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Christopher F. Melling, Why the President Should Remain Commander in Chief of the D.C. National Guard, 47 BYU L. Rev. 711 (2022).
Available at: https://digitalcommons.law.byu.edu/lawreview/vol47/iss2/11

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Why the President Should Remain Commander in Chief of the D.C. National Guard

Christopher F. Melling*

Following the “Save America” rally on January 6, protestors breached the Capitol and prevented Congress from certifying the 2020 presidential election. The riot led to President Trump’s impeachment and proposed legislation that would give the District of Columbia mayor control over the D.C. National Guard. Representatives also renewed calls for D.C. statehood, which would lead to its governor commanding the Guard. Yet the Constitution, statutes, and historical practice assert that the President—not Congress or the D.C. executive—should command D.C.’s National Guard. Certainly, revoking or limiting the President’s power over the Guard would prove satisfying in the short term, but it would disrupt the District’s political balance. Regardless of the parade of horribles that January 6 inspires, the President should remain the commander of the D.C. National Guard. Additionally, there are two significant safeguards preventing another January 6: military officials can leverage their expansive delegated power and cleave to their oaths of office.

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INTRODUCTION

America experienced a tragedy on January 6, 2021. On that day, as Congress met to certify the 2020 presidential election, President Trump proclaimed from the Ellipse, “We will never give up . . . You don’t concede when there’s theft involved . . . And if you don’t fight like hell, you’re not going to have a country anymore.” He was talking about the results of the 2020 election, which Trump claimed were in doubt two weeks before Inauguration Day. The crowd reacted favorably to the President’s

1. In President Joe Biden’s words, it was “the worst attack on our democracy since the Civil War.” Full Transcript: President Joe Biden Delivers Speech to Joint Session of Congress, ABC News (Apr. 28, 2021, 8:26 PM), https://abcn.ws/2QLMm7Y (hereinafter Biden).


4. See, e.g., William Cummings, Joey Garrison & Jim Sergent, By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election, USA TODAY (Jan. 6, 2021, 8:50 AM),
message and thousands took Trump’s call to march on the Capitol literally.\(^5\) Within the hour, a crowd had indeed marched to the Capitol ostensibly to prevent Congress from certifying electoral results.\(^6\) And they succeeded. Rioters forcibly gained entrance to the Capitol and Congress evacuated the chambers where they were certifying the results.\(^7\) Over the next few hours, the President remained largely silent despite the Capitol Police’s urgent calls for National Guard reinforcements.\(^8\) The acting Secretary of Defense eventually mobilized the District of Columbia National Guard (DCNG), but it took hours to restore order at the Capitol.\(^9\)

Because of the President’s admonition to march to the Capitol and his subsequent failure to deploy the DCNG when requested, some have suggested changes to the DCNG’s command structure. Specifically, some have demanded that the mayor of D.C., or should D.C. become a state,\(^10\) the governor, control the Guard.
This Note, however, argues that the Constitution, federal and D.C. statutes, and political realities confirm that the President should control the DCNG. Shifting command to a local executive would offend the Constitution and disrupt the political status quo. Further, Presidents’ expansive delegation to the military and the military’s oath of office adequately temper the risk of another January 6.

The Note first reviews the events surrounding the Capitol riot, explains why January 6 was an insurrection, describes the call for changes to the DCNG’s command structure, and surveys D.C.’s unique status and the DCNG. Part II contrasts the President and Congress’s authority over the DCNG via the Constitution, legislation, and statutes. Then, after describing how the shared power model between the Executive and Legislative branches relates to the military, Part III analyzes how the Constitution and politics counsel against D.C.’s mayor or governor commanding the DCNG. Part IV explains why the President should remain the DCNG’s sole commander because of the Constitution and the importance of preserving the status quo. Finally, the Note shows how presidential delegation to subordinate military officers and those officers’ oaths of office protect against presidential overreach.

I. BACKGROUND

A. The January 6 Capitol Riot

Post-election, President Trump claimed that the election results were fraudulent and should be rejected by Americans and certifying officials. Most of those statements appeared on Twitter as early as November 13, 2020. Damningly, on January 2, the

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12. E.g., Donald Trump (@realDonaldTrump), Twitter (Nov. 13, 2020, 10:56:29 AM), https://www.thetrumparchive.com/?searchbox=%22For+years+the+Dems%22 ("Now the Dems are saying what a wonderful job the Trump Administration did in making 2020 the most secure election ever. Actually this is true, except for what the Democrats did. Rigged Election"); Donald Trump (@realDonaldTrump), Twitter (Nov. 13, 2020, 7:32:26 PM), https://www.thetrumparchive.com/?searchbox=%22these+states+in+question+should%22 ("These states in question should immediately be put in the Trump Win column. Biden did not win, he lost by a lot"); Donald Trump (@realDonaldTrump), Twitter (Nov. 25, 2020, 10:44:26 AM), https://www.thetrumparchive.com/?searchbox=%22but+2020+is+a+long%22
President asked the Georgia Secretary of State to find votes to reverse the Georgia election results. Trump also invited his supporters to the “Save America” rally on January 6 in D.C.

Due to the widespread anger over the election, the Department of Homeland Security (DHS) produced a general threat assessment that pointed to an increased threat of individuals prone to commit violent acts. Two days before the riot, the D.C. Metropolitan Police Department (MPD) arrested the Proud Boys’ leader, charging him with property destruction and possession of illegal ammunition. The arrest was significant because of the alleged link between President Trump and white supremacist groups. According to their founder, the Proud Boys were formed in 2016 as a western fraternity that promoted male bonding and socializing. However, the Proud Boys had been prominent in the far-right movement including their presence at demonstrations like the deadly “Unite the Right” rally in Charlottesville and various Trump rallies. Given intelligence of the pending “Save America” rally, the Capitol Police chief urged the Capitol Police Board and Congress to request

("But 2020 is a long way from over!"); Donald Trump (@realDonaldTrump), TWITTER (Dec. 26, 2020, 8:51:55 AM), https://www.thetrumparchive.com/?searchbox=%22election+fraud%22 ("The U.S. Supreme Court has been totally incompetent and weak on the massive Election Fraud . . . We have absolute PROOF, but they don’t want to see it . . . If we have corrupt elections, we have no country!").

13. H.R. Res. 24, supra note 11.


15. DHS reported a “heightened threat environment during the 2020–2021 election season, including the extent to which the political transition and political polarization are contributing to the mobilization of individuals to commit violence.” Josh Margolin & Lucien Bruggeman, Months Ahead of Capitol Riot, DHS Threat Assessment Group Was Gutted: Officials, ABC NEWS (Jan. 9, 2021, 5:18 PM), https://abcn.ws/3mm2QkG.


that the DCNG go to alert status.\textsuperscript{20} Unfortunately, the Capitol Police Board denied the request,\textsuperscript{21} and D.C. Mayor Muriel Bowser did not declare an emergency in advance.\textsuperscript{22} On January 5, the Norfolk FBI field office shared information with D.C. law enforcement that contained specific threats against Congress.\textsuperscript{23} Yet D.C. authorities recommended not deploying additional forces.\textsuperscript{24} Mayor Bowser only asked for 340 unarmed DCNG to provide traffic control.\textsuperscript{25}

On January 6, Trump began his remarks at the “Save America” rally shortly before noon.\textsuperscript{26} Meanwhile, MPD discovered two unexploded pipe bombs at 12:45 p.m., one each at the Republican and Democratic National Committee headquarters.\textsuperscript{27} At 1:11 p.m., Trump concluded his remarks.\textsuperscript{28} Then, as one journalist reported, a “huge crush of people [came] down Pennsylvania Ave[,] . . . quickly overwhelmed” Capitol Police, and breached the Capitol.\textsuperscript{29}

\begin{footnotesize}
\begin{enumerate}
\item Wamsley, supra note 9.
\item Shabad, supra note 20.
\item Wamsley, supra note 9.
\item Id. The MPD, the U.S. Capitol Police, the U.S. Park Police, and the FBI Washington Field Office decided there was not enough specificity. Id.
\item Id. The Mayor did not want “other federal law enforcement personnel.” Muriel Bowser (@MayorBowser), TWITTER (Jan. 5, 2021, 11:53 AM), https://twitter.com/MayorBowser/status/134653035867492466. She was concerned about a repeat of June 1, 2020, where federal law enforcement aggressively cleared Lafayette Square. See id.; Tom Gjelten, Peaceful Protesters Tear-Gassed to Clear Way for Trump Church Photo-Op, NPR (June 1, 2020, 11:50 PM), http://n.pr/2NXNTq6.
\item Wamsley, supra note 9.
\item Id.
\item See Trump, supra note 3 (“All of us here today do not want to see our election victory stolen by emboldened radical-left Democrats, which is what they’re doing. And stolen by the fake news media.”; “We will not take it anymore and that’s what this is all about. . . . We will stop the steal.,” “We will not let them silence your voices. We’re not going to let it happen . . . .”; “Today is not the end, it’s just the beginning.”; “So . . . we’re going to walk down Pennsylvania Avenue . . . and we’re going to the Capitol . . . .”).
\end{enumerate}
\end{footnotesize}
Authorities alerted Congress, which was certifying the election, and both chambers sheltered in place.\textsuperscript{30} As rioters surrounded the Capitol, the Capitol Police Chief and Mayor Bowser both called for reinforcements.\textsuperscript{31} Sources dispute what happened then at the Pentagon. Some officials claim they heard the Director of the Army Staff say that the Secretary of the Army would not approve the request for DCNG activation, while the Director himself asserts that the Secretary ran to the Defense Secretary’s office.\textsuperscript{32} Meanwhile, Trump tweeted, “USA demands the truth!”\textsuperscript{33}

Over the next half hour, rioters who had breached the Capitol building committed a range of actions from threatening violence against officers and legislators to roaming the halls. Some, attired in military gear and using walkie-talkies and code names, seemed to be searching for legislators.\textsuperscript{34} Others took selfies and camped out in Speaker Nancy Pelosi’s chair.\textsuperscript{35} Due to the threat of violence, law enforcement shepherded Congress to a safer location and evacuated the Cannon House Office Building.\textsuperscript{36} Over the next few hours, four people died: two from natural causes, one from amphetamine intoxication, and one killed by Capitol police after she attempted to access the chamber where Congress was being evacuated.\textsuperscript{37}

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{29}
\item Wamsley, supra note 9.
\item Id. At 2:22 p.m., Mayor Bowser and the Capitol Police Chief were on a call with Pentagon officials, where the Chief said, “I am making an urgent, urgent immediate request for National Guard assistance. . . . I have got to get boots on the ground.” Id.
\item Id.
\item Donald Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021, 2:24:22 PM), https://www.thetrumparchive.com/?searchbox=%22USA+demands%22.
\item Dan Zak & Karen Heller, What Were the Capitol Rioters Thinking on Jan. 6?, WASH. POST (July 20, 2021, 6:00 AM), https://wapo.st/3z57IOz.
\item Id.
\end{enumerate}
\end{footnotesize}
At 3:04 p.m., the Secretary of the Army determined that the DCNG was needed to secure the Capitol and the acting Secretary of Defense approved the Army Secretary’s plan to activate 1,100 DCNG. Thirty minutes later, the White House Press Secretary tweeted that Trump had directed the DCNG to protect the Capitol. However, it was Vice President Pence, not President Trump, who called the acting Secretary of Defense at 4:08 p.m. and demanded an update. At 4:17 p.m., the President told protestors to “go home in peace,” while also saying, “[w]e had an election that was stolen from us.” The Guard arrived at the Capitol at 5:40 p.m. and secured the area by 8 p.m.

