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LEGISLATIVE BRIEFER

“Guilt by Association” Critical Infrastructure Bills and the Right to Protest

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The US has recently witnessed a rise in demonstrations surrounding the construction of natural gas and oil pipelines, with highly publicized protests at Standing Rock and other pipeline construction sites.¹ Demonstrators have expressed concern about pipelines’ effects on sacred sites, climate change, the local environment, and other issues. In response to these protests, a number of states have proposed (and in some cases passed) bills that proponents claim will protect critical infrastructure from trespass and vandalism.² However, many of these bills include provisions that would chill or limit the rights of protesters at or around infrastructure sites.

These critical infrastructure bills affect protesters’ rights in several concerning ways. Many of the bills, such as those proposed in Pennsylvania and Ohio, and passed in Oklahoma, broadly define “critical infrastructure” to include ubiquitous structures such as telephone poles or railroad tracks.³ This has led to the concern that the bills could be used to prosecute, for instance, a peaceful protester on a sidewalk near a telephone pole. Some bills create harsh new penalties for interference with critical

¹ Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fights*, NPR, Feb. 22, 2017.

² See, e.g., Oklahoma HB 1123 (2017) (enacted), Wyoming SF 0074 (2017) (vetoed by governor), Minnesota SF 3463 (2018) (vetoed by governor), Louisiana HB 727 (2017) (enacted, but conspiracy provision removed), Colorado SB 17-035 (2017) (defeated); Georgia SB 1 (2017) (defeated); Ohio SB 250 (2017) (pending); Pennsylvania SB 652 (2017) (pending).

³ Pennsylvania SB 652 (2017); Ohio SB 250 (2017); Oklahoma HB 1123 (2017).

infrastructure sites with no exemption for peaceful protest. In a proposed bill in Wyoming, for example, a protester engaged in a sit-in that “impeded” the operations of critical infrastructure could face up to ten years imprisonment.⁴ Significantly, much of the behavior targeted in these bills is already criminalized under preexisting law.⁵

This legislative briefer focuses on another aspect of critical infrastructure bills that restricts protest rights: their potential for creating collective liability. Many of the proposed bills contain broad provisions that could be used to hold peaceful protesters or protest organizers, including organizations, liable for the unlawful actions of others. This has led some to call critical infrastructure bills with such provisions “Guilty by Association” bills.⁶ For instance, a 2017 bill enacted in Oklahoma imposes up to a one million dollar fine on organizations found to be “conspirators” in critical infrastructure trespass or damage.⁷ A recent bill proposed in Minnesota would hold an individual or organization liable for trespass or vandalism if they “advise” or “counsel” someone to engage in such activities.⁸ Similarly, a bill proposed in Wyoming creates liability if one “encourages” others to engage in trespass onto or vandalism of critical infrastructure.⁹

This briefer explains how critical infrastructure bills with collective liability provisions can undermine protest rights by making both individual protesters and protest organizers liable for others’ unlawful conduct. These broad provisions create liability for protesters and protest organizers in a way that can frequently violate the First Amendment, criminalizes forms of peaceful protest, and may be unconstitutionally vague. These provisions also create confusion for prosecutors and law enforcement, potentially leading them to take unconstitutional actions, opening up state and local authorities to being sued by protesters who have had their constitutional rights violated.

Liability for Protesters

PROTECTED SPEECH

The First Amendment of the Constitution protects an individual’s right to free speech. The Supreme Court has made clear that speech, including in the course of protests,

⁴ Wyoming SF 0074 (2017).

