

THE WHITE HOUSE
WASHINGTON

May 25, 1995

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DETERMINED TO BE AN ADMINISTRATIVE

MEMORANDUM FOR LEON PANETTA
HAROLD ICKES

MARKING INITIALS: MI DATE: 4/4/95

20th-0267-5

CC: RAHM EMANUEL

FROM: ABNER MIKVA
JAMES CASTELLO J.E.C.
CHRIS CERF

SUBJECT: Regulation of Militias or Terrorist Groups

Two weeks ago, you asked White House Counsel to provide a "quick" legal judgment as to the constitutionality of several proposals to regulate militias. Our provisional opinion was reflected in a memo of May 10, which was forwarded to Leon and a copy of which is attached. To summarize, we concluded that one of the proposals--to require militias to publish membership lists--was almost surely unconstitutional, while others--such as to require militias to register with the federal government--raised less serious constitutional issues, which probably could be surmounted.

More recently, you asked DOJ to provide, by this weekend, definitive judgments about the constitutionality of several similar proposals to regulate "organizations that support terrorism." These questions *may* yield different answers from those that we gave with respect to regulating "militias." But, in any event, it is not possible for DOJ to give *definitive* answers to these questions quickly, since many of the questions are ones of first impression and will require surveying a number of relevant but not dispositive constitutional cases and then determining their likely application to the proposals now under review. Given the time and effort this will require, both our office and the lawyers at DOJ thought it would be advisable at the outset to share our policy views about the proposals under review.

All of the lawyers analyzing these proposals (in this office and at DOJ) strongly believe it is a serious mistake--as a policy *but especially* as a political matter--to impose militia controls of the type now being discussed, even if they would be constitutional.

- As a *policy* matter, such controls are of doubtful necessity, given that 41 states already have laws that ban either the creation of private military organizations or private paramilitary training that threatens civil disorder. Nor does it seem likely that the proposed federal controls would enhance federal law enforcement, given DOJ's reinterpretation of the terrorism investigation guidelines and Congress' expected passage of an anti-terrorism bill. Rather, the most likely effect of the proposed controls would be to greatly increase fears about government encroachment on individual freedom and thus, paradoxically, to fuel public sympathy for militia organizations. A recent Gallup poll found that 39% of Americans already believe the federal government "has become so large and powerful it poses an immediate threat to the rights and freedoms of ordinary citizens."
- It follows, in our judgment, that as a *political* matter the proposed controls would be extremely ill-advised. The President's anti-terrorism legislation has already brought about an unprecedented alliance on legal issues between groups like the ACLU and the NRA, who have issued a joint public statement warning that an overreaction to the bombing will jeopardize "basic freedoms." If the President were now to call for registration of militias, for publication of their membership lists, or for reporting of their activities, he would likely prompt these and other groups on the left and right to join together in even stronger opposition, with renewed calls for investigation of Waco and so on. A recent Los Angeles Times poll found that, among those who owned guns or who described themselves as "conservative" or "white fundamentalist Christians," substantially more people were "concerned that government would excessively restrict the average person's civil liberties" than were worried that government "would fail to enact strong new anti-terrorism legislation." Only respondents describing themselves as "liberals" disagreed.

Thus far, we believe the President's statements and actions in the wake of the Oklahoma City tragedy have placed him just where he should be: a) with a clear record of responding to a new threat with sensible new policies, and b) with an equally clear record of sensitivity to the rights of individuals. We worry that further proposals of the type now being discussed could be depicted in very menacing terms to average citizens and could tip the political balance against the President.

Attachment

THE WHITE HOUSE

WASHINGTON

May 10, 1995

MEMORANDUM TO ABNER MIKVA

FROM: CHRIS CERF *Che*

RE: Federal Regulation of Paramilitary Groups

Leon has asked for your "quick" reaction to a proposal to regulate paramilitary groups by requiring them (1) to release membership lists; (2) report military-style maneuvers and training to the FBI and local authorities; (3) release an inventory of weapons; (4) and register with federal authorities.

The question raises two constitutional issues: whether congress has the power to regulate such groups and whether the exercise of that power would violate the first amendment rights of the groups or its members. OLC is currently considering these issues and will report back on Thursday. My preliminary conclusion, however, is that Congress has the power to regulate paramilitary organizations under either the Commerce Clause (with appropriate findings) or Article I Sec. 8, which gives it the power to "discipl[ine] the Militia." This power should provide a sufficient basis for federal regulation along the lines of items (3) and (4) above, and probably item (2) as well.

Requiring such an organization to release its membership list, however, would likely contravene the associational rights identified in NAACP v. Alabama. Congress nonetheless could take even this step in the case of a true paramilitary organization bent on terrorist activities or acts of intimidation. In such an instance, Congress presumably would have a sufficiently substantial interest to trump the First Amendment.

The fact that the above-described regulations may be constitutional does not make them a good idea. The biggest problem is one of definition: How do you distinguish between a hunt club that favors military-style characteristics (fatigues, officers, etc.) and a true paramilitary organization? My strong view is that, no matter how carefully crafted the statute is, the Administration would be picking a huge fight with such organizations and the interest groups that represent them. My sense is that we would reap more political negatives than positives if we choose to go down this road.

An Alternative: Many states already ban true paramilitary operations, which prohibitions have survived constitutional challenges. Why not simply urge the states to take an even more aggressive stance in monitoring, regulating and, where appropriate, banning such activities.



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D. C. 20530

May 28, 1995

NOTE TO ABNER MIKVA AND JAMES COSTELLO

From: Walter Dellinger *WD*

Attached is a preliminary analysis of Constitutional issues involved in regulating the activities of paramilitary organizations. This was prepared this weekend by Stuart Benjamin, Neil Kinkopf, Marty Lederman and Michael Small who worked under the supervision of Dawn Johnsen. Richard Shiffrin provided a second review.

Given the urgency of the request, as relayed to me by James Costello, I will deliver this memo to the White House at mid-day on Sunday. I need to emphasize to you, however, that our conclusions are tentative, and that this memorandum, finished early Sunday morning, has not yet been review by our paralegal staff, nor have its conclusions been subjected to the internal review process that leads to a final OLC opinion.

We will be pleased, if so requested, to provide further analysis on these and related issues.



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D. C. 20530

May 28, 1995

**MEMORANDUM FOR
WALTER DELLINGER
DAWN JOHNSEN
RICHARD SHIFFRIN**

From: Stuart Benjamin
Neil Kinkopf
Marty Lederman
Michael Small

Re: Preliminary Analysis of Constitutional Issues Involved in Regulating the Activities of
Paramilitary Organizations

You have asked us to determine the extent to which the Constitution authorizes federal legislation to regulate private paramilitary organizations and whether the Constitution, especially through the First Amendment, imposes any limitation on these powers. In the limited time allotted, we have not been able to complete all of the research that would be necessary to formulate final legal conclusions (nor have we had time to citecheck this memorandum). This memorandum sets forth the results of the research and analysis that we have been able to complete this weekend, and the preliminary conclusions that we think are supported. We note, however, that our conclusions are so tentative at this point that they should not form the basis for any significant actions. If it would be timely and helpful, we of course would be happy to continue to research the matter and provide a final draft opinion.

In section I of the memorandum, we examine two possible sources of affirmative authority for federal regulation of paramilitary organizations: the Militia Clauses and the Commerce Clause. The Militia Clauses grant Congress broad power to enact laws to organize a militia and ensure that it is able effectively to fulfill its statutory and constitutional role. Because Congress has not previously sought to regulate the conduct of private actors under this power, there is no judicial precedent ratifying such action. Nevertheless, as explained below, we believe that Congress's authority permits it to regulate any activities that undermine the ability of the militia to achieve its constitutional and statutory purposes. Regulation of this type must be supported by appropriate congressional findings. If so supported and absent other constitutional limitations, a statute could ban paramilitary

activities outright, prohibit contributions to paramilitary organizations, or require paramilitary organizations to file reports disclosing their existence, their membership, an inventory of their weapons, and other relevant information regarding their instruction, drilling, and maneuvers.

Congress's authority under the Interstate Commerce Clause extends to the regulation -- including the prohibition -- of the use of firearms that have ever traveled in interstate commerce (which includes the vast majority of firearms). As a result, the commerce power, absent other constitutional limitations, allows Congress to regulate all of the activities of paramilitary organizations that involve firearms -- such as training and maneuvers -- and to require organizations and members to register an inventory of firearms used in such activities. The commerce power would also permit Congress to regulate paramilitary organizations' use of interstate wire, electronic, and mail communications networks and to regulate their economic activities, at least when the regulation is part of a larger regulatory scheme.

In section II, we consider whether the Bill of Rights -- in particular, the First and Fifth Amendments -- imposes any affirmative restrictions on Congress's power to regulate paramilitary activities and organizations. First, we consider whether Congress may ban or regulate certain activities -- namely, paramilitary operations and maneuvers. We conclude that there would be no constitutional bar on a simple statute reading something like the following: "It shall be unlawful for any person over 18 years of age to engage in military or paramilitary operations, drills or maneuvers in association with X or more persons, using firearms or other dangerous weapons, if those weapons have moved in interstate commerce, or if the military or paramilitary operations, drills or maneuvers otherwise affect interstate commerce." However, because this type of broad ban on activity might sweep within its scope some activity that not only is explicitly and uniquely expressive in nature, but that also does not threaten the harms that Congress wishes to address -- for example, Civil War battle reenactments and the filming of television productions depicting combat -- such a statute probably should contain exceptions for activities such as these to avoid constitutional difficulties, or add an intent requirement that the proscribed activity be "with the intent to prepare for actual armed combat."

Congress alternatively could impose certain restrictions on such activity, or require persons wishing to engage in such activity to register with the government and provide certain information that is germane to Congress's regulatory interests. In order to avoid self-incrimination concerns under the Fifth Amendment, however, Congress must ensure that the required disclosures are not "invariably indicative" of unlawful activity by the affected individuals.

Next, we consider whether the Constitution would impose constraints on Congress's ability to regulate paramilitary organizations, as such. We conclude that it would be constitutionally unproblematic to require paramilitary groups to register with the government and to disclose their officers and paramilitary activities -- and to have the state make public

such information -- as a condition for engaging in concerted paramilitary activity. Nor would the Constitution bar a requirement that an organization disclose any firearms and weapons that the organization owns or possesses. (Again, Fifth Amendment concerns would be raised insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the organization.) The First Amendment almost certainly would, however, invalidate any statute requiring such organizations to disclose the names of their members or persons who have made contributions to the organizations, at least with respect to organizations that, in addition to paramilitary activity and training, engage in advocacy of particular beliefs and ideas.

Finally, we discuss whether Congress may prohibit certain financial contributions. A prohibition on financial contributions to paramilitary organizations may be at odds with the First Amendment. Many paramilitary organizations, in addition to engaging in paramilitary exercises, also advocate particular political views and goals. Thus, a contribution to such an organization is a form of political expression and association that is at the heart of the First Amendment. Nonetheless, assuming that it would be within its enumerated powers, Congress could pass a statute prohibiting financial contributions that are made with the intent of assisting paramilitary activities, where such activities are themselves unlawful under federal law. Such a prohibition would not violate the First Amendment if (i) the statute specifies that the contribution must be made with the knowledge that paramilitary activities were illegal and with the intent of furthering illegal aims, and (ii) the knowledge and intent requirements are sufficiently clear to survive a claim that the statute is either unconstitutionally vague or overbroad. It is a difficult question whether Congress also may prohibit financial contributions that are made with the intent of assisting paramilitary activities, even where such activities are not themselves unlawful. The critical inquiry is whether it is possible to distinguish a ban on contributions made for the purpose of assisting lawful private military activities from a ban on contributions to lawful private military organizations. In that regard, a ban on financial contributions for paramilitary activities arguably relates to separately identifiable conduct that may be perceived by others as expressive of particular views, but which, on its face, does not necessarily convey any message. To the extent that the contribution made for the purpose of paramilitary activities does contain elements of protected political expression and association, the prohibition would satisfy First Amendment requirements if it serves an important or substantial interest that is unrelated to the suppression of communication and the incidental restriction on speech is no greater than essential to the achievement of that interest.

I. Sources of Authority over Private Militias

A. The Militia Clauses

With respect to militias, the Constitution empowers Congress

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

U.S. Const. art. I, § 8, cls. 15, 16. The Constitution further sets forth that, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. 2.

As used in the Constitution, the term "militia" was meant to refer to "all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.'" United States v. Miller, 307 U.S. 174, 179 (1939). Prior to the ratification of the Constitution, militias were maintained in each of the colonies and, after the Revolutionary War, were maintained by the states. The framers of the Constitution were uneasy about the prospect of maintaining a standing army. It was feared that a standing army could become an instrument for domestic oppression and tyranny. The framers sought to alleviate these fears by providing for the maintenance of a militia. Because the militia was composed of men who were "citizens primarily, soldiers on occasion," id., it was considered unlikely that it could be coopted in this manner. It was thought that by providing for the militia, the need to raise a standing army might be obviated altogether and, to the extent it was not, the need to resort to a standing army for the enforcement of domestic laws would be greatly diminished because the federal government could first resort to the militia. See id. at 178-79; Joseph Story, Commentaries on the Constitution of the United States, 420-24 (1987); The Federalist No. 29, at 182-87 (Clinton Rossiter, ed., 1961) (Hamilton).

As the term "militia" is broadly inclusive, the Constitution vests the government with complete authority to regulate the militia. See, e.g., Arver v. United States, 245 U.S. 366 (1918); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). Pursuant to its authority to organize, arm, and discipline the militia, Congress has long provided for an organized, or "well regulated," militia, which presently consists of the National Guard. While individual citizens may, in a technical sense, continue to be encompassed within the militia, there is no right in individuals outside the

governmentally organized militia and the national armed forces¹ to associate as a military company or to parade, drill, or engage in maneuvers as such. Presser v. Illinois, 115 U.S. 252, 264 (1886). The Supreme Court has held that states may prohibit all such private military associations. Id. The states derive this authority from their general police power. See, e.g., Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 216 (S.D. Tex. 1982); Commonwealth v. Murphy, 166 Mass. 171 (1896).

The federal government has never sought to prohibit or regulate private military associations and for that reason there are no authoritative pronouncements as to its power in this sphere. It is clear that the federal government does not have a general police power. See United States v. Lopez, 115 S. Ct. 1624 (1995). The Constitution grants Congress authority to organize, arm, and discipline the militia, which represents extremely broad power over the militia. See U.S. Const. art. I, § 8, cl. 16. The groups that we have been asked about, however, are not part of the militia within the meaning of the Constitution, although some appropriate that name. The constitutional militia comprises the National Guard and the "unorganized militia," which is defined as all other "able-bodied males at least 17 years of age and . . . under 45 years of age." 10 U.S.C. § 311. It may well be that many members of the private military organizations we have been asked to discuss are also members of the militia, but that does not render any of these private organizations themselves a part of the militia, just as it would not render any other organization to which an able-bodied male between the ages of 17 and 45 might belong a component of the militia. To avoid confusion on this point, we will refer to private military associations as paramilitary organizations.

Although paramilitary organizations are not themselves part of the militia, they are not necessarily beyond Congress's regulatory authority under the Militia Clauses. The Supreme Court has admonished that

If "the power of regulating the militia and of commanding its services in times of insurrection and invasion are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence and watching over the internal peace of the confederacy" (Federalist No. 29), these powers must also be so construed as to the modes of their exercise as not to defeat the great end in view.

Martin, 25 U.S. (12 Wheat.) at 30. Thus, the Militia Clauses are to be read as a broad grant of authority to Congress to secure the "great end" of those Clauses. The great end is an effective, well-regulated militia force that could contribute to the common defense and secure the internal peace and thereby obviate the need to call upon a standing army to

¹ By armed forces we refer to the organs of the military established and maintained under Congress's war powers and organized under the Department of Defense, specifically the Army, Navy, Air Force, and Marines. See U.S. Const. art. I, § 8, cls. 11-14.

enforce domestic law in response to the founding generation's deep-seated fear of such a deployment of a standing army.

