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“REVOLUTION” AT THE CAPITOL: HOW LAW HINDERED THE RESPONSE TO THE EVENTS OF JANUARY 6, 2021

JILL I. GOLDENZIEL*

INTRODUCTION

As the horrific events of January 6, 2021, unfolded in the United States, the Department of Defense (“DoD”) faced a firestorm of criticism for not preventing the attacks or responding quickly enough to stop them. As fingers pointed and leaders resigned or defended themselves, most observers overlooked one culprit: the law. The U.S. Constitution only sparsely outlines the relationship between civilian leadership and the military, leaving Congress and the DoD to fill in the blanks. Together, Congress and the DoD have created a web of statutes, regulations, and policies that generate confusion about who bears responsibility for enforcing the law when extraordinary emergencies occur on U.S. soil. When operating domestically, federal troops must also work with federal, state, and local law enforcement agencies and State National Guards to create a coordinated emergency response.¹

On January 6, this complicated web of authorities and regulations contributed to the lack of a coherent response by the DoD, National Guard, and law enforcement to the Capitol siege. This Essay will briefly lay out the

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1. This Essay will use the term “federal troops” or “federal military” to refer to the Active Duty U.S. military operating under their authorities in Title 10 of the U.S. Code and “federalized” National Guard troops operating under Title 10 Status under the Command of the President rather than state governors. *See* 10 U.S.C. § 12406. This term is meant to distinguish armed forces operating under Title 10 authorities from National Guard troops. National Guard troops may operate under two additional sets of authorities: The first is local, gubernatorial authorities paid for by the state, wherein the Guard is acting as the successor to state militias (see 10 U.S.C. § 246). The National Guard can also operate under “Title 32” authorities, where National Guard deployment is authorized by the President and financed by the DoD, but the Guard remains under the control of state governors. *See generally* Title 32 of U.S. Code. As this Essay will discuss, the restrictions for Title 10 forces operating on U.S. soil are much stronger than the restrictions for National Guard troops operating under either Title 32 status or gubernatorial control. Occasionally, the same military commander can be “dual hatted” and operate under both Title 10 and Title 32 authorities concurrently. *See* 32 U.S.C. § 325(a)(2). In this situation, different authorities would apply depending on the activities in which that command is engaged.

relevant constitutional and statutory authorities governing the deployment of federal troops on U.S. soil, including the Posse Comitatus Act, the Insurrection Act, and Defense Support for Civil Authorities.² It will then explain how these authorities hindered the DoD’s response to the events of January 6, and how available authorities might have led to a different response by the DoD, and by President Trump as Commander-in-Chief.³ A complete discussion of how these laws and regulations should be reformed lies beyond the scope of this Essay. However, viewing these laws and regulations in light of the events of January 6 highlights gaps and loopholes that must be closed to prevent another national emergency.

I. CONSTITUTIONAL AND STATUTORY AUTHORITIES

Constitutional text regarding the relationship between the military and civilian leadership is sparse. Fear of standing armies was fresh in the minds of the Framers of the Constitution following British colonization, causing the Framers to hotly debate the creation of a standing army.⁴ The Framers ultimately reached a constitutional compromise to install the President as Commander-in-Chief and place the power to fund the military in Congress.⁵ Further limiting both branches’ power, any funds would be appropriated only for a period of two years, ensuring time for civilians to vote out lawmakers who did not agree with their views of military funding.⁶

The Civil War, perhaps the United States’ greatest “constitutional revolution,” led to significant changes in civil-military relations. During Reconstruction, distrust of the federal military remained high in the South. Former Confederate states detested that federal troops were sent to perform police actions and enforce federal laws within their states.⁷ This issue came to a head in the contested presidential election of 1876 when the federal military was ordered to protect the voting rights of black freedmen in the South.⁸ Southern Democrats claimed that the military intimidated or blocked

2. See *infra* Part I.

3. See *infra* Part II.

4. See Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHL-KENT L. REV. 103 (2000) (emphasizing the creation of the Second Amendment as responsive to deep fear of a standing army); see also *The Federalist* No. 29, at 178 (Alexander Hamilton) (Project Gutenberg 1998) (arguing that a standing army is “dangerous to liberty”).

