October 26, 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: Section 516 of the FY2023 National Defense Authorization Act

Dear Chairman Reed and Ranking Member Inhofe:

We, the undersigned scholars of constitutional law, national security law, and/or military law, write in support of section 516 of the National Defense Authorization Act for Fiscal Year 2023 (the "FY2023 NDAA"). That provision, based upon an amendment introduced by Rep. Mikie Sherrill (D-N.J.), would close a troubling loophole in existing law under which former president Donald Trump claimed the authority to use the National Guard troops of one state for law enforcement duties in another state without *either* federalizing those troops *or* receiving the second state's permission. For the reasons we explain below, we believe not only that section 516 is perfectly constitutional, but that it wisely cabins authority that we do not believe Congress intended to delegate to the president in the first place.

I. 32 U.S.C. § 502(f)(2) and the June 2020 D.C. Protests

When on duty, state National Guard troops can wear three different "hats." The first, and most common, is "State Active Duty" (SAD) status, in which they are exercising state functions at the request of the state government and are generally governed by state law. The second hat is "Title 32" status (a reference to that part of the U.S. Code that deals with the National Guard), in which National Guard troops remain subject to state command and control but are used to advance federal objectives and are paid with federal funds.

Finally, the third hat, "Title 10" status, applies when state National Guard units are "federalized" by the president of the United States pursuant to one of the specific statutory authorities for doing so. Once federalized, National Guard troops come under the full command and control of the Pentagon — specifically, the Secretary of Defense. In essence, National Guard troops become part of the federal military until and unless they are returned to state status, and states retain neither authority over nor financial responsibility for the federalized Guard units.

These distinctions matter for a number of reasons, including which government pays for the troops, which government can be held liable if something goes wrong, which military justice system applies to punish misconduct, and what the National Guard units at issue can be tasked to do. To take one particularly significant example, it has long been understood that the Posse Comitatus Act (which prohibits "us[ing] any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the

laws," 18 U.S.C. § 1385) does not apply to National Guard units in either SAD or Title 32 status, because they are not, at that point, part of those federal forces. By contrast, when National Guard troops are federalized, the Posse Comitatus Act does apply — and requires "express[]" statutory authorization before those troops may be used to "execute the laws."

The problem that has arisen in recent years relates to Title 32 status. In 2006, Congress amended Title 32 to authorize the federal use of state National Guard troops not just for training missions, but in "support of operations or missions undertaken by the member's unit at the request of the president or Secretary of Defense." John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, div. A, § 525(c), 120 Stat. 2083, 2193–96 (2006) (codified at 32 U.S.C. § 502(f)(2)(A)). The key word in this provision is "request"; a state's Guard forces may be used for such missions only if that state's chief executive consents. Unfortunately, however, the legislative history provides scant insight into the types of operations or missions for which state National Guard troops may be requested under this provision, and the text of the statute offers little help.

The open-ended nature of section 502(f)(2) became clear in June 2020, when then-president Donald Trump relied upon it to request National Guard troops from 15 different states to suppress the mostly peaceful protests that broke out in Washington, D.C., in response to the murder of George Floyd by Minneapolis law enforcement officers. 11 states agreed to send troops, even though the local jurisdiction — the District of Columbia — had not requested them or otherwise acquiesced in their deployment. Instead, for what appears to have been the first time in the history of the National Guard, un-federalized Guard troops from one jurisdiction were deployed into another jurisdiction without the latter's consent.

Although the District of Columbia's relationship with the federal government raises unique legal questions, the concerns raised by the June 2020 use of section 502(f)(2) are in no way D.C.-specific. Rather, the Trump administration's interpretation of that authority could allow future presidents to deploy National Guard troops into any state in the Union — and, because the Posse Comitatus Act does not apply to Guard forces in Title 32 status, to use them for ordinary law enforcement purposes — so long as the governor of the sending state approves. This opens the door not just to an end-run around the Posse Comitatus Act, but to ominously partisan uses of military force on the home front, wherein a Democratic president could send un-federalized blue-state National Guard troops into red states without their consent, and vice-versa. Indeed, of the 11 states that accepted President Trump's June 2020 request for troops, ten had Republican governors. It is highly unlikely that Congress had such a result in mind when it enacted section 502(f)(2).

II. Section 516

Section 516 is a modest amendment that is designed to — and would — close this gap. It does not change the "operations or missions" for which National Guard troops in Title 32 status may be deployed. Rather, it adds a second consent requirement. In addition to the already-required permission of the state from which the National Guard troops are to be sent, it requires the consent of "the chief executive officer of each State . . . in which such operations or missions shall take place," including the Mayor of the District of Columbia for missions in D.C.

