

Dear Senator/Representative:

The undersigned organizations, from across the political spectrum and focusing on a wide range of issues, write to urge you to support S. 130/H.R. 657, the District of Columbia National Guard Home Rule Act, sponsored by Sen. Chris Van Hollen (D-MD) and Rep. Eleanor Holmes Norton (D-DC). The Act contains a crucial reform to the command structure of the D.C. National Guard that will prevent future abuses of the president's authority to deploy the military domestically while also improving the Guard's responsiveness and preserving the president's flexibility in a crisis.

Unlike every other National Guard organization in the United States, the D.C. National Guard (DCNG) is never under local control. Whereas the National Guards of all fifty states, Puerto Rico, Guam, and the U.S. Virgin Islands all serve under the command of their state or territorial governor unless and until they are called into federal service, the DCNG instead reports directly to the president at all times—even when acting in non-federalized status. This unusual command structure creates two serious problems, the risks of which have been vividly illustrated in the past year.

First, it leaves a major loophole in the Posse Comitatus Act. The idea behind this law is that absent congressional approval, the president should not have military forces at his disposal to act as a domestic police force. The Act establishes a general rule that bars federal military forces from participating in civilian law enforcement activities unless doing so has been expressly authorized by Congress. Congress has provided that authorization through the Insurrection Act and certain other laws, but only for specified situations and only if the correct procedures are followed.

State National Guard personnel are not subject to the Posse Comitatus Act unless they have been federalized—that is, temporarily made part of the federal military. Otherwise, when operating in non-federal status under state command and control, their ability to engage in law enforcement is not restricted. Although the DCNG is always under federal command and control, the Department of Justice has adopted the legal fiction that it may nonetheless operate in a non-federal “militia” status. That means the president can use the DCNG for law enforcement purposes without having to invoke the Insurrection Act or otherwise obtain congressional approval.

Last June, the president did just that, deploying the DCNG in response to protests against police brutality. But he did not stop there. The president also asked eleven state governors to deploy their own National Guard forces into Washington, D.C. Although these out-of-state units were nominally under their governors' command and control, for coordination purposes they were reporting through the DCNG's chain of command. That meant they were taking orders from the Secretary of the Army, who in turn acted under the direction of the Secretary of Defense and the president. This was, in effect, a large-scale federalization of the National Guard to perform a domestic policing function without invoking the Insurrection Act or any other form of congressional authorization. In other words, it was exactly what the Posse Comitatus Act was designed to prevent—and it was only possible because the president is the commander in chief of the DCNG.

The second problem with the DCNG's present command structure is that it can delay deployment in a crisis. The Guard's slow response to the riot at the U.S. Capitol on January 6, 2021 provided a frightening demonstration of this risk. As rioters breached the Capitol and threatened the safety of Congress, both the Capitol Police and the Mayor of Washington, D.C. sought assistance from the DCNG. The Mayor was able to rapidly send in the Metropolitan Police and other assets directly under her control. However, the process for deploying D.C.'s own militia is far more complicated—at least when, as on January 6, the president chooses not to deploy the DCNG himself. The Mayor and the Capitol Police had to ask the Commanding General of the DCNG for help, who was then required to request authorization for deployment from the Secretary of the Army, who can grant that authorization subject to the discretion of the president. In the end, the process took hours—including an inexplicable three hour and nineteen minute delay between the Secretary of the Army approving the DCNG's deployment and that approval being conveyed to the Commanding General, all while D.C. Guardsmen sat waiting on buses.

The District of Columbia National Guard Home Rule Act solves both of these problems by transferring control over the DCNG from the president to the Mayor of Washington, D.C. Under this new framework, the DCNG will principally operate under local control, just like every other National Guard organization in the country. Because the president will no longer be able to use the DCNG without formally federalizing it, he or she will not be able to evade the Posse Comitatus Act by first deploying the DCNG to conduct law enforcement and then arranging for "state-controlled" National Guard forces to report through the DCNG's chain of command. In addition, the Mayor will be empowered to activate the DCNG on her own initiative, just like any state or territorial governor, thereby eliminating the bureaucratic delays that slowed the Guard's deployment and exacerbated the risks to Congress's safety on January 6.

To be sure, there are circumstances in which it is appropriate for the president to command the DCNG. In such cases, the president will retain authority to call the DCNG into federal service. A number of federal statutes give the president authority to federalize the DCNG, along with any other state or territorial National Guard, in a wide variety of circumstances—including to address civil disturbances under the Insurrection Act when appropriate. These laws will not be affected by the District of Columbia National Guard Home Rule Act.

In sum, the District of Columbia National Guard Home Rule Act will close a dangerous loophole in the Posse Comitatus Act and improve the DCNG's responsiveness in emergencies like the January 6 riot, and it will do so without obstructing the president's ability to take command of the DCNG when necessary. We urge you to support this bill and thank you for your consideration.

Sincerely,

Advocacy for Principled Action in Government
Brennan Center for Justice at NYU School of Law
The Center for Security, Race and Rights
The Center for Victims of Torture
Citizens for Responsibility and Ethics in Washington (CREW)
Clean Elections Texas

Demand Progress
DemCast USA
Digital Democracy Project
Due Process Institute
Equal Justice Society
Friends Committee on National Legislation
Government Accountability Project
Human Rights First
Mainers for Accountable Leadership
Peace Action
Project on Government Oversight
Protect Democracy
Public Citizen
RepresentUs New Mexico
R Street Institute
Stand Up America
Win Without War