5. See U.S. CONST. art. I, § 8, cl. 12 (“The Congress shall have power . . . [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”).

6. *Id.*

7. See John Copeland Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732, 1749 (2004) (noting this is the popular version of the story of the 1876 election, although contested); for a somewhat different version, see ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 190–98* (2006).

8. See Nagle, *supra* note 7, at 1749.

Samuel Tilden's supporters from voting.⁹ To end the controversy, Democrats agreed to concede victory to Rutherford B. Hayes on the condition that Republicans withdrew the military from the South, among other demands.¹⁰ Shortly thereafter, Congress passed the Posse Comitatus Act ("PCA") in 1878,¹¹ which established a general rule barring federal troops from engaging in direct law enforcement actions on U.S. soil.¹² While the original text of the PCA applied only to the Army and Air Force, it has been extended by revisions and DoD directives to all branches of the federal military, including the National Guard when federalized (but not when under gubernatorial control or pursuant to "Title 32 authorities," meaning under the control of state governors but federally funded by DoD).¹³

Generally speaking, the PCA prohibits federal troops from providing direct support to law enforcement. Direct engagement in traditional law enforcement functions by federal troops violates the PCA.¹⁴ These functions might include arrest, seizure of evidence, search of a person, search of a building, investigation of a crime, interviewing witnesses, pursuit of an escaped prisoner, and search of an area for a suspect.¹⁵ Providing tactical advice or logistical support may violate the PCA if its use pervades the activities of the law enforcement officials when the advice or support materially contributes to the operation.¹⁶ Indirect support, such as providing military supplies and equipment, is permitted.¹⁷ Passive activities, such as the mere presence of military personnel; advice or recommendations given to civilian law enforcement on tactics/logistics; delivery of military material, equipment, or supplies; and aerial reconnaissance flights, do not violate the PCA.¹⁸

The PCA also permits the Secretary of Defense to make available any equipment, base facility, or research facility of the DoD to any law enforcement official for law enforcement purposes.¹⁹ DoD personnel may

9. *Id.*

10. *Id.*

11. 18 U.S.C. § 1385; *see also* Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119, 135 (2014).

12. 18 U.S.C. § 1385. The PCA was amended most recently in 1994.

13. U.S. DEP'T OF DEF., DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (Jan. 15, 1986) (extending the PCA to the Navy and Marine Corps). The Coast Guard is exempt from the PCA because it is considered to be a federal law enforcement agency and part of the Department of Homeland Security (DHS).

14. *See United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1976), *aff'd sub. nom. United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976).

15. *United States v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1975).

16. *United States v. Jaramillo*, 380 F. Supp. 1375, 1380–81 (D. Neb. 1974).

17. *Id.*

18. *Id.*

19. 10 U.S.C. § 272.

train civilian law enforcement officials in the operation and maintenance of equipment and provide expert advice.²⁰ DoD personnel may operate the equipment for purposes of monitoring air and sea traffic or traffic outside U.S. territory, aerial reconnaissance, and interception of vessels or aircraft detected outside of the United States.²¹

A. Exception to the Posse Comitatus Act: The Insurrection Act

The Insurrection Act of 1807, which grants the President authority to deploy the federal military and federalize National Guard troops during an insurrection, presents the biggest exception to the PCA.²² The two acts must be read in tandem. Initially, the PCA was designed to place bounds on the Insurrection Act.²³ However, because the Insurrection Act has been used so rarely in American history, the PCA functionally serves as the general rule and the Insurrection Act as its primary exception. Although both acts have been revised over time to limit the President’s authority to deploy federal troops on U.S. soil, the President’s power to do so remains very broad.

The President may invoke the Insurrection Act upon the request of a state governor or unilaterally. A governor may request that the President invoke the Act to protect a state against domestic violence.²⁴ The President may invoke the Act without a governor’s request if the state government is unwilling or unable to ensure respect for federal law, including constitutional rights for its citizens.²⁵ Alternatively, the President may unilaterally invoke the Act and use federal forces to perform law enforcement activities in situations of “unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States.”²⁶ The Act also authorizes the President to use federal forces to “restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition,” the state authorities are incapable of maintaining public order and the domestic violence either (1) results in a deprivation of constitutional rights or (2) “opposes or obstructs the execution of the laws of the United States.”²⁷

20. *Id.*

21. *Id.* at § 273.

