



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

DATE: April 26, 2023

TO: Chair Fahey, Vice-Chairs Breese-Iverson and Kropf,
and Members of the House Committee on Rules

FROM: Kimberly McCullough, Legislative Director
Oregon Department of Justice

SUBJECT: Support for HB 2572 -3 Amendments – Paramilitary Activity

Background:

Unauthorized, armed private paramilitary activity poses a significant threat to public safety, as it involves private persons usurping legitimate law enforcement, military and security functions. To promote a safe and just society, those individuals we designate to perform these functions must have proper training, limitations on when and how they may use force, and mechanisms for accountability when they engage in misconduct. This legislature has taken great care to enact policy that does just that, including many police reforms over the last several years. In addition to that important work, it is crucial that we also ensure that we have proper tools to prevent private paramilitary groups from engaging in unregulated law enforcement functions, including threats of violence, disruption of government operations, and interference with the rights of other people.

This is a relevant issue for Oregon. In 2022, a report on domestic violent extremism found that “[o]ver the past decade, Oregon witnessed the sixth highest number of domestic violent extremism incidents in the nation.”¹ In 2020, as our Nation approached a Presidential election, Oregon became one of the five states at highest risk for private paramilitary activity with the potential for violence and inhibiting people from exercising their constitutional rights.²

Private paramilitary activity—often referred to as “militia” activity—is prohibited by Art. I, § 27 of the Oregon Constitution and by state statutory criminal law found at ORS 166.660. However, **the language of the existing anti-paramilitary law and its lack of a civil enforcement mechanism have hampered the prevention of armed paramilitary groups** mobilizing for acts of intimidation or violence.

¹ <https://sos.oregon.gov/audits/Documents/2022-12.pdf>

² <https://www.oregonlive.com/politics/2020/11/oregon-among-5-states-at-high-risk-for-militia-activity-around-the-elections.html>

The U.S. Supreme Court has been clear that **prohibitions on private paramilitary organizations are permissible under the Second Amendment of the U.S. Constitution.** The Court decided in 1886—and repeated 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)). The Court also held that such prohibitions do not infringe on the First Amendment right to peaceably assemble. *Presser*, 116 U.S. at 267.

Solution:

The -3 amendments to HB 2572 will create a civil cause of action to address the threat of violence from armed paramilitary groups. This bill would apply to conduct that endangers public safety and infringes the rights of all Oregonians. The measure was developed in concert with law enforcement, constitutional, and legal experts to ensure that the revised provisions conform with the constitutional requirements of Article I, § 8, which protects free speech and expression.

It is important to note that the **private paramilitary activity that would be prohibited by this bill is not tied to any specific political ideology.**

The provisions of the -3 amendments to HB 2572 include:

- **Creation of a civilly enforceable prohibition** on unauthorized, armed, private paramilitary activity, with a focus on the *actions* that threaten civic life and public safety. This will allow the Attorney General to seek injunctive relief against those engaging in prohibited conduct, as well as a private cause of action for individuals harmed by private paramilitary activity to seek money damages and/or injunctive relief.
- **A definition of “private paramilitary organization”** that applies to groups of three or more persons associating under a command structure to function in public or train to function in public as a combat, combat support, law enforcement, or security services unit.
- **Important exceptions** for activities such as historic reenactments, security services authorized under state and federal law, self-defense clinics, training in the safe handling and use of firearms, lawful sports and activities related to the individual recreational use or possession of firearms, and other training authorized by the state or federal government.

- **Various changes from prior versions to address concerns raised by stakeholders, including:**
 - **Removal of criminal provisions:** The bill will leave Oregon’s existing criminal law related to paramilitary activity unchanged.
 - **Heightened standard for interference with government operations:** The bill now requires a substantial disruption of government operations or proceedings, rather than mere interference.
 - **Heightened standard for patrolling and drilling:** The bill now requires that these activities be done with a deadly weapon, rather than a dangerous weapon, to fall within the scope of the bill.
 - **Removal of “intimidation” of other persons:** Prior versions of the bill applied to acts of intimidation that prevent another person from engaging in conduct they have a right to engage in, or that cause another person to engage in conduct they have a right to refrain from. As amended, the bill will only apply if actual interference occurs.
 - **Limitations on AG enforcement:** The -3 amendments remove the ability of the Attorney General to obtain attorney fees and clarify that when enforcing this law, the Attorney General may not demand, collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless the information directly relates to an investigation into, and there are reasonable grounds to suspect that the subject of the information is involved in, paramilitary activity

Taken together, **the reforms proposed by the -3 amendments to HB 2572 would make it harder for private paramilitaries to operate with impunity throughout Oregon, regardless of their ideology.** The civil enforcement provision will also empower individual Oregonians to seek compensation for harm done to them by these groups. The focus on armed activity that interferes with government functions, usurps legitimate law enforcement authority, and infringes constitutional rights **balances the protection of public safety with the preservation of constitutional guarantees of free speech and association, the right to petition the government, and voting.**

Legal Background:

HB 2572 is consistent with the U.S. Constitution, which does not authorize or protect private paramilitary or militia organizations operating outside of governmental authority.

- The U.S. Constitution gives Congress the power to provide for organizing, disciplining, and calling forth the “militia.” U.S. Constitution, art. I, clauses 15 and 16. Congress has used this power to create the National Guard system and to authorize states to maintain their own state defense forces. 32 U.S.C. §§ 102-104, 109.
- **The Supreme Court has been clear since 1886 that the Constitution does not protect private paramilitary organizations.**
 - In *Presser v. Illinois*, 116 U.S. 252, 267 (1886), the Supreme Court held the First Amendment does not provide a “right voluntarily to associate together as a military company or organization” outside of the control of the government.
 - The Court further held that prohibitions on private paramilitary activity “do not infringe the right of the people to keep and bear arms,” and that states must be able to prohibit private paramilitary organizations as “necessary to the public peace, safety, and good order.” *Presser* 116 U.S. at 265, 268.
- **In 2008, the Supreme Court restated what it had made clear in *Presser*—that the Second Amendment “does not prevent the prohibition of private paramilitary organizations.” *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008).**

HB 2572 is consistent with Oregon’s constitution and statutory regulation of military affairs.

- Oregon’s constitution, like the constitutions of 48 states, provides that “the Military shall be kept in strict subordination to the civil power.” Or. Const., Art. I, § 27. **The only type of “militia” activity that is sanctioned in Oregon is that which is regulated and controlled by the civilian government.**
- Oregon’s constitution explicitly instructs that “[t]he Legislative Assembly shall provide by law for the organization, maintenance, and discipline of a state militia for the defense and protection of the State.” Or. Const. Art. X, § 1. The governor is the “commander in chief of state military forces,” and is the *only* government actor able to “call out such forces to execute the laws, to suppress insurrection [*sic*], or to repel invasion.” Or. Const. Art. X, § 3. **Private paramilitary groups are not permitted to act outside this system.**

- By statute, Oregon’s “militia” is comprised of the “organized” and “unorganized” militia. Or. Rev. Stat. § 396.105(1).
 - The “organized militia” is composed of the Oregon National Guard and the Oregon Civil Defense Force “when duly organized.” Or. Rev. Stat. § 396.105(2).
 - **Even the “unorganized” militia, which consists of “all able-bodied residents of the state,” can only be called into service by the governor.** *See* Or. Rev. Stat. §§ 396.105(3), 396.125, 396.135, 396.140.