Testimony of

Major General Timothy Lowenberg

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STATEMENT BY MAJOR GENERAL TIMOTHY LOWENBERG THE ADJUTANT GENERAL - WASHINGTON NATIONAL GUARD AND DIRECTOR, WASHINGTON MILITARY DEPARTMENT BEFORE THE SENATE JUDICIARY COMMITTEE ON 'THE INSURRECTION ACT RIDER' AND STATE CONTROL OF THE NATIONAL GUARD

APRIL 24, 2007 UNCLASSIFIED STATEMENT BY MAJOR GENERAL TIMOTHY J. LOWENBERG ADJUTANT GENERAL, STATE OF WASHINGTON

Thank you for the opportunity to appear before you today. I want to emphasize at the outset that I am testifying on behalf of the State of Washington and the Adjutants General Association of the United States (AGAUS). Although I am a federally recognized and U.S. Senate-confirmed General Officer of the U.S. Air Force, I appear before you today as a state official in pure state status and at state expense. My formal testimony, oral statement and responses to your questions should therefore be understood as independent expressions of states' sovereign interests. Unlike other military panelists who typically appear before you, nothing I am about to say has been previewed, edited or otherwise approved by anyone in the Department of Defense.

In a majority of the states and territories, including the State of Washington, the Adjutant General is responsible for all state emergency management functions in addition to command and control of the state's Army and Air National Guard forces. In addition, I am responsible for Washington's statewide Enhanced 911 telecommunications system and for development and execution of our statewide Homeland Security Strategic Plan and administration of all Homeland Security grant programs. Washington has averaged more than one Robert T. Stafford Relief and Emergency Assistance Act (the Stafford Act, 42 U.S.C. sections 5121 et.seq.) Presidential Disaster declaration each year for the past 40 years and our National Guard forces, acting under the command and control of the Governor and the Adjutant General, have been an indispensable response force in nearly every one of these disasters. The Governor's use of the Washington National Guard was especially instrumental in helping civil authorities restore public order during the World Trade Organization riots in Seattle in November 1999.

I speak to you, therefore, as my state's senior official responsible for military support to civil authorities. I have experience as both a supported state commander (the WTO riots referenced above) and supporting state commander (I deployed more than 1,000 National Guard soldiers and airmen to Gulf Coast states in 2005 in response to Hurricanes Katrina and Rita). S.513 is not an esoteric, "academic" or "technical" subject for Governors and Adjutants General. Section 1076 of the 2007 National Defense Authorization Act (Public Law 109-364; hereafter referred to as the 2007 NDAA) has very negative and destructive implications for the state, local and federal unity of effort called for in Homeland Security Presidential Directive 5 (HSPD 5) and in the

comprehensive emergency management plans of the several states and territories. Under the U.S. Constitution, states retain the primary responsibility and authority to provide for civil order and protection of their citizens' lives and property. Passage of S.513 is critical to restoration of historic state-federal relationships and to the states' ability to carry out their constitutional responsibilities

Applicable Federal Statutes

The Posse Comitatus Act (18 U.S.C. 1385) punishes those who, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully use [] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws...." The Posse Comitatus Act does not apply to the National Guard when in state active duty or federal Title 32 service because the Guard is under the command and control of the Governor and the Adjutant General in both statuses. It does apply to the Guard when in Title 10 service, however, because when the Guard is federalized under Title 10 it becomes an indistinguishable part of the federal forces and is under federal as opposed to state control.

The Robert T. Stafford Act (cited above) authorizes the President to make a wide range of federal services available to states that have become victims of natural or human-caused disasters. The Stafford Act authorizes the use of federal military forces for the widest possible range of domestic disaster relief but not for maintaining law and order and not as an exception to the Posse Comitatus Act. Some other independent authority is required if federal military forces are to be used to enforce the laws.

The Insurrection Act (enacted in 1807) delegates authority to the President to federalize and deploy the National Guard domestically during an insurrection or civil disturbance (10 U.S.C. Sections 331-335). Section 331 authorizes the President to use federal military forces to suppress an insurrection at the request of a state government. Section 332 authorizes the President to use armed forces in such manner as he deems necessary to enforce the laws or suppress a rebellion. Section 333 authorizes the President to use federal military forces to protect individuals from unlawful actions that obstruct the execution of federal laws or which impede the course of justice under federal laws. Section 333 was enacted to implement the Fourteenth Amendment and does not require the request or consent of the governor of the affected state.

Prior to the 2007 National Defense Authorization Act, therefore, there were carefully crafted statutes that delegated authority to the President to federalize the National Guard and to employ the Title 10 National Guard forces and other Title 10 active duty military forces for domestic purposes in response to domestic emergencies (Stafford Act) and/or violence (Insurrection Act). The Insurrection Act's martial law authority has been used sparingly. In fact, it has been invoked only 10 times in the past half-century. In every instance in which it has been used in the past 40 years, the President has acted at the request and with the concurrence of the governor of the state whose National Guard forces were federalized.

2007 National Defense Authorization Act
Expansion of Federal Martial Law

The House-passed version of the 2007 National Defense Authorization Act (NDAA) proposed to fundamentally expand the circumstances in which the President could seize control of the National Guard (i.e. "federalize" the Guard) for domestic purposes. As noted above, the Stafford Act already permits the President to use active duty military forces for emergency response operations including debris removal and road clearance; search and rescue; emergency medical care and shelter; provision of food, water and other essential needs; dissemination of public information and assistance regarding health and safety measures; and the provision of technical advice to state and local governments on disaster management and control. Since the Stafford Act authority does not constitute an exception to the Posse Comitatus Act, however, active duty military forces cannot be used for law enforcement purposes unless circumstances permit the President to independently invoke the Insurrection Act. Similarly, the President lacked authority to federalize the National Guard unless he was doing so under the Insurrection Act to suppress an "insurrection, domestic violence, unlawful combination, or conspiracy...." 10 U.S.C. 333.