22. *Id.* at §§ 331–335.

23. See Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131, 1163 (2011) (recounting Congress’s amendment of the Insurrection Act in 2006 because of fears that the Insurrection Act limited the President’s ability to use the military on U.S. soil in case of natural disasters).

24. 10 U.S.C. § 331.

25. *Id.* at § 333.

26. *Id.* at § 332.

27. *Id.* at § 333.

The text of the Insurrection Act leaves considerable room for interpretation. The Insurrection Act does not define the terms “unlawful obstructions,” “combinations,” “assemblages,” or “rebellion against the authority of the United States.”²⁸ Congress has never specified the severity of the events required to trigger invocation of the Act. The Act does not provide for judicial review, and no President has been brought to court for invoking the Insurrection Act. Accordingly, judicial interpretation of these terms as applied to the Act is largely absent.²⁹ The Act also requires that the President issue a proclamation ordering insurgents to disperse before invoking the Act.³⁰ The duration of time necessary to allow insurgents to disperse has not been interpreted by Congress or the courts.

The Insurrection Act presents a powerful tool for the President to deploy the military on U.S. soil. Despite the Act’s potential for abuse of power, U.S. Presidents have invoked the Insurrection Act infrequently throughout American history. As a norm, Presidents prefer to defer to governors’ requests before doing so. In the last century, the Act has been used primarily to help integrate public schools and control race-related unrest. Its last use was in 1992, when the Governor of California requested that President George H.W. Bush send in federal troops to help stop riots that erupted in downtown Los Angeles after policemen were acquitted of the brutal beating of Rodney King.³¹ In 2005, in the wake of Hurricane Katrina, President George W. Bush famously refused to invoke the Insurrection Act without the Louisiana Governor’s permission.³²

B. Partial Exception to the Posse Comitatus Act: Defense Support of Civil Authorities

Defense Support of Civil Authorities (“DSCA”) is the DoD’s term for support from the DoD that is requested by federal, state, or local civilian authorities. DSCA requests must be made by the President, Secretary of Defense, civil authorities, or qualifying entities.³³ DoD support under DSCA

28. *Id.* at § 332.

29. Law Professor Steve Vladeck has questioned the constitutionality of the Insurrection Act itself. See Steve Vladeck, *Under the Insurrection Act of 1807, Here’s What a U.S. President Can and Cannot Do*, WASH. POST (June 19, 2020), <https://www.washingtonpost.com/politics/2020/06/19/under-insurrection-act-1807-heres-what-us-president-can-cannot-do/>.

30. 10 U.S.C. § 334.

31. See Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 MICH. L. REV. 1309, 1323–24 (2010) (discussing instances of invocation of the Insurrection Act).

32. *Id.* at 1309 (detailing the episode of President George W. Bush deciding not to invoke the Insurrection Act in the aftermath of Hurricane Katrina).

33. U.S. DEP’T OF DEF., DIR. 3025.18(4)(c), DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (Mar. 19, 2018) [hereinafter DoDD 3025.18 (DSCA)].

may also include federalized National Guard forces, or federal military and non-military DoD personnel and assets. Reasons for support may include domestic emergencies, cyberspace incident response, law enforcement support, and other domestic activities, or requests from qualifying entities for special events. DSCA allows support to prepare, prevent, protect, respond, and recover from domestic incidents.³⁴

Legal authorities for DSCA emanate from a variety of statutory authorities and two main DoD Instructions and Directives.³⁵ Most DSCA activities, like providing immediate disaster relief in the wake of a hurricane, fall outside the scope of the PCA. The most common statute authorizing DSCA is the Stafford Act.³⁶ The Stafford Act permits the military to support the Federal Emergency Management Agency (FEMA) and other federal agencies to provide humanitarian assistance in the event of a natural disaster.³⁷ The military’s role is thus limited to supporting the civilian response.³⁸ Most Stafford Act activities fall outside the scope of the PCA.

