

# The Threat from Unlawful Private Militias Has Evolved. The Federal Government's Response Must Evolve Too.

by [Mary B. McCord](#) and [Jacob Glick](#)

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*Editor's note: This article is part of a [new series](#) from leading experts with practical solutions to democratic backsliding, polarization, and political violence.*

The investigations and prosecutions arising from the January 6, 2021 insurrection exposed the key role [played](#) by paramilitary groups in the attack on the U.S. Capitol. In particular, the leaders of the Proud Boys and the Oath Keepers were convicted of seditious conspiracy and other charges, highlighting the severity of the threat they posed to our democracy in the aftermath of the 2020 presidential election, when they answered then President Donald Trump's call to overturn his election loss. Increased scrutiny of these paramilitary groups by the U.S. government, aided by independent online sleuths, has successfully [degraded](#) the national extremist networks responsible for assaulting the Capitol.

Nevertheless, the threat from unlawful private militias — which are not protected by the U.S. Constitution and [are prohibited in all 50 states](#) — [endures](#). For example, while the leaders and many members of the Proud Boys have been imprisoned in the years since the January 6th attack, the extremist group is reportedly [rebuilding](#). Most recently, members of the Proud Boys were spotted [marching](#) in Springfield, Ohio, amid a spike in violent threats made against the city in response to the baseless demonization of Haitian immigrants by Trump, his running mate, Sen. J.D. Vance, and others.

The threat from other like-minded extremists is [growing](#) as well, even if some of them are more atomized than the Proud Boys. Evidence of the threat they pose to civil society is easy to find. Private militias and white supremacist groups frequently [mobilize](#) against local targets around the country. The result has been a paramilitary movement that is

unified by [common ideological motivations](#), even if they appear to lack the operational cohesiveness that they had in 2020.

As a result, the risks that these groups pose have continued to [evolve](#). In the years since January 6th, America has witnessed increased threats, harassment, and attacks on local government officials and others by actors motivated not just by election fraud conspiracy theories, but also other shared [ideological beliefs](#), including: hostility to COVID-19 vaccine requirements; opposition to racial justice movements; a desire to end reproductive freedom; and an antagonistic attitude toward initiatives intended to make schools and communities more welcoming for LGBTQ+ people. New coalitions of openly white supremacist paramilitary groups — such as [Patriot Front](#) and [Blood Tribe](#) — have risen to prominence, taking a leading role in organizing armed opposition to [LGBTQ+](#) events, which have in some cases resulted in [violence](#). There have also been sporadic instances of violence [targeted](#) at Jewish and Muslim communities in reaction to the ongoing war between Israel and Hamas.

Even in the absence of violence, armed intimidation by paramilitary groups can chill participation in democratic processes by forcing individuals to choose between risking their safety and making their voices heard. The presence of armed vigilantes near [ballot drop boxes](#) and at [school board meetings](#) cast a specter of violence over activities that are a core part of civic life. Their appearance at community events, such as protests and [drag brunches](#), infuses fear into public gatherings. This sort of coordinated intimidation is poisonous for America's democracy, making it less likely that everyday Americans will feel secure in asserting their fundamental rights to liberty and self-government.

Today, the risk of paramilitary violence in the United States looks different than it did in 2020, but the situation remains gravely dangerous. Paramilitary groups have demonstrated they are increasingly willing to threaten ideological opponents at the local level with organized armed force, as well assert illegal law enforcement powers. Even though national militia networks have been weakened in the years since January 6th, paramilitary actors [across the nation](#) are engaged in unlawful efforts to bully, harass, and force their perceived opponents out of the public square. Left unchecked, this creates a tinderbox for further unrest in November and beyond.

