

United States Senate

WASHINGTON, DC 20510

June 18, 2020

The Honorable Mark T. Esper
Secretary
U.S. Department of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000

Dear Secretary Esper:

Over the past two weeks, thousands of National Guard troops from across the country were sent to Washington, D.C. to respond to peaceful protests in our nation's capital. On June 11, the Department of Defense informed Congress that all out-of-state Guard personnel in Washington, D.C., with the exception of seven South Carolina National Guard members who were finalizing administrative and logistical details, had departed to their home states.

Now that these missions have effectively ended, we request that the Department provide Congress with an accounting of the total cost of all out-of-state National Guard deployments to assist in responding to civil unrest in Washington, D.C. Press reports and first-hand accounts make clear that these protests were peaceful. The size of the force deployed to Washington, D.C. was overwhelmingly disproportionate, and the American people have a right to know how much this unnecessary show of force cost them.

Additionally, we are deeply concerned by the administration's legal justification for these deployments. In a June 9 letter to D.C. Mayor Muriel Bowser and Attorney General Karl Racine, Attorney General William Barr wrote that "[a]t the direction of the President, the Secretary of Defense also requested assistance from out-of-state National Guard personnel, pursuant to 32 U.S.C. § 502(f), which authorizes States to send forces to assist the '[s]upport of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.'"¹

The law and Congressional intent is clear that National Guard troops activated under 502(f) are in Title 32 status and remain under the command and control of their state's Governor, not the President or the Secretary of Defense. But widespread accounts indicate that these out-of-state units were reporting to Defense Department leadership and the President, including a report from the Washington Post that you "told National Guardsmen deployed to the nation's capital not to use firearms or ammunition" after the President "encouraged the National Guard to be armed."²

¹ Letter from Attorney General William Barr to Washington, D.C. Mayor Muriel Bowser and Attorney General Karl Racine, dated June 9, 2020. Retrieved from <https://twitter.com/KerriKupecDOJ/status/1270487263324049410?s=20>

² Paul Sonne, Fenit Nirappil, and Josh Dawsey. "Pentagon disarms National Guard activated in D.C., sends active-duty forces home," *Washington Post*, June 5, 2020.

The New York Times reported on the extent to which Defense Department officials controlled the movements of these out-of-state Guard personnel, including Army Secretary Ryan McCarthy “por[ing] over maps and strategiz[ing] with Guard and federal officials at a command post set up at the F.B.I.’s Washington field office,” and military officials “scrambl[ing] to arrange transport planes to pick Guard members up and fly them to Washington.”³ On June 7, it was widely reported that the President, not any state’s Governor, issued the order for out-of-state Guard personnel to return home.⁴

It is clear that both Defense Department leadership and the President exercised command and control of these out-of-state National Guard personnel. As one legal commentator noted, this “blur[ed] the critical distinction between Title 32 status and Title 10 status” and effectively gave the federal government “the ability to control a cohort of (potentially armed) troops *without* the restrictions of laws like the Posse Comitatus Act”,⁵ which applies to National Guard troops activated under Title 10 and limits the ability of the federal government to use the military to enforce domestic law. Using troops domestically not so restricted is unacceptable outside of very limited extreme criteria which these protests do not meet.

No later than June 25, 2020, we ask that you respond in writing with:

- 1) an accounting of the cost of these National Guard deployments;
- 2) a full description of the chain of command from each unit up to the President and the Secretary of Defense; and,
- 3) a detailed justification explaining how the President and Secretary of Defense have the authority to command National Guard personnel in Title 32 status.

Thank you for your immediate attention to this matter.

Sincerely,

/s/Chris Van Hollen

Chris Van Hollen
United States Senator

/s/Thomas R. Carper

Thomas R. Carper
United States Senator

³ Thomas Gibbons-Neff, Eric Schmitt, and Helene Cooper. “Aggressive Tactics by National Guard, Ordered to Appease Trump, Wounded the Military, Too,” *New York Times*, June 10, 2020, updated June 11, 2020.

⁴ Sarah Westwood and Ryan Browne. “Trump says he’s ordering National Guard to begin process of withdrawing from Washington, DC,” *CNN*, June 7, 2020.

⁵ Steve Vladeck, “Why Were Out-of-State National Guard Units in Washington, D.C.? The Justice Department’s Troubling Explanation,” *Lawfare*, June 9, 2020.

/s/Richard Blumenthal

Richard Blumenthal
United States Senator

/s/Edward J. Markey

Edward J. Markey
United States Senator

/s/Ron Wyden

Ron Wyden
United States Senator

/s/Sherrod Brown

Sherrod Brown
United States Senator

/s/Patrick Leahy

Patrick Leahy
United States Senator

/s/Jeffrey A. Merkley

Jeffrey A. Merkley
United States Senator

/s/Tom Udall

Tom Udall
United States Senator