Congress has the extremely broad authority to enact provisions that it deems necessary and proper to securing these ends. See, e.g., M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 313 (1819). So, for example, we opined that the President, acting pursuant to a general delegation of authority from Congress, could require the states to maintain a racially integrated National Guard, even though the Constitution gives the states authority to appoint the officers of the militia and the National Guard had not been called into federal service.² See Executive Action to Eliminate Racially Discriminatory Practices in the National Guard while Operating as a State Unit (May 17, 1963); see also Advisory Opinion, 14 Gray 614 (Mass. 1859). If Congress were to determine that the existence or practices of paramilitary organizations tend to undermine the militia, as Congress has structured it, from achieving its purpose, Congress may take appropriate regulatory steps, including banning paramilitary organizations. In doing so, it would be incumbent upon Congress to define paramilitary organizations with reference to the specific activities that tend to undermine the militia; groups that do nothing that has such negative effects should be exempted.

There are a number of ways in which paramilitary organizations might be found to diminish the achievement of the goals underlying the Militia Clauses and the federal enactments on the subject. Given appropriate findings, Congress may view paramilitary groups as impeding the ability of the constitutional militia, in particular the National Guard, to "watch over the internal peace of the" United States. This conclusion could be supported in one of two ways. First any paramilitary group might in a specific situation purposefully attempt to block the militia from maintaining the peace. Second because paramilitary organizations are not organized, trained, disciplined, or equipped by the government within the militia system, they might take actions that, even if intended to assist the militia, actually undermine it. This was a concern of the framers, who urged that the militia be limited to a select corps that could be thoroughly trained and well-regulated. See, e.g., The Federalist No. 29, at 184-85 (Hamilton). If supported by adequate findings, such concerns would

² The militia has a dual status, as it serves both the federal and state governments. The Constitution contemplates and provides for this duality, authorizing the states to appoint officers of the militia and to train them, subject to the rules prescribed by Congress. The Constitution vests in Congress all remaining authority with respect to the militia, specifically empowering it to provide for the organizing, arming, and disciplining of the militia.

The militia is subject to the plenary authority of the President, pursuant to authority delegated by Congress, to call it into the service of the United States. In this status it is subject to the exclusive control of the federal government. See, e.g., Tarble's Case, 80 U.S. (13 Wall.) 397 (1871). Otherwise, the militia is subject to the concurrent jurisdiction of the federal and state governments, but the authority of the states in this instance is subordinate to that of the federal government. See, e.g., Houston, 18 U.S. (5 Wheat.) at 16.

justify banning paramilitary organizations³ and, a fortiori, prohibiting contributions to such organizations.

In addition to the foregoing concerns, there is a well-established constitutional interest in uniformity with respect to the militia that, in our view, would support imposing less drastic regulations on paramilitary organizations. The experience of the Revolutionary War demonstrated that, if the militia was to be effective, it was necessary that there be uniformity, especially as to organization, discipline, and equipment. See The Federalist No. 25 (Hamilton). As Justice Story explained,

It requires no skill in the science of war to discern, that uniformity in the organization and discipline of the militia will be attended with the most beneficial effects, whenever they are called into service. It will enable them to discharge the duties of the camp and field with mutual intelligence and concert, an advantage of peculiar moment in the operations of an army; and it will enable them to acquire, in a much shorter period, that degree of proficiency in military functions, which is essential to their usefulness.

Joseph Story, Commentaries on the Constitution of the United States 422; accord The Federalist No. 29 (Hamilton). Throughout the nation's first century, efforts to maintain an effective militia force were constantly retarded by the lack of uniformity, especially as to equipment. See generally Perpich v. Department of Defense, 110 S. Ct. 2418, 2423 & n.10 (1990).

In conjunction with this interest in uniformity, we see no reason to doubt that there is ample basis for Congress to conclude that a substantial percentage of the members of paramilitary organizations are also members of the unorganized militia. Because, as such, these individuals might be called into service, see 10 U.S.C. § 312, Congress has a legitimate interest in knowing who these individuals are, what they have been taught, and what sort of weapons and military equipment they are trained to employ. On these grounds, Congress possesses the constitutional authority (subject, of course, to other constitutional limitations, discussed in Part II of this memorandum) to require paramilitary organizations to file reports disclosing their existence, their membership, an inventory of their weapons, and other relevant information regarding their instruction, drilling, and maneuvers.

³ We believe it likely that there is an additional source of authority to ban paramilitary organizations. When the Militia Clauses are read together with the various war powers, particularly the power to raise armies, that the Constitution grants to Congress, see U.S. Const. art. I, § 8, cls. 11-16, it appears that Congress is granted plenary authority over military force and activity in the United States. If so, it would be well within that authority for Congress to determine to provide for one armed force -- those currently arrayed within the Department of Defense -- and one militia and to ban all competing military, or paramilitary, organizations. Again, we have not had the opportunity to research this point fully.

We hasten to point out that, so far as we have been able to research, the Militia Clauses have never been used as a source of authority to regulate private conduct. The text of the Militia Clauses would bear a construction that limited the authority of the federal government to acting directly and exclusively upon the militia. Nevertheless, experience with the other constitutionally enumerated powers of the federal government as well as judicial dicta regarding the extent of the militia power lead us to believe that this limited construction is inappropriate and that a broader assertion of authority would most likely be sustained. Because this authority has never been tested, it is advisable that it be exercised to the extent possible together with additional bases of jurisdiction, such as the power over interstate commerce.

B. The Interstate Commerce Clause

A second source of authority is the Interstate Commerce Clause, art. I, § 8, cl. 3. The Supreme Court has in the past interpreted Congress's commerce power broadly, as a "grant of plenary authority to Congress" that extends to all activities affecting commerce. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). The Court's recent decision in United States v. Lopez, 115 S. Ct. 1624 (1995), however, creates some uncertainty, as it may signal a more narrow construction of the Commerce Clause. Moreover, because the decision is so recent, there is no body of case law assessing its impact. Nonetheless, we believe that, under Lopez, Congress has the commerce power to regulate (which includes prohibiting) many, but perhaps not all, of the activities of paramilitary organizations, subject of course to separate constitutional limitations on the exercise of that power.

In Lopez the Court set out three categories of activity that Congress may regulate under its commerce power: first, "the use of the channels of interstate commerce"; second, "the instrumentalities of interstate commerce, including persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and third, "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." Id. at 1629-30 (citation omitted). The Court concluded that the activity in question -- the possession of a firearm within 1000 feet of a school -- could not be considered to fall within either of the first two categories. Id. at 1630. The Court then held that the activity also did not fall within the third category, noting that the possession of a gun near a school "has nothing to do with 'commerce' or any sort of economic enterprise," that the statute contained no jurisdictional element that would insure an effect on commerce, that the statute contained no legislative findings regarding the effect on interstate commerce, and that education was an area "where States historically have been sovereign." Id. at 1630-32.

Lopez was concerned only with the third category, and nothing in the opinion purported to limit the scope of the first two categories.⁴ Thus, Lopez does not appear to affect Congress's authority to regulate channels or instrumentalities of commerce, even if the threat comes only from intrastate activities. Lopez, 115 S. Ct. at 1629. Moreover, Lopez did not overrule -- or even reject the reasoning of -- any prior cases. In fact, the Court cites many of the earlier cases that involved expansive uses of Congress's commerce power as consistent with its holding in Lopez and merely states that it is not willing to allow further expansion of that power. See id. at 1627-29 & 1634.

We believe that, consistent with Lopez and prior cases, the government can regulate activities that involve the possession or use of firearms that have ever moved in interstate commerce. The Supreme Court suggested in United States v. Bass, 404 U.S. 336 (1971), and squarely adopted in Scarborough v. United States, 431 U.S. 563 (1977), a statutory construction under which felons could be convicted of mere receipt or possession of a firearm if that firearm had traveled in interstate commerce -- even if the defendant had not been a felon when he received it and even if the firearm's travel occurred before it reached the felon. See Scarborough, 431 U.S. at 565 & nn.2, 3 & 5.⁵ The Court in Lopez did not intimate any disagreement with Bass and Scarborough; in fact, Lopez invalidated the Gun-Free School Zones Act in part because, "[u]nlike the statute in Bass, [it] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Lopez 115 S. Ct. at 1631. Lopez, Bass, and Scarborough thus strongly support the proposition that statutes with an explicit connection to interstate commerce -- which can be satisfied by

⁴ In fact, in a case decided just five days after Lopez, the Court held that a gold mine was "engaged in . . . interstate or foreign commerce" within the meaning of a statute -- because some of the mining equipment had been shipped in interstate commerce and because the proprietor had sought workers from another state and had taken some of the gold with him out of state. On this basis, the Court concluded that the government had no obligation to demonstrate that the gold mine "affected" interstate commerce. United States v. Robertson, No. 94-251, slip op. at 2-3 (U.S. May 1, 1995).

⁵ Admittedly, in neither Bass nor Scarborough did the Court directly address the constitutionality of allowing the movement of a firearm across state lines to satisfy the statutory interstate commerce requirement, as both cases focused on statutory construction. The Court's explicit approval of the statutory construction without mentioning any constitutional concerns strongly implies, however, that this construction raises no constitutional problems. Furthermore, the Court noted in Scarborough that it had construed the statute in Bass to extend the interstate commerce requirement to the entire provision because "there was some concern about the constitutionality" of a statute that proscribed mere possession. 431 U.S. at 575. If the Court in Scarborough had had any concerns about the constitutionality of the statute as construed by Bass, it presumably would not have relied on Bass's construction as eliminating the potential constitutional concerns. Moreover, it should be noted that, in Bass, the Court suggested on its own that the government could meet its burden by showing that the gun had traveled in interstate commerce, and it is difficult to imagine that the Court would have suggested a construction that it considered to be constitutionally problematic; the Court has repeatedly stated that statutes are to be construed to avoid constitutional problems, so we must assume that the Court's own suggested construction also avoids such problems.

showing that a firearm has ever traveled in interstate commerce -- are a permissible application of Congress's commerce power.

The significance for paramilitary organizations is that, under this reasoning, the government can regulate those activities of paramilitary organizations that involve firearms that have moved in interstate commerce. The experience of the Department of Justice has been that substantially all firearms have moved in commerce, so the interstate commerce requirement should present no real barrier to the regulation of such activities. See Memorandum for the President from the Attorney General, re: Recommended Strategy in Response to Lopez, at 3 (May 5, 1995). Accordingly, Congress's commerce power extends to regulation of paramilitary organizations' use of firearms.

Thus, paramilitary organizations can be required to give an inventory of their firearms that have moved in interstate commerce, to report any maneuvers or training that involve such firearms, and to register as an organization whose members possess these firearms.⁶ Moreover, even if a paramilitary organization itself does not possess any firearms, individual members' firearms can be subject to the same regulation. Thus, all members who have engaged in the group's activities that involve firearms can be required to give an inventory of the weapons that they use in such activities. In addition, it should be noted that this commerce power would permit Congress not only to regulate but also to prohibit the use of such firearms in specified activities, which would thereby prohibit the firearm-related activities of paramilitary organizations.⁷

There are, in addition, other bases for regulating certain activities of paramilitary organizations. For instance, Congress can regulate paramilitary organizations' use of the instrumentalities of interstate commerce. Obvious examples of such instrumentalities are wire and electronic communications networks and the mail system. In fact, a number of current statutes regulate such communications pursuant to Congress's commerce power. See, e.g., 18 U.S.C. §§ 2510 - 2521. Accordingly, we believe that the commerce power allows Congress to regulate paramilitary organizations' use of the mail system as well as interstate wire and electronic communications networks (e.g., through telephone calls, faxes, or computer modems), which would likely include most forms of organizing and other communication among members. This power would extend not only to interstate communications but also, at least when part of a national regulatory scheme, to intrastate communications. In addition, we believe that Congress could, pursuant to its commerce power, regulate the economic activities of paramilitary organizations, at least when it does so as part of a larger regulatory scheme.

⁶ We do not address the possible application of Congress's commerce power to maneuvers that do not involve firearms but instead involve replicas.

⁷ We also note that the commerce power would give Congress the authority to regulate fund-raising that is related to commercial activities or to the use of firearms.

Arguably, Congress's power over the various commerce-related aspects of paramilitary organizations' activities (i.e., involving firearms, instrumentalities of commerce, and commercial activity) would allow Congress to regulate every aspect of paramilitary organizations, not just those that are directly related to one of the three spheres. Also, it may be possible to regulate all aspects of paramilitary organizations on the theory that the impact of their activities is so great that the groups substantially affect interstate commerce (akin to the impact of weapons of mass destruction, use of which is prohibited by 18 U.S.C. § 2332a). We are uncertain of the viability of these arguments (unless the paramilitary organizations could be characterized as commercial enterprises), particularly in light of Lopez. In any event, the commerce-related aspects that can be regulated would cover many of the activities of paramilitary organizations, especially in light of the breadth of permissible regulations of firearms.

II. Constitutional Limitations on Congress's Powers

Drawing upon the sources of federal legislative power discussed in the previous section -- i.e., the Commerce Clause and the Militia Clauses -- Congress may choose to address paramilitary activities and paramilitary organizations in several different ways. In this section, we consider whether the Bill of Rights -- in particular, the First and Fifth Amendments -- imposes any affirmative restrictions on Congress's power to regulate such activities and organizations. In section A, we consider whether Congress may ban or regulate certain paramilitary operations and maneuvers. In section B, we discuss whether Congress may ban or regulate paramilitary organizations qua organizations. In section C, we consider whether Congress may impose certain restrictions on financial contributions to paramilitary organizations, or contributions intended to be used for paramilitary operations.

A. Regulation of Paramilitary Operations, Drills and Maneuvers

Congress can avoid certain constitutional and definitional problems associated with the regulation of organizations, see infra section II-B, by instead banning or regulating certain paramilitary activities, without respect to who engages in such activity.

1. The Constitution does not bar Congress from banning the possession of certain weapons, nor from banning certain uses of those weapons (within the scope of its affirmative powers under the Militia and Commerce Clauses). Furthermore, even where Congress has not barred individuals from certain uses of weapons, it may bar such persons from banding together to engage in similar activity, such as paramilitary operations, maneuvers, and exercises. "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296 (1981). Thus, a simple statute could read something like the following: "It shall be unlawful for any person over 18 years of age to engage in military or paramilitary operations, drills or maneuvers in association with X or more persons, using firearms or other dangerous weapons, if those weapons have moved in interstate commerce or if the

military or paramilitary operations, drills or maneuvers otherwise affect interstate commerce."⁸

We do not believe that such a ban would impermissibly infringe the First Amendment right to free association. It is possible, of course, that in a particular case, the paramilitary operations, drills, and maneuvers in question may have some expressive element or other associational component that is possibly worthy of some constitutional solicitude. But even where that is so, it would not change our conclusion, so long as Congress's purpose in outlawing such concerted action was unrelated to suppressing such expression or association but was instead designed solely to prevent certain conduct -- such as paramilitary operations, the formation of private armies, and the dangers associated with privately run military forces. Under the test articulated in United States v. O'Brien, 391 U.S. 367, 377 (1968), such conduct-focused regulation is permissible so long as any "incidental" restrictions on First Amendment freedoms are no greater than is essential to the furtherance of a substantial or important governmental interest. As the court explained in Vietnamese Fishermen's Ass'n v. Knights of the KKK, 543 F. Supp. 198, 208-09, 216 (S.D. Tex. 1982), a statute such as that suggested here, i.e., one barring individuals from engaging in paramilitary activity, passes the O'Brien test comfortably. In particular, the proposed statute in essence would only ban association insofar as such association took the form of the conduct that Congress wishes to eliminate -- paramilitary preparation. Organizations and their members, and unaffiliated individuals, would remain entirely free to band together for other purposes, to meet as a group, and to express any viewpoints they desire.

