

December 6, 2021

The Honorable Nancy Pelosi  
Speaker of the House  
U.S. House of Representatives

The Honorable Chuck Schumer  
Majority Leader  
U.S. Senate

The Honorable Kevin McCarthy  
Minority Leader  
U.S. House of Representatives

The Honorable Mitch McConnell  
Minority Leader  
U.S. Senate

The Honorable Adam Smith  
Chairman  
U.S. House Armed Services Committee

The Honorable Jack Reed  
Chairman  
U.S. Senate Armed Services Committee

The Honorable Mike Rogers  
Ranking Member  
U.S. House Armed Services Committee

The Honorable James Inhofe  
Ranking Member  
U.S. Senate Armed Services Committee

Dear Speaker Pelosi, Minority Leader McCarthy, Majority Leader Schumer, Minority Leader McConnell, Chairman Smith, Ranking Member Rogers, Chairman Reed, and Ranking Member Inhofe:

The undersigned organizations, from across the political spectrum and focusing on a wide range of issues, urge you to retain in this year's National Defense Authorization Act (NDAA) crucial provisions relating to the National Guard and the Posse Comitatus Act that were included in the House-passed version of the legislation (H.R. 4350). These provisions are: Subtitle F, the District of Columbia National Guard Home Rule Act; Section 504, requiring the consent of the host jurisdiction for interstate National Guard deployments; Section 503, prohibiting private funding for interstate deployments of the National Guard; and Section 529F, creating an evidentiary suppression remedy for violations of the Posse Comitatus Act.

Together, these legislative provisions will address critical flaws and loopholes in the existing laws governing the National Guard that were exposed by recent events, including the deployment of the National Guard in Washington, D.C. in June 2020 and the January 6 insurrection. Given the serious threats that these gaps and weaknesses have already shown to pose to the integrity of the National Guard as well as to Americans' safety and constitutional rights, we call on you to ensure that these reforms are preserved in any compromise that the Senate and the House reach on the NDAA.

### **Updating the D.C. National Guard's Command and Control Structure**

The defining feature of the National Guard is that its members generally operate under local control unless they have been temporarily called into federal service. This arrangement is one of the pillars of federalism that balances power between national and local governments in our constitutional system. Americans can rely on the protection and assistance of locally-controlled

National Guard forces in all fifty states, as well as Puerto Rico, Guam, and the U.S. Virgin Islands.

Only the District of Columbia National Guard serves under permanent presidential control. This is not because Congress decided the president is better positioned than the mayor to command the Guard, nor is it because D.C. is not a state. Rather, at the time Congress provided for presidential command of the D.C. militia in the late 19<sup>th</sup> century, D.C. had no local government. That changed fifty years ago, and so the reason for this unusual arrangement no longer exists.

Moreover, this outdated command structure has created two serious problems. The first was vividly illustrated on January 6, 2021. As rioters broke into the U.S. Capitol and threatened members of Congress, the Mayor of Washington had to respond to this crisis with one hand tied behind her back. At her command, officers of the Metropolitan Police Department arrived on the scene within minutes, but she was not allowed to deploy D.C.'s own National Guard in the same fashion. Instead, she had to request assistance from the Pentagon. In the absence of swift action from the then-president, this bureaucratic approval process took hours. Meanwhile, members of the D.C. Guard sat waiting to help on buses.

The second problem with permanent presidential control over the D.C. Guard is that it creates a glaring loophole in the Posse Comitatus Act, the law that bars federal military forces from participating in civilian law enforcement activities without an express statutory exception (such as the Insurrection Act). This rule embodies a longstanding American tradition and recognizes the inherent danger to liberty that comes with allowing the president to use soldiers as a domestic police force. But although the D.C. Guard is for all practical purposes a "federal militia," the Department of Justice has long insisted that it can nonetheless operate in a non-federal militia status. Under this view, the president can use the D.C. Guard for domestic law enforcement free from the guardrails imposed by the Posse Comitatus Act. The Trump administration exploited this loophole in the summer of 2020, deploying the D.C. Guard against Black Lives Matter protesters in Lafayette Square without invoking the Insurrection Act or any other form of congressional authorization.

The solution to both these problems is the District of Columbia National Guard Home Rule Act, which was included in the base text of the NDAA at Subtitle F. Very simply, this legislation will transfer control over the D.C. Guard from the president to the Mayor of Washington when operating in non-federal status.

It is equally important to understand what this provision will *not* do. As should be clear, local control over the National Guard is not a stepping-stone to statehood. The National Guards of Puerto Rico, Guam, and the U.S. Virgins Islands have all been under the control of their territorial governors for decades. Moreover, this provision will not amend the Insurrection Act or otherwise affect the president's authority to federalize the D.C. Guard and deploy it when doing so is necessary and permitted by law, such as to suppress insurrections or enforce civil rights laws.

