

2021

## The National Guard in Title 32 Status: How the Executive's Power Becomes a City's Crisis

Kevin Winnie

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

---

### Recommended Citation

Kevin Winnie, *The National Guard in Title 32 Status: How the Executive's Power Becomes a City's Crisis*, 48 Fordham Urb. L.J. 1287 (2021).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol48/iss5/9>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# THE NATIONAL GUARD IN TITLE 32 STATUS: HOW THE EXECUTIVE’S POWER BECOMES A CITY’S CRISIS

*Kevin Winnie\**

*“In the environment in which Presidents must operate, it is not surprising that ‘law’ of any kind (the Constitution included) can easily become merely one more factor to be considered, or even an obstacle to be overcome.”*

- Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 9 (1993).

Introduction .....	1288
I. The National Guard: From State Militia to Federal Asset .....	1295
A. From Local Militia to Domestic Operational Force .....	1295
B. The Broad Modern Executive Use of the National Guard.....	1298
i. Title 32 Status: Procedural Requirements .....	1298
ii. The Executive’s Modern Use of National Guard Units in Title 32 Status .....	1299
iii. The Executive’s Broad Interpretation of Section 502(f) .	1301
II. The Executive’s Broad Interpretation of Section 502(f) will Prevail Over an Ambiguous Statutory Interpretation .....	1304
A. Principles of Statutory Interpretations Support a Limited Interpretation of Section 502(f) .....	1305
i. What is “Other Duty”?.....	1307
ii. Congress Provided Broad Authority to the Executive .....	1310

---

\* J.D. Candidate, 2022, Fordham University School of Law; B.A., 2016, Wesleyan University. I would like to thank Professor Andrew Kent for his guidance. Thank you also to my fellow editors on the *Fordham Urban Law Journal* especially Shazell Archer, Nicholas Loh, and Georgia Decker. I must also thank my professor and mentor Michael Lane for his indispensable guidance and encouragement throughout law school and in writing this Note. Finally, thank you to my family and friends especially my partner Veronica Birdsall and my dear friend Herb.

B. Given the Ambiguity behind Section 502(f), the Court will Defer to the Executive’s Interpretation.....	1313
i. <i>Curtiss-Wright</i> Deference .....	1313
ii. Deference to the Executive’s Interpretation on Section 502(f).....	1314
III. The Problems with the Executive’s Interpretation of Section 502(f) .....	1316
A. Executive’s Control over the Title 32 Units Becomes a City’s Crisis, Especially Washington D.C.....	1316
B. Governor’s Consent is an Ineffective Check on the Executive’s Section 502(f) Authority .....	1319
IV. Restricting the Executive’s Power over the National Guard in Title 32 Status and the DCNG.....	1322
Conclusion.....	1325

### INTRODUCTION

On January 6, 2021, the United States Capitol was breached and invaded for the first time since the British set the building ablaze during the War of 1812.<sup>1</sup> As far-right protesters raided and desecrated the halls of the Capitol, the nation watched as federal agents were overcome by the onslaught of this insistent mob. Despite both its status as one of the most protected sanctuaries in the United States and ample evidence that this was a planned invasion,<sup>2</sup> the Capitol was not adequately secured. During the entirety of this attack, the question arose: Where was the National Guard?

Although only a few miles away, the D.C. National Guard (DCNG) was assigned to traffic control, wholly unprepared for this right-wing invasion.<sup>3</sup> After the Capitol’s security was breached, D.C. officials, members of Congress, and local law enforcement pleaded with the President and Department of Defense (DoD) to redeploy the DCNG to secure the

---

1. Amanda Holpuch, *US Capitol’s Last Breach Was More than 200 Years Ago*, GUARDIAN (Jan. 6, 2021, 7:59 PM), <https://www.theguardian.com/us-news/2021/jan/06/us-capitol-building-washington-history-breach> [<https://perma.cc/VR7B-2Y28>].

2. Luke Broadwater & Nicholas Fandos, *Senate Report Details Security Failures in Jan. 6 Capitol Riot*, N.Y. TIMES (June 12, 2021), <https://www.nytimes.com/2021/06/08/us/politics/capitol-riot-security.html> [<https://perma.cc/3QKC-JUU6>] (“An F.B.I. memo on Jan. 5 warning of people traveling to Washington for ‘war’ at the Capitol never made its way to top law enforcement officials.”).

3. Paul Sonne, Peter Hermann & Missy Ryan, *Pentagon Placed Limits on D.C. Guard Ahead of Pro-Trump Protests Due to Narrow Mission*, WASH. POST (Jan. 7, 2021, 9:43 PM), [https://www.washingtonpost.com/national-security/trump-protests-washington-guard-military/2021/01/07/c5299b56-510e-11eb-b2e8-3339e73d9da2\\_story.html](https://www.washingtonpost.com/national-security/trump-protests-washington-guard-military/2021/01/07/c5299b56-510e-11eb-b2e8-3339e73d9da2_story.html) [<https://perma.cc/A5GG-GK99>].

Capitol.<sup>4</sup> The executive branch denied this request and also rejected calls by Governors of both Virginia and Maryland to deploy their National Guard units.<sup>5</sup> Meanwhile, the Capitol was ransacked by far-right rioters, which resulted in injuries and five fatalities.<sup>6</sup> Eventually, hours after the invasion initially began, the DoD would authorize the National Guard to assist law enforcement in securing the Capitol.<sup>7</sup>

The executive branch's response to these violent protesters stands in stark contrast to the June 2020 deployment of the National Guard to the Black Lives Matter (BLM) protest in Washington D.C. At the request of then-President Trump on June 2, 2020, several governors deployed their National Guard units to assist the federal government in safeguarding the capital during the public protests of the George Floyd murder.<sup>8</sup> By June 6, 2020, the National Guard's numbers in D.C. had increased to nearly 5,000 members from 11 states.<sup>9</sup> During this deployment, the National Guard used aggressive tactics to suppress these largely peaceful protests, which included flying a helicopter right above an active protest.<sup>10</sup> This use of out-of-state National Guard units was also in opposition to the wishes of Washington D.C. Mayor Muriel Bowser.<sup>11</sup> This June 2021 deployment is

4. *Id.*

5. Igor Derysh, *The Pentagon Denied Multiple Requests to Send National Guard During Capitol Siege, GOP Governor Says*, SALON (Jan. 8, 2021, 2:33 PM), <https://www.salon.com/2021/01/08/the-pentagon-denied-multiple-requests-to-send-national-guard-during-capitol-siege-gop-governor-says/> [<https://perma.cc/R3GQ-FWYN>].

6. Richard Read & Molly Hennessy-Fiske, *Police and National Guard Prepare for Attacks on Statehouses as FBI Warns of 'Armed Protests'*, L.A. TIMES (Jan. 14, 2021, 7:34 AM), <https://www.latimes.com/world-nation/story/2021-01-13/state-capital-security> [<https://perma.cc/L2JG-8VAE>].

7. Amanda Macias & Dan Mangan, *U.S. Capitol Secured Hours After Pro-Trump Rioters Invade Congress*, CNBC (Jan. 7, 2021, 7:30 AM), <https://www.cnbc.com/2021/01/06/buildings-in-us-capitol-complex-evacuated-amid-pro-trump-protests.html> [<https://perma.cc/4P53-BKE4>].

8. W.J. Hennigan, *Standing Guard, Picking up Trash and Getting Booted from a Hotel. Inside a Special Forces Unit's Controversial Deployment to D.C.*, TIME (June 12, 2020, 5:48 PM), <https://time.com/5852608/standing-guard-picking-up-trash-and-getting-booted-from-a-d-c-hotel-inside-a-special-forces-units-controversial-deployment-to-dc/> [<https://perma.cc/89AC-N3MY>].

9. *Id.* (stating 4,900 National Guard were deployed).

10. Alex Horton et al., *A Low-Flying 'Show of Force'*, WASH. POST (June 23, 2020), <https://www.washingtonpost.com/graphics/2020/investigations/helicopter-protests-washington-dc-national-guard/> [<https://perma.cc/TE8G-ZH6W>]. While the DoD investigation of this incident did not find specific wrongdoing in violation of federal or army policy, the investigator made several recommendations to train personnel in using helicopters. See U.S. DEP'T OF DEF., ARMY REGULATION 15-6 INVESTIGATION REPORT REGARDING USE OF DISTRICT OF COLUMBIA ARMY NATIONAL GUARD ROTARY WING ASSETS FOLDING WITHIN WASHINGTON D.C. ON 1 JUNE 2020 18 (2020).

11. Veronica Stracqualursi & Nicky Robertson, *DC Mayor Says She Wants Out-of-State Troops 'Out of Washington'*, CNN (June 4, 2020, 3:29 PM),

distinct to January 2021, when Mayor Bowser pleaded with the executive<sup>12</sup> to deploy out-of-state units to protect the Capitol.<sup>13</sup>

The glaring dissimilarities between the deployments of the National Guard during each of these incidents reveal the executive's broad discretion to utilize these troops in opposition to local wishes. And yet, this executive authority is complicated considering the National Guard is innately a state entity under a state governor's control unless federalized by the executive branch.<sup>14</sup> Throughout these crises, the National Guard was not federalized, yet the executive's authority reigned supreme in deciding whether to use the National Guard.<sup>15</sup> Although the executive has direct authority over the DCNG,<sup>16</sup> the President does not have such control over out-of-state units, yet decided during each incident whether to authorize the use of out-of-state Guard units. The basis of this executive power to

<https://www.cnn.com/2020/06/04/politics/dc-mayor-federal-troops-floyd-protests/index.html> [<https://perma.cc/K97A-4YPR>]; see also Emily Badger & Katie Benner, *Why Washington's Streets Have Filled with Troops the Mayor Did Not Want*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/04/upshot/george-floyd-protests-dc-statehood.html> [<https://perma.cc/M9VU-X9E7>] (stating the D.C. Mayor requested the District of Columbia's National Guard from the Trump administration and was specifically upset about federal agents and out-of-state National Guard units deployed throughout the capital).

12. This Note uses the term "executive" to broadly refer to the executive branch, yet this Note will mostly use this term in reference to the President, DoD, and Department of Justice, which are the main executive actors involved in utilizing the military and, more specifically, the National Guard.

13. Robinson Woodward-Burns, *The Best Way to Secure the Capitol Is to Make D.C. A State*, WASH. POST (Jan. 13, 2021, 11:34 AM), <https://www.washingtonpost.com/outlook/2021/01/13/dc-national-guard-bowser-capitol-riot-statehood/> [<https://perma.cc/7JGC-ZAH3>].

14. See, e.g., ARMY NAT'L GUARD, NATIONAL GUARD FACT SHEET ARMY NATIONAL GUARD (FY 2005) 3 (2006), <https://www.nationalguard.mil/About-the-Guard/Army-National-Guard/Resources/News/ARNG-Media/FileId/137011/> [<https://perma.cc/47LS-7FWN>].

15. See Helene Cooper et al., *As the D.C. Police Clear the Capitol Grounds, the Mayor Extends a Public Emergency*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/national-guard-capitol-army.html?smid=tw-nytimes&smtyp=cur> [<https://perma.cc/4979-RP79>] (finding the executive branch rejected initial request to deploy the National Guard in January 2021); Paul Sonne, Fenit Nirappil & Josh Dawsey, *Pentagon Disarms National Guard Activated in D.C., Sends Active-Duty Forces Home*, WASH. POST (June 5, 2020), [https://www.washingtonpost.com/national-security/pentagon-disarms-guardsmen-in-washington-dc-in-signal-of-de-escalation/2020/06/05/324da91a-a733-11ea-8681-7d471bf20207\\_story.html](https://www.washingtonpost.com/national-security/pentagon-disarms-guardsmen-in-washington-dc-in-signal-of-de-escalation/2020/06/05/324da91a-a733-11ea-8681-7d471bf20207_story.html) [<https://perma.cc/8TBS-7W7W>] (finding former Secretary of Defense Esper commanded the National Guard to serve unarmed and leave the capital by a certain date).

16. D.C. Code § 49-409 (2020) ("The President of the United States shall be the Commander-in-Chief of the militia of the District of Columbia.").

authorize and deploy the National Guard is found in one statute: 32 U.S.C. § 502(f) (Section 502(f)).<sup>17</sup>

Section 502 does not ostensibly provide the executive an ability to deploy a state's National Guard until one closely reads subsection 502(f).<sup>18</sup> Although titled "Required drills and field exercises," which does not explicitly suggest the executive can use the National Guard in thwarting civil protest or insurrection, subsection 502(f) may provide a broad delegation of power to the executive. Pursuant to Section 502(f), "a member of the National Guard may . . . be ordered to perform training or *other duty*" under regulations by the Secretary of the Army or Air Force, which may include "[s]upport of operations or missions . . . at the request of the President or Secretary of Defense."<sup>19</sup> Based upon this power to request the National Guard, can the President authorize these troops to perform any mission or operation under Section 502(f)?