Of course, this type of broad ban on activity might sweep within its scope some activity that not only is explicitly and uniquely expressive in nature, but that also does not threaten the harms that Congress wishes to address -- for example, Civil War battle reenactments and the filming of television productions depicting combat. Even under the O'Brien test, such an incidental restriction on activity protected by the First Amendment might in such cases be considered greater than is "essential" to further the government's interest. The statute probably should, therefore, contain exceptions for activities such as these. Care should be used, however, to ensure that the line between covered and noncovered activity is not implicitly drawn pursuant to impermissible content-based distinctions, for that would raise independent First Amendment concerns. Perhaps, therefore, Congress could add an intent requirement so as adequately to address these concerns -- for example, a requirement that the activity be "with the intent to prepare for actual armed combat."⁹

⁸ The age restriction is suggested so as to exclude from coverage the ubiquitous childhood playground cops-and-robbers escapade.

⁹ In most of the cases currently in the public eye, such an intent requirement will be susceptible of easy proof: the persons engaged in the activities readily acknowledge that such is their intent. This requirement would also have the benefit of being closely tied to the purpose underlying the statute. Another possibility is to limit the prohibition to operations undertaken with actual weapons that are operable or potentially operable. But

2. Instead of banning certain activity, Congress could impose certain restrictions on such activity, or require persons wishing to engage in such activity to register with the government and provide certain information that is germane to Congress's regulatory interests. This would be similar to disclosure requirements that Congress attaches to all sorts of activity, such as business transactions, lobbying, solicitation of charitable donations, and political activities. Moreover, the government can require that individuals register their firearms and other weapons. We therefore see no first constitutional bar to a congressional requirement that individuals register with, and reveal pertinent information to, the government as a condition for engaging in concerted paramilitary activity.

However, insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the individual, requiring such disclosure could violate the Fifth Amendment's protection against self-incrimination. Haynes v. United States, 390 U.S. 85, 96 (1968) (requiring disclosure of certain firearms impermissible because it almost automatically indicated illegal possession). If the "pervasive effect of the information called for . . . is incriminatory," the disclosure may not be compelled. Albertson v. SACB, 382 U.S. 70, 79 (1965) (requiring disclosure of membership in Communist party impermissible because such information would, virtually by necessity, be incriminatory). In order to trigger Fifth Amendment problems, however, the correlation between disclosure and incrimination must be "exceedingly high." Haynes, 390 U.S. at 97. Only "real and appreciable" risks of incrimination are impermissible, id.; "speculative and insubstantial" risks do not raise constitutional concerns, see Marchetti v. United States, 390 U.S. 39, 54 (1968).

B. Regulating Private Paramilitary Organizations

In this section we discuss whether the Constitution bars Congress from regulating, not activity as such, but paramilitary organizations. Congress might, for example, decide to regulate such organizations through registration and disclosure requirements.

As far as we are aware, Connecticut is the only state that has taken such an approach. See Conn. Gen. Stat. Ann. § 27-102 (1991) (requiring officers of "private military force" to file annual sworn statements with secretary of state including copy of organization's bylaws, rules and membership roster).¹⁰ Connecticut appears to impose its reporting requirements only upon groups or organizations with some continuity of structure and existence, such as a club or society. See id. (assuming that a "private military force" will have officers, members, bylaws and rules). The Connecticut statute further defines "private military force" as "any group of five or more persons organized or associated together in a camp, group, organization, company, association or society, or in any other manner, for the purpose of

such a limitation may not cover all of the instances of concern.

¹⁰ As we explain below, Connecticut's requirement of membership disclosure almost certainly is unconstitutional.

drilling or maneuvering with firearms or other dangerous weapons, or with imitations, copies or replicas thereof, or for the purpose of giving or acquiring military training or experience." Id. § 27-101. Even this definition might subsume many associations of individuals who have no intent of ever banding together for actual concerted paramilitary activities. Therefore, Connecticut explicitly excludes from its definition various groups such as governmental military units, reserve corps of any institution of learning, a society of war veterans, the Boy Scouts, and any person acting or appearing in any theatre, motion picture or television production while actually engaged in representing therein military characters or scenes. Id. If a federal statute is drafted, certain constitutional challenges could be avoided by including a similar list. Alternatively, it might be wise to track the definition of "military organization" offered by an expert witness in the Vietnamese Fishermen case, i.e., an organization that makes use of a "command structure, training and discipline so as to function as a combat or combat-support unit." 543 F. Supp. at 203.¹¹

Assuming that neither Congress nor the states made the activities of such organizations unlawful (that is, unless such organizations would be virtually certain to be breaking the law in some respect), there would be no constitutional bar to requiring "paramilitary groups" to register with the government, to disclose their officers, and to have the state make public such information, so long as the affected groups are defined with sufficient specificity.¹²

Indeed, even where there would be a first amendment violation in requiring disclosure or revelation of an organization's members, see below, it has never been disputed that if an organization engages in certain activity that the state properly may regulate, the state can require the organization to register with the state and to disclose its officers (i.e., the persons who speak and act on the organization's behalf) as a condition of engaging in such regulated activity. See, e.g., Communist Party of the United States v. SACB, 367 U.S. 1, 97-101 (1961); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463-64 (1958). The state may require information about an organization's purposes, activities, officials and even

¹¹ So, for example, Congress could define regulated "paramilitary organizations" as those organizations that are formed for the purpose of engaging in drills or maneuvers with firearms or other dangerous weapons, and that make use of paramilitary training and a command structure, in order to function as a combat unit or as a combat-support unit or to prepare for actual paramilitary combat. So as to avoid First Amendment problems, the definition should be drafted without reference to the organization's ideologies, beliefs, and advocacy.

¹² The characteristics of banned organizations would have to be defined with sufficient specificity to ensure fair notice to potential defendants of what constitutes a criminal offense and to protect against arbitrary and/or discriminatory enforcement. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Posters 'N' Things, Ltd. v. United States, 114 S. Ct. 1747, 1754 (1994) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). For an example of a possible definition that likely would pass constitutional muster, see supra note 11.

employees. Id.¹³ This is true with respect to all sorts of organizational activity, such as business transactions, see NAACP, 357 U.S. at 464-65; lobbying, see United States v. Harriss, 347 U.S. 612 (1954), solicitation of charitable donations, see, e.g., International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, 689 F.2d 541, 556 (5th Cir. Unit A 1982), political activities, see, e.g., Buckley, 424 U.S. at 63 (discussing requirement that political committees and candidates register with FCC), etc. There is, therefore, no reason that the state could not require paramilitary groups to register with, and reveal pertinent information to, the state as a condition for engaging in concerted paramilitary activity. For example, such an organization could be required to disclose its officers and its bylaws. Similarly, we see no difficulty in requiring such an organization to disclose any firearms and weapons that the organization itself (as opposed to its members) owns or possesses. Nor does the Constitution bar Congress from requiring such organizations to notify the state of any paramilitary activities or training in which it plans to engage.¹⁴

On the other hand, serious constitutional problems would be raised by a statute requiring paramilitary organizations to disclose the names of their members or persons who have made contributions to the organizations. In a long line of cases, the Supreme Court has ruled that such disclosure requirements are subject to the "closest scrutiny," because they impose considerable burdens on the organizations' members' freedom of association. See, e.g., Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295-96 (1981); Buckley v. Valeo, 424 U.S. at 64-66; Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. at 460-61. That scrutiny almost certainly would prohibit a requirement that paramilitary organizations disclose their membership or list of contributors, at least with respect to organizations that (in addition to mere paramilitary activity and training) engage in advocacy of particular beliefs and ideas. Such a requirement invariably would chill the associational rights of persons who wish to become members of, or contribute to, such organizations. Accordingly, a court would invalidate such a requirement, absent an

¹³ However, insofar as the services performed by employees of an organization may be motivated by a desire to thereby "contribute" to the group and associate themselves with the causes of the group, disclosure of the names of such employees may be barred, pursuant to a showing of actual deterrence of such association. See Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 94-98 (1982) (suggesting that first amendment may permit small, unpopular party to decline to reveal persons who have provided services thereto, because of likelihood that such revelation would chill associational rights of those persons who "choose to express their support for an unpopular cause by providing services rendered scarce by public hostility and suspicion").

¹⁴ However, as explained above, insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the organization, requiring such disclosure could well violate the Fifth Amendment's protection against self-incrimination. If the disclosure requirements are "directed at a highly selective group inherently suspect of criminal activities," and if the "pervasive effect of the information called for . . . is incriminatory," such disclosure may be not be compelled. Albertson, 382 U.S. at 79 (requiring disclosure of membership in Communist party impermissible because such information would, virtually by necessity, be incriminatory).

"overriding and compelling state interest" and a "substantial relation" between the information sought and the state's interest. Brown, 459 U.S. at 92 (citations omitted). This is a test that is virtually impossible for the state to meet.¹⁵ Moreover, even if that strict test somehow were met in a particular case, unpopular organizations (and the private paramilitary groups certainly would fall in this category) nonetheless would receive an exemption from such a requirement upon a showing of a "reasonable probability that the compelled disclosure . . . will subject [the members or contributors] to threats, harassment, or reprisals from either Government officials or private parties.'" Id. at 93 (quoting Buckley, 424 U.S. at 74).

C. Contributions

In this section we discuss whether the Constitution bars Congress from banning either financial contributions to paramilitary organizations, or contributions intended to be used for paramilitary operations.

1. A prohibition on financial contributions to paramilitary organizations may be at odds with the First Amendment. Many paramilitary organizations, in addition to engaging in paramilitary activities, advocate particular political perspectives. There is a strong argument that a contribution to such an organization is a form of political expression and association that is at the heart of the First Amendment, and thus restrictions on such contributions warrant exacting constitutional review. See Buckley v. Valeo, 424 U.S. 1, 16-25 (1976) (per curiam) (political contributions implicate freedoms of expression and association). See also Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981) ("Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression."). A statute barring contributions to paramilitary organizations probably would not be subject to the more lenient O'Brien standards that govern First Amendment challenges to the regulation of conduct that happens to have an expressive component. Indeed, in assessing a limitation on the dollar amount that persons could contribute to political campaigns in Buckley v. Valeo,

¹⁵ Buckley is the only recent case in which such a requirement has survived such scrutiny. There, the Court upheld a campaign-contributor disclosure requirement because of threefold governmental interests of a high magnitude: alerting voters of the sources of a candidate's funding, which would facilitate predictions of the candidate's future performance in office; deterring corruption; and detecting violations of contribution limitations. See 424 U.S. at 66-68. These sorts of interests would not be present in the case of a membership disclosure requirement for paramilitary organizations. Much older precedents in which the Ku Klux Klan and the Communist Party were required to disclose membership lists -- see Bryant v. Zimmerman, 278 U.S. 63 (1928) (KKK); Communist Party of the United States v. SACB, 367 U.S. 1, 97-105 (1961) (Communist Party) -- are of little lasting value, and arguably have implicitly been overruled or have lapsed into desuetude. See, e.g., Albertson, *supra* (disclosure of membership in Communist Party would violate Fifth Amendment); Courier-Journal v. Marshall, 828 F.2d 361, 365-366 (6th Cir. 1987) (Bryant has been implicitly overruled and should no longer be relied upon).

the Supreme Court said that the O'Brien standard did not apply to a limitation on the dollar amount that persons could contribute to political candidates.¹⁶

Although it applied heightened First Amendment scrutiny, the Court in Buckley upheld the limitation, on the grounds that it served the constitutionally sufficient interest of "prevent[ing] of corruption and the appearance of corruption spawned by real or imagined coercive influence of large financial contributions' on candidates' positions and on their actions if elected to office." Id. at 26. It is unclear whether a ban on contributions to paramilitary organizations could survive strict scrutiny. For one, the Court subsequently has described Buckley as "identif[ying] a single narrow exception to the principle that limits on political activity [are] contrary to the First Amendment: . . . the perception of undue influence of large contributors to a candidate." Citizens Against Rent Control, 454 U.S. at 296-97 (emphasis in original). The "narrow exception" of Buckley would be unavailable to justify restrictions on contributions to private military organizations. Cf. Brown v. Socialist Workers' '74 Campaign Committee, 459 U.S. 87 (1982) (interests advanced and accepted by the Court in Buckley are inapplicable when it comes to minor political parties). Moreover, Buckley involved a limitation on the amount of contributions that an individual could make, not an outright ban, thus leaving an outlet for persons to "assist in a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." 424 U.S. at 28.

2. Assuming that it would be within its enumerated powers, Congress could pass a statute prohibiting financial contributions to paramilitary organizations that are made for the purpose of assisting private military activities, where such activities are themselves made unlawful by federal law. Under principles articulated in cases involving restrictions related to affiliation with certain types of groups, such a ban would not violate the First Amendment if (i) the contribution was made with the knowledge that private military operations were illegal, and (ii) with the specific intent of furthering illegal aims. See Healy v. James, 408 U.S. 169, 186 (1972); Elfbrandt v. Russell, 384 U.S. 11, 16-17 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 511 (1964). In addition, the statute would have to be written so as to describe the "knowledge and intent" requirements with sufficient clarity to survive a claim that it is unconstitutionally vague. See Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

¹⁶ The full protection afforded political contributions in Buckley probably cannot be explained away on the grounds that Buckley is just a case about participation in electoral politics. Rather, as the Court in Buckley itself indicated, it was about political advocacy generally. See Buckley, 424 U.S. at 16-17. And in a later case involving campaign contributions, the Court defined that form of speech as encompassed within the broad First Amendment right to "'discuss publicly and truthfully all matters of public consequence.'" First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)). See also McIntyre v. Ohio Election Comm'n, No. 93-986, slip op. at 13 (April 19, 1995) (core political speech need not center on advocacy for particular candidates or for particular election issues; it involves the general "advocacy of a politically controversial viewpoint").

enforcement."). At the same time, the statute would have to be written so as to describe those requirements sufficiently narrowly to survive a claim that it "sweeps within its ambit other activities that constitute an exercise" of protected First Amendment rights. Thornhill v. Alabama, 310 U.S. 88, 97 (1940). See Village of Schaumburg v. Citizens For a Better Environment, 444 U.S. 620 (1980) (ordinance prohibiting door-to-door solicitations of contributions by charitable organizations that did not use at least 75 % of their receipts for "charitable purposes" was overbroad in violation of the First Amendment).

3. It is a difficult question whether Congress also may prohibit financial contributions that are made with the intent of assisting paramilitary activities, even where such activities are not themselves unlawful. Again, such a statutory ban would have to be within the scope of congressional power, and it would need to be carefully drafted so as to avoid vagueness and overbreadth problems. The critical inquiry is whether it is possible to distinguish a ban on contributions made for the purpose of assisting lawful private military activities from a ban on contributions to lawful private military organizations that we believe would raise serious First Amendment concerns under Buckley v. Valeo. Although the issue is far from clear, plausible distinctions could be made.

To begin with, Buckley is not directly on point. Buckley involved a limitation on the purest form of political speech and political association: expression of support for a candidate. It was apparently for that reason that the Court said that it could not decouple any nonspeech elements that may have been reflected in campaign contributions from the speech elements. A ban on contributions to paramilitary organizations triggers concerns under Buckley, because it has a direct impact on the right to express support for, and associate with, a group with a particular set of values.