Critically, section 516 does not otherwise change existing law. It does not affect the circumstances in which the president may federalize National Guard troops (and place them in "Title 10 status"). Nor does it limit the purposes for which National Guard troops may be used in Title 32 status. Nor, it should be said, does it prevent use of National Guard troops in Title 32 status for law enforcement purposes notwithstanding the Posse Comitatus Act. Rather, the amendment is narrowly crafted solely to close the loophole that the June 2020 D.C. protests revealed — the specter of Title 32 deployments of National Guard troops into jurisdictions that don't want them.

In our view, section 516 falls well within Congress's constitutional authority. Congress created the first version of today's National Guard in 1903 and has consistently exercised an array of powers under Article I, Section 8 to govern the National Guard and to authorize and circumscribe its use by both state and federal officials. Moreover, Article IV, Section 4 of the Constitution expressly conditions the use of federal troops to quell "domestic violence" within states on the consent of the state into which those troops are to be sent. *See also* 10 U.S.C. § 251 (authorizing use of federal armed forces "upon the request of its legislature or of its governor if the legislature cannot be convened" "[w]henever there is an insurrection in any State against its government").

To be sure, there are circumstances in which the federal government is, and ought to be, able to send federal troops into states *without* their consent. Since 1792, Congress has specifically identified those circumstances in two provisions of the Insurrection Act, 10 U.S.C. §§ 252–53. Section 516 in no way limits the president's existing statutory authority to use *federalized* National Guard troops, or any other active component of the U.S. military, in those circumstances. The only constraint section 516 introduces is with respect to the use of National Guard troops when they are in Title 32 status — a context in which it is *already* the case that their use requires state consent. If Congress has the authority to require a governor's consent before the National Guard troops of her state can be tasked with a federal mission under Title 32, it follows that Congress has the authority to require the consent of the governor into whose states those troops are to be deployed. Put another way, we cannot contemplate a colorable constitutional objection to section 516 that would not be inconsistent with Title 32 status *in general*.

Indeed, we would go further. In our view, the Constitution *requires* the very thing section 516 seeks to achieve: respect for the sovereignty of the states. Every U.S. state is a sovereign entity under the Constitution, and, like foreign sovereigns, their power is territorially limited. Thus, as the Supreme Court has explained, "the jurisdiction of a state is coextensive with its territory, coextensive with its legislative power." *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) (quoting *United States* v. *Bevans*, 16 U.S. (3 Wheat.) 336, 386–87 (1818)). Applying this principle, the Court has held that state courts cannot reach into other states and adjudicate the affairs of people and businesses residing there, unless those parties have sufficient "minimum contacts" with the forum state. *See, e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-92 (1980). The territorially limited sovereignty of the states means that one state, acting under its own authority, cannot deploy its National Guard forces into another state without that state's permission. To claim otherwise is to argue that U.S. states may invade one another with their militias.

The Supreme Court has held that, unless and until National Guardsmen are federalized, they remain state officers exercising state authority. *See, e.g.*, *Perpich v. Dep't of Def.*, 496 U.S. 334, 348–49 (1990). Crucially, National Guard units that are serving under section 502(f)(2) have not been federalized. They are not part of the federal armed forces for statutory purposes, which is the very reason why they are not restricted by the Posse Comitatus Act. Accordingly, a state's deployment of National Guard troops under section 502(f)(2) must respect the territorial sovereignty of other states. In clarifying that section 502(f)(2) missions require the consent of both the state sending troops and the one receiving them, section 516 simply vindicates the structural principles of the Constitution.

III. The Biden Administration's SAP

Notwithstanding section 516's modest scope, the Biden Administration expressed opposition to the provision in its Statement of Administration Policy. Specifically, the SAP notes that the Administration "opposes section 516 because it would permit non-Federal officials to disapprove use of National Guard units carrying out DoD operations and missions in a certain title 32 duty status, even when those units are performing their duty on Federal lands and at Federal facilities."

As noted above, "non-Federal officials" are *already* permitted "to disapprove use of National Guard units carrying out DoD operations and missions . . . even when those units are performing their duty on Federal lands and at Federal facilities." Under section 502(f)(2) in its current form, the federal government may only use a state's National Guard units with the consent of the governor of that state. Thus, section 516 is not breaking any new ground in giving "non-Federal officials" the power to disapprove such use of National Guard units. Rather, it simply confers that existing power upon one additional non-Federal official.

