

November 3, 2022

Senator Jack Reed
Chairman, U.S. Senate Committee on Armed Services
Russell Senate Building, Room 228
Washington, DC 20510-6050

Senator James Inhofe
Ranking Member, U.S. Senate Committee on Armed Services
Russell Senate Building, Room 228
Washington, DC 20510-6050

Re: Reforms to National Guard Deployment Authorities and the Posse Comitatus Act in the FY2023 National Defense Authorization Act

Dear Chairman Reed and Ranking Member Inhofe:

The undersigned organizations, representing diverse political perspectives and with a wide range of expertise, urge you to support three provisions in the House-passed version of the National Defense Authorization Act for Fiscal Year 2023 (H.R. 7900). Together, these provisions will address dangerous gaps in the laws that govern domestic deployment of the military. They will (1) reform the outdated command structure of the District of Columbia National Guard; (2) ensure that interstate deployments of the National Guard under Title 32 of the United States Code are carried out in accordance with the Constitution; and (3) codify an exclusionary rule that will establish a practical mechanism for enforcing the Posse Comitatus Act. In addition, we encourage you to amend Section 329 of Title 32 to prohibit privately funded deployments of the National Guard.

The D.C. National Guard Home Rule Act (Sec. 6252 of H.R.7900)

First, we urge you to support the D.C. National Guard Home Rule Act, which would transfer control over the D.C. Guard from the president to the mayor of D.C. except when called into federal service.

By prohibiting federal armed forces from participating in civilian law enforcement except when doing so is expressly authorized by law, the Posse Comitatus Act is meant to prevent the president from using the military as a domestic police force. It therefore applies to National Guard forces only when they have been called into federal service. Most of the time, the National Guards of the fifty states, Puerto Rico, Guam, and the U.S. Virgins Islands instead operate under local control, and thus are not bound by the Act.

The D.C. National Guard is the sole exception to this framework. It exists under permanent presidential control, for the sole reason that there was no local D.C. government in existence when Congress addressed the issue in 1868. Yet the Department of Justice maintains that it is generally *not* constrained by the Posse Comitatus Act. This anomalous situation leaves a gaping loophole in the Posse Comitatus Act. It also adds unnecessary layers of bureaucracy that can

hamper the D.C. Guard's flexibility in a crisis, as was vividly demonstrated by the Guard's slow response to the January 6 riot at the Capitol.

The D.C. National Guard Home Rule Act would solve both these problems by transferring control over the D.C. Guard from the president to the D.C. mayor, the city's elected chief executive. This would not constitute a step towards statehood, as should be clear from the fact that Puerto Rico, Guam, and the U.S. Virgin Islands have enjoyed local control over their National Guards for decades. Rather, it would simply bring the D.C. Guard in line with the standard, effective command structure that governs all other Guard forces. Moreover, like all other Guard forces, the D.C. Guard could be called into federal service where appropriate—such as to enforce civil rights laws or suppress insurrections—and would serve under the president's command and control while in that status.

The Sherrill Amendment (Sec. 516 of H.R.7900)

Second, we endorse Section 516 of the House-passed version of the NDAA, proposed by Rep. Mikie Sherrill (D-NJ). This provision would require all interstate deployments of the National Guard under 32 U.S.C. § 502(f) to be approved by the chief executives of both the sending and the receiving state.

In June 2020, the Trump administration took the unprecedented position that state governors acting under Section 502(f) may deploy their National Guard units into other jurisdictions without those jurisdictions' consent. This radical interpretation of the law throws the constitutionality of the statute into question, as the co-equal and territorially limited sovereignty of the states prevents one state from unilaterally sending troops into another. Put simply, U.S. states may not invade one another.

The Trump administration's construction of Section 502(f) also creates a dangerous loophole in the Posse Comitatus Act, because it means that the president can use the military for law enforcement purposes anywhere in the country, without following the procedures Congress established in the Insurrection Act, so long as one friendly governor is willing to offer up their Guard forces.

Section 516 would require all interstate deployments of the National Guard under Section 502(f) to be approved by the chief executives of both the sending and the receiving state. It is a tailored solution to the previous administration's misinterpretation of the law, and it reaffirms the basic constitutional principle that each state maintains its own sovereignty with respect to other states. Until June 2020, that was the way that Title 32 deployments had always worked.

