

Dear Member of Congress:

The undersigned organizations, from across the political spectrum and focusing on a wide range of issues, urge you to support an amendment proposed by Representative Mikie Sherrill to this year's National Defense Authorization Act (NDAA). Together with the District of Columbia National Guard Home Rule Act, which is included in the Chairman's Mark at Sections 1071-1075, this amendment will address concerns triggered by the deployment of the National Guard in Washington, D.C. in June of last year, including the operation in Lafayette Square. Last year, the House Armed Services Committee held hearings that revealed critical gaps and loopholes in the existing laws governing National Guard deployment under Title 32. The House Committee on Oversight also held hearings on the Jan 6 insurrection which illustrated additional weaknesses created by the current command structure for the D.C. National Guard. These gaps and weaknesses threaten Americans' safety as well as their constitutional rights, and Congress should act now to fix them.

### **The DC National Guard Home Rule Act**

First, we wish to convey our support and appreciation for the inclusion of the D.C. National Guard Home Rule Act in the Chairman's Mark, which would transfer control over the D.C. National Guard from the president to the mayor of Washington. In every other state and U.S. territory, the National Guard operates under local control unless and until it is called into federal service. Only the D.C. Guard is always under presidential command. This outdated arrangement is a relic from the era before D.C. had an elected local government.

It also serves to undermine the foundational principle of "posse comitatus." The Posse Comitatus Act bars the use of federal military forces for domestic law enforcement except as expressly authorized by law. However, it applies to National Guard personnel only when they have been federalized. Despite the D.C. Guard being under permanent federal control, the Department of Justice has long endorsed the legal fiction that it can nonetheless operate in a non-federal "militia" status. The combined result of D.C.'s outdated command structure and the Justice Department's questionable legal interpretation is that the president can use the D.C. Guard as a domestic police force *whenever he wishes*, creating a huge gap in the Posse Comitatus Act's coverage.

Permanent federal control over the D.C. Guard also hampers its flexibility in a crisis, as was vividly demonstrated on Jan. 6. When the attack on the Capitol began, the mayor had to ask the Department of Defense to deploy the Guard, rather than ordering them to respond herself. It took over an hour for the executive branch to approve this request, and more than three hours before the authorization was communicated to the Guard itself.

Transferring control over the D.C. National Guard to the mayor of Washington will fix both of these problems. The president will still be able to take command of the Guard when necessary by calling it into federal service, but the Guard will then be bound by the Posse Comitatus Act, just like all other federal controlled military forces. Thus, it will only be allowed to engage in law

enforcement as allowed by law. At the same time, the mayor will be able to use the Guard quickly and flexibly in an emergency.

### **The Consent for Interstate Deployment Amendment**

Additionally, we support the amendment proposed by Representative Mikie Sherrill (D-NJ) that will clarify that state governors may not deploy their National Guard units into other states or territories without those jurisdictions' consent. This limitation is arguably inherent in the Constitution. However, last June, former U.S. Attorney General William Barr claimed that 32 U.S.C. § 502(f) – the law that permits National Guard units to operate in so-called “hybrid status,” in which they may carry out federal missions but remain under state command and control – allows governors to deploy their Guard forces out of state even if the receiving state or territory objects.

This unprecedented interpretation of the law threatens basic principles of state sovereignty. If the president federalizes the National Guard, he can of course send them wherever he deems necessary. If the Guard is operating under state command, however, there is no basis under our Constitution for one state's governor to effectively invade another jurisdiction with its militia.

Barr's interpretation also undermines the Posse Comitatus Act. In hybrid status, Guardsmen are exempt from the Act because they are under state command and control—a key element of which is the governor's ability to decline a given federal mission. But if any governor can send their Guard forces into any other jurisdiction, then the right to refuse becomes meaningless. All the president needs is one willing governor in order to freely use that state's National Guard as a domestic police force anywhere in the country. Last summer, President Trump found eleven.

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There are, of course, legitimate reasons for the president to deploy the military domestically, such as providing disaster relief, repelling invasions, or enforcing civil rights laws. Congress has given the president ample authority to deal with these situations, and neither of the above reforms will prevent a president from lawfully exercising those powers. Instead, they will address dangerous gaps in the law to prevent the National Guard from being abused, misused, or dragged into partisan politics. We urge you to support Rep. Sherrill's amendment and thank you for your consideration.

Sincerely,

Advocacy for Principled Action in Government  
Blue Wave Postcard Movement  
Brennan Center for Justice at NYU School of Law  
Citizens for Responsibility and Ethics in Washington (CREW)  
Clean Elections Texas  
DC Vote  
Defending Rights & Dissent  
Demand Progress

Democracy 21  
Franciscan Action Network  
Free Speech For People  
Government Accountability Project  
Human Rights First  
Law Enforcement Action Partnership  
Niskanen Center  
Pax Christi USA  
People For the American Way  
Project on Government Oversight  
Protect Democracy  
Public Citizen  
R Street Institute  
Rock the Vote Action Fund  
Secure Elections Network  
Secure Families Initiative  
Stand Up America  
Stand Up Republic  
Students Against Voter Suppression  
The Workers Circle  
URGE: Unite for Reproductive & Gender Equity  
Veterans for American Ideals  
Win Without War  
Women's Action for New Directions