## Federal Legislation Can Help Defuse This Threat

As we have [previously written](#), the U.S. Congress can and must act decisively to address this threat. Although a patchwork of laws in all 50 states prohibits paramilitary activity, there is no comprehensive federal statute banning unauthorized private militias, penalizing individuals for engaging in paramilitary activity, or providing a mechanism for civil enforcement to enjoin unlawful activity. The continued proliferation and evolution of paramilitary extremist activity since January 6th — and the inability of federal and state law enforcement to stop some of these incidents — illustrates the need for such a statute. The [seditious conspiracy convictions](#) of the Proud Boys and Oath Keeper leadership also serve as a warning. Both paramilitary groups recruited, trained and plotted to violently prevent the counting of electoral votes required by U.S. law, and thereby prevent the peaceful transition of presidential power. Federal authorities need tools to disrupt and discourage organized paramilitary behavior *before* it reaches the level of violent sedition (as Americans witnessed on January 6th), while still respecting constitutional guarantees of free association and the right to bear arms.

Since 2022, there has been significant movement at the state level to ensure that local law enforcement is properly equipped to combat and prevent paramilitary violence. In [Oregon](#), lawmakers passed a bipartisan bill that created a comprehensive prohibition on paramilitary activity. The new law authorizes the Oregon Attorney General to seek a court order to enjoin paramilitary activity that threatens public safety, and provides for lawsuits against individuals who engage in such activity, including by victims of their vigilantism. In [Vermont](#) and [Maine](#), legislators have passed more targeted prohibitions on paramilitary training activity. Maine's new laws came in response to an [attempt](#) by neo-Nazi leaders to purchase land in the state as a base for their unlawful activities. Georgetown Law's [Institute for Constitutional Advocacy and Protection](#) (ICAP), where we both have worked, continues to provide technical assistance in other states where legislators and executive branch officials are interested in strengthening these laws.

Earlier this year, the first modern anti-paramilitary-activity bill was introduced in Congress by Senator Ed Markey (D-MA) and Representative Jamie Raskin (D-MD). The [Preventing Private Paramilitary Activity Act](#) (PPPA) gives Congress the opportunity to follow the lead of states like Oregon in creating a framework to prohibit specific defined actions taken by an armed individual acting as a part of, or on behalf of, a private

paramilitary unit. If enacted, the PPPA would, for the first time, define categories of unauthorized private paramilitary activity. These categories are drawn from existing state laws and closely track the types of armed activity that currently threaten democratic processes and vulnerable groups. Such activity includes: publicly patrolling, drilling, or engaging in techniques capable of causing bodily injury or death; interrupting government operations or proceedings; interfering with or intimidating another person in the exercise of their constitutional rights; falsely assuming the function of law enforcement; or training to engage in any of this behavior.

Crucially, the PPPA does *not* criminalize association with paramilitary groups, nor does it prohibit them from existing altogether. Rather, the bill focuses on individual conduct when someone engages in the prohibited categories of activity while armed and while intending to act as a part of, or on behalf of, a paramilitary group. In this way, the legislation is narrowly focused on the threat of unlawful violence that continues to harm America's democracy. Like Oregon's new law, the PPPA would also create civil remedies for paramilitary activity, both by authorizing the Department of Justice to seek injunctive relief against paramilitary groups and by creating a new private right of action that allows the victims of unlawful paramilitary activity to sue for injunctive relief and damages. These strong enforcement mechanisms would enable law enforcement to better protect society from the sorts of armed paramilitary activity that plagues our communities, particularly when it infringes on the rights and safety of others. The prohibitions contained in the legislation are also content-neutral, meaning that they apply regardless of the ideology motivating the individuals involved.

If enacted, the PPPA would be a game changer in the prevention of organized political violence. While there are current federal prohibitions on training for a civil disorder, there are no comprehensive laws addressing unauthorized paramilitary activity, much less any with mechanisms for preventative relief. That would not be the only transformative effect of the PPPA. Its passage would help boost federal and state law enforcement coordination in the prevention and diffusion of armed paramilitary threats. Some state prohibitions on paramilitary activity date back to the 19th century, making it less likely that local law enforcement is aware of them and, in some cases, more likely that they can be ignored because of the political cost of confronting the so-called "[militia](#)" movement. The PPPA would help change that.