However, the DoD Directives covering DSCA include authorizations for activities that could be exceptions to the PCA in an emergency. These authorizations include the Immediate Response Authority (“IRA”) and the Emergency Response Authority (“ERA”) delegated to federal military commanders.³⁹ Pursuant to the DSCA Directive, the DoD has the IRA and ERA (also called “emergency authority” in the DSCA Directive) to support civilian law enforcement when requested by a local civilian authority.⁴⁰ IRA can be requested “under imminently serious conditions and if time does not permit approval from higher authority” to “temporarily employ[] the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States.”⁴¹

34. *Id.* at para. (4)(f). DSCA also covers DoD’s counterdrug activities. Although the DoD is the lead federal agency for detection and monitoring of aerial and maritime transit of illegal drugs into the United States, these DoD activities are conducted in support of civilian law enforcement. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES, at III-7 (Oct. 29, 2018) [hereinafter JP 3-28].

35. DoDD 3025.18 (DSCA), *supra* note 33; DEP’T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (Feb. 8, 2019). Any provision by the military of direct support for law enforcement under DSCA is required by law to have a statutory basis. DoDD 3025.18 (DSCA), *supra* note 33.

36. Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (“Stafford Act”) Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified as amended at 42 U.S.C. § 5121).

37. *Id.*

38. *Id.*

39. DoDD 3025.18 (DSCA), *supra* note 33.

40. *Id.*

41. *Id.* at para. 4(i).

Authority for the IRA and ERA is delegated to federal military commanders.⁴² In practice, this means that the mayor of a city ravaged by a flash flood could call her local military base to request immediate assistance, and the commander of that base would have the authority to respond under the IRA without seeking higher approval. However, the same mayor could also request assistance to suppress protests that may be peaceful or that could be better handled by state law enforcement, federal law enforcement, or National Guard troops.

Beyond this broad text, the precise scope of “immediate response authority” is unclear. Moreover, statutory authorization for the IRA is unclear. The Joint Publication for DSCA cites authorization for both the IRA and ERA under the Stafford Act.⁴³ However, the Stafford Act does not expressly include such an authorization. Moreover, by the text of the DSCA Directive, IRA activities are not limited to activities authorized under the Stafford Act.⁴⁴ The authorities delegated to individual federal military commanders are thus vague and potentially far-reaching.

The IRA includes some checks upon potential military overreach. It does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.⁴⁵ Any decision to provide resources under the IRA requires notification to the National Joint Operations and Intelligence Center, which will, in turn, inform the appropriate DoD Components, including the relevant Combatant Command and the Office of the Assistant Secretary of Defense for Homeland Defense and Global Security.⁴⁶ Also, support under the IRA may ordinarily only last seventy-two hours.⁴⁷ DoD commanders must reassess whether there remains an extended need for assistance.⁴⁸

The scope of DSCA’s Emergency Response Authority is similarly vague. The Directive states:

[I]n extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because:

42. *Id.*

43. JP 3-28, *supra* note 34.

44. DoDD 3025.18 (DSCA), *supra* note 33.

45. JP 3-28, *supra* note 34.

46. DoDD 3025.18 (DSCA), *supra* note 33, at para. 4(i)(4).

47. *Id.* at para. 4(i)(5).

48. *Id.*

- (1) Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or,
- (2) When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions. Federal action, including the use of Federal military forces, is authorized when necessary to protect the Federal property or functions.⁴⁹

The authorization of the federal military to quell large, dangerous, destructive public disturbances implies that federal troops will be engaging in direct law enforcement activities. Yet elsewhere in the text of the DSCA Directive, federal troops are not authorized to engage directly in law enforcement.⁵⁰ Congress has not explicitly created a statutory exception to the PCA that would allow federal troops to directly support law enforcement under the DSCA. Only the use of the ERA to protect federal property or federal government functions is considered an authorized constitutional exception to the PCA.⁵¹

II. APPLICATION TO THE EVENTS OF JANUARY 6, 2021

Unclearities in the Posse Comitatus Act, Insurrection Act, and related authorities contributed to the military’s delayed response to the events of January 6, 2021. Facts surrounding the events of January 6 are still unfolding as of this writing. Below is a brief sketch of the events according to the DoD timeline released on January 8, 2021.⁵²

Following President Donald Trump’s defeat in the 2020 elections, he and his supporters began calling for protests to stop congressional certification of the electoral college votes on January 6. On December 31, 2020, the Mayor of Washington, D.C., Muriel Bowser, requested that D.C. National Guard (“DCNG”) troops be deployed to support the D.C. police during the planned protests.⁵³ The Acting Secretary of Defense authorized 340 troops on January 4, 2021.⁵⁴ On January 6, the Metropolitan Police

49. *Id.* at para. 4(k).

