

One Pager: Preventing Private Paramilitary Activity Act

Background: As evidenced by the January 6, 2021, attack on the U.S. Capitol, private paramilitary actors like the Proud Boys and Oath Keepers pose a serious threat to democracy and the rule of law. Since that time, the threat posed by paramilitary groups has continued and evolved. Such groups have mobilized to intimidate state and local officials, disrupt government proceedings, interfere with the exercise of First Amendment and voting rights, target marginalized communities, and engage in unauthorized law enforcement functions. As the 2024 election season begins in earnest, the risk remains that private paramilitaries could once again mobilize at a mass scale to defend their favored candidate and act on false claims of election fraud.

No federal law exists to directly address private paramilitary activity and protect those whose constitutional rights are threatened by anti-democratic intimidation. Although all 50 states prohibit private paramilitary conduct via constitutional provisions, statutory prohibitions, or both, these laws are often antiquated, underenforced, or ignored entirely. Moreover, the threat posed by private paramilitary organizations is not merely a state or local issue, as these groups often travel across state lines, as they did on January 6.

Legislation Overview: This legislation builds on existing state anti-paramilitary laws to create a new prohibition on unauthorized private paramilitary activity, with both civil and criminal enforcement mechanisms. The prohibition does not bar mere association with paramilitary groups; instead, it holds individuals liable if they engage in certain types of conduct while armed and while acting as part of a private paramilitary organization, which is narrowly defined as a group that is organized in a military-style command structure for the purpose of engaging publicly in pseudo-military or law enforcement-style operations. The categories of prohibited conduct address dangerous conduct engaged in by private paramilitaries:

- (1) publicly patrolling, drilling, or engaging in deadly paramilitary techniques;
- (2) interfering with or interrupting government proceedings;
- (3) interfering with the exercise of someone else's constitutional rights;
- (4) falsely assuming the functions of law enforcement and asserting authority over others; and
- (5) training to engage in such behavior.

The legislation creates different tiers of criminal penalties based on whether violations result in injury or property damage; provides harsher penalties for repeat offenders; and allows for a probationary sentence for first-time offenders. Importantly, it also creates civil remedies by authorizing the Department of Justice to seek injunctive relief against paramilitary activity and by creating a private right of action for individuals harmed by paramilitary activity to seek injunctive relief and/or damages. The legislation also contains clear exceptions for activities such as historic reenactments, state-sanctioned trainings, and veterans' parades.

Legal Background: Congress has the authority to pass this legislation under the Militia Clauses, Necessary and Proper Clause, and Commerce Clause of the U.S. Constitution. The legislation is consistent with First and Second Amendment rights. In upholding a state anti-militia law that barred bodies of men from associating as a military company or organization, or parading or drilling with arms in any city or town, the Supreme Court held in 1886—and reaffirmed in 2008—that the Second Amendment “does not prevent the prohibition of private paramilitary organizations.” *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)). Similarly, the Court held that the law did not infringe on the First Amendment right to peaceably assemble. *Presser*, 116 U.S. at 267.

The legislation applies regardless of the ideology of a private paramilitary group or the targets of their unlawful activity. It is consistent with 18 U.S.C. § 231, which prohibits training to use a firearm, explosive, or technique capable of causing injury or death for use in a civil disorder.