



February 23, 2021

## National Guard Civil Support in the District of Columbia

The use of the National Guard in various contexts within the District of Columbia (DC) has raised congressional questions regarding the authorities and mechanisms for requesting, activating, and using the National Guard to support civil authorities. This In Focus describes the National Guard, relevant mechanisms for its activation, certain legal considerations, and aspects of its use to provide law enforcement support in Washington, DC.

### The National Guard

The National Guard is descended from colonial-era militias that existed prior to the adoption of the Constitution. The Constitution recognizes the existence of, and gives the federal government limited authority over, the militia (Article I, §8, cls. 15, 16; Article 2, §2). The U.S. Code defines the militia as “all able-bodied males at least 17 years of age and ... under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard” (10 U.S.C. §246). This definition also establishes two subcategories: the unorganized militia and the organized militia. The organized militia is subdivided into the National Guard and the Naval Militia. The National Guard consists of the Army National Guard (ARNG) and the Air National Guard (ANG). The ARNG and ANG are also *reserve components* of the armed forces – under the designations Army National Guard of the United States and Air National Guard of the United States – along with the Army Reserve, Navy Reserve, Marine Corps Reserve, Air Force Reserve, and Coast Guard Reserve (10 U.S.C. §10101).

There are 54 National Guard organizations: one in every state, plus Guam, Puerto Rico, the U.S. Virgin Islands, and the District of Columbia. State and territorial governors each serve as commander in chief of their entity’s National Guard. The President of the United States is the commander in chief of the DC National Guard (DCNG).

### Federal Activation

A federal activation occurs when a reserve component unit or an individual is ordered to active duty for a federal mission, other than training, pursuant to Title 10 of the U.S. Code. Federal activation of the National Guard can include either mobilization as a reserve component of the Army or Air Force or federalization of the organized militia. Upon activation, military authority over mobilized or federalized units and personnel passes from the state or territorial governor to the President.

### Mobilization

The President can mobilize the National Guard as a reserve component of the armed forces for active duty in response

to war or national security crises, conflicts, and emergencies under the following authorities:

- Full Mobilization (10 U.S.C. §12301(a))
- Partial Mobilization (10 U.S.C. §12302(a))
- Presidential Reserve Call-up (10 U.S.C. §12304)
- Pre-planned Missions (10 U.S.C. §12304b)

### Federalization

The President can federalize the National Guard as the organized militia to become a component of the armed forces in response to insurrection, invasion, rebellion, or to enforce the law during such events.

*Insurrection.* If there is an insurrection in a state against its government, at the request of that state’s legislature, or governor if the legislature cannot be convened, the President may call the militia of another state into federal service to suppress the insurrection (10 U.S.C. §251). Whenever the President determines that rebellion or certain unlawful actions against federal authority make it impracticable to enforce the laws of the United States in any state by judicial proceedings, the President may call the militia of any state into federal service to enforce those laws or suppress those actions (10 U.S.C. §252). If rebellion or certain unlawful actions in a state impede the course of justice, prevent the execution of law, or deprive citizens of constitutional rights, the President may call the militia of any state into federal service to suppress insurrection (10 U.S.C. §253). Under any of the preceding authorities, the President may also use the other components of the armed forces to suppress insurrection.

*Invasion, Rebellion, Executing Federal Law.* The President may call members and units of the National Guard of any state into federal service to repel invasion by a foreign nation, suppress rebellion, or execute federal laws. Orders for such service are to be issued through an affected state’s governor or in the case of the DCNG, through its commanding general (10 U.S.C. §12406).

### State Activation

A governor can activate members of the National Guard under state law to perform state active duty (SAD). The President may also request that a governor activate members of the National Guard under Title 32 of the U.S. Code to perform full time National Guard duty (FTNGD) and conduct a federal mission (32 U.S.C. §502(f)). Command authority over units and personnel that conduct such missions under Title 32 remains with the governor. When performing SAD, members of the National Guard are under the control of their governor and receive pay and benefits in accordance with state law. When performing FTNGD, they remain under their respective governor’s

control, but the federal government provides pay and benefits.

### Emergency Management Assistance

Governors may employ their state's National Guard to provide direct assistance to other states on a reimbursable basis. This is done through an Emergency Management Assistance Compact (EMAC; P.L. 104-321) process that allows states to send or receive National Guard forces pursuant to a standing agreement. Such agreements may include provisions allowing an assisting state's National Guard to perform law enforcement functions, including the power to arrest, if specifically authorized by the receiving state.