B. Impeachment and Insurrection

Congress’s impeachment of President Trump exemplified the collective anger against the President for January 6 and the frustration that he was the only person who could deploy the DCNG. The impeachment article alleged a serious crime: Trump incited an insurrection. And the January 6 riot meets the standard of an insurrection laid out in the Constitution and federal law. Thus, the insurrection, supported in part by Trump’s action and inaction, lends strong support to voices that contend the President should not have control of the DCNG.


39. Kayleigh McEnany (@PressSec45), TWITTER (Jan. 6, 2021, 1:36 PM), https://twitter.com/presssec45/status/1346918582833216936?lang=en (“At President @realDonaldTrump’s direction, the National Guard is on the way along with other federal protective services. We reiterate President Trump’s call against violence and to remain peaceful.”). Of course, there is debate over whether the President did, in fact, authorize the DCNG’s deployment. The New York Times and CNN reported that “President Trump initially rebuffed and resisted requests to mobilize the National Guard to quell violent protests at the Capitol, according to a person with knowledge of the events.” Maggie Haberman & Helene Cooper, Trump Rebuffed Initial Requests to Deploy the National Guard to the Capitol, Pence Gave the Go-Ahead, N.Y. TIMES (Jan. 6, 2021, 8:31 AM), http://nyti.ms/3uR0plC; Kaitlan Collins, Zachary Cohen, Barbara Starr & Jennifer Hansler, Pence Took Lead as Trump Initially Resisted Sending National Guard to Capitol, CNN (Jan. 7, 2021, 11:39 AM), http://cnn.it/3kH4oD3. The N.Y. Times also reported that Vice President Pence gave the order, assisted by the White House Counsel. Haberman & Cooper, supra.

40. Associated Press, supra note 38.

41. Wamsley, supra note 9.

42. Id; Associated Press, supra note 38.

Two days after the riot, the House drafted an impeachment article for “Incitement of Insurrection” against President Trump.\(^\text{44}\) The article alleged that “Trump engaged in high Crimes and Misdemeanors by inciting violence against the Government of the United States.”\(^\text{45}\) Specifically, it charged that Trump “repeatedly issued false statements” in the months before the election, claimed “widespread fraud,” and “willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol.”\(^\text{46}\) The article of impeachment passed.\(^\text{47}\) During the Senate trial, the impeachment manager pled: “If that is not ground for conviction, if that is not a high crime and misdemeanor against the Republic and the United States of America, then nothing is.”\(^\text{48}\) Although the Senate acquitted him, all of the events surrounding the January 6 riot, including Trump’s encouraging of more than 8,000 supporters to march against Congress, indicate that the riot at the Capitol was an insurrection.\(^\text{49}\)

In Article I of the Constitution, Congress has the power to “call[] forth the Militia” to “suppress Insurrections and repel Invasions.”\(^\text{50}\) But these do not include ordinary threats that local law

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\(^\text{44}\) \text{Id.}\n\(^\text{45}\) \text{Id.}\n\(^\text{46}\) \text{Id.}\n\(^\text{47}\) Jeremy Herb, Manu Raju, Lauren Fox & Phil Mattingly, \textit{House Impeaches Trump for ‘Incitement of Insurrection’,} CNN (Jan. 13, 2021, 8:23 PM), http://cnn.it/2O0vd9d (showing that, with a vote of 217 to 192, the vote was not on party lines).
\(^\text{48}\) Nicholas Fandos & Emily Cochrane, \textit{7 Senate Republicans Vote ‘Guilty,’ the Most Bipartisan Margin in Favor of Conviction in History}, N.Y. TIMES (Feb. 17, 2021, 4:42 AM), http://nyti.ms/3kEMLDW (quoting Representative Jamie Raskin, lead impeachment manager).
\(^\text{50}\) U.S. \textit{Const. art. I, § 8, cl. 15.}
enforcement could handle. As Professor William Banks explains, the Founders envisioned that only extreme threats like foreign invasions, armed insurrections against the government, or direct affronts to a republican form of government would justify deploying federal military to states absent a governor’s request for aid. January 6 rioters were not foreign invaders, nor were they an organized, armed group intent on toppling the government. Rather, the January 6 riot was an insurrection because it constituted a direct threat to the states’ guarantee of a republican form of government. Many of the rioters marched to the Capitol to stop the election certification of Joseph Biden. And they succeeded. Rioters prevented state representatives from certifying the election, and by extension, the citizens of all fifty states’ selection of a President through certification of their state electoral processes.

Legislation further validates the characterization of January 6 as an insurrection. The Insurrection Act refers to an insurrection as including “domestic violence, unlawful combination, or conspiracy.” An insurrection exists when persons obstruct the execution of laws so that others are deprived of rights or privileges.


52. Granted, the rioters were armed with items like baseball bats, pepper spray, and flagpoles. See Tom Dreisbach & Tim Mak, Yes, Capitol Rioters Were Armed. Here Are the Weapons Prosecutors Say They Used, NPR (Mar. 19, 2021, 5:06 AM), https://npr.org/3kqpmqf; Holmes Lybrand, Fact Checking Claims January 6 Was Not an Armed Insurrection, CNN POLITICS (July 28, 2021, 5:23 PM), https://cnn.it/3sy5dSr. However, the rioters were intent on stopping the election count, not installing a new government. See Robert A. Pape & Keven Ruby, The Capitol Rioters Aren’t Like Other Extremists, ATLANTIC (Feb. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/02/the-capitol-rioters-arent-like-other-extremists/617895/.

53. U.S. CONST. art. IV, § 4; see Erwin Chemerinsky, Challenging Direct Democracy, 2007 MICH. ST. L. REV. 293, 301 (2007) (arguing that the Framers “thought that a republican form of government was one where people would elect representatives, and the representatives would then make the laws”).

54. Pape & Ruby, supra note 52.

and the state is unable to protect their rights. An insurrection can occur when an armed group opposes or obstructs the execution of the laws directly. The January 6 riot fits both prongs. Violence prevented Congress from certifying the election results, and law enforcement could not protect the Capitol.

Some Republican lawmakers balk at referring to January 6 as an insurrection. One representative minimized those who stormed the Capitol, calling them mere protesters. Another representative labeled the rioters “an undisciplined mob.” Borrowing a phrase from coverage of the 2020 Black Lives Matter phenomenon, one senator rejected the idea that January 6 was an insurrection, calling it “largely a ‘peaceful protest.’”

January 6 was an insurrection, however, because it was a direct threat against the states’ guarantee of a republican form of government and thus qualifies as an insurrection under the Insurrection Act. Accordingly, the insurrection, supported in part by Trump’s action and inaction, lends strong support to those that contend the President should not have control of the DCNG. But as this Note demonstrates in Parts II–IV, the President should remain the commander of the DCNG.

56. § 253(1).
57. § 253(2).
58. U.S. CONST. amend. XII (“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President.”).
59. Thus, the “state” was unable to “protect that right.” § 253(1).
60. Cristina Marcos, GOP Increasingly Balks at Calling Jan. 6 an Insurrection, HILL (June 19, 2021, 6:00 AM), https://thehill.com/homenews/house/559217-gop-increasingly-balks-at-calling-jan-6-an-insurrection. (“‘They were protesting. And I don’t approve of the way they protested, but it wasn’t an insurrection,’ said Rep. Thomas Massie (R-Ky.).”).
61. Id. (quoting Rep. Andrew Clyde (R-Ga.)).
62. See, e.g., Tara Adhikari, BLM and Floyd Protests Were Largely Peaceful, Data Confirms, CHRISTIAN SCI. MONITOR (July 8, 2021), https://www.csmonitor.com/USA/Politics/2021/0708/BLM-and-Floyd-protests-were-largely-peaceful-data-confirms.
63. Marcos, supra note 60 (quoting Sen. Ron Johnson (R-Wis.)).
64. This Note addresses the question of whether the President should command the DCNG. Perhaps the House’s Jan. 6 Commission will answer why the DCNG was not deployed earlier. See Nat’l Comm’n to Investigate the Jan. 6 Attack on the U.S. Capitol Complex Act, H.R. 3233, 117th Cong. (2021).
C. D.C. and the DCNG

To give proper context for the remainder of the Note, this section explores what makes D.C. different from the fifty states, the D.C. statehood movement, and the DCNG. First, Washington, D.C., differs from every other American polity. The federal district evolved from a collection of ugly buildings sitting on “unpaved, muddy cesspools”65 to its present grandeur.66 This evolution occurred because of its role as the capital city. The Constitution speaks to D.C.’s existence in Article I, Section 8, as “not exceeding ten Miles square,” formed by “Cession of particular States.”67 The Framers vigorously debated the Capital’s location.68 Indeed, as Whit Cobb remarks, the Framers declined to place the nation’s capital in an existing state to assuage regional jealousies and ensure the federal government’s safety and dignity.69 While D.C. has not remained the utopia Jeffersonians envisioned,70 the capital compact persists in part because the citizens of D.C. have upheld their part of the bargain by not seeking local political control.71 That is not to deny that the statehood movement is straining that bargain.72 Even so, the Framers’ vision of a district free from state influence should endure despite calls for change.73

68. Whit Cobb, Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital, 99 DICK. L. REV. 527, 531 (1995) (“The Constitution’s framers were politically sophisticated enough to know that the designation of a site for the national capital would be fiercely contested.”).
69. Id. at 530.
70. See id. at 535 (discussing the Framers who saw the national capital as an agrarian paradise, free from the influence of “urban mobs”).
71. Id. at 550.
72. See infra Part III.
73. At least one voice demands full D.C. representation in Congress so that the United States meets international law. Johnny Barnes contends that the United States violates international treaties and customary international law by denying D.C. citizens full representation in the national legislature. Johnny Barnes, Towards Equal Footing: Responding to the Perceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia, 13 D.C. L. REV. 1, 48–56 (2010) (citing international law as a way to grant D.C. statehood). Calls for statehood would mitigate the risk of a rogue President sparking another Capitol riot, but it would also raise tension between the federal government versus the local government when politics do not align. Cf. Mike DeBonis & Meagan Flynn, “It’s Not a Local
Second, though Congress has at times created independent governments for D.C., it has never given D.C. full autonomy. In 1871, Congress passed legislation molding the District of Columbia into a municipal corporation which could contract with other parties and sue in court. But three years later, Congress repealed the act based on rampant “corruption, wanton spending, debt, bankruptcy, and public outcry.” A three-member commission then governed D.C. until 1967 when a city council replaced the commissioners. Most recently, Congress approved the District of Columbia Home Rule Act of 1973.