Examining their use of National Guard units under Section 502(f), the executive branch would seem to answer this question in the affirmative. The National Guard operating under Section 502(f) is in Title 32 status, in which the guard is controlled by their respective state yet funded by the federal government.<sup>20</sup> The executive branch, under both guidance from the DoD and the Department of Justice,<sup>21</sup> has utilized a broad interpretation of Section 502(f) to deploy the National Guard in Title 32 status to execute various operational missions on behalf of the executive branch.<sup>22</sup> Such operations seem far remote from the training seemingly described in Section 502. Operating under Section 502(f), the National Guard assisted in the aftermath of both the September 11 attacks and Hurricane Katrina,<sup>23</sup>

17. See Letter from William Barr, Att'y Gen., U.S. Off. of the Att'y Gen., to Muriel Bowser, Mayor, D.C., & Karl A. Racine, Att'y Gen., D.C. (June 9, 2020), <https://twitter.com/KerriKupecDOJ/status/1270487263324049410/photo/2> [<https://perma.cc/886J-BSVF>]; see also Press Release, Nat'l Guard, National Guard Response to Civil Unrest (Jan. 8, 2021), <https://www.nationalguard.mil/Resources/Press-Releases/Article/2466269/national-guard-response-to-civil-unrest/> [<https://perma.cc/DJY9-EQF4>] ("Acting Secretary of Defense Christopher Miller approved up to 6,200 National Guardsmen to support civil authorities in the District of Columbia for up to 31 days under Title 32, 502(f) authority.").

18. 32 U.S.C. § 502.

19. *Id.*

20. TIMOTHY J. LOWENBERG, NAT'L GUARD ASS'N OF THE U.S., *THE ROLE OF THE NATIONAL GUARD IN NATIONAL DEFENSE AND HOMELAND SECURITY* 2 (2005).

21. See *infra* Section I.B; see also Authority to Use Troops to Prevent Interference with Federal Employees by Mayday Demonstrations and Consequent Impairment of Government Functions, 1 Op. O.L.C. 343 (Apr. 29, 1971), <https://www.justice.gov/file/20836/download> [<https://perma.cc/4DKS-SPF9>].

22. See *infra* Section II.B.ii.

23. ARMY NAT'L GUARD, NATIONAL GUARD HOMELAND DEFENSE WHITE PAPER: SEPTEMBER 11, 2001, HURRICANE KATRINA, AND BEYOND 3–5 (2005) [hereinafter WHITE

and, more recently, provided assistance during the COVID-19 pandemic by establishing testing centers and administering the vaccine to state residents.<sup>24</sup> DoD instructions even cite Section 502(f) to authorize the National Guard to support “special events.”<sup>25</sup> Based on this extensive use of the National Guard under Section 502(f), the executive’s interpretation of this provision seems to be limitless in scope and unrestrained by any other statutory provision.<sup>26</sup>

Although flexible use of the National Guard can be helpful in responding to novel emergencies, President Trump’s rhetoric and actions regarding the National Guard demonstrate a need for legal restraints on this broad executive power. In light of nationwide BLM protests, President Trump called upon governors to deploy their National Guard units to suppress protest in major cities and, if they did not, threatened to deploy the federal military.<sup>27</sup> On June 2, 2020, the White House ordered troops, including National Guard units, to clear BLM demonstrators protesting on Lafayette Square,<sup>28</sup> an event considered outrageous by former military

PAPERS], [https://www.nationalguard.mil/Portals/31/Documents/ARNGpdfs/whitepages/HLD%20White%20Paper\\_11OCT05\\_Final\\_Version.pdf](https://www.nationalguard.mil/Portals/31/Documents/ARNGpdfs/whitepages/HLD%20White%20Paper_11OCT05_Final_Version.pdf) [https://perma.cc/7ECV-HWM6].

24. *E.g.*, Memorandum on Providing Continued Federal Support for Governors’ Use of the National Guard to Respond to COVID-19 and To Facilitate Economic Recovery, 85 Fed. Reg. 31,665 (2020); *see* Press Release, Nat’l Guard Bureau, National Guard Active in Multiple Response Efforts (Aug. 27, 2020) [hereinafter Nat’l Guard Bureau, Multiple Response Efforts], <https://www.nationalguard.mil/Resources/Press-Releases/Article/2327309/national-guard-active-in-multiple-response-efforts/> [https://perma.cc/LYN8-Q9PR] (stating that National Guard units have created mobile testing teams while “over 19,600 National Guard professionals continue COVID-19 response efforts in all 50 states, three territories and the District of Columbia”); *see also* Donald Branum, *Vermont National Guard Rolls Out 1st Doses of COVID Vaccine*, NAT’L GUARD (Jan. 5, 2021), <https://www.nationalguard.mil/News/Article/2462445/vermont-national-guard-rolls-out-1st-doses-of-covid-vaccine/> [https://perma.cc/JQX7-U368] (stating the National Guard has also helped administer the COVID-19 vaccine); Holli Nelson, *West Virginia National Guard Helps Ramp up COVID-19 Testing*, NAT’L GUARD (Nov. 13, 2020), <https://www.nationalguard.mil/News/Article/2414557/west-virginia-national-guard-helps-ramp-up-covid-19-testing/> [https://perma.cc/VMF8-GXDP] (“Guard members . . . have been working around the clock [to] establish locations, advertise testing and collect test samples. In 13 days, 150,109 tests were conducted.”).

25. U.S. DEP’T OF DEF., ISSUANCE 3025.20, DEFENSE SUPPORT OF SPECIAL EVENTS para. 4 (2012) [hereinafter DoDI 3025.20], <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302520p.pdf> [https://perma.cc/QHJ7-XGA7] (updated May 24, 2017).

26. *See infra* Section I.B.

27. W.J. Hennigan & John Walcott, *Pulled into Yet Another Political Battle, the Pentagon Finally Pushes Back Against Trump*, TIME (June 3, 2020, 3:27 PM), <https://time.com/5846978/trump-military-protests/> [https://perma.cc/5F3N-F3GG].

28. Rebecca Tan et al., *Before Trump Vows to End “Lawlessness,” Federal Officers Confront Protestors Outside White House*, WASH. POST (June 2, 2020), <https://www.washingtonpost.com/local/washington-dc-protest-white-house-george->

personnel.<sup>29</sup> In the following days, Trump’s threats would continue when, after protests erupted over another shooting in Kenosha, Wisconsin, he threatened to send the National Guard into the city.<sup>30</sup> Although President Trump did not state under which authority he would do so, this Note argues that the President, under Section 502(f), could deploy out-of-state units to a city and disregard local objections.<sup>31</sup> President Trump’s statements surrounding the National Guard did not indicate restraint in deploying these units, urging a need to investigate the extent of this executive power. Based on President Trump’s more recent refusal to deploy National Guards units to the Capitol in January 2021,<sup>32</sup> granting the executive such broad discretion to reject the request of deployment is equally dangerous when lives are at stake. Given both President Trump’s rhetoric and the executive’s broad interpretation of Section 502(f), this Note challenges the executive’s interpretation of Section 502(f) by investigating this statute’s meaning through tools of statutory interpretation.

This Note also argues that to allow the executive’s unrestricted use of the National Guard under Section 502(f) is a problem for local municipalities and citizens directly affected by such deployments. First, unlike the federal military, the National Guard under Title 32 status can conduct law enforcement activity. Such units are not subject to the Posse Comitatus Act (PCA), which prohibits the use of “the Army or the Air Force . . . to execute the laws.”<sup>33</sup> Second, as there is no positive law to

---

floyd/2020/06/01/6b193d1c-a3c9-11ea-bb20-ebf0921f3bbd\_story.html [https://perma.cc/HJL5-MYBU] (“Hundreds of protestors were pushed away from Lafayette Square, where they were protesting the police killing of George Floyd, by the National Guard, U.S. Park Police and Secret Service.”). Former Secretary of Defense Mark Esper stated that National Guard was not directly involved the actual clearing of protesters rather they remained as back up. *See National Guard ‘Did Not Advance’ on Crowd at Lafayette Park: Esper*, YAHOO! NEWS (July 9, 2020), <https://news.yahoo.com/national-guard-did-not-advance-195115879.html> [https://perma.cc/GP7D-USVU].

29. *See* Mike Mullen, *I Cannot Remain Silent: Our Fellow Citizens Are Not the Enemy, and Must Never Become So*, ATLANTIC (June 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/american-cities-are-not-battlespaces/612553/> [https://perma.cc/8MS7-YXTB].

30. *See* Calvin Woodward & Scott Bauer, *AP FACT CHECK: Trump Tweets Distort Truth on National Guard*, ASSOC. PRESS (Sept. 1, 2020), <https://apnews.com/article/ap-top-news-or-state-wire-politics-wi-state-wire-2ea05933a91212ccfb1a3ae4c39e0e79> [https://perma.cc/Q4CQ-HT5V]; *see also* Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Mar. 26, 2021), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html> [https://perma.cc/4RDJ-8NVZ].

31. *See infra* Section III.A.

32. *See supra* note 5 and accompanying text.

33. 18 U.S.C. § 1385; *see also* NAT’L GUARD BUREAU, REGULATION 500-5, NATIONAL GUARD DOMESTIC LAW ENFORCEMENT SUPPORT AND MISSION ASSURANCE OPERATIONS, para. 4-3(b) (2010) [hereinafter NGR 500-5],



restrict the President in his use of Title 32 National Guard troops, the executive could send such forces into cities in opposition to local authorities.<sup>34</sup> While a governor's consent to use its National Guard in Title 32 status is legally mandated,<sup>35</sup> there is no law that requires the President to receive local permission prior to deploying out-of-state National Guard units into a municipality. This lack of restraints is particularly troublesome for Washington D.C. as the President has direct authority over the DCNG and can request out-of-state units into the capital. Finally, although state governors could theoretically provide an adequate limitation on the executive's use of their state's National Guard by denying a President's request, this requirement is an insufficient restraint given the financial and procedural incentives to approve deployment in Title 32 status.

This Note contributes to scholarship by understanding the legal claims that underlie the broad, nearly limitless executive use of the National Guard in their Title 32 capacity. In Part I, this Note traces the origins of the National Guard from its conception as a state-based militia to its modern role as a domestic operational force. Part I will also investigate the executive's extensive use of Title 32 units based on its broad interpretation of Section 502(f). In Part II, this Note seeks to challenge the executive's reading of Section 502(f) by exploring this statute's meaning through tools of statutory interpretation. Finding the statute's meaning ambiguous, this Note argues that the Supreme Court would defer to the executive's interpretation of Section 502(f). In Part III, whereas prior work has praised the flexible standard surrounding the use of Title 32 National Guard troops,<sup>36</sup> this Note argues that permitting the executive an almost unbounded use of such units is problematic given the lack of statutory restrictions and ineffectual checks on the executive's power. Section III explores how allocating such power to the executive is detrimental to local cities, especially Washington D.C., as the executive can disregard local authorities and deploy out-of-state National Guard units without their approval. In Part IV, this Note contends that Congress can limit the executive's power by amending Section 502(f) and granting the D.C. Mayor the same authority over the DCNG as other governors possess over their state's guard.

---

<https://www.ngbpmc.ng.mil/Portals/27/Publications/ngr/ngr%20500-5.pdf?ver=2018-09-07-082540-767> [<https://perma.cc/6JRK-DKJN>] ("National Guard members called to state active duty or in a Title 32 status . . . do not come under the restrictions imposed by the Posse Comiatus Act.").

34. See *infra* Section III.A.

35. 32 U.S.C. § 328.

36. See generally Christopher R. Brown, *Been There, Doing That in a Title 32 Status: The National Guard Now Authorized to Perform Its 400-Year Old Domestic Mission in Title 32 Status*, 2008 ARMY L. 23 (2008).

## I. THE NATIONAL GUARD: FROM STATE MILITIA TO FEDERAL ASSET

### A. From Local Militia to Domestic Operational Force

The National Guard originates from the long-standing tradition of organized local militias.<sup>37</sup> In the United States, militias were a fundamental component of the first colonies that relied on such units during the American Revolution.<sup>38</sup> During the Constitutional Convention, the founders recognized the importance of militias yet debated where the authority to control such groups should lie.<sup>39</sup> On one side, the Federalists advocated for centralized control by the federal government.<sup>40</sup> On the other, the Anti-Federalists distrusted the national government and advocated for state authority over the militia.<sup>41</sup> The Anti-Federalists placed great emphasis on militias as the principal weapons to check the “potentially arbitrary power of the central government.”<sup>42</sup> The two sides compromised with a dual system that is enshrined in the Militia Clauses in which Congress has the authority to organize, arm, and discipline the militia while states would appoint officers and train these soldiers.<sup>43</sup> In

37. JOHN K. MAHON, *HISTORY OF THE MILITIA AND THE NATIONAL GUARD* 6–7 (Louis Morton ed., 1983) (tracing the use of citizen soldiers in the United States back to the Middle Ages of Europe).

38. See MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 8 (2014) (explaining that the First colonist organized militias at Plymouth and Massachusetts Bay Colonies).

39. *Id.* at 22–23. Two sides were torn as one “yearned for an effective national force, yet felt protective of the state militias, and were eager to profess their continued fealty to the ideal.” *Id.* at 22.

40. See THE FEDERALIST NO. 29 (Alexander Hamilton) (“The power of regulating the militia, and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the Confederacy.”). *But see* THE FEDERALIST NO. 46 (James Madison) (arguing that the final authority of government and governmental power reside in the people).

41. Luther Martin, *The Genuine Information at the Legislature of the State of Maryland* (Dec. 28, 1787), <https://www.consource.org/document/luther-martin-genuine-information-1787-12-28/> [<https://perma.cc/4EVA-6YAH>] (arguing that states were in a better position to understand the “situation and circumstances of their citizens, and the regulations that would be necessary and sufficient to effect a well-regulated militia in each”).