By contrast, a ban on financial contributions for paramilitary activities arguably relates to "separately identifiable conduct [that may] be perceived by others as expressive of particular views, but which, on its face, does not necessarily convey any message." Cohen v. California, 403 U.S. 15, 18 (1971). Compare Elrod v. Burns, 427 U.S. 347, 363 n.17 (1976) (plurality opinion) (political affiliation requirements imposed on government employees sought to control "association and belief per se, not any particular form of conduct"). That the contributor could still voice support for the values and goals of private military organizations by making a general purpose donation to such groups -- let alone speaking out on behalf of and joining one -- lends further credence to the distinction between the ban on financial contributions for paramilitary activities and a ban on contributions to paramilitary organizations. To the extent that the contribution made for the purpose of paramilitary activities does contain elements of protected political expression and association, the prohibition would satisfy First Amendment requirements if it serves an important or substantial interest that is unrelated to the suppression of communication and the incidental restriction on speech is no greater than essential to the achievement of that interest. O'Brien, 391 U.S. at 377. See Texas v. Johnson, 491 U.S. 397, 410 (1989) (asserted interest underlying statute prohibiting desecration of flag -- the preservation of the flag as a symbol

of nationhood and national unity -- was directly related to the suppression of expression, because it reflected concern over the expression of "less positive concepts" of the flag).

In Buckley, the Court said that even if expenditures on campaigns could be characterized as conduct, the restriction at issue in the case was directly related to the suppression of expression -- curbing the voice of individual voters in elections -- and therefore failed the O'Brien test. 424 U.S. at 17. A ban on contributions for paramilitary activities seemingly would not have the same relationship to expression as the limitation in Buckley. Therefore, that part of the O'Brien test would be satisfied. However, the ban still would have to serve an important or substantial interest. We do not assess in this memorandum the possible interests that might be weighty enough to justify the ban.

This is not exactly what I had in mind, but it should give you a little help. I cannot overemphasize how strongly the Department and the FBI feel that the statement as presently worded is inconsistent with their law-enforcement mission. I will have something more for you tomorrow.

Seth

M E M O R A N D U M

To: HAROLD ICKES
Deputy Chief of Staff

From: SETH P. WAXMAN
Associate Deputy Attorney General

Re: Domestic Terrorism

Date: May 29, 1995

Summary

We have been asked to comment on the following proposed statement regarding domestic terrorism that might be included in the current draft of the President's speech to be given in Colorado on May 31, 1995. That statement reads:

"I have ordered Attorney General Janet Reno to draft an Executive Order requiring the FBI to report on the true nature of terrorist groups in our Nation. Americans should have access to information on the purpose and tactics of such groups before they give money or get involved."

As explained more fully below, we strongly recommend that a revised version of the foregoing statement be given. In place of the language quoted above, we suggest the following:

"I am ordering Attorney General Janet Reno to coordinate an interagency assessment of the domestic terrorist threat and to report promptly to me the results of that assessment."

In addition, if the President wishes to address specifically the so-called "militia" organizations, the statement could include the following:

"I also direct the Attorney General and the Secretary of Defense to prepare legislation to permit lawful regulation of paramilitary organizations currently operating in this country without any meaningful control."

We believe this revised version carries forward the central concept of the original statement -- the creation of a report on domestic terrorism -- while avoiding any misconception that the Administration intends to create a publicly-distributed "subversives" list that might be inconsistent with the First Amendment, the Privacy Act, or the Attorney General's Guidelines for Domestic Terrorism Investigations. The revised version also answers the serious concerns expressed by the FBI that a public report regarding terrorism would compromise ongoing investigations and reveal sensitive or classified law-enforcement information. Finally, the revised statement better accords with the proposal that Congress act to regulate militia groups.

Discussion

- I. The Department and the FBI Already Have Begun an Assessment of Terrorist Activity Pursuant to the Attorney General's Guidelines for Domestic Terrorism Investigations.
 - A. The Department of Justice already has begun an interagency assessment of the domestic terrorist threat. That assessment, which is being led by the Criminal Division and the FBI, has resulted in an agreement by all relevant federal law enforcement agencies to supply the FBI with any information in their possession regarding domestic terrorist organizations or activities.
 - B. The interagency assessment is being conducted pursuant to the Attorney General's Guidelines for Domestic Terrorism Investigations. Those Guidelines limit FBI investigations to circumstances in which there is a possibility or reasonable indication of criminal activity.
 1. The Attorney General's Guidelines were first promulgated in 1976 by Attorney General Levi as a response to the excesses of internal security investigations such as the FBI's COINTELPRO. By requiring that investigations be premised on indications of criminal activity -- including the advocacy of violence -- the Guidelines were intended to end investigations based merely on speech that advocated unpopular opinions or ideologies.

II. It Would Be Appropriate for the President to Direct Publicly That This Assessment Go Forward, As the Department's Proposed Revised Statement Suggests.

- A. Given the interagency nature of this ongoing assessment, it would be highly appropriate for the President to announce that he has ordered it to go forward.
- B. Such an announcement would facilitate interagency cooperation.
- C. The downsides to such a public announcement would be that, by alerting targetted organizations, the announcement itself might make the assessment somewhat more difficult and would engender criticism of the Department's efforts. Nonetheless, if an announcement is to be made, this is far preferable to the proposed language.

III. If the President Elects To Make the Statements As Originally Indicated, A Number of Legal and Constitutional Constraints Would likely Make Any Report Issued So General As to Be of Little Use To the Public.

- A. The original version of the President's statement contemplates that the Department would provide a report that gives "Americans access to information on the purpose and tactics of such groups before they give money or get involved."
- B. But, given the constraints imposed by the Attorney General's Guidelines, the Privacy Act, and the First Amendment, any such report would have to be so generalized as to be virtually meaningless.
- C. In the first place, as noted above, it would be improper under the Attorney General's Guidelines for the FBI to initiate domestic security investigations of groups or individuals absent circumstances indicating the possibility of criminal activity.
 - 1. It follows with even greater force that the FBI could not, consistent with the Attorney General's Guidelines, create a list for public distribution of "suspected" terrorist organizations.
- D. Similarly, the Privacy Act would limit the compilation and release of any such report.
 - 1. Since 1983, the Department has taken the position that the FBI cannot gather publicly-available information regarding an individual's or group's

exercise of First Amendment rights, except in the context of a preliminary inquiry or an investigation into possible criminal activity.

E. Finally, the First Amendment would constrain any publication of a list of "suspect" groups unrelated to ongoing criminal investigations.

1. As the Supreme Court has recognized, "[n]ational security cases ... often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime.... Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." U.S. v. U.S. District Court, 407 U.S. 297, 313 (1972).
2. The creation of a list designed to "chill" membership in particular groups that have not been accused of crimes would create obvious First Amendment issues.
3. Any public list of "suspected" terrorist groups might give rise to charges that the Administration is in essence reinstituting the discredited Attorney General's List of Subversive Organizations, which was abolished by a 1974 Executive Order issued by President Nixon.

IV. Similarly, Any Report Pursuant to the Original Proposed Statement Would Be Constrained by the Need to Protect Against the Public Release of Sensitive or Classified Law Enforcement Information.

- A. The Department's proposed revised statement leaves open the question whether any portion of the domestic terrorism assessment might be made public in the future. This provides appropriate protection to sensitive law enforcement information.
- B. Indeed, in addition to the limitations imposed by the Guidelines, the Privacy Act, and the First Amendment, any release of information in this context would be constrained by the need to protect such information.
- C. The FBI has expressed its strong opposition to any suggestion that information regarding terrorism investigations be released publicly. To do so, they argue would do grave damage to ongoing investigations.
- D. This is particularly so in the foreign intelligence field, which apparently also would be covered by the original proposed statement.

- E. In sum, then, this consideration also would require that any report would have to be so generalized as to be of little use to the public in assessing particular groups.

V. The Revised Statement Also Takes Into Account the Department's Proposal that Congress Regulate the Militia Groups.

- A. ~~To the extent that the underlying goal here is that militias be regulated, the Department has taken the position that such a task should be performed by Congress.~~
- B. The revised statement proposed by the Department thus properly places the President's direction to the Attorney General within the traditional bounds of law enforcement activity, while leaving to Congress regulation of militias.

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Waxman



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

May 28, 1995

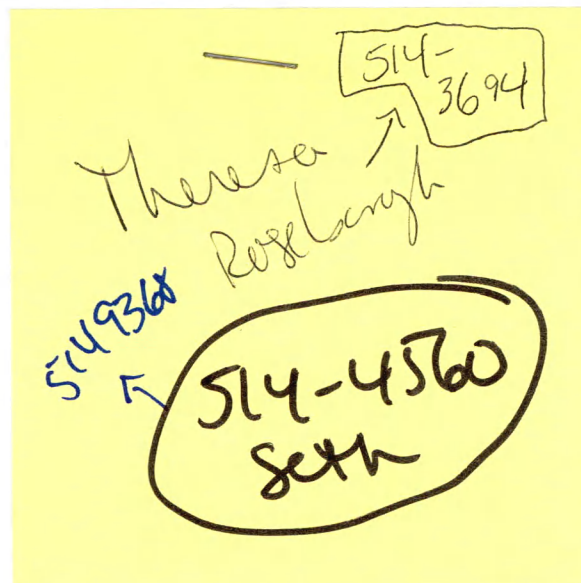
NOTE TO ABNER MIKVA AND JAMES COSTELLO

From: Walter Dellinger *wd*

Attached is a preliminary analysis of Constitutional issues involved in regulating the activities of paramilitary organizations. This was prepared this weekend by Stuart Benjamin, Neil Kinkopf, Marty Lederman and Michael Small who worked under the supervision of Dawn Johnsen. Richard Shiffrin provided a second review.

Given the urgency of the request, as relayed to me by James Costello, I will deliver this memo to the White House at mid-day on Sunday. I need to emphasize to you, however, that our conclusions are tentative, and that this memorandum, finished early Sunday morning, has not yet been review by our paralegal staff, nor have its conclusions been subjected to the internal review process that leads to a final OLC opinion.

We will be pleased, if so requested, to provide further analysis on these and related issues.





U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

May 28, 1995

**MEMORANDUM FOR
WALTER DELLINGER
DAWN JOHNSEN
RICHARD SHIFFRIN**

From: Stuart Benjamin
Neil Kinkopf
Marty Lederman
Michael Small

Re: Preliminary Analysis of Constitutional Issues Involved in Regulating the Activities of
Paramilitary Organizations

You have asked us to determine the extent to which the Constitution authorizes federal legislation to regulate private paramilitary organizations and whether the Constitution, especially through the First Amendment, imposes any limitation on these powers. In the limited time allotted, we have not been able to complete all of the research that would be necessary to formulate final legal conclusions (nor have we had time to citecheck this memorandum). This memorandum sets forth the results of the research and analysis that we have been able to complete this weekend, and the preliminary conclusions that we think are supported. We note, however, that our conclusions are so tentative at this point that they should not form the basis for any significant actions. If it would be timely and helpful, we of course would be happy to continue to research the matter and provide a final draft opinion.

In section I of the memorandum, we examine two possible sources of affirmative authority for federal regulation of paramilitary organizations: the Militia Clauses and the Commerce Clause. The Militia Clauses grant Congress broad power to enact laws to organize a militia and ensure that it is able effectively to fulfill its statutory and constitutional role. Because Congress has not previously sought to regulate the conduct of private actors under this power, there is no judicial precedent ratifying such action. Nevertheless, as explained below, we believe that Congress's authority permits it to regulate any activities that undermine the ability of the militia to achieve its constitutional and statutory purposes. Regulation of this type must be supported by appropriate congressional findings. If so supported and absent other constitutional limitations, a statute could ban paramilitary

activities outright, prohibit contributions to paramilitary organizations, or require paramilitary organizations to file reports disclosing their existence, their membership, an inventory of their weapons, and other relevant information regarding their instruction, drilling, and maneuvers.

Congress's authority under the Interstate Commerce Clause extends to the regulation -- including the prohibition -- of the use of firearms that have ever traveled in interstate commerce (which includes the vast majority of firearms). As a result, the commerce power, absent other constitutional limitations, allows Congress to regulate all of the activities of paramilitary organizations that involve firearms -- such as training and maneuvers -- and to require organizations and members to register an inventory of firearms used in such activities. The commerce power would also permit Congress to regulate paramilitary organizations' use of interstate wire, electronic, and mail communications networks and to regulate their economic activities, at least when the regulation is part of a larger regulatory scheme.

In section II, we consider whether the Bill of Rights -- in particular, the First and Fifth Amendments -- imposes any affirmative restrictions on Congress's power to regulate paramilitary activities and organizations. First, we consider whether Congress may ban or regulate certain activities -- namely, paramilitary operations and maneuvers. We conclude that there would be no constitutional bar on a simple statute reading something like the following: "It shall be unlawful for any person over 18 years of age to engage in military or paramilitary operations, drills or maneuvers in association with X or more persons, using firearms or other dangerous weapons, if those weapons have moved in interstate commerce, or if the military or paramilitary operations, drills or maneuvers otherwise affect interstate commerce." However, because this type of broad ban on activity might sweep within its scope some activity that not only is explicitly and uniquely expressive in nature, but that also does not threaten the harms that Congress wishes to address -- for example, Civil War battle reenactments and the filming of television productions depicting combat -- such a statute probably should contain exceptions for activities such as these to avoid constitutional difficulties, or add an intent requirement that the proscribed activity be "with the intent to prepare for actual armed combat."

Congress alternatively could impose certain restrictions on such activity, or require persons wishing to engage in such activity to register with the government and provide certain information that is germane to Congress's regulatory interests. In order to avoid self-incrimination concerns under the Fifth Amendment, however, Congress must ensure that the required disclosures are not "invariably indicative" of unlawful activity by the affected individuals.

Next, we consider whether the Constitution would impose constraints on Congress's ability to regulate paramilitary organizations, as such. We conclude that it would be constitutionally unproblematic to require paramilitary groups to register with the government and to disclose their officers and paramilitary activities -- and to have the state make public

such information -- as a condition for engaging in concerted paramilitary activity. Nor would the Constitution bar a requirement that an organization disclose any firearms and weapons that the organization owns or possesses. (Again, Fifth Amendment concerns would be raised insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the organization.) The First Amendment almost certainly would, however, invalidate any statute requiring such organizations to disclose the names of their members or persons who have made contributions to the organizations, at least with respect to organizations that, in addition to paramilitary activity and training, engage in advocacy of particular beliefs and ideas.

Finally, we discuss whether Congress may prohibit certain financial contributions. A prohibition on financial contributions to paramilitary organizations may be at odds with the First Amendment. Many paramilitary organizations, in addition to engaging in paramilitary exercises, also advocate particular political views and goals. Thus, a contribution to such an organization is a form of political expression and association that is at the heart of the First Amendment. Nonetheless, assuming that it would be within its enumerated powers, Congress could pass a statute prohibiting financial contributions that are made with the intent of assisting paramilitary activities, where such activities are themselves unlawful under federal law. Such a prohibition would not violate the First Amendment if (i) the statute specifies that the contribution must be made with the knowledge that paramilitary activities were illegal and with the intent of furthering illegal aims, and (ii) the knowledge and intent requirements are sufficiently clear to survive a claim that the statute is either unconstitutionally vague or overbroad. It is a difficult question whether Congress also may prohibit financial contributions that are made with the intent of assisting paramilitary activities, even where such activities are not themselves unlawful. The critical inquiry is whether it is possible to distinguish a ban on contributions made for the purpose of assisting lawful private military activities from a ban on contributions to lawful private military organizations. In that regard, a ban on financial contributions for paramilitary activities arguably relates to separately identifiable conduct that may be perceived by others as expressive of particular views, but which, on its face, does not necessarily convey any message. To the extent that the contribution made for the purpose of paramilitary activities does contain elements of protected political expression and association, the prohibition would satisfy First Amendment requirements if it serves an important or substantial interest that is unrelated to the suppression of communication and the incidental restriction on speech is no greater than essential to the achievement of that interest.

I. Sources of Authority over Private Militias

A. The Militia Clauses

With respect to militias, the Constitution empowers Congress

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

U.S. Const. art. I, § 8, cls. 15, 16. The Constitution further sets forth that, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. 2.