However, many reject the current D.C. model in favor of statehood. Mayor Bowser and the Government of D.C. sponsor the website, State of Washington, D.C. The website contends that D.C. residents are denied equality with other U.S. citizens even though D.C. citizens pay federal taxes and serve in the federal military, while the city operates its own school system, manages Medicaid programs, and is fiscally independent.

Issue Anymore”: D.C. Statehood Moves from Political Fringe to the Center of the National Democratic Agenda, WASH. POST (Mar. 20, 2021, 1:11 PM), http://wapo.st/2Pg4JkA (remarking that President Biden shouted to D.C.’s representative Eleanor Norton, “You should be a state!”).


77. D.C. Home Rule, COUNCIL OF D.C., https://dccouncil.us/dc-home-rule/ (last visited Apr. 8, 2021), “The Council is composed of a Chairman elected at large and twelve Members—four of whom are elected at large, and one from each of the District’s eight wards.” Id.


Statehood may also be constitutional and legal. As Rep. Raskin and Rep. Norton assert, granting D.C. statehood is the only way to grant political equality for D.C. residents who cannot vote on any federal laws.

The statehood movement must overcome obstacles. To begin, the Senate is unlikely to pass a D.C. statehood bill. During the 116th Congress, six Democrats even refused to co-sponsor the legislation. Republican senators have called the bill “unconstitutional,” a “Democratic power grab’ that would ‘empower the most radical agenda in modern American politics[,]’” and a “bad deal.” There is also a practical reason Republicans may not support statehood—votes. Since D.C. citizens gained the right to vote for President, they have voted overwhelmingly for

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Donald Trump said that he supports ‘whatever’s best’ for D.C. residents, including the possibility of statehood. Vice President Mike Pence has also shown support for D.C. statehood in the past: in 2007, he said that the lack of representation for D.C.’s residents a ‘historic wrong.’ However, Rep. Norton’s bill likely does not have enough votes; there are only 215 cosponsors in the House and 42 in the Senate. See Lex Juarez, D.C. Statehood Bill Mark-Up and Vote to Be Held April 14, WDVM (Mar. 31, 2021, 10:55 PM), https://www.wdvm.com/news/washington-dc/d-c-statehood-bill-mark-up-and-vote-to-be-held-april-14/.


Democratic candidates.\textsuperscript{86} It would be a fair guess that D.C. as a state would continue supporting the Democratic party.\textsuperscript{87}

As some Senators argue, granting statehood conflicts with original intent. The Framers rejected the notion that an existing state would host the capital.\textsuperscript{88} D.C. is the national capital; no state should have undue influence over national politics. Mr. Madison warned that the accumulation of power in the nation’s capital would be too great a temptation for a single state.\textsuperscript{89} And Article I gives Congress the enumerated power to pass legislation in D.C., and Congress has not relinquished that right.\textsuperscript{90} Also, fear of undue influence over the national government from three quarters of a million D.C. citizens who control a $15.5 billion budget likely remains a substantial factor in stalling the D.C. statehood movement.\textsuperscript{91} Even January 6 will likely not overcome one commentator’s argument, based on a reading of Mr. Madison’s Federalist No. 43, that an independent capital is “a critical part of the Framers’ original design for an indestructible federal union of indestructible states.”\textsuperscript{92} In sum, D.C. statehood is not likely to

\begin{itemize}
\item \textsuperscript{88} See U.S. CONST. art. I, § 8, cl. 17 (creating the District “by Cession of particular States”).
\item \textsuperscript{89} THE FEDERALIST NO. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961) (”[T]he gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence.”).
\item \textsuperscript{90} U.S. CONST. art. I, § 8, cl. 17.
\end{itemize}
become a political reality in the near future despite strong arguments for full representation.

Third, military operations in D.C. are distinct. In 1802, Congress passed legislation that created the District of Columbia Militia\(^\text{93}\) shortly after the President and Congress took up residence.\(^\text{94}\) But after a series of internal rebellions—Shays’s Rebellion,\(^\text{95}\) the Whiskey Rebellion,\(^\text{96}\) and Fries’s Rebellion,\(^\text{97}\)—some feared an armed force would cross the Potomac and lay siege to the capital.\(^\text{98}\) So unlike state militias, the DCNG retains a national mission: to obey orders of the President of the United States and stand ready to deploy overseas.\(^\text{99}\)

The DCNG also responds to domestic disturbances and performs other functions like parades, civic celebrations, and


\(^{97}\) See generally Fries’s Rebellion, BRITANNICA, https://www.britannica.com/event/Friess-Rebellion (last visited Apr. 8, 2021) (giving an overview of Fries’s Rebellion, in which President Adams in 1799 called out federal troops and militia to suppress a group of German farmers who marched to Bethlehem, Pennsylvania to liberate federal tax protesters).

\(^{98}\) Even President Washington was not immune from insinuations that the successful general would reenact Caesar crossing the Rubicon. See Saikrishna Bangalore Prakash, The Past, Present, and Future of Presidential Power, 14 U. ST. THOMAS L.J. 627, 637 (2018) (citation omitted) (“Jeffersonians called Washington an ‘embryo-Caesar[,]’”); see also The Founding of a Legacy, D.C. NAT’L GUARD, https://dc.ng.mil/About-Us/Heritage/DC-National-Guard-Museum/Exhibits/The-Foundation-of-a-Legacy/ (last visited Apr. 8, 2021) (discussing the fear that the “will of a military general could keep the legislative body from enacting the will of the people”).

natural disasters. President Johnson activated the Guard after Dr. Martin Luther King Jr.‘s assassination. And as riots in response to George Floyd’s murder intensified, President Trump called up the National Guard in twenty-three states and the District to “dominate the streets” and “end[] the riots and lawlessness that has spread throughout our country.” Seven months later, the DCNG mobilized again to protect the Capitol building.

II. AUTHORITY TO COMMAND THE DCNG

D.C., as a politically neutral polity that functions as the nation’s capital, must have a military force commanded by the chief executive notwithstanding the January 6 insurrection. In fact, presidential authority to command the DCNG flows from the Constitution and federal statutes. Articles II and I of the Constitution provide the basis for the President’s power over the

100. The DCNG is a “responsive, dependable force for … Independence Day celebrations” and other civic events like “the Million Man March, the Dr. Martin Luther King, Jr. Memorial dedication and state funerals.” See Past and Post War, D.C. NAT’L GUARD, https://dc.ng.mil/About-Us/Heritage/History/Past-and-post-war/ (last visited Apr. 8, 2021). The DCNG also responds to natural disasters, such as “Hurricane Katrina, the blizzard of ’96, the ‘Snowpocalypse’ blizzard of 2010, Hurricane Irene, Hurricane Sandy and many other[s].” Id.


102. See generally Derrick Bryson Taylor, George Floyd Protests: A Timeline, N.Y. TIMES (Sept. 7, 2021), http://nyti.ms/3e9A4zH.

103. Ryan Browne, Alicia Lee & Renee Rigdon, There Are as Many National Guard Members Activated in the US as There Are Active Duty Troops in Iraq, Syria and Afghanistan, CNN (June 1, 2020, 11:48 PM), http://cnn.it/3sR0cUg. Media reported the DCNG and police using smoke canisters, pepper balls, horses, shields, and batons to clear Lafayette Square. Gen Gittleson & Jordyn Phelps, Police Use Munitions to Forcibly Push Back Peaceful Protestors from Trump Church Visit, ABC NEWS (June 2, 2020, 6:36 PM), http://abcn.ws/3sMlsuf.

104. That said, it is disputed whether President Trump explicitly gave the order to mobilize the DCNG. See Lauren Giella, Fact Check: Did Trump Call in the National Guard After Rioters Stormed the Capitol?, NEWSWEEK (Jan. 8, 2021, 7:15 PM), https://bit.ly/3nWc9fr; see also Alexander Mallin & Beatrice Peterson, Lawmakers Grill Officials on Jan. 6 Timeline for Deploying National Guard to Capitol, ABC NEWS (Mar. 3, 2021, 3:25 PM), http://abcn.ws/3epyHwS (discussing whether the acting Secretary of Defense, Secretary of the Army, or commander of the DCNG made the call).
Guard. Cementing that power are executive orders, federal statutes, and D.C. laws.

A. The President

1. Article II powers

Article II grants the President the commander in chief and executive powers.\textsuperscript{105} 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.”\textsuperscript{106} To guide that power, the Constitution gives clear commander’s intent.\textsuperscript{107} The President must take an oath or affirmation to “faithfully execute the office of President of the United States, and . . . to the best of [his] Ability, preserve, protect and defend the Constitution . . . .”\textsuperscript{108} Also, the Executive “shall take Care that the Laws be faithfully executed[.]”\textsuperscript{109} Thus, the Constitution directs the Commander in Chief to follow, not his own whims, but those of the American people. And, as the Constitution’s preamble states, “We the People” established the Constitution that thus gave the President his authority.

\textsuperscript{105} U.S. Const. art. II, § 1, cl. 1; § 2, cl. 1.

\textsuperscript{106} U.S. Const. art. II, § 2. Of course, it took faith for the Republic to give the Chief Executive even partial power over state militia. The colonies had just won independence from George III, characterized as “[a] Prince whose character is thus marked by every act which may define a Tyrant[.]” The Declaration of Independence para. 3 (U.S. 1776). Some, like Patrick Henry, feared “a King . . . in the field, at the head of his army, [who] can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke.” Patrick Henry, in The Anti-Federalist Papers and the Constitutional Convention Debates 214 (Ralph Ketcham ed., 1986).