42. MAHON, *supra* note 37, at 48.

43. U.S. CONST. art. 1, § 8, cl. 15 (“The Congress shall have Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]”); *id.* art. 1, § 8, cl. 16 (“The Congress shall have Power . . . [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointing of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]”).

doing so, Congress, not the President, was given the power to call forth the state militias into federal services for three reasons: to execute the laws of the union, suppress insurrections, and repel invasion.<sup>44</sup>

While Congress passed two acts to regulate the militia in 1792, the states would primarily control these entities and would continue to do so until 1903 when, after the Spanish-American War, the federal government passed the Dick Act to reinvigorate the militias.<sup>45</sup> The Dick Act officially christened the militias as “National Guards”<sup>46</sup> and marked a beginning of increasing and continuous federal control over the militias.<sup>47</sup> The Dick Act allocated federal funds for equipment and training and permitted the President to order a fixed number of militiamen to serve as reserves during wartime.<sup>48</sup> From this point onward, the National Guard’s role in United States military affairs would grow.<sup>49</sup>

The federal government would continue to regulate the National Guard transitioning these units from a local force into a reserve for the federal army on an as-needed basis.<sup>50</sup> After World War I, Congress would solidify the National Guard’s status as a federal reserve force.<sup>51</sup> Congress’s 1933 amendment to the National Defense Act of 1916 granted the President the power to federalize the National Guard when Congress declared a national

---

44. *Id.* art. 1, § 8, cl. 15.

45. MAHON, *supra* note 37, at 138–39; *see also* MICHAEL D. DOUBLER & JOHN W. LISTMAN JR., *THE NATIONAL GUARD: AN ILLUSTRATED HISTORY OF AMERICA’S CITIZEN-SOLDIERS* 53–54 (2d. ed. 2007). President Roosevelt exclaimed that the “militia law is obsolete and worthless.” Theodore Roosevelt, President, First Annual Message to Congress (Dec. 3, 1901) (transcript available in the University of Virginia Miller Center). George Washington felt similarly about the militia during the Revolutionary War stating, “to place any dependence upon Militia, is, assuredly, resting upon a broken staff.” WALDMAN, *supra* note 38, at 14. In fact, many state militias fell into decay from the War of 1812 onward. *See* DOUBLER & LISTMAN, *supra* note 45, at 22–23. While some states abolished mandatory service, others eliminated their militias altogether. *See id.*

46. The Militia Act of 1903, Pub. L. No. 57-33, § 3, 32 Stat. 775 (1903) (also known as the Dick Act); *see also* ELBRIDGE COLBY, *THE NATIONAL GUARD OF THE UNITED STATES: A HALF CENTURY OF PROGRESS I-1* (1977) (explaining that the term “National Guard” was used in some states and is thought to have originated during a visit to the United States by Marquis de Lafayette in 1824).

47. MAHON, *supra* note 37, at 139.

48. The Militia Act of 1903 § 3.

49. *See* RAPHAEL S. COHEN, *DEMISTIFYING THE CITIZEN SOLDIER* 16 (2015), [https://www.rand.org/pubs/research\\_reports/RR1141.html](https://www.rand.org/pubs/research_reports/RR1141.html) [<https://perma.cc/6PZQ-6CSR>] (finding that the Dick Act and subsequent reforms led to the increasing role of the National Guard in the United States’s national security).

50. *Id.*

51. DOUBLER & LISTMAN, *supra* note 45, at 68, 72 (explaining that the National Defense Act of 1933 established the National Guard as a permanent reserve component).

emergency.<sup>52</sup> Representative of the growing federal control was the mandate calling for National Guard troops to take a dual oath to both the nation and their state.<sup>53</sup> In the 1970s and after the Vietnam War, the DoD announced the Total Force Policy that would “fully integrate their active and reserve forces into a ‘homogenous whole.’”<sup>54</sup> The Total Force Policy incorporated the National Guard into the military reserve and established the National Guard as the sole reserve for federal forces.<sup>55</sup> As a result of the Total Force Policy, the National Guard was brought into closer harmony with the active army.<sup>56</sup>

After the conclusion of the Gulf War, the National Guard’s role shifted again from a reserve force to an operational unit, which would further integrate the National Guard into the military in order to be readily utilized for any major conflict.<sup>57</sup> Unlike its previous status as a reserve force, this operational status transitioned the National Guard into a perennial asset for national security.<sup>58</sup> Starting in the 1990s, the National Guard would respond to major domestic emergencies, including suppressing civil unrest during the 1992 Rodney King riots in Los Angeles and aiding towns during major flooding along the Mississippi River.<sup>59</sup> In the aftermath of the September 11 terrorist attacks, the National Guard provided both local support in New York City, from arranging medical treatment to aiding law enforcement, and nationwide assistance in securing commercial airports and the U.S. borders.<sup>60</sup> While heavily involved domestically, the National Guard also served abroad, participating in both the Iraq and Afghanistan Wars.<sup>61</sup> In the aftermath of Hurricane Katrina in 2005, the National Guard was deployed to perform rooftop rescues and deliver supplies via helicopter.<sup>62</sup> Perhaps the largest domestic deployment of the National Guard was during 2020 when, at one point, 63,000 guard members were

---

52. See MAHON, *supra* note 37, at 174–75 (explaining the importance of this authority since, prior to this amendment, the National Guard would be dissolved from their units and drafted individually. Now units would remain intact while in federal service).

53. DOUBLER & LISTMAN, *supra* note 45, at 73.

54. *Id.* at 116.

55. *Id.*

56. *Id.*

57. See COHEN, *supra* note 49, at 22.

58. See *id.* at 29.

59. DOUBLER & LISTMAN, *supra* note 45, at 126.

60. See Richard H. Kohn, *Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT’L L. 165, 172–73 (2003).

61. COHEN, *supra* note 49, at 24.

62. WHITE PAPERS, *supra* note 23, at 3–4.

active in responding to the COVID-19 pandemic, civil disturbances, and other natural disasters, including the California wildfires.<sup>63</sup>

## B. The Broad Modern Executive Use of the National Guard

### *i. Title 32 Status: Procedural Requirements*

The National Guard can serve in one of three distinct statuses: State Active Duty, Title 32 status, or Title 10 status.<sup>64</sup> Determining the National Guard's status among these three statuses is important as each determines the authority in charge and whether the guard is limited by federal or state law.<sup>65</sup> The Supreme Court aptly outlined the National Guard's status: "In a sense, [National Guard members] must keep three hats in their closets — a civilian hat, a state militia hat, and an army hat — only one of which is worn at any particular time."<sup>66</sup> In this Section, this Note will outline procedural requirements that must be completed prior to the National Guard deploying under Title 32 status.

Although the National Guard is inherently a state entity, these units may act in three distinct contexts: as a purely state force in State Active Duty (SAD); as a federal force under Title 10 (Title 10 status); and as state force used for federal operations in Title 32 status.<sup>67</sup> In SAD status, the National Guard is directly controlled by the governor and paid for by the state.<sup>68</sup> The National Guard in Title 10 status is fully controlled by the federal government and integrated into the military.<sup>69</sup> Yet, while in Title 32 status, the National Guard is a state force funded by the federal government and utilized for operational support by either the federal or state governments.<sup>70</sup>

63. Nat'l Guard Bureau, Multiple Response Efforts, *supra* note 24 (stating that National Guard units have created mobile testing teams while "over 19,600 National Guard professionals continue COVID-19 response efforts in all 50 states, three territories and the District of Columbia"); *see also National Guard Continues Wildfire Operation*, ASS'N U.S. ARMY (Sept. 24, 2020, 2:06 PM), <https://www.ausa.org/news/national-guard-continues-wildfire-operations> [<https://perma.cc/PJ5L-VVL3>] (stating the California National Guard used helicopters to dump water and suppress fires).

64. *See* LOWENBERG, *supra* note 20, at 2–3.

65. *See* CTR. FOR L. & MIL. OPERATIONS, DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES 48–49 (2018) [hereinafter DOMESTIC OPERATIONAL LAW HANDBOOK], [https://www.loc.gov/rr/frd/Military\\_Law/pdf/domestic-law-handbook-2018.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/domestic-law-handbook-2018.pdf) [<https://perma.cc/G9DG-RGYS>] ("Status is also the primary factor for determining the applicability of law for such issues as benefits, protections, and liabilities.").

66. *Perpich v. Dep't of Def.*, 496 U.S. 334, 348 (1990).

67. *See* LOWENBERG, *supra* note 20, at 2–3.

68. *Id.* at 2.

69. *Id.* at 2–3 ("When employed at home or abroad in Title 10 status, National Guard forces are stripped of all state control and become indistinguishable elements of the federal military force.").

70. *Id.*

Furthermore, in either SAD or Title 32 status, the National Guard is not subject to the PCA, which allows these units to enforce domestic law.<sup>71</sup> The Title 32 Status represents the unique role that the National Guard plays in the American federalist structure as units are under the command of the states but are funded by the federal government.<sup>72</sup>

Before operating under Title 32 status, this duty status must be approved by the executive branch and the state governor. The approval of Title 32 status may occur in three ways. First, a governor may request to deploy the National Guard in Title 32 status with the consent of the proper Departmental Secretary.<sup>73</sup> Second, the DoD can prescribe regulations to authorize Title 32 status.<sup>74</sup> Third, the President or Secretary of Defense can specifically request a governor to deploy their National Guard for training or “other duty.”<sup>75</sup> In any case, both the governor and the executive branch must concur over the deployment of the National Guard units in Title 32 status.

*ii. The Executive’s Modern Use of National Guard  
Units in Title 32 Status*

Since the National Guard’s transition to an operational force in the 1990s,<sup>76</sup> the federal government has authorized the National Guard in Title 32 status to conduct homeland security missions at the discretion of the executive branch. Responding to the September 11 terrorist attacks, the National Guard was deployed in Title 32 status across the nation.<sup>77</sup>

71. *See* Gilbert v. United States, 165 F.3d 470, 473 (6th Cir. 1999); United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997); *see also* NGR 500-5, *supra* note 33, para. 4-3(b) (“National Guard members called to state active duty or in a Title 32 status . . . do not come under the restrictions imposed by the Posse Comitatus Act.”).

72. *See* LOWENBERG, *supra* note 20, at 2 (“These provisions are unique to the National Guard.”).

73. 32 U.S.C. § 328 (“The Governor of a State or the Commonwealth of Puerto Rico, Guam, or the Virgin Islands, or the commanding general of the District of Columbia National Guard, as the case may be, with the consent of the Secretary concerned, may order a member of the National Guard to perform Active Guard and Reserve duty, as defined by section 101(d)(6) of title 10, pursuant to section 502(f) of this title [32 USCS § 502(f)].”).

74. *See* 32 U.S.C. § 502(f)(1).

75. *Id.* § 502(f)(2); *see also* U.S. DEP’T OF DEF., ISSUANCE 3025.22, THE USE OF NATIONAL GUARD FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 3-d (2013) [hereinafter DoDI 3025.22], <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302522p.pdf?ver=2019-02-13-093838-733> [https://perma.cc/6F92-XE9W] (“The use of the National Guard to support a federal department or agency or qualifying entity request for assistance will only be conducted in a duty status . . . unless otherwise authorized by the Secretary of Defense.” (emphasis added)) (updated May 15, 2017).

76. *See supra* Section I.A.

77. WHITE PAPERS, *supra* note 23, at 3.

Following the September 11 attacks, the executive has provided that the National Guard can be used to support the security of “National Special Security Events.”<sup>78</sup> This has included the National Guard supporting security efforts at the 2002 Winter Olympics in Utah, the 2004 G-8 summit in Georgia, and both the 2004 Democrat and Republican National Conventions in Boston and New York City, respectively.<sup>79</sup>

In 2007, Congress officially amended Title 32 to permit the National Guard to “support or execute homeland defense activities.”<sup>80</sup> Homeland defense activity means duty taken “for the military protection of the territory or domestic population of the United States . . . determined by the Secretary of Defense.”<sup>81</sup> Although not explicitly citing this statutory provision in authorizing homeland security missions, each presidential administration since George W. Bush has authorized the National Guard in Title 32 status to support the Department of Homeland Security in monitoring the southern border.<sup>82</sup> While deployed to the border, the National Guard was not authorized to make arrests,<sup>83</sup> yet supported Border Patrol in “operating surveillance systems, analyzing intelligence, installing fences and vehicle barriers, building patrol roads and providing training.”<sup>84</sup> The National Guard also identified individuals attempting to enter the

---

78. *Id.* at 5.

79. *Id.* at 5–6.

80. 32 U.S.C. § 904(a).

81. *Id.* § 901.

82. See R. CHUCK MASON, CONG. RSCH. SERV., R41286, SECURING AMERICA’S BORDERS: THE ROLE OF THE MILITARY 2 (2013), <https://fas.org/sgp/crs/homsec/R41286.pdf> [<https://perma.cc/MJY4-T4PV>] (discussing President Obama’s deployment of National Guard to the border, known as Operation Phalanx); Presidential Memorandum from President Donald J. Trump for the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security (Apr. 4, 2018), <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-secretary-defense-attorney-general-secretary-homeland-security/> [<https://perma.cc/XLS6-BNWL>] (President Trump’s request to deploy National Guard troops to the border); MICHAEL D. DOUBLER, NAT’L GUARD BUREAU, OPERATION JUMP START: THE NATIONAL GUARD ON THE SOUTHWEST BORDER, 2006-2008 19 (2008) [hereinafter DOUBLER REPORT], <https://www.nationalguard.mil/portals/31/Documents/About/Publications/Documents/Operation%20Jump%20Start.pdf> [<https://perma.cc/HT88-GNJ5>] (discussing the Bush Administration’s use of the National Guard at the border).

83. JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10121, THE PRESIDENT’S AUTHORITY TO USE THE NATIONAL GUARD OR THE ARMED FORCES TO SECURE THE BORDER 2 (2018), <https://fas.org/sgp/crs/natsec/LSB10121.pdf> [<https://perma.cc/D7VY-6QGS>] (“Although National Guard members did not engage in direct law enforcement activities during these two border security operations [under the Bush and Obama Administrations], it is possible that states might consider giving them that authority in future operations.”).