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The DC Mayor may execute interstate civil defense and emergency management assistance compacts with state and territorial governors (D.C. Code §§7-2209, 7-2332). As the DCNG "Commander-in-Chief ... in its militia status, the President stands in the position of a Governor of a State" (Deputy Associate Attorney General opinion, April 4, 1989). Given the lack of mayoral command authority over the DC militia, it is unclear if the mayor's compacts or agreements could include receipt of National Guard forces from a state or territory

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### National Guard Civil Support (NGCS)

NGCS is defined as "support provided by the National Guard while in a [SAD] status or Title 32 status to civil authorities for domestic emergencies, designated law enforcement, and other activities." (Chief National Guard Bureau Instruction 3000.04). NGCS missions include law enforcement (LE) activity and response to civil disturbance.

#### Law Enforcement Activity

Governors have authority to activate the National Guard to conduct LE activities when LE officials are not able to maintain law and order. Such activities are conducted while performing SAD. If requested by the appropriate authority, governors may assist other states or federal entities by allowing their National Guard to perform LE functions as part of a federal mission while on FTNGD. Under EMAC, they can also assist other states while on SAD.

#### Civil Disturbance Operations

The National Guard may assist civil authorities when they are unable to control civil disorder. The National Guard typically is the first military responder during such disturbances. It typically responds to civil disturbance while on SAD or FTNGD.

### District of Columbia Civil Support

The DCNG is under the control of the federal government, and the President serves as "the Commander-in-Chief of the militia of the District of Columbia" (D.C. Code §49-409). The DCNG is analogous to the organized militia of a state (32 U.S.C. §101(4), (6)). An Executive Order delegated authority to the Secretary of Defense to command the DCNG through its commanding general, "to supervise, administer, and control" it, and "[s]ubject to the direction of the President as Commander-in-Chief, the Secretary may order out the National Guard under title 39 of the District of Columbia Code to aid the civil authorities of the District of Columbia." (E.O. 11485, 34 F.R. 15411, October 1, 1969). A Secretary of Defense memorandum further delegates

supervision, administration, and control of the DCNG to the Secretary of the Army for its ARNG and Secretary of the Air Force for its ANG. Under the memorandum, "The Secretary of the Army, after consultation with [the Secretary of Defense] and subject to the direction of the President... may order out the National Guard...to aid the civil authorities of the District of Columbia." (Secretary of Defense Memorandum, October 10, 1969).

### Law Enforcement Activity in the District of Columbia and the DCNG

Enforcement of criminal laws in the District of Columbia is the responsibility of a number of federal and local LE entities with distinct but often-overlapping jurisdictions. For instance, the Metropolitan Police Department (MPD) is the primary local LE agency in D.C., but it often operates in tandem with, among others, federal LE charged with policing the Capitol building and grounds (U.S. Capitol Police), the National Mall and the Ellipse (U.S. Park Police), and federal court buildings (U.S. Marshals Service). National Guard entities may provide LE assistance in the District of Columbia, though the scope of permissible assistance depends in part on whether they have been activated for federal service under Title 10 of the U.S. Code. When the National Guard has been so activated, the Posse Comitatus Act (PCA; 18 U.S.C. §1385), generally precludes direct engagement in LE functions such as search, seizure, and arrest, as the PCA prohibits willful use of "any part of the Army or the Air Force . . . to execute the laws" except as authorized by the Constitution or Act of Congress.

Exceptions to the PCA exist. For example, the insurrection provisions noted above authorize the President to deploy the military to address significant civil unrest under certain conditions, and Congress has given statutory authority for the military (including National Guard in federal service) to provide a range of support to civilian LE such as training and equipment (10 U.S.C. §§271-84). In the latter case, statutory language makes explicit that authorized support activity does not include "direct participation . . . in a search, seizure, arrest, or other similar activity" unless permitted elsewhere in law (10 U.S.C. §275).

National Guard entities in *state* service—that is, not activated under Title 10—are not subject to PCA restrictions. Thus, the extent to which they may support LE agencies and perform traditional LE functions is largely a matter of state law and authorization, per National Guard Regulation 500-5/Air National Guard Instruction 10-208. The inapplicability of the PCA arguably includes the DCNG operating in militia status or FTNGD, even though DCNG is ultimately subject to presidential control. For example, the Department of Justice has asserted that portions of the D.C. Code authorize use of DCNG in militia status to support law enforcement activities of MPD (13 Op. O.L.C. 91 (1989)). Federal authorities may also permit granting LE authority to DCNG in other circumstances (e.g., 2 U.S.C. §1974 governing appointment as Capitol Police special officers in an emergency).

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