\textsuperscript{107} The U.S. Army defines commander’s intent:
The commander’s intent describes the desired endstate. It is a concise statement of the purpose of the operation and must be understood two levels below the level of the issuing commander. It must clearly state the purpose of the mission. It is the single unifying focus for all subordinate elements. It is not a summary of the concept of the operation. Its purpose is to focus subordinates on what has to be accomplished in order to achieve success, even when the plan and concept no longer apply, and to discipline their efforts toward that end.


\textsuperscript{108} U.S. Const. art. II, § 1.

\textsuperscript{109} U.S. Const. art. II, § 3.
Even so, the Commander in Chief Clause needs two clarifications. First, “called into the actual Service” means that the President cannot direct the Guard unless it is in federal service. However, D.C. is a federal district and thereby subject to Congress’s legislation exclusively. As section II.B discusses, both Congress and the D.C. Council have asserted through law that the President commands the DCNG. And so the President need not “call up” the DCNG as he would a state’s National Guard. Second, the District of Columbia is not a state. Even if one reads the Clause narrowly to exclude the President’s command of D.C.’s National Guard, legislation—the Insurrection Act and D.C. Code section 49-409—confirms his power over the DCNG.

Next, the Constitution grants the President the executive power. This authority combines with the commander in chief power to give the President broad leeway over military affairs. So, even if laws were silent on who controls the DCNG, the President’s dual role as commander in chief and chief executive means that he rightly commands military units, especially during an insurrection.

That said, the Executive Clause, as Professor Saikrishna Prakash explains, is an enigma. Under one interpretation, the President’s executive power is like a king’s. The President leads
a “unitary, hierarchical executive branch” and has the right to execute laws affecting military and international affairs.\textsuperscript{117} Responding to a sudden attack in the capital, the President thus has power to mobilize requisite forces to defend the nation.\textsuperscript{118}

Others, like Professor Richard Epstein, take a more limited view of the President’s powers.\textsuperscript{119} Professor Epstein argues that the executive and commander in chief powers should not allow the President to ignore treaties or statutes, or to have inherent power over the militia.\textsuperscript{120} Instead, the President should command the militia only when it is called into federal service.\textsuperscript{121} This view may be accurate for the President’s power over the National Guard in the fifty states but not for D.C. In the nation’s political heart, Alexander Hamilton’s “vigorous executive” must exist in full to protect against foreign attacks, administer laws, protect property against groups that attempt to interrupt the national government, and secure liberty against factions and anarchy.\textsuperscript{122} Thousands of angry citizens attacking the Capitol certainly falls within Mr. Hamilton’s examples.

The Supreme Court explored executive power within the context of presidential action during military conflict in \textit{Youngstown Sheet \& Tube Co. v. Sawyer}.\textsuperscript{123} During the Korean Crisis,\textsuperscript{124} a nation-wide work stoppage at the country’s steel mills jeopardized the production of much-needed armaments for the war effort.\textsuperscript{125} In response, President Truman issued Executive Order 10340, directing the Secretary of Commerce to seize the mills.\textsuperscript{126} The question before the Court was

\begin{itemize}
  \item \textsuperscript{117} \textit{Id.} at 703.
  \item \textsuperscript{119} See, e.g., \textit{Id.} at 706–07; Curtis A. Bradley \& Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 \textit{Mich. L. Rev.} 545, 646 (2004) (“[T]he [Foreign Affairs] Act’s specific and modest language suggests that its basis was understood to be the Constitution’s discrete grants, functionally applied, rather than an unstated consensus viewing foreign affairs as an inherently executive matter.”).
  \item \textsuperscript{120} Epstein, \textit{supra} note 118, at 320–21.
  \item \textsuperscript{121} \textit{Id.} at 323.
  \item \textsuperscript{122} \textit{The Federalist} No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
  \item \textsuperscript{123} \textit{Youngstown Sheet \& Tube Co. v. Sawyer}, 343 U.S. 579, 587 (1952).
  \item \textsuperscript{124} The conflict in Korea was not technically a war because Congress never formally declared one. See Charles A. Stevenson, \textit{The Korea War Powers Precedent}, LAWFARE (July 25, 2020, 10:52 AM), https://www.lawfareblog.com/korea-war-powers-precedent.
  \item \textsuperscript{125} \textit{Youngstown}, 343 U.S. at 582.
  \item \textsuperscript{126} \textit{Id.} at 583.
\end{itemize}
whether the President’s order was constitutional. While the Court ultimately declined to sustain the seizure order, Justice Jackson discussed the executive power as that “from the reign of ancient kings to the rule of modern dictators[,]” which marked the executive’s speed. Concurring, Justice Frankfurter surveyed the historical practice of the power, considering the “systematic, unbroken, executive practice . . . engaged in by Presidents . . . making as it were such exercise of power part of the structure of our government . . . as a gloss on ‘executive Power[,]’”

The Supreme Court for the District of Columbia also analyzed the executive power for military decisions. Ruling on Lincoln’s suspension of habeas corpus during the Civil War, the court “regarded every possible vigorous and legal exercise of executive power for the suppression of the existing rebellion, not only as the legal right, but the solemn and sworn duty of the President.” And in an 1863 treatise, Judge Daniel Agnew lauded the President’s constitutional power when the rule of law was obstructed or

127. Id. at 584.
128. Id.
129. Id. at 629 (Jackson, J., concurring). Justice Jackson offered the hierarchy of Presidential power when compared to Congress’s actions. See id. at 636–38 (discussing the three tiers).
131. In re Dugan, 6 D.C. 131, 148 (1865). Though many of Lincoln’s actions during the War Between the States raised difficult questions about the scope of presidential power, few criticize Lincoln’s actions during a crisis. See, e.g., Daniel W. Hamilton, Popular Constitutionalism in the Civil War: A Trial Run, 81 CHI.-KENT L. REV. 953, 958 (2006) (recalling Chief Justice Taney’s belief that “much of the Lincoln administration’s war policy was unconstitutional”). In fact, most share the Hon. Daniel Agnew’s view of Lincoln:

O, how grand is the spectacle of an upright man breasting the pitiless storm of misfortune, injustice, and passion, in the discharge of high and holy duty! The fate of a great nation hangs suspended on his arm, and with his face turned upward toward heaven, as if to scrutinize the decrees of the Providence above, he stands, nobly determined to sustain and lift it above all human effort to destroy. Millions look to him for safety, and he feels the awful weight of responsibility crushing him almost to earth. But, with faith unmoved, hope, renewed, “springs eternal in his breast,” and he marches onward to the goal of duty[.]

DANIEL AGNEW, OUR NATIONAL CONSTITUTION: ITS ADAPTATION TO A STATE OF WAR OR INSURRECTION 38 (1863).
when the normal civil process was unable to suppress unrest. He remarked that the President has unquestioned power to suppress insurrections given his titles as Commander in Chief and Chief Executive.

2. Executive orders

The President relies on executive orders to act in the absence of congressional legislation. Promulgated on October 1, 1969, Executive Order 11485 references the President’s authority as commander in chief of the Armed Forces and the DCNG. The President can delegate authority to the Secretary of Defense who then may delegate to the Commanding General of the DCNG, to “supervise, administer and control the Army National Guard and the Air National Guard of the District of Columbia . . . while in militia status.” Through the President, the Secretary “may [also] order out the National Guard . . . to aid the civil authorities of the District.” Neither the Insurrection Act nor D.C. Code section 49-409 directly authorizes the President to aid D.C. civil authorities, or, in the alternative, denies him the power. The Executive Order is important because it cements the President’s authority over the

132. AGNEW, supra note 131, at 14 (“[W]hen the laws are obstructed or opposed by combinations too powerful to be suppressed by the ordinary civil process.”).

133. Id. at 14–15 (“[T]he President, who is the constitutional head of the army, navy, and militia, and who is constitutionally enjoined by oath to preserve, protect, and defend the Constitution, and to take care that the laws be faithfully executed; is commanded to use the whole military power of the United States to suppress such combination, and cause the laws to be duly executed; and that he is the sole and exclusive judge of the facts calling the exercise of this power into requisition.”).


136. Id.

137. Id.; see also MICHAEL A. FOSTER, LAWRENCE KAPP & ALAN OTT, CONG. RSCH. SERV., IF11768, NATIONAL GUARD CIVIL SUPPORT IN THE DISTRICT OF COLUMBIA 1–3 (2021).
DCNG when Congress has not directly spoken on the matter and the President is acting in accordance with his independent, constitutional powers.\textsuperscript{138}

Absent congressional action to the contrary, the President has constitutional power as commander in chief, chief executive, and, by virtue of Executive Order 11485, the authority to control D.C.’s military force. Protecting the nation’s capital requires speed, decisiveness, and unity of command. Congress’s natural inefficiencies confirm that the President should retain military power, which is why the Constitution places control of the military in Article II.\textsuperscript{139}

B. Congress

The Constitution grants Congress significant powers in Article I that includes limited control over military affairs. In addition to the President’s role, Congress guides the DCNG through traditional military legislation like the Insurrection Act as well as relevant D.C. law.

1. Article I powers

Congress’s role differs from the Executive respecting the military. The President is aptly named Commander in Chief because he commands the armed forces.\textsuperscript{140} Yet the Constitution gives Congress control over some aspects of the military such as the spending power and the Calling-Forth Clause.\textsuperscript{141} Further, Congress controls the purse strings and can pass laws regulating the military.

\textsuperscript{138} In other words, the President is operating in Justice Jackson’s second tier, the “absence of either a congressional grant or denial of authority” and so the President “can only rely upon his own independent powers.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

\textsuperscript{139} Congress is not the right body to respond to emergencies. They “cannot foresee the infinite variety of circumstances attending war, and therefore legislat[e] most effectively in vesting the President the whole power of the Government, and leaving him to act upon the circumstances.” \textit{Agnew, supra} note 131, at 15.

\textsuperscript{140} U.S. \textit{CONST.} art. II, § 2.

\textsuperscript{141} Anti-Federalists worried that a federal army would “trample on [the] fallen liberty[.]” \textit{Patrick Henry, Speech at the Virginia Ratifying Convention} (June 5, 1788), \textit{reprinted in Anti-Federalist Papers and the Constitutional Convention Debates} 202 (Ralph Ketcham ed., 1986). They wondered, “[h]ave we the means of resisting disciplined armies, when our only defence, the militia is put into the hands of Congress?” \textit{Id.} Ultimately, the Federalists won the debate and Congress retained enumerated power over the militia.
Finally, Congress has exclusive jurisdiction over D.C. laws to include the DCNG.

First, Congress may enact laws relating to the National Guard. For example, while militias were originally state institutions, Congress put them under federal control during mobilization for WWI. A dual enlistment requirement was also created so that members of the National Guard played two complementary roles: National Guard for the states and the National Guard used for federal missions. Additionally, Congress holds the 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[.].” Congress can also call up the militia to enforce laws, suppress insurrections, and defend against invasions. And congressional laws like the Insurrection Act specify when the President can activate the National Guard.