84. DOUBLER REPORT, *supra* note 82, at 18.

United States and relayed such information to Border Patrol to make arrests.<sup>85</sup>

With a growing domestic role, the National Guard has been used by the executive to assist in recovery efforts for major national disasters. While assisting in the Hurricane Katrina recovery efforts, the National Guard operated in a Title 32 status.<sup>86</sup> Once considered the largest statewide deployment of the National Guard, over 50,000 guard members were deployed to assist in responding to the local disaster.<sup>87</sup> In the aftermath of the hurricane, the National Guard worked on construction projects, provided logistical support by flying supplies to areas with restricted access, and performed rescues across hurricane-stricken areas.<sup>88</sup> Since Hurricane Katrina, the National Guard has continued to respond to emergencies arising from natural disasters in Title 32 status.<sup>89</sup> More recently, the National Guard was used to respond to the California wildfire and assisted in suppressing these forest-wide fires through helicopter water dumps.<sup>90</sup>

*iii. The Executive's Broad Interpretation of Section 502(f)*

Section 502(f) is the central statutory authorization for the National Guard to perform or conduct domestic operational missions under Title 32 status.<sup>91</sup> Specifically, Section 502(f)(1) permits the Secretary of the Army or Secretary of the Air Force to prescribe regulations that may order the National Guard “to perform training or other duty.”<sup>92</sup> Contrasting with the training requirements of Section 502(a), the DoD recognizes that Section

85. See Letter from Davi M. D’Agostino, Dir., U.S. Gov’t Accountability Off., to Carl Levin, U.S. Sen., & Howard P. “Buck” McKeon, U.S. Rep. 18 (Sept. 12, 2011).

86. WHITE PAPERS, *supra* note 23, at 12.

87. *Id.* at 4.

88. *Id.* at 4–5.

89. See NAT’L GUARD BUREAU, 2015 POSTURE STATEMENT 36, <https://www.nationalguard.mil/portals/31/Documents/PostureStatements/2015%20National%20Guard%20Bureau%20Posture%20Statement.pdf> [https://perma.cc/236G-TXCT] (last visited Oct. 6, 2021) (“National Guard Soldiers and Airmen logged nearly 452,100 duty days (in state active duty and Title 32 status) in response to state emergencies in FY13.”); NAT’L GUARD BUREAU, 2016 POSTURE STATEMENT 11, <https://www.nationalguard.mil/portals/31/Documents/PostureStatements/2016%20National%20Guard%20Bureau%20Posture%20Statement.pdf> [https://perma.cc/5CEZ-EKTG] (last visited Oct. 6, 2021) (“Army and Air National Guardsmen were called-up (in state active duty and Title 32 status) by their governors 200 times and logged 281,263 man days responding to homeland incidents in FY14. Part of those responses included 63 natural disasters; including 17 fires, 14 winter storms, 12 tornadoes, 12 floods and 3 hurricanes.”).

90. See *supra* note 63 and accompanying text.

91. WHITE PAPER, *supra* note 23, at 12.

92. 32 U.S.C. § 502(f)(1).



502(f) provides distinct responsibilities and duties to the National Guard.<sup>93</sup> Under Section 502(a), the National Guard is primarily in a training status,<sup>94</sup> whereas, under Section 502(f), the National Guard can conduct training or perform other duties.<sup>95</sup> This has two important ramifications for the National Guard acting pursuant to Section 502(f) status.

First, the executive allows the National Guard under Section 502(f) to satisfy training requirements while performing an operational mission. Training under Section 502(f) is not interchangeable with training under Section 502(a).<sup>96</sup> While Section 502(a) operational assistance may occur incidental to training, Section 502(f) training may occur accompanying active duty.<sup>97</sup> For example, while deployed to the southern border under Section 502(f), National Guard troops were supporting an operational mission while also satisfying training requirements.<sup>98</sup> National Guard units training under Section 502(a) can only provide operational support when there is “incidental benefit” to civil authorities.<sup>99</sup> For example, a National Guard mobile hospital unit deployed for training can be diverted to support a local emergency. Since the training is consequentially supporting another operation, this unit’s actions are authorized under Section 502(a).<sup>100</sup>

Second, unlike Section 502(a), Section 502(f) states that the National Guard can operate pursuant to “other duty” prescribed by DoD regulations or as requested by the President or Secretary of Defense.<sup>101</sup> In interpreting this “other duty,” the executive indicates that Section 502(f) creates an independent duty for National Guard units, which is not limited by other

---

93. DOMESTIC OPERATIONAL LAW HANDBOOK, *supra* note 65, at 198. (“[S]tatus under Section 502(a) is materially different from status under Section 502(f) in both purpose and approval authority.”).

94. *Id.*

95. *See* 32 U.S.C. § 502(f); *see also* DOUBLER REPORT, *supra* note 82, at 7 (explaining that while deployed to the Mexico border, National Guard troops were training as well as participating on an operational mission).

96. OFF. OF THE CHIEF GEN. COUNS., NAT’L GUARD BUREAU, DOMESTIC OPERATIONS LAW AND POLICY 66 (2019) [hereinafter NGB DOMESTIC GUIDANCE]. Handbooks and publications can be used as guidance for determining an agency’s interpretation of a statute. *See, e.g.*, S.D. Warren Co. v. Me. Bd. of Env’t Prot., 547 U.S. 370, 377 (2006) (citing the EPA’s Water Quality Standards Handbook); FCC v. Am. Broad. Co., 347 U.S. 284, 294 (1954) (citing publications by the Post Office and Department of Justice to discover the agency’s interpretation of a statutory language).

97. NGB DOMESTIC GUIDANCE, *supra* note 96, at 70.

98. DOUBLER REPORT, *supra* note 82, at 47 (explaining that while deployed to the U.S.-Mexico border, National Guard troops were training as well as participating on an operational mission).

99. NGB DOMESTIC GUIDANCE, *supra* note 96, at 68.

100. *Id.* at 68–69.

101. 32 U.S.C. § 502(f).

statutory provisions.<sup>102</sup> Specifically, the National Guard Bureau (NGB)<sup>103</sup> suggests that Section 502(f) duty permits the National Guard to conduct missions other than those explicitly authorized by statutes.<sup>104</sup> Therefore, although there are particular statutes that cite Section 502(f) to authorize specific missions for Title 32 National Guard units, the NGB has promulgated instructions that suggest Section 502(f) can allow operations and missions beyond those explicitly permitted by law. Pursuant to the independent duty, DoD Issuance permits the National Guard under Section 502(f) to support “international and domestic special events.”<sup>105</sup> These special events may include supporting security efforts at a President’s State of the Union address, the Olympics, or the Boy Scout Jamboree.<sup>106</sup> In supporting such events, the National Guard could provide support through aviation, security, logistics, or nuclear threat identification.<sup>107</sup> Unlike homeland security and counter-drug missions, there is no legislation that specifically authorizes the National Guard to support these special events.

In accordance with this broad, indeterminate “other duty,” the DoD has developed guidance for National Guard units deployed on civil disturbance or civil support missions.<sup>108</sup> As the PCA does not apply to the National Guard in Title 32 status, the National Guard could partake in law enforcement activities in any city or state.<sup>109</sup> The PCA was created to prohibit the military from engaging in law enforcement, yet, as the National

102. NAT’L GUARD BUREAU, CNGBI 1302.01, GUIDANCE FOR MEMBERS PERFORMING DUTY UNDER THE AUTHORITY OF 32 USC § 502(F) para. 1 (2012) [hereinafter CNGBI 1302.01], <https://www.ngbpmc.ng.mil/Portals/27/Publications/cngbi/CNGBI%201302.01%2020170712.pdf?ver=2018-05-09-165343-363> [https://perma.cc/F6PS-K5D7] (certified as current in July 2017) (“This policy governs the use of National Guard (NG) members performing duty under the authority of Title 32 United States Code (U.S.C.) § 502(f) for missions other than missions authorized by 32 U.S.C. § 112 ‘Drug Interdiction and Counter-Drug Activities,’ 32 U.S.C. § 902 ‘Homeland Defense Activities,’ 32 U.S.C. § 328 ‘Active Guard and Reserve duty: Governor’s Authority,’ and 10 U.S.C. § 12310(c) ‘Operations Relating to Defense Against Weapons of Mass Destruction and Terrorist Attacks.’”).

103. The National Guard Bureau is “a joint activity of the Department of Defense . . . [and] the channel of communications on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States between (1) the Department of the Army and Department of the Air Force, and (2) the several States.” 10 U.S.C. § 10501.

104. *See supra* note 102.

105. DoDI 3025.20, *supra* note 25, para. 4(a).

106. *Id.* at Enclosure 3 para. 2b.

107. *Id.* at Enclosure 3 para. 2b(7).

108. *See* DoDI 3025.22, *supra* note 75, para. 2(a)(2) (“The use of the National Guard for [Defense Support of Civil Authorities] in response to a request for assistance from a federal department or agency or qualifying entity in accordance with Reference (e), when conducted in a duty status pursuant to section 502(f) of Reference (a).”).

109. *See supra* note 71.

Guard in Title 32 status is considered a state force, such units are not subject to this limitation.<sup>110</sup> Pursuant to this DoD guidance, the National Guard serves in a support capacity to local civil authorities<sup>111</sup> and is typically tasked with assignments like crowd management, transportation security, or emergency responder protection.<sup>112</sup> Although not explicitly stated, the NGB indicates that National Guard members may be able to make arrests depending on the degree of force used by those evading the law.<sup>113</sup> When working pursuant to another state's request for assistance, National Guard members are not authorized to make arrests unless the governor of the affected state permits National Guard units to do so.<sup>114</sup> The NGB does not promulgate specific advice in making arrests or conducting similar law enforcement activities when acting pursuant to a federal mission. While deployed to the capital, the out-of-state guard units have been primarily deployed to support local law enforcement.<sup>115</sup> During its June 2020 deployment, these National Guard units were unarmed,<sup>116</sup> yet guard units were fully armed for the January 2021 presidential inauguration.<sup>117</sup>

## II. THE EXECUTIVE'S BROAD INTERPRETATION OF SECTION 502(F) WILL PREVAIL OVER AN AMBIGUOUS STATUTORY INTERPRETATION

There is no indication that the executive's all-embracing utilization of the National Guard will subside.<sup>118</sup> As the National Guard's role in

110. *See supra* note 71.

111. U.S. DEP'T OF DEF., DIRECTIVE 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) para. 2 (2010), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/302518p.pdf> [<https://perma.cc/N9RE-8XRM>] (updated Mar. 2018).

112. DOMESTIC OPERATIONAL LAW HANDBOOK, *supra* note 65, at 105–06 (finding that the National Guard could provide area security support, facility security operations, and manage public safety and security support assets).

113. NGR 500-5, *supra* note 33, para. 4-4. In Level Four, suspects that use violence or threatening behavior, National Guard agents could use chemical agents to affect an arrest. *Id.* para. 4-4(g)(4).

114. *Id.* para. 8-6.

115. *See, e.g.*, Press Release, Off. of Utah Gov. Gary R. Herbert, The Utah National Guard in Washington D.C. (June 5, 2020), <https://justfacts.votesmart.org/public-statement/1434466/the-utah-national-guard-in-washington-dc> [<https://perma.cc/BRF6-USV6>] (“[T]he Utah National Guard is in the area to play a support role for local law enforcement, helping with cleanup duties and protecting various national treasures.”).

116. *See* Sonne et al., *supra* note 15.

117. *See* Helene Cooper & Adam Goldman, *Pentagon to Arm National Guard Troops Deploying to Capitol for Inauguration*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2021/01/12/us/politics/national-guard-troops-armed-inauguration.html> [<https://perma.cc/DC2W-AQ9V>].

118. *See supra* note 63.

domestic affairs grows, determining the limitation on the executive's use of Title 32 National Guard units becomes increasingly important because providing the executive indeterminate discretion to use such troops may "open[] the door to potential abuse."<sup>119</sup> This potential for misuse leaves major cities vulnerable to deployments of the National Guard in opposition to local authorities. In Section II.A, this Note argues that, utilizing the principles of statutory interpretation, the executive's broad interpretation of Section 502(f) will prevail given the statute's ambiguity. Although a textual reading of Section 502(f) provides that the executive is limited in regulating National Guard units, the legislative history demonstrates an intent to delegate broad authority to the executive. In Section II.B, this Note explains that, given the statute's ambiguity, a legal challenge to the executive's interpretation will fail as the Supreme Court practices extreme deference to the executive on matters of military and national security.

#### **A. Principles of Statutory Interpretations Support a Limited Interpretation of Section 502(f)**

The Supreme Court has employed a process of practical reasoning in statutory interpretation, relying on a hierarchy of sources to interpret statutes.<sup>120</sup> Although judges differ in their approaches to statutory interpretation, this analysis often begins with examining the statutory text.<sup>121</sup> The Court will assume Congress granted undefined statutory words their "ordinary meaning."<sup>122</sup> Ordinary Meaning refers to the assumption "that Congress uses common words in their popular meaning, as used in the common speech of men."<sup>123</sup> If a term is defined by the statute, the Court follows the provided definition even if contrary to the ordinary meaning.<sup>124</sup>

A court's investigation does not end with a presumption of ordinary meaning as statutory interpretation is "holistic" and must be consistent

119. See Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies*, 91 MARQ. L. REV. 1027, 1079 (2008).

120. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353–54 (1990).

121. *Id.* at 354–59; see also *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) ("The text is clear, so we need not consider this extra-textual evidence.").

122. *Yates v. United States*, 574 U.S. 528, 537 (2015); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011).

123. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

124. See *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

within the statutory context.<sup>125</sup> In doing so, the Court can employ a number of textual canons of statutory construction, including maxims of word association, which are general notions of English language composition or syntax.<sup>126</sup> Additionally, statutory provisions are read by reference to the whole act<sup>127</sup> and similar provisions elsewhere in the law.<sup>128</sup> Courts also avoid interpreting provisions that would yield inconsistent meaning when referencing other statutes that rely on a particular interpretation.<sup>129</sup> For example, in *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court considered other statutory provisions to determine if the FDA was authorized to regulate tobacco.<sup>130</sup>

If a court finds a clear textual meaning, this may conclude the statutory analysis or serve as a presumption that the textual meaning is correct.<sup>131</sup> If the statute is still ambiguous, judges may rely on legislative history to illuminate the meaning behind the statutory text.<sup>132</sup> Legislative history is always potentially relevant because statutes can be amended over time.<sup>133</sup> If Congress's intent is ascertained by the legislative history and supports the textual meaning, the interpretation is likely decisive.<sup>134</sup> If there is a

---

125. *E.g.*, *SW Gen.*, 137 S. Ct. at 938–39 (interpreting disputed terms using first the statutory subsection individually and then considering the statute as a whole); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear.”).

126. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 595 (6th ed. 2020).

127. *See Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (“In sum, ‘[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.’” (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984))).

128. *E.g.*, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting) (considering “the sense in which [the disputed statutory term] is used elsewhere in federal legislation and treaty”); *United States v. Marshall*, 908 F.2d 1312, 1316 (7th Cir. 1990) (considering how similar statutes were applied in other circumstances).

129. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143–44 (2000) (referencing other statutory provisions enacted by Congress to determine whether the FDA had authority to regulate tobacco).

130. *Id.* at 143–45 (reviewing six pieces of legislation that Congress passed regarding tobacco regulation).

131. *See Eskridge & Frickey, supra* note 120, at 355–56.

132. *See, e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) (“Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text.”)

133. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695–96 (2014) (citing subsequent amendments to the definition of “exercise of religion”); *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 231 (2007) (reviewing the amendment of a statute over time to show statutory meaning).

134. Eskridge & Frickey, *supra* note 120, at 357.

lack of clarity after consulting legislative history, the Court may refer to more dynamic factors such as constitutional principles,<sup>135</sup> agency enforcement methods,<sup>136</sup> and legislative inaction.<sup>137</sup>

Applying this framework to Section 502(f) in Section A.i, the textual interpretation reveals a more limited interpretation of Section 502(f) yet does not clarify the extent to which the DoD is limited in regulating the National Guard. As the textual interpretation is still ambiguous, Section A.ii reviews Section 502(f)'s legislative history finding it does not provide insight into any limitations on the DoD using 502(f) authorized National Guard troops. Therefore, given that the text and legislative history are imprecise, referring to other interpretative devices like legislative inaction indicates the executive's broad interpretation of Section 502(f) will prevail.

*i. What is "Other Duty"?*

To understand what "other duty" entails, statutory interpretation must begin with the text.<sup>138</sup> In doing so, a textual analysis of Section 502(f) demonstrates three findings. First, while a strict reading of Section 502(f) provides the DoD has broad discretion to use Title 32 National Guard members, referencing the entirety of Section 502 and other statutory provisions limits the extent of DoD's authority. Second, Section 502(f)(2) specifically allows the President or Secretary of Defense to request the National Guard in Title 32 status capacity, yet this is limited by the provision's plain meaning. Third, Section 502(f)'s "other duty" will likely be limited under the canon of constitutional avoidance because the Constitution provides Congress the power to call forth the National Guard. Although the text indicates a limitation on the DoD, there is still ambiguity behind this "other duty" language and, therefore, the legislative history should be consulted.

A textual reading of only Section 502(f) indicates that the DoD has broad authority to use the National Guard in Title 32 status. Under Section 502(f)(1), the National Guard may "be ordered to perform training or other duty in addition to that prescribed under [Section 502(a)]" pursuant to

135. *Id.* at 359; Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 834 (2017) (explaining that the canon of constitutional avoidance "holds that if there are two or more plausible readings of a statute, and one of these raises serious constitutional concerns, the Court should adopt the reading that avoids the constitutional problem").

136. *See* ESKRIDGE ET AL., *supra* note 126, at 811–12.

137. *Id.* (discussing legislative inaction); *see also* *Evans v. United States*, 504 U.S. 255, 269 (1992) (assuming Congress acquiesced to long standing interpretation of statute by lower courts).

138. *See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296–97 (2006); *see also* Eskridge & Frickey, *supra* note 120, at 353–54.

regulations created by the Secretary of the Army or Secretary of the Air Force.<sup>139</sup> The use of “or” in a statute without a list of items is disjunctive as this is the ordinary use of the word “or.”<sup>140</sup> Duty, therefore, must differ from training based on the statute’s plain meaning. This interpretation is supported by reading Section 502(f)(2)(A), which explains that training or duty under Section 502(f)(1) may include “[s]upport of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.”<sup>141</sup> The term “may” connotes discretion.<sup>142</sup> Therefore, as Section 502(f)(2) uses the term “may” to expand upon training or duty under Section 502(f)(1), this indicates that training or other duty is not limited to the examples outlined in Section 502(f)(2). If “other duty” could include the National Guard supporting any mission or operation, then the DoD’s Section 502(f) authority over the National Guard is expansive.

Although referring to Section 502(f) does not restrict the DoD in ordering the National Guard to conduct “other duty,” referencing the entire act and other statutory provisions indicates a more limited meaning behind Section 502(f). In statutory interpretation, the entire act, including other Section 502 provisions and additional statutes, must be referenced as statutory interpretation is “holistic.”<sup>143</sup> As the National Guard has been authorized to conduct homeland security operations under 32 U.S.C. § 904 and counter-drug activities under 32 U.S.C. § 112, defining “other duty” as any duty would make any additional statutes that cite Section 502(f) repetitive. If “other duty” meant any duty, the DoD could authorize the National Guard to conduct homeland security missions or counter-drug operations without additional statutory authorization. “Other duty” therefore cannot be limitless to supporting any and all operations or missions.

Yet, although “other duty” is not limited by Section 502(f)(2), the President’s authority to request the National Guard pursuant to Section

---

139. 32 U.S.C. § 502(f)(1).

140. *Loughrin v. United States*, 573 U.S. 351, 357 (2014); *United States v. Woods*, 571 U.S. 31, 45 (2013) (“While that can sometimes introduce an appositive — a word or phrase that is synonymous with what precedes it (‘Vienna or Wien,’ ‘Batman or the Caped Crusader’) — its ordinary use is almost always disjunctive, that is, the words it connects are to ‘be given separate meanings.’” (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))).

141. 32 U.S.C. § 502(f)(2)(A).

142. *See, e.g., Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (“Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.”).

143. *See Burwell v. Hobby Lobby, Inc.*, 573 U.S. 682, 695–96 (2014); *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010); *Ricci v. DeStefano* 557 U.S. 557, 580 (2009).

502(f) is restricted given the language used in Section 502(f)(2)(A) and the other statutory provision citing Section 502(f). Compared to Section 502(f)(1), which holds that the National Guard could be “ordered to *perform* training or other duty,” Section 502(f)(2)(A) uses more limited language stating that the President could request the National Guard to “[s]upport of operations or missions.”<sup>144</sup> The Court has found that a variation in terms suggests a variation in meaning.<sup>145</sup> Therefore, using “support” rather than “perform” indicates a restraint in the National Guard performing operations or missions. In addition, other statutory provisions that authorize the National Guard to conduct duties pursuant to Section 502(f) use the term “perform” or “execute.”<sup>146</sup> Referring to the ordinary meaning of support and perform,<sup>147</sup> support has a more limited dictionary definition.<sup>148</sup> Support has been defined as “to promote the interests or cause of” or “assist, help,”<sup>149</sup> whereas “perform” can mean “to adhere to the terms of” or “carry out, do.”<sup>150</sup> Asserting these dictionary definitions, it is likely that the President and Secretary of Defense are limited in requesting the National Guard to “assist” or “help” rather than to “perform”

144. 32 U.S.C. §§ 502(f)(1)–(2) (emphases added).

145. *See, e.g.,* *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

146. *See* 32 U.S.C. § 904(a) (stating the National Guard “may support or execute homeland defense activities”); 32 U.S.C. § 112(b) (stating the National Guard may “be ordered to perform full-time National Guard duty under section 502(f)”).

147. *See* *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); *Yates v. United States*, 574 U.S. 528, 537 (2015).

148. Dictionaries can help find the ordinary meaning of a term. *See* *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566–67 (2012) (using many dictionaries including Webster’s Dictionary); *Rapanos v. United States*, 547 U.S. 715, 732–33 (2006) (plurality opinion) (using Webster’s dictionary).

149. *Support*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/support?src=search-dict-hed> [<https://perma.cc/ZEM3-HDCQ>] (last visited Sept. 3, 2021). Oxford Dictionary is generally consistent with this definition of “support” defining the word in its second definition as “[g]ive assistance to, especially financially; enable to function or act.” While the first definition is “[b]ear all or part of the weight of; hold up,” this definition does not seem as applicable given it is defined in reference to “supporting objects.” *See Support*, LEXICO, <https://www.lexico.com/en/definition/support> [<https://perma.cc/2WTR-BZZW>] (last visited Sept. 3, 2021) (Lexico is an Oxford University powered dictionary).

150. *Perform*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/perform> [<https://perma.cc/UV2Q-3PDG>] (last visited Sept. 3, 2021). Oxford Dictionary is even more supportive of the Merriam-Webster definition of perform, defining “perform” as “[c]arry out, accomplish, or fulfill (an action, task, or function).” *See Perform*, LEXICO, <https://www.lexico.com/en/definition/perform> [<https://perma.cc/UE53-KD9P>] (last visited Sept. 3, 2021).



or “carry out” operations or missions. This would be consistent with National Guard supporting local law enforcement in the capital pursuant to President Trump’s request.

This limited reading of Section 502(f) is supported by the canon of constitutional avoidance because the Constitution permits only Congress to call forth the militia to execute the laws of the union, suppress insurrections, and repel invasion.<sup>151</sup> The canon of constitutional avoidance provides that if a reading of a statute indicates serious doubt on the statute’s constitutionality, a court should find another plausible reading that would avoid the constitutional issue.<sup>152</sup> If the DoD were permitted to call upon the National Guard to enforce federal laws, Congress would have to provide explicit authorization to the DoD to do so. Although Congress has authorized the President to federalize the National Guard under the Insurrection Act,<sup>153</sup> Congress would have to clearly delegate such authority to the executive under Title 32.<sup>154</sup>

A textual interpretation of Section 502(f) demonstrates a limited interpretation of “other duty,” yet there is a lack of clarity over what this “other duty” could entail. As the statute’s textual reading does not indicate a clear understanding of “other duty,” referring to the legislative history is a proper recourse to discover the meaning of “other duty.”

*ii. Congress Provided Broad Authority to the Executive*

If the statutory meaning is still ambiguous, judges may rely on legislative history to illuminate the meaning behind the statutory text.<sup>155</sup> If there is a lack of clarity after consulting legislative history, the Court may refer to more dynamic factors such as constitutional principles,<sup>156</sup> agency enforcement methods,<sup>157</sup> and legislative inaction.<sup>158</sup> The legislative history

---

151. U.S. CONST. art. I, § 8, cl. 15.

152. *See, e.g.,* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

153. 10 U.S.C. §§ 251–255.

154. *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

155. *See, e.g.,* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1749 (2020) (“Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.” (quoting *Milner v. Dep’t of the Navy*, 562 U.S. 562, 574 (2011))); *see also* *Milner*, 562 U.S. at 572 (“Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text.”).

156. *See* Eskridge & Frickey, *supra* note 120, at 359; Krishnakumar, *supra* note 135, at 834–35.

157. *See* ESKRIDGE ET AL., *supra* note 126, at 811–12.

reveals two findings. First, although the legislative history provides insight into the purpose of Section 502(f), there is no indication that Congress sought to limit the executive's use of Title 32 National Guard units. Second, the legislative history suggests that the President and Secretary of Defense's authority to request the National Guard under Title 32 is limited to supporting ongoing missions rather than executing any mission. Therefore, as the legislative history does not provide a limitation on the DoD's authority, the courts may assume that Congress has acquiesced to DoD regulations that show a broad interpretation of Section 502(f) since no statutory amendments have been enacted to limit the executive.

The legislative history of Section 502 indicates a shift in the National Guard's role that supports a broad interpretation of Section 502(f). Legislative history is always potentially relevant because statutes can be amended over time.<sup>159</sup> While originally enacted to ensure the DoD had the authority to authorize training for the National Guard,<sup>160</sup> the congressional record indicates that the 2007 amendments to Section 502(f) represented a transition for Title 32 National Guard units from a "strategic reserve" to an "operational reserve."<sup>161</sup> In explaining this shift in the congressional record, then-Senator Levin defined an "operational reserve" as "actively support[ing] ongoing operational missions where appropriate."<sup>162</sup> Because the Senator's explanation was provided through the congressional record, such records can provide insight into the legislative intent of Section 502(f).<sup>163</sup> Senator Levin's remarks, therefore, support an interpretation that the intent of Section 502 was to transition the National Guard into an operational force under the discretion of the DoD.

---

158. *See id.* (discussing legislative inaction); *see Evans v. United States*, 504 U.S. 255, 269 (1992) (assuming Congress acquiesced to long standing interpretation of statute by lower courts).

159. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695–96 (2014) (citing subsequent amendments to detect Congress's changing definition of "exercise of religion"); *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 231 (2007) (reviewing the amendment of a statute over time to show statutory meaning).

160. *See* H.R. REP. NO. 88-886, at 1 (1963); SEN. REP. NO. 88-1584, at 1 (1963); H.R. REP. NO. 87-788, at 1 (1961).

161. 152 CONG. REC. S6,392 (daily ed. June 22, 2006) (statement of Sen. Levin).

162. *Id.*

163. *See Gonzales v. Carhart*, 550 U.S. 124, 176 (2007) (citing findings in the congressional record to support an interpretation of a statute); *Bilski v. Kappos*, 561 U.S. 593, 642 (2010) (referencing the congressional record); *see also* Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 31, 50 tbl. 2 (2018) (showing congressional records were cited when interpreting statutes by both the Supreme Court and lower courts).

Although the legislative history does not explicitly provide limitations on the DoD to use the National Guard pursuant to Section 502(f), the congressional record suggests the President and Secretary of Defense's authority under Section 502(f)(2)(A) is limited. Following Senator Levin's explanation, Senator Kent Conrad provided an example of operational reserve service in which the North Dakota Air National Guard could provide security to augment Active-Duty security forces if the Secretary of Defense so requested it.<sup>164</sup> A House Committee report also supports a limitation on the President's authority to request the National Guard. The committee explicitly stated that the new amendments will authorize "[s]tate governors . . . to mobilize national guard forces to support operational missions taken at the request of the President or the Secretary of Defense."<sup>165</sup> The committee report did not state that a governor could authorize the performance of missions but only to support missions. As committee reports are the most authoritative piece of legislative history<sup>166</sup> but do not supersede the plain meaning of the statute,<sup>167</sup> the President's authority to request Title 32 National Guard troops may be restricted to supporting ongoing missions.

As both the textual analysis and legislative history do not explicitly provide limitations on the executive's ability to use the National Guard under Section 502(f), courts may employ an assumption of legislative acquiescence. If Congress is aware of an agency interpretation of a statute and does not amend the statute, the Court may presume that Congress "acquiesced" to this interpretation.<sup>168</sup> This assumption would allow the executive's broad interpretation to prevail. Congress was aware of the executive's extensive use of Section 502(f) as the most recent appropriation bill featured a proposed amendment to restrict Section 502(f).<sup>169</sup> Yet, this amendment was removed prior to passage.<sup>170</sup> Although the Supreme Court

---

164. See 152 CONG. REC. S6,392–93 (statement of Sen. Conrad).

165. H.R. REP. NO. 109-452, at 311 (2007).

166. *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring) ("Committee reports, like the Senate Report the Court discusses here . . . are a particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning." (internal citations omitted)); *Johnson v. De Grandy*, 512 U.S. 997, 1010 n.9 (1994).

167. *Compare* *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (finding legislative history is not needed "in the face of unambiguous text"), *with id.* at 308–13 (Souter, J., dissenting) ("I can find no good reason for this Court to interpret the language of this statute as meaning the precise opposite of what Congress told us it intended.").

168. *ESKRIDGE ET AL.*, *supra* note 126, at 811–12.

169. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 513 (2020).

170. *See id.*

normally requires more time to pass prior to attributing significance to the failure of Congress to act on legislation,<sup>171</sup> Section 502(f) was last amended in 2007, and the Court has employed this assumption in shorter time frames.<sup>172</sup>

**B. Given the Ambiguity behind Section 502(f), the Court will Defer to the Executive's Interpretation**

Seeing as Section 502(f) does not indicate that the DoD is limited in regulating Title 32 National Guard forces, the Court may defer to the executive branch's interpretation of Section 502(f). In matters of national security, the Court has employed *Curtiss-Wright* deference, which provides extreme deference to the executive's interpretation of statutory authority in military and foreign affairs. As Section 502(f) does not expressly limit the DoD in regulating the National Guard and the executive's interpretation of Section 502(f) encompasses matters of national security, the executive's broad interpretation of Section 502(f) will prevail.

*i. Curtiss-Wright Deference*

In cases of national security or foreign affairs, the Supreme Court has strongly deferred to the executive department's interpretation of their powers through what has been called *Curtiss-Wright* deference, named after the 1936 Court decision.<sup>173</sup> In *United States v. Curtiss-Wright Exports*, the Court held that "congressional legislation . . . within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."<sup>174</sup> When applying *Curtiss-Wright* deference, the Court will find the executive department's interpretation prevails in cases of both statutory ambiguity and where Congress has not preempted the agency or presidential interpretation.<sup>175</sup> "Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and

---

171. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (finding the nonaction of Congress significant after 12 years from first passing the statute, yet, during this time, 13 bills were introduced to overturn the IRS interpretation of a statute).

172. See *id.* at 600–01.

173. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100 (2008).

174. 299 U.S. 304, 320 (1936).

175. Eskridge & Baer, *supra* note 173, at 1100–01.

national security affairs.”<sup>176</sup> This high level of deference is attributed to the Court’s reliance on the President’s Article II powers rather than just on Congress’s Article I authority and, therefore, not dependent upon statutory delegation.<sup>177</sup> Although statutory delegation is not a central consideration in using this standard, such authorization would augment the executive’s interpretation.<sup>178</sup>

Tracking the Court’s deference regime, William Eskridge and Lauren Baer found that the Court employed *Curtiss-Wright* deference in cases involving foreign affairs and national security without explicitly mentioning this standard of deference.<sup>179</sup> Although the Court may generally employ strong deference to the President’s interpretation in foreign affairs and national security, the Court does not always exercise this deference. This occurred in *Hamdan v. Rumsfeld*.<sup>180</sup> In *Hamdan*, the majority opinion did not defer to the President’s statutory interpretation given the Court’s dissimilar interpretation of the statute and the executive’s failure to provide convincing evidence for his interpretation.<sup>181</sup>

*ii. Deference to the Executive’s Interpretation on Section 502(f)*

As the Court tends to use *Curtiss-Wright* deference on matters of national security, the Court is likely to uphold the executive interpretation of Section 502(f). The executive’s broad interpretation is likely to receive *Curtiss-Wright* deference considering that Congress did not expressly limit the executive in Section 502(f), and the executive has cited Section 502(f)

---

176. *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988); *see also* *Munaf v. Geren*, 553 U.S. 674, 689 (2008).

177. Eskridge & Baer, *supra* note 173, at 1100–01; *see also* *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (“Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act.”).

178. *See* Eskridge & Baer, *supra* note 173, at 1100–01; *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (finding the President’s authority is at its maximum “[w]hen the President acts pursuant to an express or implied authorization of Congress . . . for it includes all that he possesses in his own right plus all that Congress can delegate.”).

179. Eskridge & Baer, *supra* note 173, at 1102.

180. 548 U.S. 557 (2006).

181. *Id.* at 623–24 (2006) (finding the President’s statutory interpretation warranted less deference given the Court’s interpretation of the statute and the executive’s failure to provide convincing evidence for his interpretation). *But see id.* at 679–81 (2006) (Thomas, J., dissenting) (advocating for “a heavy measure of [judicial] deference” to the President’s interpretation of statutory grants of authority by relying on an inherent presidential authority in foreign affairs and national security stemming from the Court’s opinion in *Dames & Moore v. Regan*, 453 U.S. 654 (1981)).

to authorize the National Guard to conduct military and national security operations.<sup>182</sup>

While the Supreme Court has not always employed *Curtiss-Wright* deference when the statutory text provides clear limitations on the executive, Section 502(f), as discussed, does not unequivocally restrict the executive. As the statutory language and legislative history may indicate the executive was vested with broad authority, the Court is likely to defer to the executive's interpretation.<sup>183</sup> Although a textual reading of Section 502(f) may limit the executive's ability to regulate Title 32 National Guard units to only missions statutorily authorized,<sup>184</sup> the Court may accept the executive's interpretation given there are no explicit statutory limitations. Therefore, given the failure of Congress to unambiguously restrict the DoD in Section 502(f), the Court will likely defer to the executive's broad interpretation.

Since the executive has used Section 502(f) to authorize the National Guard in military and national security operations, the Court will likely be reluctant to reject this interpretation. The Court utilizes *Curtiss-Wright* deference for executive interpretations of statutes that grant authority to the executive in military and national security affairs. The executive's interpretation of Section 502(f) deals exclusively in military and national security matters. For example, in conducting support to local authorities, the National Guard can provide "military support" during "national security emergencies" pursuant to Section 502(f).<sup>185</sup> A national security emergency may include responding to any natural disaster, military attack, or other

182. See *supra* Sections I.B.ii–iii.

183. See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 187 (1993) ("It is perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores."); *Carlucci v. Doe*, 488 U.S. 93, 104 (1988) (finding the statute uses permissive language to authorize the executive to remove one's security clearances); see also *CIA v. Sims*, 471 U.S. 159, 168–69 (1985) ("The plain meaning of the statutory language, as well as the legislative history of the National Security Act, however, indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure.").

184. See *supra* Section II.A.i.

185. U.S. DEP'T OF DEF., DIRECTIVE 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) para. 4.1.7.2. (1994), <https://www.hsdl.org/?abstract&did=386> ("Under the national civil defense policy, the Department of Defense shall support civil authorities in civil defense, to include facilitating the use of the National Guard in each State for response in both peacetime disasters and *national security emergencies*." (emphasis added)); *Id.* para. 1.5 ("Facilitate the coordination of [military assistance] . . . to Civil Authorities . . ."); *Id.* para. E2.1.16 ("Military Support to Civil Authorities . . . [includes measures] to foster mutual assistance and support between the [DoD] and any civil government agency . . . including national security emergencies.").

emergencies that “threatens the national security of the United States.”<sup>186</sup> Considering that the executive cites Section 502(f) to use the National Guard to support military and national security operations, the executive’s interpretation will likely prevail under the Court’s *Curtiss-Wright* deference.

### III. THE PROBLEMS WITH THE EXECUTIVE’S INTERPRETATION OF SECTION 502(F)

As the executive’s broad interpretation of Section 502(f) is likely to survive under the Court’s *Curtiss-Wright* deference regime, the executive can use the National Guard for a wide breadth of operations or missions. Part III argues that permitting the executive to utilize the National Guard pursuant to this extensive interpretation presents two key policy problems. First, in Section III.A, this Note explains that the executive is not statutorily required to obtain local approval prior to deploying out-of-state National Guard units into a municipality. In doing so, the executive can subject local cities, especially Washington D.C., to unwanted deployments of National Guard units. Second, in Section III.B, this Note argues that, although a governor can deny the executive’s request to use National Guard units in Title 32 status, a state governor is unlikely to reject such a request.

#### A. Executive’s Control over the Title 32 Units Becomes a City’s Crisis, Especially Washington D.C.

Pursuant to a broad interpretation of Section 502(f), the executive is not prohibited from authorizing a mission that deploys National Guard units from one state into the cities of a different state. In doing so, the executive is not required to receive the permission of local authorities. Such deployments of National Guard units are detrimental to localities because the National Guard may be immune from state and local law. The recent deployments to Washington D.C. demonstrate how the capital is particularly susceptible to possible misuse of the National Guard.

Title 32 does not have any language prohibiting the President from authorizing National Guard units to missions in cities within other states. A recently proposed amendment in the Defense Authorization Act of 2021 demonstrates the absence of such a prohibitive provision.<sup>187</sup> This reform would limit Section 502(f)(2)(A) to only domestic missions and require the

---

186. *Id.* para. E2.1.17.

187. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 513.

consent of local authorities where these operations take place.<sup>188</sup> The amendment was removed from this bill,<sup>189</sup> and neither Title 32 nor Section 502 currently have such a restriction. The President, therefore, can seemingly authorize otherwise unwanted National Guard troops to missions in any locality. Although subsequent unpassed legislative history is not determinative to the meaning of a statute,<sup>190</sup> this amendment is relevant in demonstrating that the current statutory structure does not explicitly prohibit the President from sending out-of-state National Guard units into a city without local consent.<sup>191</sup>

Given the lack of legal clarity around Title 32 status deployment, out-of-state units may be immune from state and municipal law to the detriment of local citizens. The National Guard used pursuant to the executive's request may avoid legal liability for actions in another state as state or federal law may immunize Title 32 guard members.<sup>192</sup> Some states provide immunity to guard members in Title 32 status.<sup>193</sup> If operating in such a state, out-of-state Title 32 units may violate local law under the cover of such immunity. Depending on the scope of the mission and governance of federal regulations, the Federal Supremacy Clause may also grant the Title 32 units immunity from state law.<sup>194</sup> The Federal Supremacy Clause establishes that federal law takes precedence over state law and state constitutions.<sup>195</sup>

188. Therefore, 32 U.S.C. § 502(f)(2) would read as follows: “(2) The training or duty ordered to be performed under paragraph (1) may include the following: (A) Support of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense ‘and performed inside the United States with the consent of the chief executive officer of the State.’”

189. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021).

190. *See, e.g., Musick, Peeler & Garrett v. Emps. Ins.*, 508 U.S. 286, 293 (1993) (finding subsequent congressional legislation helpful in determining the meaning of a statute). *But see Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) (“In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed.”).

191. Although clarification by Congress can mean a disagreement with the executive’s statutory interpretation rather than an assumption that the executive’s interpretation is correct, this amendment demonstrates the President is not explicitly restricted by statute.

192. *Compare* DOMESTIC OPERATIONAL LAW HANDBOOK, *supra* note 65, at 238 (“When the National Guard operates in a State status, either Title 32 or SAD, the rules for the use of force are based on the State law where the mission is taking place.”), *with* NGR 500-5, *supra* note 33, para. 4-4 (“Before deployment, states involved will *normally* negotiate an agreement on which rules for the use of force the supporting units and forces will follow.” (emphasis added)).