## The PPPA Stands on Firm Constitutional Ground

There is no doubt that the PPPA and similar state measures have solid legal and constitutional footing. However, proponents of these measures must confront the [mythology that has developed](#) about the historic role of private militias since before America's founding, as well as misinformation about the scope of the First and Second Amendments. Put simply, there is no state or federal authority for individuals to form their own private militias operating outside of governmental control. "Well regulated" has always meant regulated *by the government—and not independent from the government*. Indeed, nearly every state has included in its constitution a provision requiring all military to be "strictly subordinate" to civilian power—that is, to the governor of that state.

At the federal level, the U.S. Constitution gave Congress the power under Article I to provide for the organizing, arming, disciplining, and calling forth of the "militia"—a power that Congress used in enacting a series of Militia Acts that eventually led to the modern National Guard system. The Constitution conveys no authority on Americans to form their own private armies, controlled by self-styled military leaders, who can use or project the use of force onto others in a time and manner of their own choosing.

The Supreme Court has repeatedly endorsed the idea that governments can restrain private paramilitary activity. As far back as 1886, the Court rejected both First and Second Amendment arguments challenging a state anti-militia law. [Presser v. Illinois](#) held that the government must be able to prohibit private paramilitary organizations as "necessary to the public peace, safety, and good order." The Court further explained that military organizations and activities are "subject to the regulation and control of the state and federal governments."

The Court affirmed its support for the central premise in *Presser* when it issued its 2008 decision in [District of Columbia v. Heller](#), holding for the first time that the Second Amendment protects an individual right to bear arms for self-defense. Justice Antonin Scalia, writing for the majority, made clear that this reading of the Second Amendment did not take away states' ability to protect against private militias, citing *Presser* for the unchallenged principle that the Second Amendment "does not prevent the prohibition of private paramilitary organizations." The Supreme Court's 2022 opinion in [New York State](#)

[Rifle & Pistol Association v. Bruen](#) did not unsettle this law. Though *Bruen* requires the government to show that firearms regulations have a sufficient historical analogue in order to withstand Second Amendment challenges, prohibitions on private paramilitary activity stretch back centuries, well before the adoption of the Second Amendment or the Constitution itself.

In yet another indication of the constitutional sturdiness of anti-paramilitary statutes, none of these laws has been challenged as part of the tidal wave of pro-gun litigation unleashed by *Bruen*. The few times that these laws *have* been considered by a court, they have been upheld. ICAP has utilized anti-paramilitary laws in two states — [Virginia](#) and [New Mexico](#) — to successfully litigate claims against paramilitary groups that wreaked havoc in Charlottesville in 2017 and at an Albuquerque racial justice protest in 2020.

### **The PPPA is a Major and Necessary Step Toward Protecting Democracy**

As a comprehensive prohibition on private paramilitary activity, the PPPA should be at the center of a legislative push to shore up our democratic institutions from the threat of authoritarianism and political violence. Since January 6th, there is an increased awareness by paramilitary actors that they can more effectively pursue their campaigns of intimidation by focusing their efforts on smaller shows of force against their ideological enemies. They seek to avoid the scrutiny that came as a result of their large-scale mobilization in 2020. Of course, a well-placed spark of incitement could quickly ignite another inferno of nationwide unrest. In the meantime, the reality is dangerous enough: Paramilitary actors loom over different corners of free society, including local governments, public health infrastructure, election officials, and LGBTQ+ people, as well as others.

Without action to address this lawless behavior, other efforts to protect American democracy — defending the right to vote, codifying access to abortion healthcare, and ensuring equal protection under law regardless of racial, religious, sexual, or gender identity — will be held hostage to the possibility of paramilitary violence. This is why Congress must follow the lead of states like Oregon, Maine, and Vermont, and pass the PPPA. It is a necessary step towards protecting the public square from political violence, defending vulnerable communities from targeted attacks, and protecting core principles of the rule of law.

**IMAGE: Members of the Proud Boys make the “OK” symbol with their hands as they pose in front of the Oregon State Capitol building during a far-right rally on January 8, 2022 in Salem, Oregon. – The rally, two days after the first anniversary of the January 6 Capitol riot in Washington, DC, was held to demand “Justice for J6 Political Prisoners”. (Photo by MATHIEU LEWIS-ROLLAND/AFP via Getty Images)**

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