Second, and perhaps the most significant authority, is Congress’s power of the purse. To harness the taxing and spending clauses for military affairs, Article I directs Congress “[t]o
raise and support Armies” and “provide and maintain a Navy[].”

The President may be the commander in chief, but troops cannot go far without appropriations. With considerable assistance from the federal government, states fund their own National Guard. Congress funds the Guard’s activities under Title 32 status when the National Guard executes federal missions under state control or Title 10 status when the President activates the Guard for federal service. For D.C., the federal government funded 63% of the DCNG through federal payments and grants in 2016. Should D.C. become a state, however, D.C. would likely have to increase local funds by about $8 million unless the DCNG were to be activated under Title 10 or 32 status for an enduring mission.

Finally, Congress legislates exclusively for D.C. As James Madison argued in Federalist No. 43, a national government must have complete authority over its seat of government which includes control over legislation. Otherwise, there might be

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151. See Joseph Dragovich, George Washington’s Money War, MEDIUM (Nov. 25, 2019), https://medium.com/lessons-from-history/george-washingtons-money-war-c1cb55cd3df ("More frightening than the shot of the British: the enemy was hyperinflation. Ironically, the man who would eventually be the face of the one-dollar bill spent a lot of time worrying about the value of the Continental dollar, and how its collapse endangered the American Revolution.").
155. Id. (federal payments and grants totaled $8,290,383 in 2016).
156. Title 32 status means that a National Guard is being used for federal purposes, but control remains with the governor. See Dwight Stirling & Corey Lovato, With All Due Respect, Mr. President, We’re Not Going to Follow That Order: How and Why States Decide Which Federal Military Rules Apply to State National Guard Personnel, 22 TEX. REV. L. & POL. 95, 108 (2017).
157. U.S. CONST. art. I, § 8, cl. 17. (“To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States.”).
158. Mr. Madison argued that “[t]he indispensable necessity of complete authority at the seat of government carries its own evidence with it.” CASEY, supra note 92 (quoting THE FEDERALIST NO. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961)).
undue influence exerted from the national government on the local government, or vice versa.\textsuperscript{159}

The President retains command over the military as commander in chief and chief executive. Congress, however, has significant powers under Article I to regulate the military, control funding, and legislate for D.C. In sum, both branches affect the DCNG’s operation.

2. The Insurrection Act

The Insurrection Act is the primary law pertaining to presidential power over state militia.\textsuperscript{160} If Congress calls forth the militia, command of that body rests with the commander in chief.\textsuperscript{161} The Framers created this shared power model to promote checks and balances and prevent a President from invoking martial law capriciously.\textsuperscript{162}

Continuing in the tradition of the Militia Acts of 1792 and 1795,\textsuperscript{163} the Insurrection Act allows the President to use federal
forces and the militia to enforce laws.\textsuperscript{164} Today, the Act exists in Title 10 of the U.S. Code.\textsuperscript{165} It affirms the President’s power to mobilize the National Guard in the spirit of the original Militia Acts.\textsuperscript{166} The President may use the Guard to respond to various crises. He can mobilize state forces “[w]henever [he] considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws[].”\textsuperscript{167} There does not have to be an actual insurrection. Even an unlawful obstruction like a labor dispute\textsuperscript{168} or riot\textsuperscript{169} may be enough to trigger executive authority.

President invoked the Act one time. See Wiener, supra note 142, at 187–88 (suppressing the 1794 Whiskey Rebellion). In 1795, Congress amended the Militia Act to remove the provision requiring notification of a federal judiciary official before Presidential action. See Militia Act of 1795, Chapter 36, 3 Congress, Public Law 3-36. 1 Stat. 424 (1795). So the President now judged when a situation merited calling forth the militia. See F.E. Guerra-Pujol, Domestic Constitutional Violence, 41 U. Ark. Little Rock L. Rev. 211, 223 (2019) (“Under the new law, the President had the unilateral power to decide how serious or severe an obstruction was.”).\textsuperscript{164} Insurrection Act, Ch. 39, 2 Stat. 443 (1807); Hoffmeister, supra note 161, at 882–83.\textsuperscript{165} 10 U.S.C. §§ 251–55.\textsuperscript{166} Id. § 251 (“Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia . . . as he considers necessary to suppress the insurrection.”).\textsuperscript{167} Id. § 252; Cf. Militia Act of 1792, Ch. 28, 1 Stat. 264 (1792) (“[I]t shall be lawful for the President . . . on the application of the legislature of such state, or of the executive . . . to call forth such number of the militia of any other state . . . as he may judge sufficient to suppress such insurrection.”).\textsuperscript{168} See Harlan D. Unrau, Historic Resource Study: Chesapeake & Ohio Canal, 130–32 (2007), https://www.nps.gov/parkhistory/online_books/choh/unrau_hrs.pdf (describing President Jackson’s mobilization of U.S. Cavalry to “preserve the peace” at the C&O Canal); Jonathan Bassett, The Pullman Strike of 1894, 11 LAB. HIST. 34, 34 (1997) (showing that President Cleveland ordered federal troops to enforce an injunction against striking Pullman workers); Randall McGuire, Colorado Coalfield Massacre, 57 ARCHAEOLOGY 62, 62 (2004) (recounting the deployment of the Colorado National Guard to attack striking miners); see also Tung Yin, Coercion and Terrorism Prosecutions in the Shadow of Military Detention, 2006 BYU L. REV. 1255, 1328 (explaining why the Court in Moyer v. Peabody, 212 U.S. 78, 84 (1909), justified a governor’s deployment of the National Guard’s because the strikers were “stand[ing] in the way of restoring peace”).\textsuperscript{169} See Michael Jackman, Forgotten History: Detroit’s 1943 Race Riot Broke Out 75 Years Ago Today, DETROIT METRO TIMES (June 20, 2018, 8:49 AM), https://www.metrotimes.com/news-hits/archives/2018/06/20/forgotten-history-detroits-1943-race-riot-broke-out-75-years-ago-today; Michael Yockel, 100 Years: The Riots of 1968, BALTIMORE (May 2007), https://www.baltimoremagazine.com/section/community/100-years-the-riots-of-1968/; cf. Anjuli Sastry & Karen Grigsby Bates, When LA Erupted in Anger: A Look Back at the Rodney King Riots, NPR (Apr. 26, 2017, 1:21 PM), http://n.pr/3c5cx0f (marking a governor’s mobilization of National Guard to quell a riot).
Yet Congress does not give the President unfettered power. Granted, under the Insurrection Act’s authority, the President may suppress insurrections, domestic violence, or conspiracies. But an incident must fall under one of two broad categories. First, the disorder must prevent a state from executing its laws to the extent that people are deprived a “right, privilege, immunity, or protection[,]” and the state government is unable to protect the peoples’ rights. Second, the commander in chief may order out the Guard if the unrest obstructs or impedes federal law. So given these limitations, the Insurrection Act buttresses Congress’s intent that the President should be able to deploy federal forces within states “only in the gravest of circumstances[.]”

Still, some argue that Congress never had the authority to pass the Insurrection Act. Critics complain that the Insurrection Act “has exceeded constitutional boundaries erected to protect state decision-making prerogatives[.]” In short, they are concerned that the act gives too much power to the President. Yet, as Professor Thaddeus Hoffmeister points out, the President’s domestic use of troops flows from Congress’s delegation of constitutional power.

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171. id. § 253(1).
172. id. § 253(2).
173. William C. Banks, Providing “Supplemental Security” – The Insurrection Act and the Military Role in Responding to Domestic Crises, 3 J. Nat’l Sec. & Pol’y 39, 45 (2009). Banks also discusses how Congress passed a 2006 amendment to the Insurrection Act, following Hurricane Katrina, that “unconstitutionally permitted the President to bypass state decisionmakers and extended federal authority beyond what the Article IV Protection Clause and Article I Calling Forth Clauses permit.” id. at 44. Congress, recognizing its error, repealed the amendment less than two years later. Id.
174. Hoffmeister, supra note 161, at 883–84 (“According to Professor Engdahl, who has written extensively on domestic military use, using ‘regular troops was not pursuant to the letter of the Constitution, which at most contemplated only militia for this role.’ This view was shared by President Millard Fillmore. President Fillmore also noted that the law could not apply to federal troops because it conflicted with the President’s constitutional duties as Commander-in-Chief.”) (citations omitted).
175. Banks, supra note 173, at 45.
176. See id. at 81 (“[P]ermit[ting] uninvited federal military action in the event of domestic violence ignores unambiguous constitutional text, and it flies in the face of the original understanding of the Protection Clause.”).
177. Hoffmeister, supra note 161, at 883–84 (“[S]upport for its constitutionality can be found in several places. First, looking beyond Article I, Section 8, Clause 15 and examining Congress’ War Powers in their entirety under Article I, Section 8, there is a strong argument..."
Executive necessary power, under congressional limitations, to protect the nation during emergencies.

3. D.C. statutes

Because of D.C.’s unique status, the mayor does not command the National Guard. Instead, D.C. law, affirmed by Congress, directs the President as commander in chief of the DCNG. Laws for D.C. must pass through Congress because D.C. does not have an actual legislative body. Thus, Congress could have put the mayor in command. Instead of doing so, Congress allowed D.C. to name the President as the DCNG’s commander in chief through D.C. Code § 49-409. This act was logical because of the DCNG’s national character. Section 49-404 states that “The enrolled militia shall not be subject to any duty except when called into the service of the United States, or to aid the civil authorities in the execution of the laws or suppression of riots.” As explained in section I.C, D.C. is unique as the national capital. Any riot or disturbance that would prohibit the execution of laws would affect the nation. And so the nation’s commander in chief should naturally control D.C.’s military force.

C. Shared Power

By design, the Constitution and federal law create points of overlap and conflict between the President and Congress respecting control of the DCNG. As Commander in Chief, the

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178. Granted, D.C. residents did secure the presidential vote with the Twenty-Third Amendment. U.S. CONST. amend. XXIII. In a compromise, however, Congress enacted the District of Columbia Home Rule Act. D.C. CODE § 1-201 (2021). So Congress delegated legislative powers to the District but retained an ultimate legislative veto. § 1-201.102 (“[A]uthorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.”).


180. Id. § 49-404.
President can order the DCNG when called into federal service. But Congress has express power over D.C. legislation and equipping and funding the military.

Though it appears that a local executive should direct many of the DCNG’s roles, the D.C. Mayor cannot mobilize the DCNG—she can only request forces. The job of mobilization rests with the President. Thus, in a January 6 scenario—when there is a direct threat to the national government—the President and his authorized deputies are the only ones who can deploy the DCNG.