193. *See, e.g., N.Y. MIL. LAW § 235* (McKinney 2021) (granting civil and criminal immunity to New York National Guard in active service for the state for “any act or acts done by them in the performance of their duty”); *NEV. REV. STAT. § 412.154(1)* (2021).

194. DOMESTIC OPERATIONAL LAW HANDBOOK, *supra* note 65, at 237.

195. U.S. CONST. art. VI, cl. 2.



Current case law suggests that the Federal Supremacy Clause could provide immunity to non-federal personnel executing federally-authorized missions like the Title 32 National Guard units, which are technically state entities.<sup>196</sup> In addition, guard members in Title 32 status are also immune from common law torts,<sup>197</sup> as National Guard members acting under Section 502 are covered by the Federal Torts Claims Act.<sup>198</sup> Therefore, if a National Guard member were to injure a local resident during such a deployment, the member may be immune from such wrongdoing under either state or federal law.

Based on the President's ability to authorize out-of-state missions, the residents of Washington D.C. are particularly vulnerable to potential misuse of the National Guard. Unlike other units which are under the control of their governor, the DCNG is under the direct authority of the President.<sup>199</sup> In conjunction with the President's ability to request Title 32 units for missions, the executive has unilateral control over National Guard units in the capital.<sup>200</sup> The executive can, therefore, selectively utilize these

196. *See, e.g.*, *West Virginia v. Laing*, 133 F. 887 (4th Cir. 1904) (member of U.S. Marshal's posse made of ordinary citizens charged with murder); *Connecticut v. Marra*, 528 F. Supp. 381 (D. Conn. 1981) (FBI informant charged with attempting to bribe a city policeman).

197. *See Gilmore v. Mississippi*, 905 F.3d 781, 784–85 (5th Cir. 2018) (“Although National Guard members do not normally fall within the definition of ‘federal employees,’ they are covered by the Westfall Act when ‘engaged in . . . duty under section . . . 502 . . . of title 32.’ 28 U.S.C. § 2671.”); *Jackson v. Tate*, 648 F.3d 729, 735–36 (9th Cir. 2011) (finding National Guard members are exempt from common law torts under the Westfall Act when operating under section 502(f)).

198. 28 U.S.C. § 2671.

199. D.C. Code § 49-409 (2020) (“The President of the United States shall be the Commander-in-Chief of the militia of the District of Columbia.”).

200. Letter from Mark A. Milley, Gen., U.S. Army, & Mark T. Esper, Sec’y of Def., to Adam Smith, Rep., U.S. House of Reps. (June 10, 2020), <https://media.defense.gov/2020/Jul/06/2002434495/-1/-1/1/4-10-JUN-2020-RESPONSE-OSD005360-20-REPLY-061720-CJCS-AND-SD.PDF> [<https://perma.cc/UK6J-DSCK>]. Although the letter states the National Guard was under the tactical control of the DCNG's Major General, the Major General reports to the President. D.C. NAT'L GUARD, 2019 ANNUAL REPORT 5 (2019) [hereinafter DCNG, 2019 ANNUAL REPORT], [https://dc.ng.mil/Portals/26/2019%20DCNG%20Annual%20Report\\_1.pdf](https://dc.ng.mil/Portals/26/2019%20DCNG%20Annual%20Report_1.pdf) [<https://perma.cc/DH2R-U75Q>] (showing an organization chart of the DCNG illustrating the Major General reports to the President). Tactical control also allows the federal government to give orders “necessary to accomplish missions or tasked assigned.” DEPT. OF DEF., DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 209 (2021), <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf> [<https://perma.cc/WFU6-SSCU>]; *see also* Elizabeth Goitein & Joseph Nunn, *Why DC's Mayor Should Have Authority over the DC National Guard*, BRENNAN CTR. FOR JUST. (Jan. 8, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/why-dcs-mayor-should-have-authority-over-dc-national-guard> [<https://perma.cc/VL4N-HW7Y>] (“[T]he Department of Justice has ADOPTED the legal fiction that the DCNG may operate in non-federal status

both out-of-state Title 32 units and the DCNG to conduct law enforcement activities as they are not subject to the PCA. The two recent incidences of out-of-state guard deployments in D.C. demonstrate the extent to which the capital is subject to the executive's whim. During the June 2020 deployment, Mayor Bowser's opposition was disregarded by both the Trump Administration and state governors.<sup>201</sup> The executive then rejected the governors' of Virginia and Maryland and the D.C. Mayor's request to send guard units during the January 2021 invasion of the Capitol, resulting in several injuries and deaths.<sup>202</sup> Based on the previously discussed legal ambiguity of Title 32 troops' deployment and the executive's broad power derived from Section 502(f), the capital is defenseless against the executive's complete power over the National Guard while deployed in the capital.

### **B. Governor's Consent is an Ineffective Check on the Executive's Section 502(f) Authority**

Although unrestricted in deploying out-of-state National Guard units into other cities, the executive must still acquire permission from a governor prior to deploying a state's National Guard in Title 32 status. While in Title 32 status, the National Guard is still under the direct authority of the governor. Therefore, the governor could either reject a

---

even though it is *always* under the president's command and control and is *always* federally funded." (emphasis in original)).

201. See Lara Seligman, *Esper Orders All Remaining Active-Duty Troops Home from D.C. Area*, POLITICO (June 5, 2020, 4:29 PM), <https://www.politico.com/news/2020/06/05/esper-active-duty-washington-dc-protest-303824> [<https://perma.cc/W94W-M6GX>] (indicating that, when former Secretary Esper ordered troops to return on June 5, he did not cite the Mayor's request to remove the troops as a reason for ending the operation); Camryn Justice, *D.C. Mayor Sends Letter to Gov. DeWine Requesting Ohio National Guard Be Removed from City*, ABC NEWS 5 (June 5, 2020, 11:25 PM), <https://www.news5cleveland.com/news/state/dc-mayor-sends-letter-to-gov-dewine-requesting-ohio-national-guard-be-removed-from-city> [<https://perma.cc/9GH6-8QZ3>] (finding that, although Mayor Bowser requested Ohio Governor Mike DeWine to remove the Ohio National Guard units in D.C., the Ohio Governor only removed one troop because the FBI discovered this troop endorsed white supremacy); CBS3 Staff, *Gov. Murphy Says New Jersey's National Guard Troops Returning from Washington*, CBS PHILLY (June 5, 2020, 2:36 PM), <https://philadelphia.cbslocal.com/2020/06/05/new-jersey-national-guard-troops-returning-washington-george-floyd-protest/> [<https://perma.cc/EP79-38E4>] (finding New Jersey Governor Phil Murphy stated that New Jersey National Guard units returned because their deployment ended, not based on the Mayor's request).

202. Joe Walsh, *Reports: Trump Resisted Sending National Guard to Quell Violent Mob at U.S. Capitol*, FORBES (Jan. 6, 2021, 9:51 PM), <https://www.forbes.com/sites/joewalsh/2021/01/06/reports-trump-resisted-sending-national-guard-to-quell-violent-mob-at-us-capitol/?sh=199b32431e18> [<https://perma.cc/SEG4-TYWN>]; see also Read & Hennessy-Fiske, *supra* note 6 (reporting many injuries and five fatalities as a result of the Capitol invasion).

request from the executive or, once accepting such a request, order their National Guard troops to withdraw from any federal operation. Although the governor can thwart any Title 32 request from the executive, a governor is unlikely to deny a request to deploy their state's National Guard in Title 32 status given financial and procedural considerations. Since a governor is incentivized to approve such a request, the President, therefore, can easily procure National Guard troops to perform an operational mission.<sup>203</sup>

As the federal government fully funds the National Guard while in Title 32 status,<sup>204</sup> the governor will likely approve such a Title 32 request to avoid using the state's budget. The frequency of governors' acceptance of federal funds is evident from the large role federal funding plays in each state National Guard's budget. Each year, the Comptroller of the Army National Guard distributes funding to states based on an annual DoD appropriations bill.<sup>205</sup> In Fiscal Year 2020, the federal government was estimated to provide around \$7 billion to the states for the National Guard.<sup>206</sup> In comparison to federal funding, state allocation is minimal.<sup>207</sup>

203. In addition, there may be incentive for the National Guard units themselves to act under Title 32 status as such troops would be authorized to use equipment provided by the federal government. For example, in a recent investigation by the Inspector General Department of the Air Force regarding four National Guard unit's use of RC-26Bs aircrafts while in SAD status, the report found that units in California, Wisconsin, and Arizona improperly used these aircraft because the primary purpose of their investigation was to support law enforcement rather than using the aircraft for training as an incidental benefit to civil law enforcement. INSPECTOR GEN. DEP'T OF THE AIR FORCE, REPORT OF INVESTIGATION (CASE S8934P) CONCERNING RC-26B OPERATIONS 1-4 JUNE 2020 (2020), [https://media.defense.gov/2020/Aug/21/2002482179/-1/-1/1/REPORT\\_OF\\_INVESTIGATION\\_CONCERNING\\_RC\\_26B\\_OPERATIONS\\_1\\_4\\_JUNE\\_2020.PDF](https://media.defense.gov/2020/Aug/21/2002482179/-1/-1/1/REPORT_OF_INVESTIGATION_CONCERNING_RC_26B_OPERATIONS_1_4_JUNE_2020.PDF) [<https://perma.cc/S8U3-LHQ5>]. The investigation concluded that that the use of such aircrafts was inappropriate under SAD status and should have been used while in Title 32 status. *Id.* at 57.

204. DOMESTIC OPERATIONAL LAW HANDBOOK, *supra* note 65, at 63.

205. *See, e.g.*, ARMY NAT'L GUARD, ANNUAL FINANCIAL REPORT: FY 2015 13 (2015) [hereinafter ANG FY 2015 REPORT].

206. OFF. OF THE UNDER SEC'Y OF DEF. (COMPTROLLER)/CHIEF FIN. OFF., U.S. DEP'T OF DEF., OPERATION AND MAINTENANCE OVERVIEW: FISCAL YEAR 2020 BUDGET ESTIMATES 19 (2019), [https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/fy2020\\_OM\\_Overview.pdf](https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/fy2020_OM_Overview.pdf) [<https://perma.cc/L3Q2-QABQ>]; *see also* ANG FY 2015 REPORT, *supra* note 205, at 101 (providing a breakdown by state).

207. *See, e.g.*, U.S. DEP'T OF DEF., READINESS & ENVIRONMENTAL PROTECTION INTEGRATION PROGRAM, STATE PROFILE: MISSISSIPPI 1, [https://www.repi.mil/Portals/44/Documents/State\\_Fact\\_Sheets/Mississippi\\_StateFacts.pdf](https://www.repi.mil/Portals/44/Documents/State_Fact_Sheets/Mississippi_StateFacts.pdf) [<https://perma.cc/F2M7-BLUH>] (last visited Sept. 3, 2021) (stating that, in FY 2018, federal funding for the Mississippi National Guard was approximately \$622 million while state funding was \$7.9 million); OFF. OF N.H. GOV. CHRISTOPHER T. SUNUNU, GOVERNOR'S CAPITAL BUDGET: FISCAL YEARS ending June, 30 2020-2021 2 (2019), <https://das.nh.gov/budget/Budget2020-2021/GovernorsCapitalBudget.pdf> [<https://perma.cc/7CXM-S5V5>] (showing the New Hampshire budget, under Adjutant

While historically, states paid for roughly 85% of the National Guard budget, the federal government has increasingly funded the National Guard.<sup>208</sup> For example, in 2020, the state of Utah allocated \$6 million to the Utah National Guard, whereas the federal government provided \$345 million.<sup>209</sup> The numbers would suggest that governors are not shy about accepting federal funding for their National Guards.

Governors are further incentivized to accept federal requests for National Guards units because operations under Title 32 status can satisfy mandatory training requirements. Although operational support may occur incidental to training under Section 502(a) status,<sup>210</sup> National Guard units under Section 502(f) may satisfy training requirements incidental to performing duty pursuant to the federal government's request.<sup>211</sup> Therefore, the National Guard can satisfy training requirements while conducting a federally-authorized mission. For example, when pursuing missions that support civil authorities, states can count this participation towards training requirements.<sup>212</sup> The possibility to include such operations towards training requirements may entice states to accept the President's or Secretary of Defense's request to deploy the National Guard.

Moreover, partisanship may play a role in a governor's decision to accept or deny an executive request. During the June 2020 D.C. deployment, largely Republican governors accepted, while predominately

General or National Guard categories, provided around \$3 million while federal funding was around \$25 million for FY 2020–2021).

208. COHEN, *supra* note 49, at 18–19.

209. UTAH NAT'L GUARD, FY 2020 STATE BUDGET REQUEST, <https://le.utah.gov/interim/2019/pdf/00002001.pdf> [<https://perma.cc/4M7C-B3UJ>] (last visited Sept. 16, 2021).

210. See U.S. DEP'T OF DEF., ISSUANCE 1215.06, UNIFORM RESERVE, TRAINING, AND RETIREMENT CATEGORIES FOR THE RESERVE COMPONENTS Enclosure 3, para. 4 (2014), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/121506p.pdf?ver=2019-03-11-081732-937> [<https://perma.cc/SNC4-F7HV>].