As used in the Constitution, the term "militia" was meant to refer to "all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.'" United States v. Miller, 307 U.S. 174, 179 (1939). Prior to the ratification of the Constitution, militias were maintained in each of the colonies and, after the Revolutionary War, were maintained by the states. The framers of the Constitution were uneasy about the prospect of maintaining a standing army. It was feared that a standing army could become an instrument for domestic oppression and tyranny. The framers sought to alleviate these fears by providing for the maintenance of a militia. Because the militia was composed of men who were "citizens primarily, soldiers on occasion," *id.*, it was considered unlikely that it could be coopted in this manner. It was thought that by providing for the militia, the need to raise a standing army might be obviated altogether and, to the extent it was not, the need to resort to a standing army for the enforcement of domestic laws would be greatly diminished because the federal government could first resort to the militia. *See id.* at 178-79; Joseph Story, *Commentaries on the Constitution of the United States*, 420-24 (1987); The Federalist No. 29, at 182-87 (Clinton Rossiter, ed., 1961) (Hamilton).

As the term "militia" is broadly inclusive, the Constitution vests the government with complete authority to regulate the militia. *See, e.g., Arver v. United States*, 245 U.S. 366 (1918); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). Pursuant to its authority to organize, arm, and discipline the militia, Congress has long provided for an organized, or "well regulated," militia, which presently consists of the National Guard. While individual citizens may, in a technical sense, continue to be encompassed within the militia, there is no right in individuals outside the

governmentally organized militia and the national armed forces¹ to associate as a military company or to parade, drill, or engage in maneuvers as such. Presser v. Illinois, 115 U.S. 252, 264 (1886). The Supreme Court has held that states may prohibit all such private military associations. Id. The states derive this authority from their general police power. See, e.g., Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 216 (S.D. Tex. 1982); Commonwealth v. Murphy, 166 Mass. 171 (1896).

The federal government has never sought to prohibit or regulate private military associations and for that reason there are no authoritative pronouncements as to its power in this sphere. It is clear that the federal government does not have a general police power. See United States v. Lopez, 115 S. Ct. 1624 (1995). The Constitution grants Congress authority to organize, arm, and discipline the militia, which represents extremely broad power over the militia. See U.S. Const. art. I, § 8, cl. 16. The groups that we have been asked about, however, are not part of the militia within the meaning of the Constitution, although some appropriate that name. The constitutional militia comprises the National Guard and the "unorganized militia," which is defined as all other "able-bodied males at least 17 years of age and . . . under 45 years of age." 10 U.S.C. § 311. It may well be that many members of the private military organizations we have been asked to discuss are also members of the militia, but that does not render any of these private organizations themselves a part of the militia, just as it would not render any other organization to which an able-bodied male between the ages of 17 and 45 might belong a component of the militia. To avoid confusion on this point, we will refer to private military associations as paramilitary organizations.

Although paramilitary organizations are not themselves part of the militia, they are not necessarily beyond Congress's regulatory authority under the Militia Clauses. The Supreme Court has admonished that

If "the power of regulating the militia and of commanding its services in times of insurrection and invasion are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence and watching over the internal peace of the confederacy" (Federalist No. 29), these powers must also be so construed as to the modes of their exercise as not to defeat the great end in view.

Martin, 25 U.S. (12 Wheat.) at 30. Thus, the Militia Clauses are to be read as a broad grant of authority to Congress to secure the "great end" of those Clauses. The great end is an effective, well-regulated militia force that could contribute to the common defense and secure the internal peace and thereby obviate the need to call upon a standing army to

¹ By armed forces we refer to the organs of the military established and maintained under Congress's war powers and organized under the Department of Defense, specifically the Army, Navy, Air Force, and Marines. See U.S. Const. art. I, § 8, cls. 11-14.

enforce domestic law in response to the founding generation's deep-seated fear of such a deployment of a standing army.

Congress has the extremely broad authority to enact provisions that it deems necessary and proper to securing these ends. See, e.g., M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 313 (1819). So, for example, we opined that the President, acting pursuant to a general delegation of authority from Congress, could require the states to maintain a racially integrated National Guard, even though the Constitution gives the states authority to appoint the officers of the militia and the National Guard had not been called into federal service.² See Executive Action to Eliminate Racially Discriminatory Practices in the National Guard while Operating as a State Unit (May 17, 1963); see also Advisory Opinion, 14 Gray 614 (Mass. 1859). If Congress were to determine that the existence or practices of paramilitary organizations tend to undermine the militia, as Congress has structured it, from achieving its purpose, Congress may take appropriate regulatory steps, including banning paramilitary organizations. In doing so, it would be incumbent upon Congress to define paramilitary organizations with reference to the specific activities that tend to undermine the militia; groups that do nothing that has such negative effects should be exempted.

There are a number of ways in which paramilitary organizations might be found to diminish the achievement of the goals underlying the Militia Clauses and the federal enactments on the subject. Given appropriate findings, Congress may view paramilitary groups as impeding the ability of the constitutional militia, in particular the National Guard, to "watch over the internal peace of the" United States. This conclusion could be supported in one of two ways. First any paramilitary group might in a specific situation purposefully attempt to block the militia from maintaining the peace. Second because paramilitary organizations are not organized, trained, disciplined, or equipped by the government within the militia system, they might take actions that, even if intended to assist the militia, actually undermine it. This was a concern of the framers, who urged that the militia be limited to a select corps that could be thoroughly trained and well-regulated. See, e.g., The Federalist No. 29, at 184-85 (Hamilton). If supported by adequate findings, such concerns would

² The militia has a dual status, as it serves both the federal and state governments. The Constitution contemplates and provides for this duality, authorizing the states to appoint officers of the militia and to train them, subject to the rules prescribed by Congress. The Constitution vests in Congress all remaining authority with respect to the militia, specifically empowering it to provide for the organizing, arming, and disciplining of the militia.

The militia is subject to the plenary authority of the President, pursuant to authority delegated by Congress, to call it into the service of the United States. In this status it is subject to the exclusive control of the federal government. See, e.g., Tarble's Case, 80 U.S. (13 Wall.) 397 (1871). Otherwise, the militia is subject to the concurrent jurisdiction of the federal and state governments, but the authority of the states in this instance is subordinate to that of the federal government. See, e.g., Houston, 18 U.S. (5 Wheat.) at 16.

justify banning paramilitary organizations³ and, a fortiori, prohibiting contributions to such organizations.

In addition to the foregoing concerns, there is a well-established constitutional interest in uniformity with respect to the militia that, in our view, would support imposing less drastic regulations on paramilitary organizations. The experience of the Revolutionary War demonstrated that, if the militia was to be effective, it was necessary that there be uniformity, especially as to organization, discipline, and equipment. See The Federalist No. 25 (Hamilton). As Justice Story explained,

It requires no skill in the science of war to discern, that uniformity in the organization and discipline of the militia will be attended with the most beneficial effects, whenever they are called into service. It will enable them to discharge the duties of the camp and field with mutual intelligence and concert, an advantage of peculiar moment in the operations of an army; and it will enable them to acquire, in a much shorter period, that degree of proficiency in military functions, which is essential to their usefulness.

Joseph Story, Commentaries on the Constitution of the United States 422; accord The Federalist No. 29 (Hamilton). Throughout the nation's first century, efforts to maintain an effective militia force were constantly retarded by the lack of uniformity, especially as to equipment. See generally Perpich v. Department of Defense, 110 S. Ct. 2418, 2423 & n.10 (1990).

In conjunction with this interest in uniformity, we see no reason to doubt that there is ample basis for Congress to conclude that a substantial percentage of the members of paramilitary organizations are also members of the unorganized militia. Because, as such, these individuals might be called into service, see 10 U.S.C. § 312, Congress has a legitimate interest in knowing who these individuals are, what they have been taught, and what sort of weapons and military equipment they are trained to employ. On these grounds, Congress possesses the constitutional authority (subject, of course, to other constitutional limitations, discussed in Part II of this memorandum) to require paramilitary organizations to file reports disclosing their existence, their membership, an inventory of their weapons, and other relevant information regarding their instruction, drilling, and maneuvers.

³ We believe it likely that there is an additional source of authority to ban paramilitary organizations. When the Militia Clauses are read together with the various war powers, particularly the power to raise armies, that the Constitution grants to Congress, see U.S. Const. art. I, § 8, cls. 11-16, it appears that Congress is granted plenary authority over military force and activity in the United States. If so, it would be well within that authority for Congress to determine to provide for one armed force -- those currently arrayed within the Department of Defense -- and one militia and to ban all competing military, or paramilitary, organizations. Again, we have not had the opportunity to research this point fully.

We hasten to point out that, so far as we have been able to research, the Militia Clauses have never been used as a source of authority to regulate private conduct. The text of the Militia Clauses would bear a construction that limited the authority of the federal government to acting directly and exclusively upon the militia. Nevertheless, experience with the other constitutionally enumerated powers of the federal government as well as judicial dicta regarding the extent of the militia power lead us to believe that this limited construction is inappropriate and that a broader assertion of authority would most likely be sustained. Because this authority has never been tested, it is advisable that it be exercised to the extent possible together with additional bases of jurisdiction, such as the power over interstate commerce.

B. The Interstate Commerce Clause

A second source of authority is the Interstate Commerce Clause, art. I, § 8, cl. 3. The Supreme Court has in the past interpreted Congress's commerce power broadly, as a "grant of plenary authority to Congress" that extends to all activities affecting commerce. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). The Court's recent decision in United States v. Lopez, 115 S. Ct. 1624 (1995), however, creates some uncertainty, as it may signal a more narrow construction of the Commerce Clause. Moreover, because the decision is so recent, there is no body of case law assessing its impact. Nonetheless, we believe that, under Lopez, Congress has the commerce power to regulate (which includes prohibiting) many, but perhaps not all, of the activities of paramilitary organizations, subject of course to separate constitutional limitations on the exercise of that power.

In Lopez the Court set out three categories of activity that Congress may regulate under its commerce power: first, "the use of the channels of interstate commerce"; second, "the instrumentalities of interstate commerce, including persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and third, "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." Id. at 1629-30 (citation omitted). The Court concluded that the activity in question -- the possession of a firearm within 1000 feet of a school -- could not be considered to fall within either of the first two categories. Id. at 1630. The Court then held that the activity also did not fall within the third category, noting that the possession of a gun near a school "has nothing to do with 'commerce' or any sort of economic enterprise," that the statute contained no jurisdictional element that would insure an effect on commerce, that the statute contained no legislative findings regarding the effect on interstate commerce, and that education was an area "where States historically have been sovereign." Id. at 1630-32.

Lopez was concerned only with the third category, and nothing in the opinion purported to limit the scope of the first two categories.⁴ Thus, Lopez does not appear to affect Congress's authority to regulate channels or instrumentalities of commerce, even if the threat comes only from intrastate activities. Lopez, 115 S. Ct. at 1629. Moreover, Lopez did not overrule -- or even reject the reasoning of -- any prior cases. In fact, the Court cites many of the earlier cases that involved expansive uses of Congress's commerce power as consistent with its holding in Lopez and merely states that it is not willing to allow further expansion of that power. See id. at 1627-29 & 1634.

We believe that, consistent with Lopez and prior cases, the government can regulate activities that involve the possession or use of firearms that have ever moved in interstate commerce. The Supreme Court suggested in United States v. Bass, 404 U.S. 336 (1971), and squarely adopted in Scarborough v. United States, 431 U.S. 563 (1977), a statutory construction under which felons could be convicted of mere receipt or possession of a firearm if that firearm had traveled in interstate commerce -- even if the defendant had not been a felon when he received it and even if the firearm's travel occurred before it reached the felon. See Scarborough, 431 U.S. at 565 & nn.2, 3 & 5.⁵ The Court in Lopez did not intimate any disagreement with Bass and Scarborough; in fact, Lopez invalidated the Gun-Free School Zones Act in part because, "[u]nlike the statute in Bass, [it] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Lopez 115 S. Ct. at 1631. Lopez, Bass, and Scarborough thus strongly support the proposition that statutes with an explicit connection to interstate commerce -- which can be satisfied by

⁴ In fact, in a case decided just five days after Lopez, the Court held that a gold mine was "engaged in . . . interstate or foreign commerce" within the meaning of a statute -- because some of the mining equipment had been shipped in interstate commerce and because the proprietor had sought workers from another state and had taken some of the gold with him out of state. On this basis, the Court concluded that the government had no obligation to demonstrate that the gold mine "affected" interstate commerce. United States v. Robertson, No. 94-251, slip op. at 2-3 (U.S. May 1, 1995).

⁵ Admittedly, in neither Bass nor Scarborough did the Court directly address the constitutionality of allowing the movement of a firearm across state lines to satisfy the statutory interstate commerce requirement, as both cases focused on statutory construction. The Court's explicit approval of the statutory construction without mentioning any constitutional concerns strongly implies, however, that this construction raises no constitutional problems. Furthermore, the Court noted in Scarborough that it had construed the statute in Bass to extend the interstate commerce requirement to the entire provision because "there was some concern about the constitutionality" of a statute that proscribed mere possession. 431 U.S. at 575. If the Court in Scarborough had had any concerns about the constitutionality of the statute as construed by Bass, it presumably would not have relied on Bass's construction as eliminating the potential constitutional concerns. Moreover, it should be noted that, in Bass, the Court suggested on its own that the government could meet its burden by showing that the gun had traveled in interstate commerce, and it is difficult to imagine that the Court would have suggested a construction that it considered to be constitutionally problematic; the Court has repeatedly stated that statutes are to be construed to avoid constitutional problems, so we must assume that the Court's own suggested construction also avoids such problems.

showing that a firearm has ever traveled in interstate commerce -- are a permissible application of Congress's commerce power.

The significance for paramilitary organizations is that, under this reasoning, the government can regulate those activities of paramilitary organizations that involve firearms that have moved in interstate commerce. The experience of the Department of Justice has been that substantially all firearms have moved in commerce, so the interstate commerce requirement should present no real barrier to the regulation of such activities. See Memorandum for the President from the Attorney General, re: Recommended Strategy in Response to Lopez, at 3 (May 5, 1995). Accordingly, Congress's commerce power extends to regulation of paramilitary organizations' use of firearms.

Thus, paramilitary organizations can be required to give an inventory of their firearms that have moved in interstate commerce, to report any maneuvers or training that involve such firearms, and to register as an organization whose members possess these firearms.⁶ Moreover, even if a paramilitary organization itself does not possess any firearms, individual members' firearms can be subject to the same regulation. Thus, all members who have engaged in the group's activities that involve firearms can be required to give an inventory of the weapons that they use in such activities. In addition, it should be noted that this commerce power would permit Congress not only to regulate but also to prohibit the use of such firearms in specified activities, which would thereby prohibit the firearm-related activities of paramilitary organizations.⁷

There are, in addition, other bases for regulating certain activities of paramilitary organizations. For instance, Congress can regulate paramilitary organizations' use of the instrumentalities of interstate commerce. Obvious examples of such instrumentalities are wire and electronic communications networks and the mail system. In fact, a number of current statutes regulate such communications pursuant to Congress's commerce power. See, e.g., 18 U.S.C. §§ 2510 - 2521. Accordingly, we believe that the commerce power allows Congress to regulate paramilitary organizations' use of the mail system as well as interstate wire and electronic communications networks (e.g., through telephone calls, faxes, or computer modems), which would likely include most forms of organizing and other communication among members. This power would extend not only to interstate communications but also, at least when part of a national regulatory scheme, to intrastate communications. In addition, we believe that Congress could, pursuant to its commerce power, regulate the economic activities of paramilitary organizations, at least when it does so as part of a larger regulatory scheme.

⁶ We do not address the possible application of Congress's commerce power to maneuvers that do not involve firearms but instead involve replicas.