Because the Constitution and congressional statutes give the weight of D.C. military control to the President, there is a danger of a rogue commander in chief issuing unconstitutional orders. Despite the risk, the President should control the DCNG because the President has ability to make rapid, centralized decisions using the full weight of the Executive branch. Discussed in Part III, another solution to minimize the risk would be to allow D.C.’s executive—whether it be mayor or governor—to control the DCNG in whole or in part.

III. D.C.’S EXECUTIVE AS COMMANDER OF THE DCNG

D.C.’s executive could theoretically command the DCNG or share command with the President. However, allowing the mayor or governor of D.C. to control the DCNG would create a conflict of interest and disrupt the political status quo. For example, should the President mobilize the DCNG and order it to prevent Congress from meeting, that order would be unconstitutional. But imagine a scenario where Congress meets to certify an election and actionable intelligence points to pending violence. Further, the Mayor, Congress, and administration officials recommend the DCNG’s deployment, yet the President refuses. To preempt this scenario,
Congress could give the Mayor control over the DCNG, or through legislation, make D.C. the fifty-first state and put the Guard under the Governor’s control. But those options would likely create more conflict, even under a power-sharing arrangement.

The D.C. Mayor could command the DCNG apart from homeland defense activities. For years, D.C.’s representative has petitioned this very fact. Rep. Norton reintroduced the District of Columbia National Guard Home Rule Act in February 2021, and the proposal gained support from numerous civil society groups. The Act purports to give D.C.’s mayor the same authorities over the National Guard as state governors. Or D.C. could become a state, and the State of Washington, Douglass Commonwealth’s governor would then control the Guard. Existing D.C. laws would

184. District of Columbia National Guard Home Rule Act, H.R. 657, 117th Cong. (2021). See Press Release, House Comm. Oversight & Reform, Norton, Maloney, Van Hollen, Carper Say D.C. Mayor Must be Given Control over D.C. Nat’l Guard and President Must be Stripped of Auth. over D.C. Police Dep’t (Jan. 8, 2021), https://oversight.house.gov/news/press-releases/norton-maloney-van-hollen-carper-say-dc-mayor-must-be-given-control-over-dc (“Congresswoman Eleanor Holmes Norton (D-DC), Rep. Carolyn B. Maloney (D-NY), Chairwoman of the Committee on Oversight and Reform, Senator Chris Van Hollen (D-MD), and Senator Tom Carper (D-DE) said that Wednesday’s attack on the U.S. Capitol demonstrated once again that local public safety in the District of Columbia (D.C.) is subject to the whim of the President and that it is past time for Congress, pending D.C. statehood, to pass legislation to give the District’s mayor control over the D.C. National Guard and to repeal the President’s authority to federalize the D.C. police department.”).


186. District of Columbia National Guard Home Rule Act, S. 130, 117th Cong. (2021) (“[E]xtend to the Mayor of the District of Columbia the same authority . . . as the Governors of the several States . . . with respect to administration of the National Guard and its use to respond to natural disasters and other civil disturbances.”).


apply, and the DCNG would become the Capital National Guard under the command of the governor.189

However, giving the D.C. executive even partial control over a critical military force in the national capital invites conflict of interest. Respecting presidential power, the Constitution names the President as commander in chief, grants him the executive power, and charges him with defending the Constitution against enemies foreign and domestic. Rome experimented with dual executives after it discarded monarchy.190 But when Gaius Octavius proclaimed himself emperor in 27 BCE,191 and initiated an imperial dynasty, the consuls’ power faded.192 Of course, the President is not a Roman emperor.193 The Framers did, however, want the President in some measure to have powers akin to the king in military affairs.194 And unitary presidential power is even more necessary for protecting the country’s political heart.

That is not to deny that two persons influencing the D.C. military—the President and the mayor or governor of D.C.—could

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189. H.R. 657; S. 130.
192. Oliver Fletcher, What Was the Role of Consul in the Roman Republic?, HISTORY HIT (Nov. 23, 2018), https://www.historyhit.com/what-was-the-role-of-consul-in-the-roman-republic/ (“While Rome’s emperors did not abolish the office of consul it became a largely ceremonial post, increasingly vulnerable to corruption and misuse.”).
193. But cf. Ronald J. Krotoszynski, Jr., “A Republic if [We] can Keep It”: A Prolegomenon on Righting the Ship of State in the Wake of the Trumpian Tempest, 98 Tex. L. Rev. 539, 549 (2020) (“It bears noting that Levinson and Balkin are hardly alone in criticizing the creeping evolution of the office of the President into that of a Roman Emperor and Congress’s abject failure to do anything meaningful to arrest, much less reverse, this trend.”) (footnote omitted).
194. The Federalist No. 69, at 417 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (Unlike a king, the “President w[ould] have only the occasional command of such part of the militia” whereas “[t]he king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions.”).
not create checks and balances. But events like January 6 demand swift action. Two bickering commanders may create a stalemate like the one formed in the aftermath of Hurricane Katrina. After Katrina ravaged New Orleans, President Bush considered invoking the Insurrection Act. Yet he delayed because of the Louisiana governor’s refusal to request federal military assistance. Meanwhile, civil unrest mounted. During crises, especially those that might occur in D.C., the nation should have one commander. Granted, even should the D.C. Mayor or Governor command the Guard, their authority would not extend to homeland defense because federal statutes are supreme over local statutes. But the line between extreme threats like insurrections and foreign invasions, where the Insurrection Act clearly applies, and civil unrest may not be evident. Thus, there is a danger in a Katrina-like tug-of-war between the D.C. executive and the President.

195. See Roman Consul, WIKIPEDIA, https://en.wikipedia.org/wiki/Roman_consul#Abuse_prevention (last visited Apr. 8, 2021) (describing three checks for the two Roman consuls: Roman consuls could veto each other, the consuls would take monthly turns administering, and consuls wanted to have a political future).

196. See Michael Bahar, The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States, 5 HARRY NAT’L SEC. J. 537, 634 (2014) (“Tensions between the presidency and the governors were high as the memory of Katrina festered.”); Lisa Grow Sun, Disaster Mythology and the Law, 96 CORNELL L. REV. 1131, 1158 (2011) (describing the pressure for President Bush to invoke the Insurrection Act versus political backlash should the feds deploy the National Guard over the state governor’s objections).

197. Id. at 1158–59.

198. Id. at 1160 (“However, political considerations weighed against the Act’s invocation. President Bush’s advisors feared the political repercussions of federalizing National Guard troops over the objection of Louisiana Governor Blanco . . . .”)

199. For example, the Assistant Secretary of Defense for Homeland Defense recommended a “dual hatted” approach to post-Katrina operations to achieve unity of command. Id. Compare this response to U.S. operations in post-invasion Iraq 2003–04. See Thomas E. Ricks, General Failure, ATLANTIC (Nov. 2012), https://www.theatlantic.com/magazine/archive/2012/11/general-failure/309148/ (“This lack of any coherent strategy manifested itself in the radically different approaches taken by different Army divisions in the war. Observers moving from one part of Iraq to another were often struck by the extent to which each division was fighting its own war, with its own assessment of the threat, its own solutions, and its own rules of engagement.”).

200. For example, see the proposed revision to D.C. Code § 49-404. D.C. CODE § 49-409 (2021); see also 32 U.S.C. §§ 901–08; 10 U.S.C. § 252. Examples of homeland defense activities include deployments overseas in support of combat operations and flying combat air patrol. Past and Post War, supra note 100.

201. See, e.g., THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Roman history records many instances of mischiefs to the republic from the dissensions between the Consuls, and between the military Tribunes . . . .”).
Congress delegated to the President power to mobilize the Guard under emergencies and named him DCNG’s commander in chief. Having a single commander for the DCNG is essential to protect our nation’s capital. Giving the D.C. Mayor or Governor power would create a shared-power dynamic that would, as Alexander Hamilton described, frustrate the national government.\footnote{202} For these reasons, Congress should not strip the President of his authority over the DCNG.

IV. PRESIDENT AS COMMANDER OF THE DCNG

Instead of a situation where the local D.C. executive controls the DCNG, the President should have de facto control of the DCNG because that model follows the Constitution and preserves the political status quo. Some post-January 6 critics, on the other hand, strongly disagree.\footnote{203} However, two variables temper the risk of a rogue President: presidential delegation to senior-ranking military and civilian defense officers and the military’s oath of office.\footnote{204}

A. The Constitutional and Political Choice

1. President as commander of the DCNG

The Constitution, federal statutes, and historical practice affirm that the President, not Congress, should command the DCNG. To begin, the Constitution empowers the President with the commander-in-chief power.\footnote{205} Some of the Framers relied on the common understanding of the President’s role as a unitary executive who can respond quickly to invasion and domestic

\footnote{202} “[T]hey lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide[,]… they might impede or frustrate the most important measures of the government, [and]… they might split the community into the most violent and irreconcilable factions….” Id.

\footnote{203} See Press Release, supra note 184.


\footnote{205} U.S. CONST. art. II, § 2.
Mr. Hamilton felt that this clause was self-explanatory. Thus, the President, not Congress or D.C.’s mayor, should command D.C.’s military force. More, history and even some of Hollywood’s exaggerated plots show why D.C. is a prime target for bad actors. The Commander in Chief needs to be able to call upon the National Guard at a moment’s notice to protect the capital.

Even without the commander-in-chief power, the President could rely on his executive power. While the Constitution does not declare the President commander of D.C., the President operates in Justice Jackson’s first tier—where “the President acts pursuant to an express or implied authorization of Congress”—because the Chief Executive follows Congress’s intent. Indeed, Congress has named the President commander of the DCNG and given him the power to mobilize the National Guard. Thus, in Justice Jackson’s view, the President’s “authority is at its maximum.”

Congress could try to reassert authority. Article I, Section 8 gives Congress the power for “organizing, arming, and disciplining, the Militia . . . .” However, the clause does not

206. See The Federalist No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.”).

207. Id. (“The propriety of this provision is so evident in itself, and it is, at the same time, so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it.”).

208. See generally NCC Staff, On This Day, the British Set Fire to Washington, D.C., NAT’L CONST. CTR. (Aug. 24, 2021), https://constitutioncenter.org/blog/on-this-day-the-british-set-fire-to-washington-d-c (marking the 206th anniversary of the Bladensburg defeat and the British raid on the capital).

209. See Bill Zwecker, Morgan Freeman Isn’t Pres, but He’s Next in Line, ROBERTEBERT.COM (Mar. 20, 2013), https://www.rogerebert.com/reviews/olympus-has-fallen-2013 (reviewing the 2013 flick Olympus Has Fallen, about a North Korean terrorist plot to seize the White House and kidnap the President).


