces would be considered the lawful exercise of a constitutional right implicit in the Second Amendment. As a result, in order for the instructional or participatory bans to be constitutionally applied, an underlying unlawful act, based on existing civil or criminal statutes, must be established to satisfy the requirement that the trainer/trainee know or intend that the training be *unlawfully* used in furtherance of a civil disorder. Conversely, if the formation of citizen armies is not under the umbrella of Second Amendment protections, training designed to prepare for potential attack by government forces would be considered unlawful, and thus meet the requirement that the trainer/trainee know or intend that the training be unlawfully used in furtherance of a civil disorder.

Furthermore, in the context of the advocacy of violence, it is necessary that the instructional ban comply with *Brandenburg's* imminent lawless action standard. For example, speech or associational activities cannot be characterized as likely to incite or produce imminent lawless action on the basis of (i) an undifferentiated fear or apprehension of disturbance, or (ii) the mere tendency to lead to violence. While the training of militia members to prepare for potential attack by government forces arguably has a tendency to lead to violence, such training activities are insufficient to implicate imminent lawless action. Ultimately, the critical distinction to be made is that being imminently prepared for offensive attack by government forces would not be likely to incite or produce imminent lawless action, while engaging in training activities that are for purposes other than to defend against potential government attack would be likely to do so.

Moreover, the participatory ban is further qualified by the Supreme Court's decision in *NAACP v. Clairborne*. Ultimately, participants in alleged unlawful paramilitary training activities must individually adopt the unlawful design of the training in order to be criminally liable. In other words, guilt cannot be imputed to all participants simply because some of the trainees intended to unlawfully use the acquired knowledge in furtherance of a civil disorder.

The recent growth and popularity of the citizen militia movement has spawned strong reactions from public officials, law enforcement groups, and watchdog organizations. It is likely that reaction to the movement will include application of the associational, instructional, and participatory bans to the activities of the various citizen militia groups in an effort to diminish the threat such groups represent to the political and social structure of America. By pointing out the constitutional implications of the respective bans, it is hoped that questions surrounding the Second Amendment are given the consideration they ultimately deserve. Furthermore, legislators, judges, prosecutors, and law enforcement officials should carefully consider the implications of enforcing the associational, instructional, and participatory bans in light of the constitutional concerns enumerated in this Comment.

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