⁵ For example, in Minnesota, Governor Mark Dayton vetoed a critical infrastructure bill because state law “already address criminal [trespass and vandalism] activity and liability.” Minnesota Veto Letter, May 30, 2018, http://mn.gov/gov-stat/pdf/2018_05_30_LETTER_VETO_Letter_Infrastructure_Protest_Bill.pdf

⁶ Mike Hughlett, *Proposed Minnesota law targets those who train or recruit protesters who damage ‘critical infrastructure’*, STAR TRIBUNE, April 7, 2018. Minnesota Governor Mark Dayton noted this point when he vetoed Minnesota HF 3463 in 2018, stating he would not “support a bill that potentially holds Minnesotans responsible for other people’s actions with which they had no direct involvement.” Minnesota Veto Letter, *supra* note 5

⁷ Oklahoma HB 1123 (2017)

⁸ Minnesota SF 3463 (2018)

⁹ Wyoming SF 0074 (2017)

may not be prohibited simply because it is extreme or disrespectful,¹⁰ although it can be proscribed when it is “directed at inciting or producing imminent lawless action” and is “likely to incite or produce such action.”¹¹ Regulations on protected speech must be narrowly tailored to serve a significant government interest, be content-neutral, and leave open ample alternative channels of communication.¹²

The language in critical infrastructure bills concerning collective liability are frequently overly broad and can be used to infringe on constitutionally-protected speech. Consider the Wyoming bill discussed above, which prohibits “encouraging” protesters who trespass. If protesters chant a generic slogan, such as “Stop the pipeline”, and other protesters then proceed to trespass on property and engage in civil disobedience, a protester who simply joined the chant could potentially be charged for having “encouraged” trespass. However, the protester’s chant is protected speech under the First Amendment.¹³

PROTECTED ASSOCIATION

The right to association is also protected under the First Amendment. In 1982, in *NAACP v. Claiborne Hardware Co.* the Supreme Court affirmed that the First Amendment “restricts the ability of the State to impose liability on an individual solely because of his association with another.”¹⁴ This is true even if some members of a group engage in unlawful acts. As the Court noted, those connected with a social movement “cannot be characterized as [being part of] a violent conspiracy simply by reference to the ephemeral consequences of a relatively few violent acts [of others in the movement].”¹⁵

The use of conspiracy and other collective liability provisions in critical infrastructure bills can infringe the right to association. The definition of conspiracy varies by state, but the offense generally includes an agreement by two or more people to undertake an unlawful act, and some step towards completion of that act.¹⁶ The open-endedness of this definition has had troubling consequences for the right to protest.¹⁷

¹⁰ See *Cohen v. California*, 403 U.S. 15 (1971) (finding the use of provocative language was constitutionally protected speech); *Snyder v. Phelps*, 562 U.S. 443 (2011) (finding provocative protest was protected under the 1st Amendment).

¹¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).

¹² *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹³ *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).

¹⁴ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982).

¹⁵ *Id.* at 933.

¹⁶ Conspiracy, Legal Information Institute, available at <https://www.law.cornell.edu/wex/conspiracy>

¹⁷ Conspiracy charges have a long and inglorious history of being used to target dissent in the United States, including during World War I, the McCarthy era, and protests against the Vietnam War. See generally, David B. Filvaroff, *Conspiracy and the First Amendment*, 121(2) U. OF PENN. L. REV. 189 (1972) (documenting historical examples of how conspiracy charges were used to target dissenting views). In other countries, forms of collective liability have also been used as a tactic to crack down on protests and dissent. For an extreme example, see Burundi’s Law on Public Gatherings (2013) that makes organizers of public rallies civilly and criminally liable for

Significantly, one does not actually have to commit an unlawful act to be found guilty of conspiracy—one only needs to take a step towards commission. For instance, if one agrees to engage in an act of civil disobedience, like a sit-in, and takes steps in planning that sit-in with other protesters, such as by preparing posters or downloading a map of the sit-in location, one could arguably be charged with conspiracy to trespass even if the sit-in never occurs or the person ultimately does not take part in it.