⁷ We also note that the commerce power would give Congress the authority to regulate fund-raising that is related to commercial activities or to the use of firearms.

Arguably, Congress's power over the various commerce-related aspects of paramilitary organizations' activities (i.e., involving firearms, instrumentalities of commerce, and commercial activity) would allow Congress to regulate every aspect of paramilitary organizations, not just those that are directly related to one of the three spheres. Also, it may be possible to regulate all aspects of paramilitary organizations on the theory that the impact of their activities is so great that the groups substantially affect interstate commerce (akin to the impact of weapons of mass destruction, use of which is prohibited by 18 U.S.C. § 2332a). We are uncertain of the viability of these arguments (unless the paramilitary organizations could be characterized as commercial enterprises), particularly in light of Lopez. In any event, the commerce-related aspects that can be regulated would cover many of the activities of paramilitary organizations, especially in light of the breadth of permissible regulations of firearms.

II. Constitutional Limitations on Congress's Powers

Drawing upon the sources of federal legislative power discussed in the previous section -- i.e., the Commerce Clause and the Militia Clauses -- Congress may choose to address paramilitary activities and paramilitary organizations in several different ways. In this section, we consider whether the Bill of Rights -- in particular, the First and Fifth Amendments -- imposes any affirmative restrictions on Congress's power to regulate such activities and organizations. In section A, we consider whether Congress may ban or regulate certain paramilitary operations and maneuvers. In section B, we discuss whether Congress may ban or regulate paramilitary organizations qua organizations. In section C, we consider whether Congress may impose certain restrictions on financial contributions to paramilitary organizations, or contributions intended to be used for paramilitary operations.

A. Regulation of Paramilitary Operations, Drills and Maneuvers

Congress can avoid certain constitutional and definitional problems associated with the regulation of organizations, see infra section II-B, by instead banning or regulating certain paramilitary activities, without respect to who engages in such activity.

1. The Constitution does not bar Congress from banning the possession of certain weapons, nor from banning certain uses of those weapons (within the scope of its affirmative powers under the Militia and Commerce Clauses). Furthermore, even where Congress has not barred individuals from certain uses of weapons, it may bar such persons from banding together to engage in similar activity, such as paramilitary operations, maneuvers, and exercises. "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296 (1981). Thus, a simple statute could read something like the following: "It shall be unlawful for any person over 18 years of age to engage in military or paramilitary operations, drills or maneuvers in association with X or more persons, using firearms or other dangerous weapons, if those weapons have moved in interstate commerce or if the

military or paramilitary operations, drills or maneuvers otherwise affect interstate commerce."⁸

We do not believe that such a ban would impermissibly infringe the First Amendment right to free association. It is possible, of course, that in a particular case, the paramilitary operations, drills, and maneuvers in question may have some expressive element or other associational component that is possibly worthy of some constitutional solicitude. But even where that is so, it would not change our conclusion, so long as Congress's purpose in outlawing such concerted action was unrelated to suppressing such expression or association but was instead designed solely to prevent certain conduct -- such as paramilitary operations, the formation of private armies, and the dangers associated with privately run military forces. Under the test articulated in United States v. O'Brien, 391 U.S. 367, 377 (1968), such conduct-focused regulation is permissible so long as any "incidental" restrictions on First Amendment freedoms are no greater than is essential to the furtherance of a substantial or important governmental interest. As the court explained in Vietnamese Fishermen's Ass'n v. Knights of the KKK, 543 F. Supp. 198, 208-09, 216 (S.D. Tex. 1982), a statute such as that suggested here, *i.e.*, one barring individuals from engaging in paramilitary activity, passes the O'Brien test comfortably. In particular, the proposed statute in essence would only ban association insofar as such association took the form of the conduct that Congress wishes to eliminate -- paramilitary preparation. Organizations and their members, and unaffiliated individuals, would remain entirely free to band together for other purposes, to meet as a group, and to express any viewpoints they desire.

Of course, this type of broad ban on activity might sweep within its scope some activity that not only is explicitly and uniquely expressive in nature, but that also does not threaten the harms that Congress wishes to address -- for example, Civil War battle reenactments and the filming of television productions depicting combat. Even under the O'Brien test, such an incidental restriction on activity protected by the First Amendment might in such cases be considered greater than is "essential" to further the government's interest. The statute probably should, therefore, contain exceptions for activities such as these. Care should be used, however, to ensure that the line between covered and noncovered activity is not implicitly drawn pursuant to impermissible content-based distinctions, for that would raise independent First Amendment concerns. Perhaps, therefore, Congress could add an intent requirement so as adequately to address these concerns -- for example, a requirement that the activity be "with the intent to prepare for actual armed combat."⁹

⁸ The age restriction is suggested so as to exclude from coverage the ubiquitous childhood playground cops-and-robbers escapade.

⁹ In most of the cases currently in the public eye, such an intent requirement will be susceptible of easy proof: the persons engaged in the activities readily acknowledge that such is their intent. This requirement would also have the benefit of being closely tied to the purpose underlying the statute. Another possibility is to limit the prohibition to operations undertaken with actual weapons that are operable or potentially operable. But

2. Instead of banning certain activity, Congress could impose certain restrictions on such activity, or require persons wishing to engage in such activity to register with the government and provide certain information that is germane to Congress's regulatory interests. This would be similar to disclosure requirements that Congress attaches to all sorts of activity, such as business transactions, lobbying, solicitation of charitable donations, and political activities. Moreover, the government can require that individuals register their firearms and other weapons. We therefore see no first constitutional bar to a congressional requirement that individuals register with, and reveal pertinent information to, the government as a condition for engaging in concerted paramilitary activity.

However, insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the individual, requiring such disclosure could violate the Fifth Amendment's protection against self-incrimination. Haynes v. United States, 390 U.S. 85, 96 (1968) (requiring disclosure of certain firearms impermissible because it almost automatically indicated illegal possession). If the "pervasive effect of the information called for . . . is incriminatory," the disclosure may not be compelled. Albertson v. SACB, 382 U.S. 70, 79 (1965) (requiring disclosure of membership in Communist party impermissible because such information would, virtually by necessity, be incriminatory). In order to trigger Fifth Amendment problems, however, the correlation between disclosure and incrimination must be "exceedingly high." Haynes, 390 U.S. at 97. Only "real and appreciable" risks of incrimination are impermissible, id.; "speculative and insubstantial" risks do not raise constitutional concerns, see Marchetti v. United States, 390 U.S. 39, 54 (1968).

B. Regulating Private Paramilitary Organizations

In this section we discuss whether the Constitution bars Congress from regulating, not activity as such, but paramilitary organizations. Congress might, for example, decide to regulate such organizations through registration and disclosure requirements.

As far as we are aware, Connecticut is the only state that has taken such an approach. See Conn. Gen. Stat. Ann. § 27-102 (1991) (requiring officers of "private military force" to file annual sworn statements with secretary of state including copy of organization's bylaws, rules and membership roster).¹⁰ Connecticut appears to impose its reporting requirements only upon groups or organizations with some continuity of structure and existence, such as a club or society. See id. (assuming that a "private military force" will have officers, members, bylaws and rules). The Connecticut statute further defines "private military force" as "any group of five or more persons organized or associated together in a camp, group, organization, company, association or society, or in any other manner, for the purpose of

such a limitation may not cover all of the instances of concern.

¹⁰ As we explain below, Connecticut's requirement of membership disclosure almost certainly is unconstitutional.

drilling or maneuvering with firearms or other dangerous weapons, or with imitations, copies or replicas thereof, or for the purpose of giving or acquiring military training or experience." Id. § 27-101. Even this definition might subsume many associations of individuals who have no intent of ever banding together for actual concerted paramilitary activities. Therefore, Connecticut explicitly excludes from its definition various groups such as governmental military units, reserve corps of any institution of learning, a society of war veterans, the Boy Scouts, and any person acting or appearing in any theatre, motion picture or television production while actually engaged in representing therein military characters or scenes. Id. If a federal statute is drafted, certain constitutional challenges could be avoided by including a similar list. Alternatively, it might be wise to track the definition of "military organization" offered by an expert witness in the Vietnamese Fishermen case, *i.e.*, an organization that makes use of a "command structure, training and discipline so as to function as a combat or combat-support unit." 543 F. Supp. at 203.¹¹

Assuming that neither Congress nor the states made the activities of such organizations unlawful (that is, unless such organizations would be virtually certain to be breaking the law in some respect), there would be no constitutional bar to requiring "paramilitary groups" to register with the government, to disclose their officers, and to have the state make public such information, so long as the affected groups are defined with sufficient specificity.¹²

Indeed, even where there would be a first amendment violation in requiring disclosure or revelation of an organization's members, see below, it has never been disputed that if an organization engages in certain activity that the state properly may regulate, the state can require the organization to register with the state and to disclose its officers (*i.e.*, the persons who speak and act on the organization's behalf) as a condition of engaging in such regulated activity. See, e.g., Communist Party of the United States v. SACB, 367 U.S. 1, 97-101 (1961); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463-64 (1958). The state may require information about an organization's purposes, activities, officials and even

¹¹ So, for example, Congress could define regulated "paramilitary organizations" as those organizations that are formed for the purpose of engaging in drills or maneuvers with firearms or other dangerous weapons, and that make use of paramilitary training and a command structure, in order to function as a combat unit or as a combat-support unit or to prepare for actual paramilitary combat. So as to avoid First Amendment problems, the definition should be drafted without reference to the organization's ideologies, beliefs, and advocacy.

¹² The characteristics of banned organizations would have to be defined with sufficient specificity to ensure fair notice to potential defendants of what constitutes a criminal offense and to protect against arbitrary and/or discriminatory enforcement. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Posters 'N' Things, Ltd. v. United States, 114 S. Ct. 1747, 1754 (1994) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). For an example of a possible definition that likely would pass constitutional muster, see supra note 11.

employees. Id.¹³ This is true with respect to all sorts of organizational activity, such as business transactions, see NAACP, 357 U.S. at 464-65; lobbying, see United States v. Harriss, 347 U.S. 612 (1954), solicitation of charitable donations, see, e.g., International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, 689 F.2d 541, 556 (5th Cir. Unit A 1982), political activities, see, e.g., Buckley, 424 U.S. at 63 (discussing requirement that political committees and candidates register with FCC), etc. There is, therefore, no reason that the state could not require paramilitary groups to register with, and reveal pertinent information to, the state as a condition for engaging in concerted paramilitary activity. For example, such an organization could be required to disclose its officers and its bylaws. Similarly, we see no difficulty in requiring such an organization to disclose any firearms and weapons that the organization itself (as opposed to its members) owns or possesses. Nor does the Constitution bar Congress from requiring such organizations to notify the state of any paramilitary activities or training in which it plans to engage.¹⁴

On the other hand, serious constitutional problems would be raised by a statute requiring paramilitary organizations to disclose the names of their members or persons who have made contributions to the organizations. In a long line of cases, the Supreme Court has ruled that such disclosure requirements are subject to the "closest scrutiny," because they impose considerable burdens on the organizations' members' freedom of association. See, e.g., Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295-96 (1981); Buckley v. Valeo, 424 U.S. at 64-66; Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. at 460-61. That scrutiny almost certainly would prohibit a requirement that paramilitary organizations disclose their membership or list of contributors, at least with respect to organizations that (in addition to mere paramilitary activity and training) engage in advocacy of particular beliefs and ideas. Such a requirement invariably would chill the associational rights of persons who wish to become members of, or contribute to, such organizations. Accordingly, a court would invalidate such a requirement, absent an

¹³ However, insofar as the services performed by employees of an organization may be motivated by a desire to thereby "contribute" to the group and associate themselves with the causes of the group, disclosure of the names of such employees may be barred, pursuant to a showing of actual deterrence of such association. See Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 94-98 (1982) (suggesting that first amendment may permit small, unpopular party to decline to reveal persons who have provided services thereto, because of likelihood that such revelation would chill associational rights of those persons who "choose to express their support for an unpopular cause by providing services rendered scarce by public hostility and suspicion").

¹⁴ However, as explained above, insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the organization, requiring such disclosure could well violate the Fifth Amendment's protection against self-incrimination. If the disclosure requirements are "directed at a highly selective group inherently suspect of criminal activities," and if the "pervasive effect of the information called for . . . is incriminatory," such disclosure may be not be compelled. Albertson, 382 U.S. at 79 (requiring disclosure of membership in Communist party impermissible because such information would, virtually by necessity, be incriminatory).

"overriding and compelling state interest" and a "substantial relation" between the information sought and the state's interest. Brown, 459 U.S. at 92 (citations omitted). This is a test that is virtually impossible for the state to meet.¹⁵ Moreover, even if that strict test somehow were met in a particular case, unpopular organizations (and the private paramilitary groups certainly would fall in this category) nonetheless would receive an exemption from such a requirement upon a showing of a "'reasonable probability that the compelled disclosure . . . will subject [the members or contributors] to threats, harassment, or reprisals from either Government officials or private parties.'" Id. at 93 (quoting Buckley, 424 U.S. at 74).

C. Contributions

In this section we discuss whether the Constitution bars Congress from banning either financial contributions to paramilitary organizations, or contributions intended to be used for paramilitary operations.

1. A prohibition on financial contributions to paramilitary organizations may be at odds with the First Amendment. Many paramilitary organizations, in addition to engaging in paramilitary activities, advocate particular political perspectives. There is a strong argument that a contribution to such an organization is a form of political expression and association that is at the heart of the First Amendment, and thus restrictions on such contributions warrant exacting constitutional review. See Buckley v. Valeo, 424 U.S. 1, 16-25 (1976) (per curiam) (political contributions implicate freedoms of expression and association). See also Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981) ("Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression."). A statute barring contributions to paramilitary organizations probably would not be subject to the more lenient O'Brien standards that govern First Amendment challenges to the regulation of conduct that happens to have an expressive component. Indeed, in assessing a limitation on the dollar amount that persons could contribute to political campaigns in Buckley v. Valeo,

¹⁵ Buckley is the only recent case in which such a requirement has survived such scrutiny. There, the Court upheld a campaign-contributor disclosure requirement because of threefold governmental interests of a high magnitude: alerting voters of the sources of a candidate's funding, which would facilitate predictions of the candidate's future performance in office; deterring corruption; and detecting violations of contribution limitations. See 424 U.S. at 66-68. These sorts of interests would not be present in the case of a membership disclosure requirement for paramilitary organizations. Much older precedents in which the Ku Klux Klan and the Communist Party were required to disclose membership lists -- see Bryant v. Zimmerman, 278 U.S. 63 (1928) (KKK); Communist Party of the United States v. SACB, 367 U.S. 1, 97-105 (1961) (Communist Party) -- are of little lasting value, and arguably have implicitly been overruled or have lapsed into desuetude. See, e.g., Albertson, *supra* (disclosure of membership in Communist Party would violate Fifth Amendment); Courier-Journal v. Marshall, 828 F.2d 361, 365-366 (6th Cir. 1987) (Bryant has been implicitly overruled and should no longer be relied upon).

the Supreme Court said that the O'Brien standard did not apply to a limitation on the dollar amount that persons could contribute to political candidates.¹⁶

Although it applied heightened First Amendment scrutiny, the Court in Buckley upheld the limitation, on the grounds that it served the constitutionally sufficient interest of "prevent[ing] of corruption and the appearance of corruption spawned by real or imagined coercive influence of large financial contributions' on candidates' positions and on their actions if elected to office." Id. at 26. It is unclear whether a ban on contributions to paramilitary organizations could survive strict scrutiny. For one, the Court subsequently has described Buckley as "identif[y]ing" a single narrow exception to the principle that limits on political activity [are] contrary to the First Amendment: . . . the perception of undue influence of large contributors to a candidate." Citizens Against Rent Control, 454 U.S. at 296-97 (emphasis in original). The "narrow exception" of Buckley would be unavailable to justify restrictions on contributions to private military organizations. Cf. Brown v. Socialist Workers' '74 Campaign Committee, 459 U.S. 87 (1982) (interests advanced and accepted by the Court in Buckley are inapplicable when it comes to minor political parties). Moreover, Buckley involved a limitation on the amount of contributions that an individual could make, not an outright ban, thus leaving an outlet for persons to "assist in a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." 424 U.S. at 28.