## **Clarifying the Constitutional Prohibition on Non-Consensual Interstate Deployments**

Section 504 of the House NDAA, originally proposed by Representative Mikie Sherrill (D-NJ), addresses another issue relating to the National Guard. When serving in “Title 32 status” under Section 502(f) of Title 32, National Guard forces operate under local command and control, but are paid with federal funds and can be used to carry out federal missions requested by the president, if the governors consent to such use. In June 2020, eleven state governors agreed to then-President Trump’s request to send their National Guard troops into Washington, D.C., even though D.C.’s elected leader objected. Then-Attorney General William Barr justified this action by claiming that National Guard troops operating in Title 32 status can be sent from their own jurisdiction into another without the latter jurisdiction’s consent.

Allowing governors to forcibly deploy their National Guard troops into other jurisdictions cannot be squared with our constitutional system, in which states are co-equal and territorially limited sovereigns. Barr’s interpretation would allow U.S. states to effectively invade each other, raising the specter of “red state armies” and “blue state armies” being used to enforce partisan priorities across the country. Section 504 eliminates this constitutional danger zone simply and effectively by clarifying that interstate deployments of the National Guard in Title 32 status require consent from the chief executives of both the sending and receiving jurisdictions.

Like the D.C. National Guard Home Rule Act, this provision does not affect the president’s ability to federalize the National Guard or invoke the Insurrection Act, whether to enforce federal civil rights laws, suppress an insurrection, or for some other lawful purpose. In such circumstances, the president may send National Guard forces wherever they are needed, with or without the consent of the receiving jurisdiction.

## **Protecting Civilian Oversight and Protecting the National Guard from Political Exploitation**

Section 503 of the House NDAA, originally proposed by Representative Veronica Escobar (D-TX), forbids privately-funded interstate deployments of the National Guard except in cases of major disaster or emergency covered by the Stafford Act. The proposal, which was adopted during committee markup by voice vote, was sparked by news this June that an out-of-state billionaire donor would be paying for the Governor of South Dakota to deploy her state’s National Guard troops to the southern U.S. border.

This unprecedented move should not be allowed to become a trend. Such private financing raises profound concerns as it erodes civilian oversight and democratically-accountable control of the military, as well as making the National Guard vulnerable to corruption, abuses of power, and exploitation for political gain. The Escobar provision will make clear that National Guard forces are not for sale to the highest bidder. It will protect the integrity of the Guard by ensuring that their operations may only be funded with public money that has been appropriated by the federal government or state legislature.

Both this provision and Section 504 (the above provision that would prohibit states operating under Title 32 from essentially mounting armed invasions of other states) are plainly within the power of Congress to enact. The Constitution charges Congress with “organizing, arming, and

disciplining, the Militia,” reserving to the states only the appointment of officers and responsibility for “training the Militia according to the discipline prescribed by Congress.” Congress has exercised its power to regulate the militia consistently since 1792, and Title 32 today is filled with congressionally imposed rules that apply to the Guard when it is not in federal status. Sections 504 and 503 are well within the realm of regulations that Congress has imposed for more than two centuries.

### **Deterring Violations of the Posse Comitatus Act**

Finally, Section 529F of the House NDAA, proposed by Representative Adam Schiff (D-CA), addresses a longstanding problem with the Posse Comitatus Act—the lack of meaningful consequences for violating the law. Although the Posse Comitatus Act is a criminal statute, only two people have ever been charged under the Act, even though it has been violated on many documented occasions; both prosecutions occurred in the 1800s, shortly after the law was passed, and neither resulted in a conviction. Section 529F will direct courts to suppress evidence that was acquired by federal troops in violation of the Posse Comitatus Act, a remedy that some federal courts have already imposed. This will facilitate enforcement of the Act and establish clear consequences to deter the government from violating it.

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In short, these four provisions address unnecessary and dangerous irregularities, ambiguities, and gaps in current law, shoring up long-standing and reasonable restrictions on the domestic use of military forces. We urge you to preserve them in the final conference agreement for the FY2022 NDAA.

Sincerely,

American Civil Liberties Union  
Blue Wave Postcard Movement  
Brennan Center for Justice at NYU School  
of Law  
Citizens for Responsibility and Ethics in  
Washington (CREW)  
Clean Elections Texas  
Common Defense  
DC Vote  
Defending Rights & Dissent  
Franciscan Action Network  
Greenpeace

Human Rights First  
Law Enforcement Action Partnership  
Mainers for Accountable Leadership Action  
Niskanen Center  
Oxfam America  
Project On Government Oversight  
Protect Democracy  
Public Citizen  
VoteVets  
Win Without War  
The Workers Circle