Even chanting a slogan at a demonstration or showing up to a rally where someone else trespasses on property could potentially make one liable as a co-conspirator under a theory of conspiracy. Such a concern is not merely hypothetical. Conspiracy provisions have been read broadly in other protest contexts. For instance, in 2017, despite not having evidence of individual wrongdoing, a U.S. Assistant Attorney cited protesters' collective chanting in Washington DC as evidence of collective action and a "conspiracy to riot" in a trial involving vandalism and other charges.¹⁸

SURVEILLANCE, SEARCH, AND ARREST OF PROTESTERS

Collective liability provisions in critical infrastructure bills not only give prosecutors dangerously wide latitude to prosecute demonstrators, but also make it easier for law enforcement to surveil, search, and arrest protesters.

A warrant for law enforcement to engage in surveillance may be given on "probable cause", which is defined as a "fair probability" that evidence of a crime will be found.¹⁹ It is generally easier for law enforcement to show that there is a "fair probability" that they will find evidence of a conspiracy than other crimes, because a conspiracy does not require an individual to have engaged in any unlawful activity. Even a Google search has been held to be proof of taking part in a conspiracy.²⁰ As such, under critical infrastructure bills with conspiracy provisions, a large numbers of protesters could be surveilled by law enforcement before a rally by showing there is a "fair probability" that protesters could be "conspiring" to take part in or aid civil disobedience during the rally.

Similarly, for law enforcement to search or arrest someone, including during a protest, requires a showing of probable cause. This standard is again easier to meet when one does not have to show evidence of actual unlawful activity, but merely a "fair

any unlawful act committed by anyone attending the gathering, available at

<http://www.icnl.org/research/journal/vol19iss1/Vital%20Nshimirimana%20and%20Audace%20Gatavu.pdf>

¹⁸ Chip Gibbons, *The Prosecution of Inauguration-Day Protesters is a Threat to Dissent*, THE NATION, Oct. 20, 2017.

Those tried under this theory were ultimately acquitted by a jury.

¹⁹ See, *Illinois v. Gates*, 462 U.S. 213 (1983).

²⁰ Aziz Huq, *The latest Supreme Court decision is being hailed as a big victory for digital privacy. Its not.* VOX, June 23, 2018.

probability” that a conspiracy exists to, for example, engage in a sit-in during a protest that may result in trespass.

Liability for those who Organize or Support Protests

The freedom of assembly includes the right of individuals and organizations to organize and facilitate protests. Collective liability language in many critical infrastructure bills, however, can arguably capture constitutionally-protected activities of those who help plan or provide assistance to protesters.

Some critical infrastructure bills would hold organizations that facilitate protests responsible for the unlawful actions of individual protesters. Oklahoma, for example, enacted a law that creates liability for organizations “found to be a conspirator with persons who are found to have committed any [trespass or vandalism under the Act]”.²¹ As discussed above, the use of conspiracy, and related language, could require only attenuated connections between the organization and the individual(s) engaged in an unlawful act.

No organization or organizer can control all the actions of those who attend a demonstration. The inherent uncertainty of what may occur at protests, particularly around politically-sensitive topics, coupled with broad collective liability provisions, may cause some potential organizers to not engage in protest-planning altogether to avoid the risk of being held liable for the actions of participants. Consider, for example, an organization that plans a protest about an issue on which individuals have been known to engage in civil disobedience. Is that organization now open to liability because they have created a scenario in which some protesters might choose to trespass? Would liability follow if nothing unlawful ensues, but the planning organization had knowledge that some protesters were considering acts of civil disobedience, including trespass, and continued with the event anyway?

Or consider an organization that knows civil disobedience might occur at a demonstration and decides to train protesters on how to be peacefully arrested. By trying to create a more orderly demonstration, the organization, or those involved in the training, an over-zealous prosecutor may argue that they are now liable for the actions of those who engage in civil disobedience. As a result, some organizations and organizers may simply choose not to plan demonstrations. In some cases, this could have the effect of silencing constitutionally protected speech. In other cases, this could lead to demonstrations that are less well-planned and so potentially more volatile and dangerous for all involved.