50. *Id.* (noting that “[f]ederal military forces shall not be used to quell civil disturbances unless specifically authorized by the President,” referencing Chapter 13 of Reference (d)).

51. 32 C.F.R. § 215.4 (2017).

52. U.S. Dep’t of Def., Planning and Execution Timeline for the National Guard’s Involvement in the January 6, 2021 Violent Attack at the U.S. Capitol (Jan. 8, 2021), <https://media.defense.gov/2021/Jan/11/2002563151/-1/-1/0/PLANNING-AND-EXECUTION-TIMELINE-FOR-THE-NATIONAL-GUARDS-INVOLVEMENT-IN-THE-JANUARY-6-2021-VIOLENT-ATTACK-AT-THE-US-CAPITOL.PDF> [hereinafter DoD Timeline].

53. *Id.*

54. *Id.*

Department of D.C. (“MPD”) would be responsible for the city streets of the National Mall and Capitol area; U.S. Park Police would be responsible for the site of Trump’s speech and rally; Secret Service would be responsible for the White House premises; and Capitol Police would be responsible for the Capitol itself.⁵⁵ These assignments represented the usual jurisdictions for these agencies. Capitol Police were not prepared with additional staffing nor equipped with riot gear. In a letter to the Department of Justice, Mayor Bowser also made clear that she was not requesting support from federal law enforcement.⁵⁶

Neither the Capitol Police nor the D.C. Mayor requested additional support from the DoD. On January 3, 2021, the Pentagon confirmed with the Capitol Police that there was no request for DoD support.⁵⁷ On January 4, the Capitol Police again confirmed this in a phone call with the Secretary of the Army. On January 5, Mayor Bowser informed the Acting Attorney General, Acting Secretary of Defense, and the Secretary of the Army that there were no additional support requirements from the District of Columbia.⁵⁸

On January 6, 2021, a large group gathered outside the White House and the Capitol to protest the results of the 2020 presidential election and Congress’s certification of the vote. During a “March to Save America” rally that took place in the Ellipse outside the White House, President Trump instructed the group to march to the Capitol to press Congress not to certify electoral votes. Around 1:00 PM, hundreds of protesters marched to the Capitol, pushing through protective barriers and past Capitol Police.⁵⁹ Capitol Police requested reinforcement from MPD, who arrived shortly after the request. At 1:09 PM, the Capitol Police Chief asked the Sergeant-at-Arms of the Senate and House to declare an emergency in order to call in the DCNG.⁶⁰ The Capitol Police commander formally declared a riot at 1:50 PM. Capitol Police and MPD were unable to control the rioters, and around

55. Greg Myre, *Where Was Security When a Pro-Trump Mob Stormed the Capitol?*, NPR (Jan. 7, 2021, 10:33 AM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/954349992/where-was-the-security-when-a-mob-stormed-the-capitol>.

56. Mayor Muriel Bowser (@MayorBowser), TWITTER (Jan. 5, 2021, 1:53 PM), <https://twitter.com/MayorBowser/status/1346530358674792466/photo/1>.

57. DoD Timeline, *supra* note 52.

58. *Id.*

59. Lisa Mascaro, Ben Fox & Lolita C. Baldor, ‘Clear the Capitol,’ *Pence Pleaded, Timeline of Riot Shows*, AP NEWS (Apr. 10, 2021), <https://apnews.com/article/capitol-siege-army-racial-injustice-riots-only-on-ap-480e95d9d075a0a946e837c3156cdeb9>; Carol D. Leonnig et al., *Outgoing Capitol Police Chief: House, Senate Security Officials Hamstrung Efforts to Call in National Guard* (Jan. 10, 2021, 11:38 PM), https://www.washingtonpost.com/politics/sund-riot-national-guard/2021/01/10/fc2ce7d4-5384-11eb-a817-e5e7f8a406d6_story.html.