2. Assuming that it would be within its enumerated powers, Congress could pass a statute prohibiting financial contributions to paramilitary organizations that are made for the purpose of assisting private military activities, where such activities are themselves made unlawful by federal law. Under principles articulated in cases involving restrictions related to affiliation with certain types of groups, such a ban would not violate the First Amendment if (i) the contribution was made with the knowledge that private military operations were illegal, and (ii) with the specific intent of furthering illegal aims. See Healy v. James, 408 U.S. 169, 186 (1972); Elfbrandt v. Russell, 384 U.S. 11, 16-17 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 511 (1964). In addition, the statute would have to be written so as to describe the "knowledge and intent" requirements with sufficient clarity to survive a claim that it is unconstitutionally vague. See Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

¹⁶ The full protection afforded political contributions in Buckley probably cannot be explained away on the grounds that Buckley is just a case about participation in electoral politics. Rather, as the Court in Buckley itself indicated, it was about political advocacy generally. See Buckley, 424 U.S. at 16-17. And in a later case involving campaign contributions, the Court defined that form of speech as encompassed within the broad First Amendment right to "'discuss publicly and truthfully all matters of public consequence.'" First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)). See also McIntyre v. Ohio Election Comm'n, No. 93-986, slip op. at 13 (April 19, 1995) (core political speech need not center on advocacy for particular candidates or for particular election issues; it involves the general "advocacy of a politically controversial viewpoint").

enforcement."). At the same time, the statute would have to be written so as to describe those requirements sufficiently narrowly to survive a claim that it "sweeps within its ambit other activities that constitute an exercise" of protected First Amendment rights. Thornhill v. Alabama, 310 U.S. 88, 97 (1940). See Village of Schaumburg v. Citizens For a Better Environment, 444 U.S. 620 (1980) (ordinance prohibiting door-to-door solicitations of contributions by charitable organizations that did not use at least 75% of their receipts for "charitable purposes" was overbroad in violation of the First Amendment).

3. It is a difficult question whether Congress also may prohibit financial contributions that are made with the intent of assisting paramilitary activities, even where such activities are not themselves unlawful. Again, such a statutory ban would have to be within the scope of congressional power, and it would need to be carefully drafted so as to avoid vagueness and overbreadth problems. The critical inquiry is whether it is possible to distinguish a ban on contributions made for the purpose of assisting lawful private military activities from a ban on contributions to lawful private military organizations that we believe would raise serious First Amendment concerns under Buckley v. Valeo. Although the issue is far from clear, plausible distinctions could be made.

To begin with, Buckley is not directly on point. Buckley involved a limitation on the purest form of political speech and political association: expression of support for a candidate. It was apparently for that reason that the Court said that it could not decouple any nonspeech elements that may have been reflected in campaign contributions from the speech elements. A ban on contributions to paramilitary organizations triggers concerns under Buckley, because it has a direct impact on the right to express support for, and associate with, a group with a particular set of values.

By contrast, a ban on financial contributions for paramilitary activities arguably relates to "separately identifiable conduct [that may] be perceived by others as expressive of particular views, but which, on its face, does not necessarily convey any message." Cohen v. California, 403 U.S. 15, 18 (1971). Compare Elrod v. Burns, 427 U.S. 347, 363 n.17 (1976) (plurality opinion) (political affiliation requirements imposed on government employees sought to control "association and belief per se, not any particular form of conduct"). That the contributor could still voice support for the values and goals of private military organizations by making a general purpose donation to such groups -- let alone speaking out on behalf of and joining one -- lends further credence to the distinction between the ban on financial contributions for paramilitary activities and a ban on contributions to paramilitary organizations. To the extent that the contribution made for the purpose of paramilitary activities does contain elements of protected political expression and association, the prohibition would satisfy First Amendment requirements if it serves an important or substantial interest that is unrelated to the suppression of communication and the incidental restriction on speech is no greater than essential to the achievement of that interest. O'Brien, 391 U.S. at 377. See Texas v. Johnson, 491 U.S. 397, 410 (1989) (asserted interest underlying statute prohibiting desecration of flag -- the preservation of the flag as a symbol

of nationhood and national unity -- was directly related to the suppression of expression, because it reflected concern over the expression of "less positive concepts" of the flag).

In Buckley, the Court said that even if expenditures on campaigns could be characterized as conduct, the restriction at issue in the case was directly related to the suppression of expression -- curbing the voice of individual voters in elections -- and therefore failed the O'Brien test. 424 U.S. at 17. A ban on contributions for paramilitary activities seemingly would not have the same relationship to expression as the limitation in Buckley. Therefore, that part of the O'Brien test would be satisfied. However, the ban still would have to serve an important or substantial interest. We do not assess in this memorandum the possible interests that might be weighty enough to justify the ban.

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For Harold
From Jen

May 10, 1995

**THE FEDERAL GOVERNMENT'S POWER TO
REGULATE PARAMILITARY ORGANIZATIONS**

1. Summary

The federal government, by legislation, may require paramilitary groups to:

- register their existence with federal authorities;
- notify federal and state authorities when they engage in combat maneuvers and military training;
- disclose a list of members; and
- provide an inventory of weapons.

2. The Power to Regulate Private Military Organizations

It is well-settled that private military associations can be regulated by the state government. Both the Supreme Court in 1886, and, more recently, a United States District Court in 1982, have upheld the power of state governments to ban private military activities. These cases make clear that there is no constitutional right to associate as a private military organization.

In Presser v. Illinois, 116 U.S. 252 (1886), the defendant was indicted under an Illinois statute which prohibited "any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms ... without license of the Governor thereof, which license may at any time be revoked...." 116 U.S. at 253. In upholding the prosecution, the Court stated:

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without and independent of an Act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under

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our political system they are subject to the regulation and control of the State and Federal Governments....

116 U.S. at 267 (emphasis supplied).

More recently, in Vietnamese Fishermen's Association v. The Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Texas 1982), an association of Vietnamese fishermen sought to enjoin the military arm of the Ku Klux Klan (the self styled Texas Emergency Reserve) from associating in private military or paramilitary companies under a Texas statute which was virtually identical to the one at issue in Presser. The group sought the injunction on the ground that it was necessary to remedy violations of their civil rights, and to protect them from racial intimidation and violence.

In reviewing the KKK's challenge, the district court stated that it could find "no authority for the proposition that military operations ... are protected by the First Amendment." Id. at 208. As an initial matter, the court concluded that military activities constitute "conduct," rather than "speech." The court further noted that even if such military activity could be characterized as speech, "the threat of violence ... is precisely such an irrefutable and dangerous 'communication' that it resembles the use of 'fighting words,' and, therefore, is not protected by the First Amendment." Id. (citing L. Tribe, American Constitutional Law, § 12-8, at 605). See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Most importantly, the court held that private military activity could be regulated even if it assumed that such conduct were an exercise of free speech. The Court noted that, under United States v. O'Brien, 391 U.S. 367 (1968):

"A governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. at 209 (quoting O'Brien, supra, 391 U.S. at 377).

The court pointed out that (a) under Presser, the state has the power to regulate private military activity; (b) the government interest in regulating such activity -- in view of its inherent danger -- is weighty; (c) the government interest is not intended to, nor does it, suppress free expression; and (d) any

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restriction on First Amendment rights would be minimal, as the defendants were free to express their views by means other than the threat of military force. Id. See also Person v. Miller, 854 F.2d 656 (4th Cir. 1986), cert. denied, 489 U.S. 1011 (1989), (upholding contempt finding based upon a North Carolina statute similar to those in Presser and Vietnamese Fishermen's Ass'n).¹

Finally, it is important to note that regulation of paramilitary groups does not violate the "right of the people to keep and bear arms" under the Second Amendment. The courts in both Presser and Vietnamese Fishermen's Ass'n rejected arguments based upon the Second Amendment. See Presser, supra, 116 U.S. at 266-67; Vietnamese Fishermen's Ass'n, supra, 543 F.Supp. at 210. Indeed, we are unaware of any federal court decision striking down any gun control legislation on Second Amendment grounds.

Thus, in United States v. Miller, 307 U.S. 174 (1939), the defendant challenged, on Second Amendment grounds, his conviction for interstate transportation of a short-barrel shotgun under the National Firearms Act of 1934. In rejecting the defendant's argument, the Court explained that the Second Amendment's right to bear arms exists only within the context of a "well regulated militia." As the Court explained:

In the absence of any evidence tending to show that possession or use of a [short-barrel shotgun] at this time has some reasonable relation to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument ... With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

Id. at 178 (emphasis supplied). See also United States v. Lewis, 445 U.S. 55, 66 (1980) ("legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties"); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992), cert. denied, 113 S.Ct. 1614 (1993); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984).

Hence, the district court in Vietnamese Fishermen's Ass'n, supra, rejected the defendants' Second Amendment challenge to the injunction on private military action, stating:

¹ At least twenty-two other states have statutes barring private military associations. See, e.g., Cal. Penal Code § 11460; Conn. Gen. Stat. §§ 27-101, 27-102; N.Y. Mil. Law § 240. We are unaware of any state statute that has been successfully challenged.

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An injunction against defendants' military activities does no violence to the Second Amendment. By its express language, that 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. United States v. Miller, 307 U.S. 174, 178, 59 S.Ct. 816, 818, 83 L.Ed. 1206 (1939); United States v. Birmley, 529 F.2d 103, 107 (6th Cir. 1976).... In short, the Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies. See United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939); United States v. Cruikshank, 92 U.S. 542, 553, 23 L.Ed. 588 (1876).

543 F.Supp. at 210 (footnote omitted).

3. Implying Federal Powers to Regulate Private Military Groups

The Supreme Court, in Presser, recognized that the federal government, as well as the states, could regulate private military associations:

Military organizations and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments....
116 U.S. at 267 (emphasis supplied).

There are a number of additional sources from which to imply federal power to regulate private military activity. First, Article I, section 8 of the Constitution, gives to Congress broad powers to raise and regulate armies.² Implicit in these powers (or necessary and proper to their implementation) is the right to prevent others from taking military force into their own hands.

Second, federal sovereignty under Article I, section 8, includes the power to regulate state militias as well. The National Guard is the only authorized militia on the state level. Gilligan v. Morgan, 413 U.S. 1, 9 (1973). As the Court recognized,

² Article I, section 8 provides that Congress shall have the power: "[t]o raise and support armies ... [t]o make rules for the Government and Regulation of the land and naval forces ... [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [t]o provide for organizing, arming and disciplining, the Militia ... reserving to the States ... the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"

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the federal government is authorized under Article I, section 8, to provide for organizing, arming and disciplining the Guard. King v. St. Vincent's Hospital, 502 U.S. 215, 216 n.2 (1991); Perpich v. Department of Defense, 496 U.S. 334, 344-46 (1990). Plainly, the federal government's authority to regulate state militias should permit similar restrictions upon private military activity as well.

Third, federal power to regulate paramilitary activity can be derived from the government's right to prevent insurrections; implicit in that right is the prerogative to take reasonable steps to prevent an insurrection before its occurrence. Cf. Martin v. Mott, 25 U.S. 19 (1827); Raymond v. Thomas, 91 U.S. 712 (1875).

Fourth, the federal government undoubtedly has broad power to protect itself from destabilizing forces. As a New York State appellate court observed in another context:

There can be no justification for the organization of [a private military] 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 never used or 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.

Application of Cassidy, 268 A.D. 282, 51 N.Y.S.2d 202, 205 (2d Dept. 1944), aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1947) (emphasis supplied). See also Vietnamese Fishermen's Ass'n, supra, 543 F.Supp. at 216 (finding regulation furthered a "vital government interest because the proliferation of private military organizations threatens to result in lawlessness and destructive chaos").³

Fifth, and finally, notwithstanding the recent Supreme Court ruling in United States v. Lopez, 1995 W.L. 238424 (April 26, 1995), federal regulation of private militias can be based upon the authority of Congress "[t]o regulate Commerce ... among the several

³ In Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 95 (1961), the Supreme Court upheld the Subversive Activities Control Act based upon the unremarkable proposition that the federal government can take action to protect against threats to itself -- even without evidence of military training or military activity in the United States. While the cases upholding regulation of the Communist Party have not been explicitly overruled, they have been largely discredited.

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States...." under Article I, section 8, clause 3 of the Constitution (the Commerce Clause). While the Court's decision in Lopez may engender some uncertainty concerning the scope of Congressional authority under the Commerce Clause, it seems clear that legislation regulating private military organizations meets the criteria established by the Court's decision.⁴

In Lopez, the Court struck down the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A). In reaching its decision, the Court distilled its prior decisions based upon the Commerce Clause, and identified three categories of activity that Congress may regulate under the Commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) those activities that have a "substantial affect" on interstate commerce. Id. at * 6. After noting that the statute did not implicate the first two areas, the Court focused its analysis on the "substantial affect," concluding as follows:

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Id. at * 11.

There are several factors that distinguish regulation of private military activity from the legislation at issue in Lopez. Most importantly, the regulation concerns groups of people -- and weapons that have, presumably, been transported across state lines -- "in interstate commerce." Id. at * 6. Moreover, the activities of these organizations, which are comprised of large groups of

⁴ In his majority opinion, Chief Justice Rehnquist noted that the Court's decision "may in some cases result in legal uncertainty," but pointed out that "Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty 'to say what the law is'" Lopez, 1995 WL 238424 at * 10 (quoting Marbury v. Madison, 1 Cranch. 137, 177 (1803)).

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individuals, have a far more "substantial affect" on interstate commerce than a "local student at a local school."⁵ Id.

4. Disclosure of Membership Lists

In New York ex rel Bryant v. Zimmerman, 273 U.S. 63 (1928), the Supreme Court allowed disclosure of Ku Klux Klan membership lists under a New York state statute directing any association of more than twenty persons which requires an oath as a prerequisite or condition of membership to register and file with the secretary of state a copy of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and list of its officers.

The authority to compel such disclosure was limited, however, by the Supreme Court in NAACP v. State of Alabama, 357 U.S. 449 (1958) and its progeny. In that case, the Court recognized that an order of a state court requiring the NAACP to make its membership lists available to the state would have a deterrent effect upon the members' right to freedom of association guaranteed by the First and Fourteenth Amendments. Consequently, the Court held that the NAACP did not have to turn over its membership lists because the state had failed to show a substantial interest in obtaining them. Similarly, in Gibson v. Florida Legislative Investigation Co., 372 U.S. 539 (1963), the Court stated that the test to reconcile the government's interest in seeking disclosure of an organization's members and the members' right to freedom of association is whether the state can "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." 372 U.S. at 546. See also Bates v. Little Rock, 361 U.S. 516 (1960); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961).⁶

⁵ This is even more likely if the definition of a paramilitary organization were to require the participation of a minimum number of persons. For example, Connecticut's statute defines a private military force as "any group of five or more persons organized or associated together in a camp, group, organization, company, association or society, or in any other manner, for the purpose of drilling or maneuvering with firearms or other dangerous weapons, or with imitations, copies or replicas thereof, or for the purpose of giving or acquiring military training or experience...." Conn.Gen.St. § 27-101.

⁶ In several of the "Communist Party" cases, the Court found a compelling interest justifying disclosure of the names of members. See, e.g., Uphaus v. Wyman, 360 U.S. 72 (1959) (state's compelling interest in self-preservation justified disclosure of the names of persons who attended summer camps allegedly operated by subversive organizations). See also Communist Party of United (continued...)