212. Militia Act of 1792, ch. 28, 1 Stat. 264 (1792); Militia Act of 1795, ch. 36, 2 Stat. 425 (1795); Insurrection Act, ch. 39, 2 Stat. 443 (1807); D.C. CODE § 49-409 (2021) (the militia, as referenced in the early Acts, became the National Guard of modern times).

213. Youngstown, 343 U.S. at 635 (Jackson, J., concurring).

include the authority to “command” or “control,” only to execute administrative functions like equipping, appointing officers, and “governing.”

Likewise, the Constitution grants Congress power to pass “exclusive Legislation in all Cases . . . over such District . . . .” But none of these powers equal command. Like the Army and Navy clauses, Congress provides while the President commands.

Additionally, Congress’s power of the purse is the ultimate trump card. Yet, to effectively wield this power, Congress would have to defund the DCNG—an action that would be politically unacceptable. As Professor Michael Paulsen correctly notes, this is merely Congress’s “‘shoot-out’ power[,]” And the shoving match could also inflame passions.

That is why even Congress’s displeasure over the President’s mobilization of the Guard at Lafayette Square did not trigger calls to defund. The Guard is a critical guarantor of D.C.’s security and national defense.

215. Id. (listing Congress’s power in “governing such Part of them”).


218. The Framers intended it as such. See THE FEDERALIST No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) (discussing how the separation of powers works at “keeping each other in their proper places”).

219. See Robert F. Turner, War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely’s War and Responsibility, 34 VA. J. INT’L L. 903, 974 (1994) (admitting that Congress does have “constitutional power to end U.S. military operations by refusing to appropriate the necessary funding[,]” but recounting that Congress’s attempt to defund Vietnam was also “unconstitutional[,]” as “Congress . . . usurp[ed] the discretion of the Commander in Chief . . . .”).

220. See Chris Cillizza, Is ‘Defund the Police’ a Massive Political Mistake?, CNN POLITICS (June 8, 2020), http://cnn.it/3cVtESF (recounting that on the campaign trail, Biden refused to support defunding the police). But see Noah Berlatzky, Defund the Police; Then Defund the Military, FOREIGN POL’Y (June 15, 2020, 12:13 PM), https://foreignpolicy.com/2020/06/15/defund-the-police-military-spending-militarization-black-lives-matter/ (remarking that “[f]or Democrats, constraining military budgets in order to invest in social services was once a mainstream position, not a fringe one”).


222. Id. at 131 (“Congress may push but the President should push back.”).


224. See Erich B. Smith, D.C. Air Guard Unit Protects Skies Over Nation’s Capital, 113TH WING (Jan. 10, 2019), 746
747  Commander in Chief of the DCNG

So Congress is not likely to use its appropriations power to curtail the President’s control over the DCNG.

Constitutionally, the President has a sure foundation for his command of the DCNG with the Commander in Chief and Executive Clauses. Further, Congress has passed legislation affirming the President’s power to call forth the National Guard to suppress insurrections and it would be politically untenable for Congress to use its spending power to reassert control. Thus, the Chief Executive has the prerogative to command the DCNG.

2. Preserving the political status quo

One could plausibly claim that D.C. would be better served in the event of another January 6 if the mayor commanded the DCNG. After all, Mayor Bowser demanded National Guard support hours before President Trump on January 6. Yet the President must command the DCNG because the Constitution envisions D.C. as politically neutral. Naming the Mayor commander in chief would disrupt the status quo and lead to unacceptable tension between the federal government and D.C.

There are practical reasons for leaving the President in charge. To begin, D.C. is home to the nation’s political infrastructure. For frontline protection, the federal government relies on the Capitol Police and assorted federal officers. Yet these agencies lack the firepower


225. E.g., Elizabeth Goitein & Joseph Nunn, Why DC’s Mayor Should Have Authority Over the DC National Guard, BRENNAH CTR. FOR JUST. (Jan. 8, 2021), https://www.brennancenter.org/our-work/analysis-opinion/why-dcs-mayor-should-have-authority-over-dc-national-guard.

226. See supra note 31 and accompanying text.


and training of professional soldiers.\(^2\) Thus, the President needs a responsive, well-equipped military force like the DCNG. If the Mayor of D.C. controlled the Guard, the President might have limited options should urgent need arise. He could ask the mayor for permission to deploy the DCNG, but that would take time and the mayor may not grant his request.\(^3\) Or the President could declare an emergency and use the Guard as he would from any other state.\(^4\) Again, that would take precious time, and the President must have tools immediately available to uphold his oath.\(^5\)

To counter the loss of exclusive access to the Guard, the President would most likely strengthen the existing forces under his control.\(^6\) Yet that could create tension between the Chief Executive and D.C.’s Mayor should D.C. host polarizing events.\(^7\) Such a scenario might present complications. For example, the President might order executive agencies to stand down in advance of a mass protest that was not coordinated with D.C. officials. Then, as the crowd threatened federal buildings, the D.C. Mayor’s office may frantically deploy the DCNG.

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229. See Patrick Skinner, Our Training Didn’t Cover When to Shoot at a Mob Storming the Capitol, WASH. POST (Jan. 12, 2021, 10:11 AM), http://wapo.st/2OUXnTF (writing that “we were not trained in what to do if hundreds of people, egged on by the President of the United States, decided to rush the building and disrupt certification of the votes of the electoral college”).

230. See supra notes 196–200 and accompanying text.

231. See Mark Cancian, President Trump Has the Power to Call Out the Troops. He Shouldn’t Use It, FORBES (June 2, 2020, 7:38 AM), https://www.forbes.com/sites/markcancian/2020/06/02/the-president-has-the-power-call-out-the-troopsbut-shouldnt/?sh=82357df1793b (describing the President’s power to federalize the National Guard to maintain order).


233. For example, some House members called for raising the Capitol Police’s budget by twenty percent, which would “make it the biggest police force in the nation[].” Nicole Fallert, After Calls to Defund Police, Democrats Consider 20% Increase to Capitol Police Budget, Making It Biggest Force in the U.S., NEWSWEEK (Mar. 4, 2021, 2:33 PM), https://www.newsweek.com/after-calls-defund-police-democrats-consider-20-increase-capitol-police-budget-making-it-1573831.


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That is not to say that D.C.’s executive and the President could not work out a power-sharing arrangement. For example, Congress could grant the D.C. executive some semblance of power over the DCNG. Specifically, it would allow the D.C. executive the power to order the DCNG should the President fail to call out the National Guard or orders the Guard to take unconstitutional action.\(^{235}\) In this case, the mayor’s orders would not erase the Chief Executive’s constitutional and statutory role as commander in chief. The mayor would simply exercise power under a narrow exception. In effect, the D.C. Mayor would act as if she were the President, responding to a crisis in a given state.\(^{236}\) The President could reclaim authority over the DCNG once the crisis passed.

However, there are three issues with this proposal. First, as discussed in section I.C and Part III, the situation in D.C. is different from that of the fifty states.\(^{237}\) Unlike the state governor/President relationship, where the state is a sovereign body,\(^{238}\) D.C. was not designed to be an independent polity.\(^{239}\) Second, the narrow exception to the President’s control of the DCNG might expand to the point that the mayor could deploy the DCNG at will.\(^{240}\) Third, once the D.C. Mayor took control of the DCNG, it might be difficult for the President to reassert command.\(^{241}\)

\(^{235}\) For example, Mayor Bowser could have ordered the DCNG’s deployment on January 6 to restore order.

\(^{236}\) Thus, the lesson learned from Hurricane Katrina’s aftermath—“certain emergencies are so dire that they can transform what is ‘truly local’ into a matter of national concern” — would apply, albeit reversed. Bahar, supra note 196, at 540 (citing United States v. Morrison, 529 U.S. 598, 617–18 (2000)). In the District of Columbia, certain crises could be so extreme that they would change what is a national concern into a local matter.

\(^{237}\) See, e.g., id. (discussing how the Stafford Act lets the President “unilaterally exercise any authority . . . when he or she determines an emergency exists[,]” but “this section requires the President to consult the governor to determine whether such an emergency exists”).

\(^{238}\) Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”).

\(^{239}\) See supra notes 65–73 and accompanying text.

\(^{240}\) See United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (“[L]est the exceptions swallow the rule.”).

\(^{241}\) For example, the National Guard deployment to D.C. for initially a short-term mission turned into a five-month deployment. See Howard Altman, 26,000 National Guard Troops Came to DC and Protected the Inauguration Without Incident. Now the Drawdown Begins, MILITARY TIMES (Jan. 21, 2021), https://www.militarytimes.com/news/your-military/2021/01/21/26000-national-guard-troops-came-to-dc-to-protect-the-inauguration-now-the-d rawdown-begins/; Sarah Ferris,
The District of Columbia is the nation’s capital. The Framers intended D.C. to remain neutral, and the Constitution grants Congress exclusive jurisdiction. Congress chose the President as the DCNG commander and gave him unquestioned power to declare emergencies and mobilize the Guard. Even allowing an exception where the D.C. Mayor could deploy the DCNG in the absence of presidential action, divesting the President of power would lead to a political imbalance between the federal and local executive.

B. Safeguards

Even before January 6, some have suggested that more rigorous checks should limit the commander in chief’s control of the DCNG. Because the President can deploy the Guard, some worry that a Chief Executive, subject to his “character and whims,” could use the force for “undemocratic purposes.” President Trump didn’t use the National Guard for undemocratic purposes on January 6, but he did fail to take decisive action by not deploying the Guard when Mayor Bowser and the Capitol Police requested support. However, normally reliable safeguards exist in presidential delegation to the military and the military’s oath of office.

1. Prior delegation

The President regularly delegates authority to senior military officials. The practice is essential for the leader who commands almost two million active duty and reserve forces. Delegation comes in two forms. The President might delegate through standing executive orders, or he might issue orders before a specific event. For

242. See supra note 160. These calls for change arose from outrage that President Trump staged a so-called “photo-op” in front of St. John’s Church that required law enforcement to use crowd control methods to disperse protestors. See, e.g., Katie Rogers, Protestors Dispersed with Tear Gas So Trump Could Pose at Church, N.Y. TIMES (Sept. 17, 2020), http://nyti.ms/3byyJRt.