60. Leonnig et al., *supra* note 59.

2:00 PM, the rioters breached the Capitol through broken windows.⁶¹ Some rioters were equipped with riot gear, weapons, body armor, and plastic handcuffs. Both the House and Senate evacuated at 1:26 PM, and immediately thereafter, the rioters entered the chamber.⁶²

At 1:49 PM, the Capitol Police Chief requested DCNG assistance, which was approved by the Acting Secretary of Defense at 3:04 PM.⁶³ Members of the DCNG arrived at the Capitol at 5:40 PM.⁶⁴ At 5:45 PM, the Acting Secretary of Defense approved out-of-state National Guard forces to deploy to D.C. to stop the protestors.⁶⁵

A. How the Law Hindered the Response to the January 6 Riots

Once the siege began, the D.C. Mayor had no direct authority to call out the DCNG. Because D.C. is not a state, the Mayor does not have direct authority over the DCNG the way a state governor would. Ordinarily, state National Guards report to the governors of their states until and unless they are federalized. Since D.C. has no governor, Congress instead made the President the Commander in Chief of the DCNG, whether or not it is federalized.⁶⁶ The Guard is always federally funded. The DCNG is considered to be operating as a “militia” on behalf of the District unless it is federalized. This terminology is legal fiction, since the President has commanding authority of the Guard in either case.

This legal peculiarity translates into immense power for the President to use the National Guard for law enforcement purposes within D.C. and creates a complicated web of legal authorities and chain of command that delayed the Pentagon’s response to the events of January 6. The chain of command from the White House to the DCNG has several layers. Pursuant to Executive Order 11,485, the Secretary of Defense, under the direction of the President, may order out the DCNG to assist D.C. civil authorities in accordance with the D.C. Code—itsself enacted by Congress.⁶⁷ The Executive Order further delegates the President’s authority over the DCNG to the Secretary of Defense while operating in militia status.⁶⁸ A DoD memorandum further delegates this authority to the Secretary of the Army for the D.C. Army National Guard, and the Secretary of the Air Force for the D.C. Air National

61. *Id.*

62. DoD Timeline, *supra* note 52.

63. *Id.*

64. *Id.*

65. *Id.*

66. D.C. CODE ANN. § 49-409 (West 2021).

67. Exec. Order No. 11,485, 34 Fed. Reg. 15,411 (Jan. 3, 1969).

68. *Id.*

Guard.⁶⁹ The Secretaries exercise this authority through the Commanding General of the DCNG, who is appointed by the President. The Commanding General fulfills the same role as the Adjutant General of a state National Guard and commands the DCNG in practice. If the D.C. Mayor should wish to request support from the DCNG for law enforcement or any other purpose, she may not do so directly. Instead, she must submit a request to the Commanding General, who would then notify the Secretary of the Army.⁷⁰

This chain of command means that neither the D.C. Mayor, nor any other D.C. official, has authority to call up the Guard. Under Executive Order 11,485, the Secretary of Defense, subject to the direction of the President, may order out the National Guard to aid D.C.'s civil authorities.⁷¹ The D.C. Mayor can submit a request for civil support from the Guard to the Commanding General, who notifies the Secretary of the Army.⁷²

The Department of Justice ("DOJ") has asserted that the DCNG can be used for law enforcement purposes not subject to the PCA because the DCNG is operating as the District's "militia" unless it is explicitly federalized.⁷³ This would mean, in effect, that the DCNG would operate like State National Guards while under state control, when State National Guards are operating under Title 32.⁷⁴ It is unclear whether DOJ's position is legally permissible, considering that the DCNG is *always* federalized and under the control of the Secretary of the Army and the President. Accordingly, some scholars maintain the opposite view: that the DCNG is always under federal control, and thus is always subject to the PCA.⁷⁵ Furthermore, the language of DSCA explicitly applies the Directive to "Army National Guard . . . personnel when under Federal command and control,"⁷⁶ which would, by its own language, apply to the DCNG. The DOJ's interpretation effectively means that the

69. Supervision and Control of the National Guard of the District of Columbia, 34 Fed. Reg. 15,411, 15,443 (Oct. 1, 1969).