211. NGB DOMESTIC GUIDANCE, *supra* note 96, at 70.

212. NAT'L GUARD BUREAU, REGULATION 350-1, ARMY NATIONAL GUARD TRAINING para. 3-9(j) (2009), <https://www.ngbpmc.ng.mil/Portals/27/Publications/ngr/ngr%20350-1.pdf?ver=2018-09-07-082540-017> [<https://perma.cc/HE4P-KKUV>] (“(1) DSCA projects may be performed by entire units in conjunction with unit training when appropriate training is derived for the entire unit and such training contributes to Federal mission readiness. (2) DSCA projects may be performed by elements of a unit when the element represents an organized group (platoon, squad, or section) that normally trains together. The training must contribute to the skill enhancement of all group members and to the readiness of their unit. (3) DSCA projects may be performed by individuals when the project has a training benefit toward the unit's MTOE/TDA mission; e.g., medical service support. (4) Constructive credit for participation in the DSCA program, as outlined above, may be granted according to Table 3-2 of this regulation.”).

Democratic governors denied, the executive's request.<sup>213</sup> Similarly, in 2019, after the former Republican New Mexico Governor accepted President Trump's request to deploy the state's National Guard to the border, the succeeding Democrat Governor withdrew, on political grounds, her state's National Guard from this federal mission.<sup>214</sup> Although in each instance, some governors denied or revoked the executive's request to use the National Guard, the President was still able to accumulate National Guard units for each operation. In the case of the D.C. deployment, the President was able to acquire a force of around 4,900 National Guard troops from 11 states.<sup>215</sup> At the southern border, the National Guard continues to operate in support of the Border Patrol.<sup>216</sup>

#### IV. RESTRICTING THE EXECUTIVE'S POWER OVER THE NATIONAL GUARD IN TITLE 32 STATUS AND THE DCNG

The President has vast control over the military, a power derived from the Constitution and delegated by Congress.<sup>217</sup> In the modern era, the President has often been hesitant in their use of the military in domestic disputes, including in their utilization of the National Guard.<sup>218</sup> Although

213. See Alan Suderman, *How Governors Are Responding to Trump Request to Send National Guard Troops to D.C.*, PBS (June 2, 2020, 5:47 PM), <https://www.pbs.org/newshour/nation/how-governors-are-responding-to-trumps-request-to-send-national-guard-troops-to-d-c> [https://perma.cc/27JB-CEV3] (“At least three states — New York, Virginia and Delaware — have so far rejected the request, with at least one governor citing Trump’s rhetoric about using troops to ‘dominate’ protesters as a reason why. All of those states are led by Democrats.”).

214. Morgan Lee, *New Mexico Governor Pulls National Guard Troops from Border*, Assoc. Press (Feb. 5, 2019), <https://apnews.com/article/d00059684a424ab7adf1a43c618c86fd> [https://perma.cc/JT9S-NU5A]; see also Bill Chappell, *N.M. Governor Pulls National Guard from Border, Citing a ‘Charade’ at Federal Level*, NPR (Feb. 6, 2019, 10:25 AM), <https://www.npr.org/2019/02/06/691937342/n-m-governor-pulls-national-guard-from-border-citing-a-charade-at-federal-level> [https://perma.cc/LN3X-M4TT].

215. See *supra* note 9 and accompanying text.

216. *Border Mission Extended Through 2020*, NAT’L GUARD ASS’N U.S. (Sept. 17, 2019), <https://www.ngaus.org/about-ngaus/newsroom/border-mission-extended-through-2020> [https://perma.cc/SZ2V-D674].

217. See, e.g., U.S. CONST. art. II, § 2, cl. 1. (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

218. Although not needing the Pennsylvania governor’s permission pursuant to the Militia Acts of 1792, President Washington did not wish to call forth the militia without consulting the Governor. Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT’L SEC. J. 537, 573 (2014). In the aftermath of Hurricane Katrina, President Bush was cautious in responding to this emergency contemplating the optics surrounding his federalization of Louisiana’s National Guard when opposed by the Democrat Governor Kathleen Blanco. See Eric Lipton, Eric Schmitt & Thom Shanker, *Political Issues Snarled Plans for Troop Aid*,

rooted in historical precedent, this general disinclination to use military forces should not become the standard to limit the executive. Without proper legal or fiscal repercussions, the executive will continue to abuse this ambiguous and overly broad power. This is especially salient for the executive's use of Title 32 National Guard units that are used without express limitations according to the executive's interpretation of Section 502(f). In this Part, this Note reviews the recently proposed reform in Congress and suggests robust solutions to the possible misuse of Title 32 National Guard units. In particular, this Note argues that Section 502(f) should be limited and that the D.C. Mayor should be granted authority over the DCNG, similar to the power state governors have over their guard units.

In the recent National Defense Authorization Act for Fiscal Year 2021, Section 502(f) was proposed to be amended as follows:

(2) The training or duty ordered to be performed under paragraph (1) may include the following: (A) Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense "*and performed inside the United States with the consent of the chief executive officer of the State.*"<sup>219</sup>

This reform, proposed by New Jersey Representative Sherrill of the 11th District,<sup>220</sup> would prohibit the use of out-of-state National Guard to enter another state, territory, or the capital without local approval.<sup>221</sup> This amendment was removed from the bill.<sup>222</sup> Although this amendment might have solved the problem of the executive branch deploying out-of-state National Guards in opposition to local wishes, there is still the issue of the ambiguous "other duty." Section 502 has been praised for its ability to provide the National Guard with a wide swath of duties and a flexible standard to respond to domestic emergencies.<sup>223</sup> In empathizing with the desire to retain this flexibility, this Note proposes three solutions to restrict

---

N.Y. TIMES (Sept. 9, 2005), <https://www.nytimes.com/2005/09/09/us/nationalspecial/political-issues-snarled-plans-for-troop-aid.html> [<https://perma.cc/5GVJ-DLPG>].

219. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 513 (2020).

220. Rep. Mikie Sherrill (@RepSherrill), TWITTER (July 2, 2020, 7:42 PM), <https://twitter.com/RepSherrill/status/1278836354722541570?s=20> [<https://perma.cc/WD8R-9Z85>].

221. H.R. 6395, Sec 513.

222. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021).

223. *See generally* Brown, *supra* note 36, at 23.

the executive's use of the National Guard in Title 32 status without confining these units to a rigid statutory standard.

Perhaps, Congress's strongest power to restrict the executive is the "power of the purse," especially with respect to the misuse of military personnel.<sup>224</sup> The recent reform by Representative Sherrill is made under legislation for the fiscal budget of the DoD, as have most amendments to Section 502(f).<sup>225</sup> A restriction of the executive budget could disincentivize the President or Secretary of Defense from authorizing or requesting the National Guard in Title 32 status. As Title 32 status is funded by the federal government, the fewer funds available, the less likely the executive will propose or accept a request for Title 32 status. Therefore, if Congress were to limit the DoD budget, the executive may be deterred in authorizing missions to perform civil law enforcement functions when more salient emergencies, like national disasters, are likely to arise.

Second, Congress could amend the PCA to include operations conducted by the National Guard when requested by the executive under Title 32. This proposal may provide the flexibility praised by scholars while ensuring the National Guard in Title 32 status could not be improperly used by the federal government. The PCA's purpose is to prevent federal troops from conducting civil law enforcement unless under specific circumstances.<sup>226</sup> By including missions by Title 32 National Guard units when requested by the executive branch in the PCA, this law will continue to prevent the federal government from using militarized troops to enforce domestic law. This reform will continue to exclude a governor's request for Title 32 status from the PCA, which is consistent with the law's objectives. This amendment would also allow for the flexibility of using Title 32 troops to respond to novel emergencies as the "other duty" language would continue to allow the executive to use their discretion in authorizing the National Guard in Title 32 status.

In addition to these amendments, the D.C. Mayor should be granted authority over the DCNG like a state governor's power over their respective National Guard units. Unlike other governors, the D.C. Mayor can only use the DCNG if the executive branch provides express

---

224. Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 170 (2003).

225. *See supra* note 219.

226. *See, e.g.*, JENNIFER K. ELSEA, CONG. RSCH. SERV., R42669, THE POSSE COMITATUS ACT AND RELATED MATTERS: A SKETCH 2-3 (2018), <https://fas.org/sgp/crs/natsec/R42669.pdf> [<https://perma.cc/8WCZ-7U5T>] (listing statutory and constitutional exceptions to the PCA).

authorization.<sup>227</sup> Given that the capital is increasingly experiencing more and more protests,<sup>228</sup> granting the D.C. Mayor authorization to use the DCNG can enhance the safety of D.C. residents, protesters, and law enforcement. The most recent invasion of the Capitol demonstrates the need for this reform. As the Mayor was powerless to deploy the DCNG, the executive's delay in doing so resulted in a prolonged invasion of the Capitol and serious injuries and fatalities.<sup>229</sup> Although there is a timely debate on whether D.C. should be granted statehood,<sup>230</sup> Title 32 does not differentiate between the National Guard of recognized states and D.C. except in allowing the control of the DCNG to the DCNG commanding general who is under the direct authority of the President.<sup>231</sup> Therefore, the D.C. Mayor should be recognized as a state governor for purposes of activating the DCNG and keeping the DCNG semi-independent of the executive branch. In doing so, the D.C. Mayor can act as a check on the executive's unfettered use of the DCNG and restrict the President's ability to find a legal loophole around the PCA. In addition, if the D.C. Mayor were given authority to deploy the DCNG, the Capitol may have been secured sooner, and lives could have been saved during the January 2021 invasion of the Capitol.

#### CONCLUSION

The National Guard is a unique embodiment of the United States federalist structure. Whereas governors have the ultimate authority over the National Guard in most cases, the federal government can regulate and

227. D.C. CODE § 49-103 (2021) (“When there is in the District of Columbia a tumult, riot, mob, or a body of men acting together by force with attempt to commit a felony or to offer violence to persons or property, or by force or violence to break and resist the laws, or when such tumult, riot, or mob is threatened, it shall be lawful for the Mayor of the District of Columbia, or for the United States Marshal for the District of Columbia, or for the National Capital Service Director, to call on the Commander-in-Chief to aid them in suppressing such violence and enforcing the laws . . .”).

228. Marissa J. Lang, *D.C. Is Becoming a Protest Battleground. In a Polarized Nation, Experts Say That's Unlikely to Change.*, WASH. POST (Jan. 1, 2021, 7:08 AM), [https://www.washingtonpost.com/local/washington-dc-protests/2021/01/01/da743c20-4a68-11eb-839a-cf4ba7b7c48c\\_story.html](https://www.washingtonpost.com/local/washington-dc-protests/2021/01/01/da743c20-4a68-11eb-839a-cf4ba7b7c48c_story.html) [<https://perma.cc/JN55-8474>].

229. See Read & Hennessy-Fiske, *supra* note 6.

230. See, e.g., Zachary B. Wolf, *Why DC Should (And Should Not) Be the 51st State*, CNN (June 26, 2020, 8:09 PM), <https://www.cnn.com/2020/06/26/politics/dc-statehood-101/index.html> [<https://perma.cc/53ZD-GGVV>].

231. See 32 U.S.C. § 325 (providing that the commanding general of the DCNG may consent to duty status of the DCNG). Section 101 of Title 32 defines “National Guard” as comprising of the Army National Guard and the Air National Guard. Each definition of Army and Air National Guard includes the organized militias of the District of Columbia. See *id.* § 101. DCNG’s Major General reports directly to the President. See DCNG, 2019 ANNUAL REPORT, *supra* note 200.



utilize these units. This Note has argued that the executive branch has extensively used National Guard members under Title 32 status based on its interpretation of Section 502(f). Although contending that the statute may provide limitations on the executive, this Note claims that the executive interpretation will prevail under the Court's strong deference to the executive over military affairs. Given the executive's broad power under this expansive interpretation of Section 502(f), the President can deploy out-of-state National Guard units into cities and towns without local permission. As a governor's approval is easily acquired, the President can utilize these National Guard units to conduct missions to the detriment of local citizens, especially those residing in Washington D.C.

The National Guard has been instrumental in responding to national emergencies. Such units provided tremendous support after the September 11 attacks, Hurricane Katrina, and recently during the COVID-19 pandemic. It would be impossible to expect any level of government to predict future catastrophes. The year 2020 is evidence enough to show the need for flexible standards in using the National Guard. Although this Note has advocated for more restrictions on the Title 32 status, it has encouraged restrictions that leave a flexible standard for the National Guard to respond to novel emergencies. It would be equally dangerous to constrict the National Guard to a role where state and federal government are unsure whether the National Guard could be legally deployed. Scholars have often criticized the delayed federal response in deploying the military to Hurricane Katrina caused by the executive branch's internal debates over the legality behind such actions.<sup>232</sup> Perhaps during the most recent invasion of the Capitol, the five lives lost could have been prevented by a swift National Guard deployment. When lives are at stake, a hesitant reaction due to confusing legal standards can be disastrous.

Although the executive could use such National Guard members in cities without local approval, a practice that has not yet been implemented by the executive branch in a major city besides the capital, President Trump's actions indicate that to rely on historical patterns to regulate military use is irresponsible. Where entrenched precedent persuades our understanding, society must question whether there is positive law to prevent disastrous outcomes. Without doing so, we may lay the groundwork for future transgressions that are permissible wrongs yet could have been seamlessly prevented. Although the law remains, a new President may be elected

---

232. See, e.g., Candidus Dougherty, *While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster*, 29 N. Ill. U. L. REV. 117, 136 (2008); Stephen M. Griffin, *Stop Federalism Before it Kills Again: Reflections on Hurricane Katrina*, 21 ST. JOHN'S J. LEGAL COMMENT. 527, 537-38 (2007).

every four years. The United States would be unwise to rely on one person to ensure precedent is followed. Rather, advocating for the enactment of positive law would ensure precedent becomes law and future calamity is avoided.