The bills discussed above that create liability for “assisting,” “encouraging,” or “advising” those who trespass could encompass more individuals and organizations

²¹ Oklahoma HB 1123 (2017)

than just protest organizers. Groups or individuals who provide water or medical aid to protestors committing civil disobedience could face high criminal penalties for “assisting” these protesters. Even an individual who simply attended a planning meeting could potentially become liable if their attendance was viewed to have “assisted” or “encouraged” a demonstration where civil disobedience then occurred.

Finally, the penalties of many of these bills are more than punitive, they are silencing. For example, the critical infrastructure enacted in Oklahoma allows for fines of up to one million dollars for organizations found to be a conspirator in critical infrastructure trespass or damage. This level of financial penalty is catastrophic for a small organization and to avoid potential liability they may simply decide not to organize a protest.

Vagueness

The collective liability provisions of these critical infrastructure bills are not only broad, but also vague. The U.S Supreme Court has held that a law is unconstitutionally vague when it does not “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”²² Although it is not clear if any of the provisions of these bills, such as liability for “encouraging” someone to trespass, rise to this standard of unconstitutionality, they can certainly lead to confusion for protesters and protest organizers—as well as for law enforcement and prosecutors—about what constitutes unlawful activity. Not only may this chill constitutionally protected protest, but it could also lead to overzealous law enforcement action against and prosecution of constitutionally protected protest activity. In other contexts, law enforcement overreach has led protesters to sue authorities for violating their rights, resulting in high payouts by the government.²³ State and local authorities have not just a constitutional obligation, but also a financial interest in ensuring that the law is clear.

Conclusion

Critical infrastructure bills with collective liability provisions will likely continue to be introduced by state legislators. Protests around current pipeline construction are ongoing and new pipelines continue to be planned. The American Legislative Exchange Council (ALEC), an influential collective of state legislators and private-sector representatives, has supported states’ adoption of critical infrastructure bills,

²² *Grayned v. City of Rockford* 408 U.S. 104, 108 (1972); See, also, *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (striking down an ordinance banning any assembly of three or more people who “annoy” passersby as being unconstitutionally vague because it has no ascertainable standard).

²³ See, for example, Spencer S. Hsu, *U.S. District settle in last mass-arrest lawsuit in 2002 World Bank protests*, WASHINGTON POST, April 13, 2016.

and has promoted a model bill that contains a collective liability provision.²⁴ The critical infrastructure bills are also part of a larger, continuing, national trend of state legislators introducing legislation that restricts protest rights in contexts other than critical infrastructure, including by imposing forms of collective liability on protesters or protest organizers.²⁵

Collective liability provisions in critical infrastructure bills are frequently both broad and vague. As a result, they can lead to a decline in the willingness of persons or organizations to either plan or participate in a protest and, in many cases, may be unconstitutional. Legislators, the media, and the public should carefully examine provisions in these bills to appreciate their legal and policy implications and how they might undermine protest rights.

Contact Information

If you have questions, would like to learn more about this issue, or ICNL's U.S. Program, please contact us:

Nicholas Robinson

ICNL LEGAL ADVISOR

✉ nrobinson@icnl.org

Elly Page

ICNL LEGAL ADVISOR

✉ epage@icnl.org

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²⁴ Critical Infrastructure Protection Act (2018), available at <https://www.alec.org/model-policy/critical-infrastructure-protection-act/>

²⁵ For more on proposed and passed laws that restrict protests, see ICNL, US Protest Law Tracker, <http://www.icnl.org/usprotestlawtracker/>. AZ SB 1142 (2017) would have added riot to the list of racketeering charges so that even being near a riot could lead to felony racketeering charges. Wisconsin SB 303 (2017) as originally introduced was worded so broadly that someone who was merely at a protest where a destructive incident took place could be charged with participation in a riot.