70. D.C. CODE ANN. § 49-403 (West 2021) (authorizing requests for support involving riots or unrest); D.C. CODE ANN. § 49-404 (West 2021) (authorizing support for other requests).

71. Exec. Order 11,485, 34 Fed. Reg. at 15,411.

72. D.C. CODE ANN. § 49-403 (West 2021); D.C. CODE ANN. § 49-404 (West 2021).

73. Use of the Nat'l Guard to Support Drug Interdiction Efforts in D.C., 13 Op. O.L.C. 91, 92 (1989) ("Since by its terms the Posse Comitatus Act applies only to the use of the Army or the Air Force, it applies to a National Guard only when it has been put into federal service as part of the Army or Air Force. Since the described use for the District of Columbia National Guard would be for it in its militia rather than federal service capacity, it is not prohibited by the Posse Comitatus Act.")

74. *Id.*

75. Elizabeth Goitein & Joseph Nunn, *Why D.C.'s Mayor Should Have Authority over the D.C. National Guard*, JUST SEC. (Jan. 8, 2021), <https://www.justsecurity.org/74098/why-d-c-s-mayor-should-have-authority-over-the-d-c-national-guard/>.

76. DoDD 3025.18 (DSCA), *supra* note 33, para. 2(b).

President can use the DCNG for law enforcement purposes, within the District, without the Insurrection Act or other statutory authorities.⁷⁷

The D.C. Mayor’s lack of control over the DCNG hindered the response of the full DCNG to assist the Capitol Police and MPD on January 6. Under the DOJ’s interpretation that the DCNG need only follow the PCA when formally federalized, the DCNG was permitted to participate in law enforcement. Thus, the DCNG could have secured the perimeter, made arrests, and engaged in other law enforcement activities in support of the MPD and Capitol Police on January 6. Unfortunately, no D.C. official was able to order them out to do so. Hours passed before the Pentagon granted authorization for full DCNG deployment that Mayor Bowser would have been able to grant herself if she had been governor of a state.

Without the authority to call up the DCNG, the D.C. Mayor requested assistance from other states’ National Guards under the Emergency Management Assistance Compact (“EMAC”).⁷⁸ EMAC is a congressionally ratified agreement between the fifty states, D.C., Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands that permits deployment of National Guard troops across jurisdictions to respond to emergencies.⁷⁹ The D.C. Mayor, not the President, has the authority to request assistance under EMAC.

Unlike National Guard troops operating in their own states, out-of-state National Guard troops deployed under EMAC are subject to the PCA, which prevents them from engaging in law enforcement activities while deployed for assistance.⁸⁰ The National Guard units authorized from New Jersey, Delaware, New York, and Pennsylvania to assist during the declared emergency in D.C. were thus unable to directly participate in law enforcement activities.⁸¹ Deployment of out-of-state National Guard units to be used in D.C. requires approval from the Pentagon before entering D.C. or before deploying on federal property, creating an additional layer of approval before these guardsmen could help secure D.C.⁸²

77. Goitein & Nunn, *supra* note 75.

78. Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877 (1996) [hereinafter EMAC].

79. *Id.*

80. *Id.* at art. XIII.

81. Article XIII of EMAC also seemingly prohibits its use in any situation where the President would be authorized to invoke the Insurrection Act. *Id.* Since the President could have invoked the Insurrection Act, it is unclear whether it was legal to send out-of-state National Guards through EMAC.

82. Mark Nevitt, *Tragedy at the Capitol: Four Questions that Demand Answers*, JUST SEC. (Jan. 9, 2021), <https://www.justsecurity.org/74121/tragedy-at-the-capitol-four-questions-that-demand-answers/>.