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There are several compelling government interests to justify obtaining the membership lists of private military associations. For example, the identity of members would be important to the federal government for the purpose of locating weapons and understanding the nature of the military activities engaged in or contemplated by the groups.

In addition, the federal government's well-recognized power under the Commerce Clause to require licensing and registration in connection with firearms and ammunition would similarly provide the authority to require disclosure of membership lists and an inventory of weapons. See generally 18 U.S.C. S 921, et seq.; 26 U.S.C. S 5841, et seq.

5. Conclusion

Regulation of paramilitary groups by the federal government is both permissible under the Constitution and appropriate in view of the threat these organizations pose. Any regulation should be based upon clear legislative findings, and should define the groups to be regulated, focusing on their military activities. Statutes which are already on the books in close to two dozen states provide guidance for defining the groups and the prohibited activities.

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Joshua F. Scheier

⁶(...continued)

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May 10, 1995

**THE FEDERAL GOVERNMENT'S POWER TO
REGULATE PARAMILITARY ORGANIZATIONS**

1. Summary

The federal government, by legislation, may require paramilitary groups to:

- register their existence with federal authorities;
- notify federal and state authorities when they engage in combat maneuvers and military training;
- disclose a list of members; and
- provide an inventory of weapons.

2. The Power to Regulate Private Military Organizations

It is well-settled that private military associations can be regulated by the state government. Both the Supreme Court in 1886, and, more recently, a United States District Court in 1982, have upheld the power of state governments to ban private military activities. These cases make clear that there is no constitutional right to associate as a private military organization.

In Presser v. Illinois, 116 U.S. 252 (1886), the defendant was indicted under an Illinois statute which prohibited "any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms ... without license of the Governor thereof, which license may at any time be revoked...." 116 U.S. at 253. In upholding the prosecution, the Court stated:

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without and independent of an Act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under

HERRICK, FEINSTEIN, JJ.

our political system they are subject to the regulation and control of the State and Federal Governments....

116 U.S. at 267 (emphasis supplied).

More recently, in Vietnamese Fishermen's Association v. The Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Texas 1982), an association of Vietnamese fishermen sought to enjoin the military arm of the Ku Klux Klan (the self styled Texas Emergency Reserve) from associating in private military or paramilitary companies under a Texas statute which was virtually identical to the one at issue in Presser. The group sought the injunction on the ground that it was necessary to remedy violations of their civil rights, and to protect them from racial intimidation and violence.

In reviewing the KKK's challenge, the district court stated that it could find "no authority for the proposition that military operations ... are protected by the First Amendment." Id. at 208. As an initial matter, the court concluded that military activities constitute "conduct," rather than "speech." The court further noted that even if such military activity could be characterized as speech, "the threat of violence ... is precisely such an irrefutable and dangerous 'communication' that it resembles the use of 'fighting words,' and, therefore, is not protected by the First Amendment." Id. (citing L. Tribe, American Constitutional Law, § 12-8, at 605). See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Most importantly, the court held that private military activity could be regulated even if it assumed that such conduct were an exercise of free speech. The Court noted that, under United States v. O'Brien, 391 U.S. 367 (1968):

"A governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. at 209 (quoting O'Brien, supra, 391 U.S. at 377).

The court pointed out that (a) under Presser, the state has the power to regulate private military activity; (b) the government interest in regulating such activity -- in view of its inherent danger -- is weighty; (c) the government interest is not intended to, nor does it, suppress free expression; and (d) any

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restriction on First Amendment rights would be minimal, as the defendants were free to express their views by means other than the threat of military force. Id. See also Person v. Miller, 854 F.2d 656 (4th Cir. 1986), cert. denied, 489 U.S. 1011 (1989), (upholding contempt finding based upon a North Carolina statute similar to those in Presser and Vietnamese Fishermen's Ass'n).¹

Finally, it is important to note that regulation of paramilitary groups does not violate the "right of the people to keep and bear arms" under the Second Amendment. The courts in both Presser and Vietnamese Fishermen's Ass'n rejected arguments based upon the Second Amendment. See Presser, supra, 116 U.S. at 266-67; Vietnamese Fishermen's Ass'n, supra, 543 F.Supp. at 210. Indeed, we are unaware of any federal court decision striking down any gun control legislation on Second Amendment grounds.

Thus, in United States v. Miller, 307 U.S. 174 (1939), the defendant challenged, on Second Amendment grounds, his conviction for interstate transportation of a short-barrel shotgun under the National Firearms Act of 1934. In rejecting the defendant's argument, the Court explained that the Second Amendment's right to bear arms exists only within the context of a "well regulated militia." As the Court explained:

In the absence of any evidence tending to show that possession or use of a [short-barrel shotgun] at this time has some reasonable relation to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument ... With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

Id. at 178 (emphasis supplied). See also United States v. Lewis, 445 U.S. 55, 66 (1980) ("legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties"); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992), cert. denied, 113 S.Ct. 1614 (1993); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984).

Hence, the district court in Vietnamese Fishermen's Ass'n, supra, rejected the defendants' Second Amendment challenge to the injunction on private military action, stating:

¹ At least twenty-two other states have statutes barring private military associations. See, e.g., Cal. Penal Code § 11460; Conn. Gen. Stat. §§ 27-101, 27-102; N.Y. Mil. Law § 240. We are unaware of any state statute that has been successfully challenged.

HERRICK, FEINSTEIN *et al.*

An injunction against defendants' military activities does no violence to the Second Amendment. By its express language, that 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. United States v. Miller, 307 U.S. 174, 178, 59 S.Ct. 816, 818, 83 L.Ed. 1206 (1939); United States v. Birmley, 529 F.2d 103, 107 (6th Cir. 1976).... In short, the Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies. See United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939); United States v. Cruikshank, 92 U.S. 542, 553, 23 L.Ed. 588 (1876).

543 F.Supp. at 210 (footnote omitted).

3. Implying Federal Powers to Regulate Private Military Groups

The Supreme Court, in Presser, recognized that the federal government, as well as the states, could regulate private military associations:

Military organizations and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments....
116 U.S. at 267 (emphasis supplied).

There are a number of additional sources from which to imply federal power to regulate private military activity. First, Article I, section 8 of the Constitution, gives to Congress broad powers to raise and regulate armies.² Implicit in these powers (or necessary and proper to their implementation) is the right to prevent others from taking military force into their own hands.

Second, federal sovereignty under Article I, section 8, includes the power to regulate state militias as well. The National Guard is the only authorized militia on the state level. Gilligan v. Morgan, 413 U.S. 1, 9 (1973). As the Court recognized,

² Article I, section 8 provides that Congress shall have the power: "[t]o raise and support armies ... [t]o make rules for the Government and Regulation of the land and naval forces ... [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [t]o provide for organizing, arming and disciplining, the Militia ... reserving to the States ... the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"

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the federal government is authorized under Article I, section 8, to provide for organizing, arming and disciplining the Guard. King v. St. Vincent's Hospital, 502 U.S. 215, 216 n.2 (1991); Perpich v. Department of Defense, 496 U.S. 334, 344-46 (1990). Plainly, the federal government's authority to regulate state militias should permit similar restrictions upon private military activity as well.

Third, federal power to regulate paramilitary activity can be derived from the government's right to prevent insurrections; implicit in that right is the prerogative to take reasonable steps to prevent an insurrection before its occurrence. Cf. Martin v. Mott, 25 U.S. 19 (1827); Raymond v. Thomas, 91 U.S. 712 (1875).

Fourth, the federal government undoubtedly has broad power to protect itself from destabilizing forces. As a New York State appellate court observed in another context:

There can be no justification for the organization of [a private military] 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 never used or 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.

Application of Cassidy, 268 A.D. 282, 51 N.Y.S.2d 202, 205 (2d Dept. 1944), aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1947) (emphasis supplied). See also Vietnamese Fishermen's Ass'n, supra, 543 F.Supp. at 216 (finding regulation furthered a "vital government interest because the proliferation of private military organizations threatens to result in lawlessness and destructive chaos").³

Fifth, and finally, notwithstanding the recent Supreme Court ruling in United States v. Lopez, 1995 W.L. 238424 (April 26, 1995), federal regulation of private militias can be based upon the authority of Congress "[t]o regulate Commerce ... among the several

³ In Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 95 (1961), the Supreme Court upheld the Subversive Activities Control Act based upon the unremarkable proposition that the federal government can take action to protect against threats to itself -- even without evidence of military training or military activity in the United States. While the cases upholding regulation of the Communist Party have not been explicitly overruled, they have been largely discredited.

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States...." under Article I, section 8, clause 3 of the Constitution (the Commerce Clause). While the Court's decision in Lopez may engender some uncertainty concerning the scope of Congressional authority under the Commerce Clause, it seems clear that legislation regulating private military organizations meets the criteria established by the Court's decision.⁴

In Lopez, the Court struck down the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A). In reaching its decision, the Court distilled its prior decisions based upon the Commerce Clause, and identified three categories of activity that Congress may regulate under the Commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) those activities that have a "substantial affect" on interstate commerce. Id. at * 6. After noting that the statute did not implicate the first two areas, the Court focused its analysis on the "substantial affect," concluding as follows:

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Id. at * 11.

There are several factors that distinguish regulation of private military activity from the legislation at issue in Lopez. Most importantly, the regulation concerns groups of people -- and weapons that have, presumably, been transported across state lines -- "in interstate commerce." Id. at * 6. Moreover, the activities of these organizations, which are comprised of large groups of

⁴ In his majority opinion, Chief Justice Rehnquist noted that the Court's decision "may in some cases result in legal uncertainty," but pointed out that "Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty 'to say what the law is'" Lopez, 1995 WL 238424 at * 10 (quoting Marbury v. Madison, 1 Cranch. 137, 177 (1803)).

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individuals, have a far more "substantial affect" on interstate commerce than a "local student at a local school."⁵ Id.

4. Disclosure of Membership Lists

In New York ex rel Bryant v. Zimmerman, 273 U.S. 63 (1928), the Supreme Court allowed disclosure of Ku Klux Klan membership lists under a New York state statute directing any association of more than twenty persons which requires an oath as a prerequisite or condition of membership to register and file with the secretary of state a copy of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and list of its officers.

The authority to compel such disclosure was limited, however, by the Supreme Court in NAACP v. State of Alabama, 357 U.S. 449 (1958) and its progeny. In that case, the Court recognized that an order of a state court requiring the NAACP to make its membership lists available to the state would have a deterrent effect upon the members' right to freedom of association guaranteed by the First and Fourteenth Amendments. Consequently, the Court held that the NAACP did not have to turn over its membership lists because the state had failed to show a substantial interest in obtaining them. Similarly, in Gibson v. Florida Legislative Investigation Co., 372 U.S. 539 (1963), the Court stated that the test to reconcile the government's interest in seeking disclosure of an organization's members and the members' right to freedom of association is whether the state can "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." 372 U.S. at 546. See also Bates v. Little Rock, 361 U.S. 516 (1960); Louisiana ex rel. Gremlion v. NAACP, 366 U.S. 293 (1961).⁶

⁵ This is even more likely if the definition of a paramilitary organization were to require the participation of a minimum number of persons. For example, Connecticut's statute defines a private military force as "any group of five or more persons organized or associated together in a camp, group, organization, company, association or society, or in any other manner, for the purpose of drilling or maneuvering with firearms or other dangerous weapons, or with imitations, copies or replicas thereof, or for the purpose of giving or acquiring military training or experience...." Conn.Gen.St. § 27-101.

⁶ In several of the "Communist Party" cases, the Court found a compelling interest justifying disclosure of the names of members. See, e.g., Uphaus v. Wyman, 360 U.S. 72 (1959) (state's compelling interest in self-preservation justified disclosure of the names of persons who attended summer camps allegedly operated by subversive organizations). See also Communist Party of United (continued...)

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There are several compelling government interests to justify obtaining the membership lists of private military associations. For example, the identity of members would be important to the federal government for the purpose of locating weapons and understanding the nature of the military activities engaged in or contemplated by the groups.

In addition, the federal government's well-recognized power under the Commerce Clause to require licensing and registration in connection with firearms and ammunition would similarly provide the authority to require disclosure of membership lists and an inventory of weapons. See generally 18 U.S.C. S 921, et seq.; 26 U.S.C. S 5841, et seq.

5. Conclusion

Regulation of paramilitary groups by the federal government is both permissible under the Constitution and appropriate in view of the threat these organizations pose. Any regulation should be based upon clear legislative findings, and should define the groups to be regulated, focusing on their military activities. Statutes which are already on the books in close to two dozen states provide guidance for defining the groups and the prohibited activities.

Elizabeth Holtzman
Ronald J. Levine
Joshua F. Scheier

⁶(...continued)

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COUNSEL

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May 10, 1995

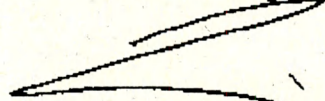
Honorable Harold Ickes
Deputy Chief of Staff
White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Harold:

At Dick Morris' suggestion, I'm sending you a memorandum my colleagues and I prepared on federal powers to regulate paramilitary organizations.

With best wishes,

Sincerely,



Elizabeth Holtzman

EH:nl
Encls.

Ten o'clock -

call & get the
complete document
document looking
& get a copy to
Seth Wapner -
I need a copy

May 10, 1995

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Women:

Alexis - ① Boulder McKay
② television w/
Miami/Cuban time

it's a novel
they, couldn't
wait for
Potus to
go Miami



U. S. Department of Justice
Office of the Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

DATE: May 22, 1995

TO: Jennifer O'Connor
The White House

Telephone No. () - Fax No. () 456 - 7929

FROM: Seth P. Waxman
Associate Deputy Attorney General

Telephone No. (202) 514 - 4560 Fax No. (202) 514 - 9368

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U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

M E M O R A N D U M

TO: HAROLD M. ICKES
Assistant to the President

FROM: SETH P. WAXMAN^{SW}
Associate Deputy Attorney General

RE: Domestic Terrorism

DATE: May 21, 1995

Harold, I understand these are the questions to which you would like answers from DOJ:

1. Could the President constitutionally publish a list of organizations (domestic and otherwise) that support terrorism in the United States? If so, is additional statutory authority needed?
2. With appropriate statutory authority, could the President: (a) prohibit funding to such organizations? (b) outlaw membership in them? or (c) require them to publish a list of their members?

If I've gotten these right, there is no need to reply.

How would you define?

S390 - Potus' omnibus counter terrorism bill. Defines them.

- ① old federalize state laws regulating parental groups
- ② fed states that exist (one dial of domestic)

seth
514-4560

Beverly Jones

Waxman

II

Defining of a terr org, public
of name, forcing it to release
or divulge names of mmbors

- 1) definition of terr org
- 2) do you need stat auth to
order AG to define em
when FBI finds em
can you publicize it
(need stat.? or EO)

3) did we publish

4) did we force em to
give list of mmbors

↑
huge
const.
issues
(in 50s, Com. Party
7 req'd to
divulge b/c
ISA assoc)

Potus has auth to designate
fryn terr orgs (IEPA)
did it in Feb on terr orgs
being Middle East

basis of EO was stat.
(IEPA)

7 know if it covers dom. terr. too

"our"

OLC needs to look at issues

- Pres ter legal does provide for Pres detum. of ter orgs.

limited to for. orgs

~~but not~~

it does define

+ we did use some def

OLC says that's legal

+ if done, we can prohib. \$, support of the org.

you can define, publish name, + prohibit all material support

can't make it list members or prohibit membership in it

unless can prove there are no legit activities

we're on record opposing legis that would ban membership by Americans in Hamas, tho it = illegal to give \$ to Hamas

to - prob not const
+ can't ban membership unless worthy

it does ≠ terrorist

SCT won't let you if it has
lawful ≠ unlawful obj

1) Can he publish list of dom ten
orgs

a def

b const abil,

c stat auth needed

2) can you req them to prov list
of mbrs

3) can you outlaw mbrship in

4) bar funding