

United States Senate

WASHINGTON, DC 20510

June 10, 2020

The Honorable Richard Shelby
Chairman, Subcommittee on Defense
Committee on Appropriations
122 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Richard Durbin
Ranking Member, Subcommittee on Defense
Committee on Appropriations
115 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Shelby and Ranking Member Durbin,

In recent weeks, tens of thousands of Americans have marched together in over 350 cities across the country to voice outrage over the brutal and unjust killing of George Floyd by police in Minneapolis and a far longer history of systemic racism that for centuries has eroded American values of democracy, justice, and equal opportunity. Unfortunately, rather than heeding their urgent calls for an end to the racialized violence buried deep within our country's law enforcement and criminal justice institutions, President Trump has taken the exact opposite approach, threatening to unilaterally invoke the Insurrection Act of 1807 to deploy active duty military personnel to quell the protests, irrespective of whether state governors have requested the assistance of federal troops. As you draft the Fiscal Year 2021 Defense Appropriations bill, we respectfully request you include a provision to prohibit funding for deployments under the Insurrection Act for which the President, Secretary of Defense, and Attorney General have not provided a joint certification to Congress that a state is unable or unwilling to enforce federal law.

We recognize that while your subcommittee's appropriations request deadline has now passed, the circumstances of recent weeks necessitate congressional action to prevent the unnecessary and counterproductive militarization of law enforcement at a time of national reckoning over the legacies of racial injustice. Ordering active duty troops to police racial justice protests without states' consent would constitute a misuse of presidential authority inconsistent with legal precedent. It also risks militarizing law enforcement practices even further in blatant disregard of protestors' calls to curtail systemic police abuse. And, as noted by a number of retired military leaders, pitting U.S. Armed Forces against the American people could severely erode the public's trust in the military as an institution, trust that has taken decades to rebuild since the Vietnam War.

The Insurrection Act (10 U.S.C. §§ 251–255) allows states to request the assistance of federal forces to support domestic law enforcement, and it generally bars the president from deploying the military as a domestic police force. The law has been invoked only about 20 times throughout U.S. history, including to enforce federal court orders mandating desegregation during the civil rights movement, and rarely without a state governor's consent. However, certain provisions grant the president unilateral authority to deploy the military "as he considers necessary" in states where a rebellion, insurrection, or violence "makes it impracticable to enforce the laws of the United States," especially if the courts and broader justice system cease

to operate. As written, these provisions confer an overly-broad authority to the president to subjectively evaluate the circumstances of civil unrest and determine whether they jeopardize the enforcement of federal law in practice.

Numerous legal experts have sounded the alarm that President Trump's use of the Insurrection Act without the agreement of a state governor or legislature would defy past precedent. Unlike the desegregation struggles of the late 1950s and early 1960s, states have not refused to enforce federal law or acted in direct violation of federal authority. Nor has the capacity of courts to enforce U.S. law been compromised. Even Secretary of Defense Mark Esper recently rejected the president's threat to deploy active duty troops for domestic law enforcement, calling the use of the Insurrection Act "a matter of last resort" reserved for "the most urgent and dire situations," not warranted under the current circumstances.

Now more than ever, we must be attentive to the militarization of domestic policing and the unchecked power of law enforcement over Black communities. We urge you to act on the American people's calls for justice and scrutiny within our police forces and prohibit funding for deployments under the Insurrection Act that lack a joint certification to Congress of a state's inability or unwillingness to enforce federal law.

We thank you for your consideration of this request.

Sincerely,



Jeffrey A. Merkley
United States Senator



Richard Blumenthal
United States Senator



Edward J. Markey
United States Senator



Ron Wyden
United States Senator

/s/

Chris Van Hollen
United States Senator