244. See supra Section I.A.

example, before January 6, the Chief of Staff to the acting Secretary of Defense reported that President Trump directed the acting Secretary to “take any necessary steps” to support requests from D.C. law enforcement to protect the Capitol and federal property.\textsuperscript{246}

Delegation is important because it is not a best practice for a commander in chief to dictate subordinates’ specific tactics.\textsuperscript{247} Instead, the commander should convey his intent and allow subordinates freedom in carrying out those orders.\textsuperscript{248} However, the President should interject himself into military operations if there is a risk of strategic consequences, especially when “details might determine the fate of the enterprise.”\textsuperscript{249}

Prior delegation should have prevented or mitigated the storming of the Capitol. The President had delegated authority to federal agencies, allowing them to respond to an event like January 6.\textsuperscript{250} More, Executive Order 12656 requires departments to respond adequately to emergent crises.\textsuperscript{251} But by most accounts,

\begin{itemize}
\item \textsuperscript{246} Haberman & Cooper, \textit{supra} note 39 (emphasis added).
\item \textsuperscript{247} \textit{See}, \textit{e.g.}, CHRISTOPHER J. LAMB, \textit{THE MIROMANAGEMENT MYTH AND MISSION COMMAND: MAKING THE CASE FOR OVERSIGHT OF MILITARY OPERATIONS} 52 (Thomas F. Lynch III ed., 2020) (describing how mission command philosophy left U.S. Army brigades “free to choose how they approached their campaign”).
\item \textsuperscript{248} \textit{See supra} note 107 (describing commander’s intent). As Lamb posits, a president, especially one without military experience, should leave the generals and admirals in charge of military decisions during war and large-scale military operations. \textit{LAMB, supra} note 247, at 28.
\item \textsuperscript{249} \textit{LAMB, supra} note 247, at 28.
\item \textsuperscript{250} Exec. Order No. 12656, 53 Fed. Reg. 47,493 (Nov. 18, 1988) (“The head of each Federal department and agency, as appropriate, shall . . . [b]e prepared to respond adequately to all national security emergencies . . .”). Specifically, agencies “shall . . . [i]dentify facilities . . . essential to the national defense and national welfare, and assess their vulnerabilities and develop strategies, plans, and programs to provide for the security of such facilities . . . .” \textit{id.} at 47,494.
\item \textsuperscript{251} \textit{id.} at 47,491 (“The policy of the United States is to have sufficient capabilities at all levels of government to meet essential defense and civilian needs during any national security emergency.”).
\end{itemize}
agencies failed to meet the standard. In short, subordinate military officials and agencies share blame for the ineffective response.

Additionally, the President could have been more specific when he delegated to his commanders. Arguably, he should have known that an inflamed crowd might take literally his call to “stop the steal,” and thus could have provided advance orders to the National Guard. But micromanagement would have been atypical.

For most of his presidency, Trump offered broad intent and let the military execute. Spontaneous tweets to his top generals, while arguably legal orders, typically reinforced existing orders or gave broad strategic guidance. As a result, when rioters breached the Capitol, the acting Secretary of Defense or Secretary of the Army should not have waited for direction from the President who was.

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254. Trump, supra note 3.

255. For example, President Trump deferred to the military when he called for withdrawal from Syria. See W.J. Hennigan & Brian Bennett, Trump Doesn’t Micromanage the Military — But That Could Backfire, L.A. TIMES (June 7, 2017, 5:00 AM), http://lat.ms/3qyivA. But see Matthew Dallek, In the Weeds, WASH. POST (Sept. 13, 2019), http://wapo.st/3kWGpje (describing Trump as a severe micromanager who used Twitter to announce a ban on transgender in the military); Dov S. Zakheim, Being Commander in Chief Does Not Mean Micromanaging the Military, Hill (June 12, 2020, 11:30 AM), https://thehill.com/opinion/national-security/502318-being-commander-in-chief-does-not-mean-micromanaging-the-military (quoting Trump’s tweets that Southern military bases should keep their names).


257. See id. (discussing how President Trump reinforced standing Rules of Engagement, considered a military transgender ban, and told the Navy to cease administrative proceedings against a Navy SEAL).
tweeting “USA demands the Truth!” Instead, the two military leaders—who had the delegated authority to deploy the Guard on behalf of the President—could have taken more responsive action in the absence of Presidential direction. They eventually did so about an hour after the breach. Delegation worked. And so the issue was the delay, not that the D.C. Mayor lacked control of the DCNG.

2. **The oath of office**

The second check to prevent unconstitutional action is the military’s oath of office. An officer owes allegiance to the Constitution, not to any one person. So while some media feared that Trump would exit office by launching a strike on Iran or another country, possibly with nuclear weapons, General John E. Hyten quickly explained that no military leader would obey an illegal order. As he stated, “the U.S. military is trained to obey all legal orders passed down the chain of command and to disobey illegal ones, even if the President himself directs the illegal act.”

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258. *Supra* note 33.
259. *Supra* note 38 and accompanying text.
260. All military and civilian officers take the oath of office. See, e.g., Corey Kingsbury, *Mattis Takes Oath of Office*, YOUTUBE (Jan. 21, 2017), https://www.youtube.com/watch?v=A4Ldq1PTFNw (showing James Mattis taking the oath of office). In the oath, the officer swears or affirms that they will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. SO HELP ME GOD. 5 U.S.C. § 3331 (emphasis added).
261. See, e.g., David Schwartz & Steven Simon, *The United States’ Nuclear Peril Will Outlast This Administration*, FOREIGN POL’Y (Jan. 11, 2021, 4:46 PM), https://foreignpolicy.com/2021/01/11/nuclear-threat-trump-strike-distraction/ (“We need not presume the President is unstable in order to find this an extremely unsettling possibility.”).
262. Rebecca Heinrichs, *Trump, National Command Authority and Lawful Orders*, REALCLEAR DEF. (Nov. 27, 2017), https://www.realcleardefense.com/articles/2017/11/27/trump_national_command_authority_and_lawful_orders_112688.html (“The way the process works is it’s simple: I provide advice to the President, he’ll tell me what to do and if it’s illegal, guess what’s going to happen? . . . I’m going to say, ‘Mr. President that’s illegal.’” (quoting General Hyten, Commander USSTRATCOM)).
263. *Id.*
The tragedy of My Lai informs how the military provides training to its soldiers on their constitutional responsibilities. On March 16, 1968, an Army unit, which had suffered dozens of casualties from Viet Cong guerilla attacks, was sent to a Vietnamese hamlet to fight the Viet Cong. Based on inaccurate intelligence, the unit had been given orders to shoot at anything moving and to destroy all buildings and crops. After four hours, soldiers had killed approximately 500 civilians. Military members are taught this massacre as a cautionary tale: do not forget your oath to the Constitution. That is not to deny that members of the military are taught to obey tactical orders in battle unflinchingly. They are. But those orders must be lawful, and that is why there are roughly 4,600 judge advocates who instruct officers and enlisted personnel that their oath to the Constitution may override orders. Indeed, military leaders receive extensive legal training on their obligations.


266. Id.

267. Id. But not all Army personnel participated in the massacre. Warrant Officer Hugh Thompson was instrumental in saving many innocent lives. Id.

268. See James E. Baker, Good Governance Paper No. 21: Obedience to Orders, Lawful Orders, and the Military's Constitutional Compact, JUST SEC. (Nov. 2, 2020), https://www.justsecurity.org/73221/good-governance-paper-no-21-obedience-to-orders-lawful-orders-and-the-militarys-constitutional-compact/ (“Obedience to orders is the vital principle of military life—the fundamental rule, in peace and in war, for all inferiors through all the grades from the general of the army to the newest recruit.” (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920))).

269. John Ford, When Can a Soldier Disobey an Order?, WAR ON THE ROCKS (July 24, 2017), https://warontherocks.com/2017/07/when-can-a-soldier-disobey-an-order/ (“Soldiers taking orders in combat must act quickly and don’t always have time to calmly deliberate on every decision.”).

270. Id.

271. See, e.g., UMSC Fiscal Year 2021 Schedule for Senior Leader Legal Course, Legal Officer Course, and Legal Clerk Course, MARADMIN 456/20 (Aug. 12, 2020, 7:00 PM), https://www.marines.mil/News/Messages/Messages-Display/Article/2310797/usmc-fiscal-year-2021-schedule-for-senior-leader-legal-course-legal-officer-cou (announcing a course to “provide[] familiarization with the Uniform Code of Military Justice, administrative fact-finding bodies, administrative separation procedures, the courts-martial process, and ethics”).
Thus, a President’s unlawful order to the acting Secretary of Defense, Secretary of the Army, or DCNG commander should never lead to these subordinate officers taking unconstitutional or unlawful action. Had one of these officers called President Trump on January 6 and asked for permission to deploy the DCNG to protect the Capitol, and the President refused, then these officers’ training and oaths would demand that they disobey.272 Or, should Trump have told the DCNG to stand down as the riot continued, the DCNG commander would be bound by his oath to refuse.

Because the President provides subordinate military leaders with significant delegated power and those leaders swear an oath to the Constitution, there should never be danger of the military committing unlawful acts. Thus, these pillars—constitutional support for the President as the Guard’s commander in chief and political backlash from naming a D.C. executive commander—foreclose any serious discussion of the mayor or governor as commander in chief of the DCNG.

CONCLUSION

One event, even as tragic as January 6, should not lead to changes in command of the DCNG. The nation must avoid another insurrection if it wants to stand firm against her enemies.273 Yet transferring control to the mayor would shift the balance of power, offend the Constitution, and lead to undesired consequences. The Constitution, Congress, and the President concur that the Chief Executive, not Congress or the D.C. Mayor, commands the DCNG.274 Another President may make a wrong decision when it comes to D.C. security. But there are strong safeguards to prevent

272. See, e.g., Amanda Macias, Top Military Leaders Condemn “Sedition and Insurrection” at Capitol, Acknowledge Biden Win, CNBC (Jan. 12, 2021, 6:56 PM), https://cnbc.com/3sBVkDq (“As we have done throughout our history, the U.S. military will obey lawful orders from civilian leadership, support civilian authorities to protect lives and property, ensure public safety in accordance with the law, and remain fully committed to protecting and defending the Constitution[,]”) (quoting Gen. Mark Milley, Chairman of the Joint Chiefs of Staff).

273. President Biden asked in an address on Apr. 28, “[c]an our democracy overcome the lies, anger, hate, and fears that have pulled us apart? America’s adversaries . . . are betting we can’t . . . They look at the images of the mob that assaulted the Capitol as proof that the sun is setting on American democracy.” Biden, supra note 1.

274. Echoing Judge Agnew, the Constitution demands nothing less. AGNEW, supra note 131, at 16 (“Thus, it is the purpose of the Constitution, and his duty to put down insurrection. To this end, the whole military force is at his command.”).
another January 6. For these reasons, the President should remain the DCNG commander in chief.