



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring  
Attorney General

202 North Ninth Street  
Richmond, Virginia 23219  
804-786-2071  
Fax 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

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The Honorable Charniele L. Herring  
Member, House of Delegates  
Post Office Box 11779  
Alexandria, Virginia 22312

Dear Delegate Herring:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

## Issue Presented

You explain that, on July 9, 2019, heavily-armed private militia members<sup>1</sup> intimidated Virginians who lined up outside the Pocahontas Building to meet with and petition their representatives during a Special Legislative Session. You note that the militia members carried assault-style weapons, wore military fatigues and accessories, patrolled the crowd or took positions suggestive of a security force, and generally assumed the appearance of law enforcement officers. By your account, these militia members were not in line to enter the building and were not seeking to engage with members of the General Assembly. You express concern about similar conduct occurring at the upcoming session of the State Crime Commission, which will meet on August 19 and 20, 2019, to take up legislative proposals from the Special Legislative Session. Accordingly, you have asked whether the conduct of these militia members violates the law.

## Applicable Law

Several provisions of the Constitution of Virginia and the Code of Virginia bear on this question. Article I, § 13 of the Constitution of Virginia provides:

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<sup>1</sup> Based on your request, I assume for purposes of this opinion that the individuals referenced were in fact members of a private militia.

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.<sup>[2]</sup>

Section 15.2-1704(A) of the Code of Virginia states:

The police force of a locality . . . is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.<sup>[3]</sup>

Section 18.2-174 of the Code of Virginia states in relevant part:

Any person who falsely assumes or exercises the functions, powers, duties, and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or any local, city, county, state, or federal law-enforcement officer, or who falsely assumes or pretends to be any such officer, is guilty of a Class 1 misdemeanor.<sup>[4]</sup>

### Discussion

The constitutional and statutory provisions quoted above do not deny anyone the right to speak, assemble, or petition the government. Nor do they impede anyone's right to bear arms. Legitimate concerns are raised, however, "when a group comes as a unit, in uniform, with military or law enforcement weapons, equipment, tactics, and appearance, under a clear chain of command authority, looking like the police or military, and they are neither a part of or subject to the local, state, or federal military or police."<sup>5</sup> The Framers of our Constitution and laws saw fit to address that activity, and proper enforcement of the provisions they crafted will not impair other rights guaranteed under the Constitution of the United States or the Constitution of Virginia.

Article I, § 13 of the Constitution of Virginia makes clear the Framers' intent to preclude private militias. By providing that civilian control of the military should be preserved "in all cases,"<sup>6</sup> the Framers instructed that "no private army or militia would have any justified existence or authority apart from the federal, state, or local authorities."<sup>7</sup>

Article I, § 13, and the strict subordination clause in particular, is closely "intertwined with the survival of representative government and personal freedoms."<sup>8</sup> The provision "ensures the right of all citizens . . . to live free from the fear of an alien soldiery commanded by men who are not responsible to

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<sup>2</sup> VA. CONST. art. I, § 13.

<sup>3</sup> VA. CODE ANN. § 15.2-1704 (2018).

<sup>4</sup> VA. CODE ANN. § 18.2-174 (2014).

<sup>5</sup> *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657, at \*12 (City of Charlottesville Cir. Ct. July 7, 2018).

<sup>6</sup> VA. CONST. art. I, § 13.

<sup>7</sup> *City of Charlottesville*, 2018 WL 4698657, at \*4.

<sup>8</sup> I A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, at 277 (1974).

law and the political process.”<sup>9</sup> It also facilitates the government’s ability to protect the public. As the circuit court recognized in a case arising out of the events in Charlottesville in August 2017, “[i]t is a difficult enough job for the local or state police, or the National Guard for that matter, to control crowds at events such as the Unite the Right rally . . . . With armed but unauthorized militia groups . . . bringing weapons and other military equipment into the fray, law enforcement’s job is much more difficult and dangerous. This may have been part of the impetus for the constitutional provision . . . .”<sup>10</sup>