Moreover, if the governor of a state into which the president wishes to deploy National Guard troops under section 502(f)(2) withholds her consent, the president retains the power to federalize those National Guard troops as authorized under current law — at which point section 516 becomes irrelevant. Thus, the objection offered by the SAP is, in our view, misplaced. Again, the only meaningful difference between current law and section 516 is whether section 502(f)(2) deployments will require the consent of one governor or two. If there is a principled explanation for why the latter is problematic when the former is not, the SAP does not provide it.

IV. Conclusion

The June 2020 protests in Washington, D.C. presented an ominous specter: A president of one party using National Guard troops sent by governors almost exclusively of the same party to put down protests in a jurisdiction that overwhelmingly supports the other party. That specter was made possible only by an interpretation of an obscure provision of Title 32 that Congress likely never intended and that ignores states' sovereignty under the Constitution. Preventing this specter from recurring ought to be a matter on which individuals across the ideological spectrum can find common cause. To that end, and because we believe that section 516 is a prudent and perfectly constitutional assertion of Congress's constitutional authority, we strongly support its passage as part of the FY2023 NDAA.

SIGNATORIES*

KHALED ABOU EL FADL
Omar and Azmeralda Alfi Professor of Law
UCLA School of Law

SAHAR AZIZ
Distinguished Professor of Law
Chancellor's Social Justice Scholar
Rutgers Law School

WILLIAM C. BANKS
Professor of Law, Emeritus
Syracuse University College of Law

EMILY BERMAN
Associate Professor
Royce R. Till Professorship
University of Houston Law Center

ERIC R. CARPENTER
Associate Professor of Law
Florida International University
College of Law

GEOFFREY S. CORN
George R. Killam, Jr. Chair of Criminal Law
Director, Center for Military Law and Policy
Texas Tech University School of Law

JOHN C. DEHN
Associate Professor
Director, National Security and
Civil Rights Program
Loyola University Chicago School of Law

LAURA DONOHUE
Anne Fleming Research Professor
Professor of Law
Director, Center on National Security and
the Law
Georgetown University Law Center

WILLIAM DUNLAP
Professor of Law
Quinnipiac University School of Law

STEPHEN DYCUS
Professor of Law, Emeritus
Vermont Law and Graduate School

TOM J. FARER
University Professor and Dean Emeritus
Josef Korbel School of International Studies
University of Denver

EUGENE R. FIDELL
Visiting Lecturer in Law
Yale Law School

LAWRENCE FRIEDMAN
Professor of Law
New England Law | Boston

TONY GHIOTTO
Assistant Teaching Professor of Law
Director, Kimball Anderson and Karen
Gatsis Anderson Center for Advocacy
and Professionalism
University of Illinois College of Law

JONATHAN HAFETZ
Professor of Law
Seton Hall Law School

REBECCA HAMILTON
Associate Professor of Law
American University
Washington College of Law

SUSAN N. HERMAN
Ruth Bader Ginsburg Professor of Law
Brooklyn Law School

TODD HUNTLEY
Director, National Security Law Program
Lecturer in Law
Georgetown University Law Center

* Institutional affiliations are provided for identification purposes only.

AZIZ Z. HUQ
Frank and Bernice J. Greenberg
Professor of Law
University of Chicago Law School

NANCY KASSOP
Professor
Department of Political Science and
International Relations
State University of New York at New Paltz

MICHAEL J. KELLY
Professor, School of Law
Senator Allen A. Sekt Endowed Chair in Law
Creighton University

ROBERT KNOWLES
Associate Professor of Law
University of Baltimore School of Law

JULES LOBEL
Bessie McKee Walthour Professor of Law
University of Pittsburgh Law School

DAVID LUBAN
Distinguished University Professor
Georgetown University Law Center

MARK P. NEVITT
Associate Professor
Emory University School of Law

EDWARD P. RICHARDS
Clarence W. Edwards Professor of Law
Edward J. Womac, Jr. Endowed
Professorship in Energy Law
LSU Law School

DAKOTA S. RUDESILL
Associate Professor, Moritz College of Law
Co-Leader, Security & Governance, Mershon
Center for International Security Studies
The Ohio State University

STEPHEN I. VLADECK[†]
Charles Alan Wright Chair in Federal Courts
University of Texas School of Law

* * *

[†] Principal author.