In its Statement of Administration Position, the Biden administration argued that Section 516 would give a non-federal official the power to veto deployments of the National Guard for federal missions when acting in Title 32 status. However, under Title 32, the governor of the state that is asked to deploy troops already has that power: Title 32 allows the president or Secretary of Defense to *request* deployments, not *require* them. The governor who receives this request retains command and control at all times; that is what distinguishes Title 32, under which National Guard forces may pursue federal missions upon request, from Title 10, under which

National Guard forces are brought fully under federal control. Section 516 would merely require the consent of two governors rather than one.

Critically, Section 516 would have no effect on the president's ability to call the National Guard into federal service and use them for law enforcement purposes anywhere in the country as authorized by Congress. That means the president would still be able to use the National Guard, with or without the consent of the states, where necessary to enforce civil rights laws or to suppress insurrections.

The Schiff Amendment (Sec. 549B of H.R.7900)

Third, we support Section 549B of the House-passed version of the NDAA, proposed by Rep. Adam Schiff (D-CA), which would codify an exclusionary rule barring the use of evidence obtained in violation of the Posse Comitatus Act.

Under current law, the Posse Comitatus Act lacks a practical and effective enforcement mechanism. Although the Act is framed as a criminal statute, no one has ever been convicted for violating it. Yet from time to time, the military has engaged in domestic law enforcement activity, including the collection of evidence, without the necessary authorization. That evidence, despite being collected unlawfully, nevertheless has been used in a number of legal proceedings.

Section 549B would prevent this. Specifically, it would prohibit the use during legal proceedings of evidence that was collected by or with the assistance of members of the armed forces in violation of the Posse Comitatus Act. Establishing this sort of clear enforcement mechanism would both help safeguard the integrity of judicial proceedings and also deter violations of the Posse Comitatus Act in the first place, by making clear to military and civilian government officials that they cannot benefit in court from misusing the military on U.S. soil.

Amend Section 329 of Title 32 to Prohibit Privately Funded Deployments of the National Guard

Finally, we ask you to amend Section 329 of Title 32 to prohibit all privately funded interstate deployments of the National Guard, except in cases of natural disaster covered by the Stafford Act. National Guard missions should never be paid for by private donors. Private funding reduces transparency and accountability and creates the appearance that National Guard forces are soldiers for hire. This undermines public faith in the military, and harms morale among Guard members, who did not volunteer to serve their country and communities in order to be treated as mercenaries.

Under current law, Section 329 of Title 32 only bars private funding for National Guard deployments in Title 10 or Title 32 status, but such deployments are, by definition, always funded with federal dollars. The provision should be amended to ensure that it also applies to State Active Duty (SAD) status, in which the Guard performs state-defined missions at the state's expense, by striking "(under this title or title 10)" from the provision. Congress has ample authority to legislate restrictions on SAD deployments that cross state lines, stemming from both

its power “to provide for organizing, arming, and disciplining, the Milia” (U.S. Const., art. II, sec. 8, cl. 16) and its broad powers under the Commerce Clause (U.S. Const., art. II, sec. 8, cl. 3).

None of the above reforms will prevent presidents from lawfully exercising the powers Congress has granted them to deploy the military to provide disaster relief, suppress insurrections, or enforce civil rights laws. All that these provisions will do is strengthen the Posse Comitatus Act and prevent the National Guard from being abused, misused, or dragged into partisan politics. We urge you to support these reforms and thank you for your consideration.

Sincerely,

American Civil Liberties Union
American College of National Security Leaders
Brennan Center for Justice at NYU School of Law
Broward for Progress
Citizens for Responsibility and Ethics in Washington (CREW)
CommonDefense.us
DC Vote
Defending Rights & Dissent
Demand Progress Action
Democracy 21
Due Process Institute
Government Information Watch
Greenpeace USA
Human Rights First
Issue One Reform
Law Enforcement Action Partnership
Niskanen Center
Pax Christi USA
Project On Government Oversight
Protect Democracy
Public Citizen
Secure Families Initiative
The Workers Circle