In accord with Article I, § 13, § 15.2-1704(A) of the Code of Virginia specifically reserves to local police forces “responsibil[ity] for . . . the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.”<sup>11</sup> Likewise, § 18.2-174 of the Code of Virginia prohibits “falsely assum[ing] or exercis[ing] the functions, powers, duties, and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or any local, city, county, state, or federal law-enforcement officer, or . . . falsely assum[ing] or pretend[ing] to be any such officer.”<sup>12</sup> These provisions preserve the principle enshrined in Article I, § 13 that police power is reserved to those “responsible to the people and answerable to the law.”<sup>13</sup>

The conduct you describe can constitute a violation of the criminal prohibition set out in § 18.2-174. You describe a group of private militia members coming as a unit, heavily armed with assault-style weapons, dressed in fatigues and other military accessories, and acting in a coordinated fashion. These militia members patrolled a line of citizens waiting to engage with legislators and projected authority to manage the crowd.

Under the Code of Virginia, the responsibility to “safeguard . . . life and property” and to “preserv[e] . . . peace” is vested in the local police and other properly designated law-enforcement personnel.<sup>14</sup> By engaging in crowd control or purporting to secure a public area, private militia members usurp a role specifically reserved to law enforcement, thereby “assum[ing] or exercis[ing] the functions,

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<sup>9</sup> *Id.*; see also *id.* at 274 (“The final clause of section 13, which dictates subordination of the military to the civil power, possesses more vitality. The passage must be read in conjunction with Article V, section 7, which names the Governor as Commander-in-Chief of the armed forces of the Commonwealth. Since the Governor is an elected official of the civil government, responsible to the people and answerable to the law, his appointment as Commander-in-Chief fulfills the need to keep the military authority integrated with the popular will as expressed through the elected officials of the Commonwealth.”).

<sup>10</sup> *City of Charlottesville*, 2018 WL 4698657, at \*4.

<sup>11</sup> VA. CODE ANN. § 15.2-1704(A). Virginia law recognizes that local police forces may need assistance in certain circumstances and makes appropriate allowances. See, e.g., VA. CODE ANN. § 15.2-1726 (2018) (permitting localities to enter into reciprocal agreements “for cooperation in the furnishing of police services”); *Id.* § 15.2-1724 (2018) (permitting localities to send police officers anywhere in the Commonwealth “in response to any law-enforcement emergency involving any immediate threat to life or public safety”); *id.* § 15.2-1734(A) (2018) (permitting localities to call into service auxiliary police officers “in time of public emergency” or “at such times as there are insufficient numbers of regular police officers to preserve the peace, safety and good order of the community”).

<sup>12</sup> VA. CODE ANN. § 18.2-174.

<sup>13</sup> HOWARD, *supra* n.7, at 274.

<sup>14</sup> VA. CODE ANN. § 15.2-1704; see note 10, *supra*.

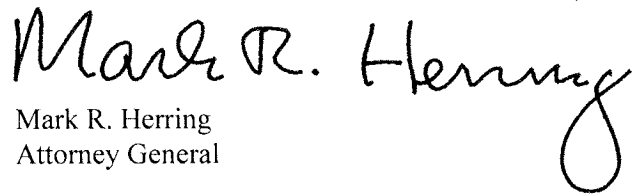
powers, duties, and privileges” of law enforcement or peace officers.<sup>15</sup> The improper assumption of law enforcement authority can be used to intimidate or chill the exercise of rights reserved to our citizens, such as the rights to speak, assemble, and petition the government.<sup>16</sup> Section 18.2-174 prohibits such conduct.

### Conclusion

Accordingly, it is my opinion that the conduct described in your request can constitute a violation of § 18.2-174 of the Code of Virginia.

With kindest regards, I am,

Very truly yours,

  
Mark R. Herring  
Attorney General

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<sup>15</sup> VA. CODE ANN. § 18.2-174. Even if militia members do not actually assume roles reserved for law enforcement, they also can violate the criminal prohibition by “pretend[ing]” to be law enforcement or peace officers. *Id.*

<sup>16</sup> *See* United States v. Chappell, 691 F.3d 388, 399 (4th Cir. 2012) (observing that “[t]he police function serves a significant salutary purpose in protecting public safety, but it also possesses an oppressive potential in the curtailment of liberty” and recognizing that “adding to the legitimate number of officers an untold flock of faux policemen” would “risk expanding the oppressiveness of the police function”).