B. Other Options for Responding to the January 6 Riots

The Pentagon might also have responded to the Capitol siege using DSCA. However, doing so would have created concerns about the norm of civilian control over the military. As noted above, in extraordinary emergency circumstances where prior authorization by the President is impossible and local authorities are unable to control the situation, DSCA's emergency response authority permits federal military commanders to temporarily engage in activities that are necessary to quell unexpected civil disturbances and restore governmental function or public order.⁸³ It also permits federal military commanders, in such extraordinary circumstances, to protect federal property or functions.⁸⁴ The January 6 attack on the Capitol likely met the level of civil disturbance required. However, authorization by the President as the events were unfolding was not "impossible." Even if it were, as the shocking events unfolded, no one in the chain of command may have been willing or able to determine that the Commander-in-Chief could not possibly make such an authorization. Thus, it would have been difficult for federal military commanders to use this provision to override presidential consent, had it existed.

DSCA's immediate response authority may have permitted an immediate response to "save lives, prevent human suffering, or mitigate great property damage within the United States."⁸⁵ Although the IRA is typically used for large-scale natural disasters, the Capitol attacks might have qualified, given their prominence and the potential for damage to the home of the legislative branch. However, the only requests to DoD by qualifying authorities during the Capitol attacks were for National Guard troops, not federal military forces. Pentagon officials likely respected the norm of deference to requests from qualifying authorities.

It does not appear that the D.C. Mayor, law enforcement, or qualifying authorities ever requested the assistance of federal military troops on January 6. The official DoD timeline of events on January 6 discusses only requests for DCNG and National Guard troops from other states.⁸⁶ In the absence of these requests, it is unclear under what authorities the Pentagon could have provided additional federal military support on January 6. These unclear authorities, combined with the Pentagon's norm of hesitancy to deploy federal troops on domestic soil, likely hampered the federal military's response on January 6.

83. DoDD 3025.18 (DSCA), *supra* note 33, at para. 4(k).

84. *Id.* at para. 4(k)(2).

85. *Id.* at para. 4(i).

86. *See* DoD Timeline, *supra* note 52.

CONCLUSION

Thus, the constitutional and statutory framework surrounding the deployment of the military on U.S. soil may have played a significant role in hindering the military’s response on January 6.⁸⁷ The layers of bureaucracy necessary to deploy the National Guard to our nation’s capital to protect the Capitol building likely hindered the response as well.⁸⁸

As the historical record shows, and as the events of January 6 illustrate, deployment of the federal military on U.S. soil is a matter that is not taken lightly by Pentagon leadership or by the American public. Historically, the American public has been very resistant to the use of federal troops on U.S. soil. In most cases, the law is clear in permitting federal troops to be used domestically, primarily in humanitarian emergencies—and even then, usually at the request of state governors. The law proscribes the use of federal troops for law enforcement purposes in most instances. Norms and public disapproval have kept the biggest exception to this rule, the Insurrection Act, from being invoked very often.

In emergency situations, where leaders are prone to hit the panic button, Americans often look to the military as a savior. On January 6, congressional leaders were no exception. Speaker Nancy Pelosi called the Chairman of the Joint Chiefs of Staff during the January 6 siege to seek help, even though the Chairman is outside the military chain of command.⁸⁹ Senate Minority Leader Chuck Schumer also called the Pentagon.⁹⁰ Vice President Mike Pence demanded that the Acting Secretary of Defense “Clear the Capitol.”⁹¹ But for many reasons, including the existing patchwork of legal authorities, the military could not save them. As discussed above, the law places significant constraints on the ability of federal troops to respond to domestic emergencies. Sometimes, constraints on the use of the federal military on U.S. soil exist to preserve important constitutional law and norms. However, legal authorities surrounding the use of the D.C. National Guard hardly serve such a purpose—and may have prevented a quicker military response at the Capitol on January 6.

As the law stands, the President can use the Insurrection Act to deploy federal troops on U.S. soil and directly command the D.C. National Guard. President Trump, as Commander-in-Chief, could have quickly ordered federal troops to the Capitol on January 6. If the President had given such orders, the response would have changed constitutional norms of civil-

87. *See supra* Section III.A.

88. *See supra* Section III.A.

89. Mascaro et al., *supra* note 59.

90. *Id.*

91. *Id.*

military relations in the United States forever—no matter what he ordered them to do once there. Given the current state of the law, perhaps the greatest constitutional revolution at the Capitol on January 6 is the one that did not occur.