Section 511 of the House-passed version of the 2007 NDAA would have delegated to the President authority to involuntarily seize control of the National Guard in the event of any "serious natural or manmade disaster, accident or catastrophe". The effect of Section 511, therefore, would have been to authorize the President to involuntarily take control of the Guard for emergency response purposes but not for law enforcement operations unless circumstances independently justified the President's invocation of the Insurrection Act.

As the 2007 NDAA went to conference, the National Governors Association (NGA) sent letters to the ranking majority and minority members of the U.S. Senate and House of Representatives and to the Secretary of Defense (see attached August 1, 2006 letters) protesting the provisions of Section 511. The governors noted that Section 511 and similar provisions in the Senate bill would represent "a dramatic expansion of federal authority during natural disasters that could cause confusion in the command-and-control of the National Guard and interfere with states' ability to respond to natural disasters within their borders". They reiterated that any such fundamental change in law should be considered only in consultation and coordination with the governors and "The role of the Guard in the states and to the nation as a whole is too important to have major policy decisions made without full debate and input from the governors throughout the policy process."

In conference, the chairs dropped the House version (Section 511) but substituted an even broader provision that simultaneously amended the federal Insurrection Act and authorized the President to take control of the Guard in response to any "natural disaster, epidemic or other serious public emergency, terrorist attack or incident, or other condition in any State or possession of the United States....." Because this was done under an expansion of the President's Insurrection Act powers, military forces operating at the President's direction in such circumstances are not subject to the Posse Comitatus Act and can be used to force compliance with laws by any rules for use of lethal force (RUF) or rules of engagement (ROE) authorized by the President or those acting under his delegated authority.

The conference report was agreed to in the House on the same day as its filing (September 29, 2006) and in the Senate the following day (September 30, 2006).

Without any hearing or consultation with the governors and without any articulation or justification of need, Section 1076 of the 2007 NDAA changed more than 100 years of well-established and carefully balanced state-federal and civil -military relationships. One hundred years of law and policy were changed without any publicly or privately acknowledged author or proponent of the change. As written, the Act does not require the President to contact, confer or collaborate in any way with a governor before seizing control of a state's National Guard forces. It requires only notice to Congress that the President has taken the action but no explanation, justification or consent of congress is required.

If these provisions had been in effect during the 2005 Hurricane Katrina response, the President could have unilaterally seized control of the National Guard forces of all 54 states, territories and the District of Columbia as they were engaged in recovery operations in the Gulf Coast states. He could have done so by a unilateral determination that state authorities were incapable of preventing public violence and maintaining public order. Ironically, the President's unilateral assumption of control over the Guard might well be the very act that would preclude a state from having the resources to maintain or restore public order.

In the event of such a federal take-over, governors of supporting state forces would be unable to withdraw their units or exercise any control or influence over their personnel even if they were needed in response to an unexpected emergency in their own state.

The Adjutants General Association of the United States (AGAUS) urges Congress to restore the historic balance of state and federal interests by swiftly passing S.513. AGAUS believes that, with the exception of the two circumstances noted below, governors should control any and all domestic use of military force within their state (regardless of whether the domestically employed forces are Active, Reserve or National Guard forces) and should retain control over their own National Guard forces wherever and whenever they are employed within the United States or its territories or the District of Columbia. The two exceptions are: (1) if National Guard lethal force is required under the direction of national command authorities to repel an attack or invasion against the United States or (2) if National Guard units or personnel are being used in state status to resist a lawful order of the judicial, legislative or executive branches of the federal government (e.g., the school desegregation and civil rights cases of 1957-1965).

Impact on Essential State Interests

The National Guard is the only organized, trained and equipped military force a governor can call upon to restore or sustain public safety in the event of a state or local emergency, including enforcement of state declarations of martial law (see, for example, RCW 38.08.030, authorizing the governor's "Proclamation of complete or limited martial law"). With the exception of the two circumstances noted above, the domestic use of military force within any state without the governor's consent, supervision and ultimate control and the imposition of federal control over a state's National Guard units or personnel for domestic purposes without the governor's prior knowledge and consent are infringements of state sovereignty and deprive states of the means of carrying out the core functions of state government, including protection of a state's citizens under the state's existing laws or as part of a state's imposition and enforcement of its own martial law provisions.

Further, imposing Presidential control over the National Guard for domestic purposes without notice to the governor and without the governor's consent negates the unity of local-state-federal effort needed in times of domestic peril and would undermine the speed and efficiency with which the National Guard responds under the Governor's control to in-state emergencies and in support of other states through state-to-state mutual aid agreements such as the Emergency Management Assistance Compact (EMAC)

Federal Plans for Implementing Expanded Martial Law Authority

US Northern Command (USNORTHCOM) has been engaged for some time in deliberative planning for implementation of Section 1076 of the 2007 National Defense Authorization Act (the law was effective October 17, 2006). The formal NORTHCOM CONPLAN 2502-05 was approved by Secretary of Defense Gates on March 15, 2007. The final approved plan states "This document is classified UNCLASSIFIED to ensure ease of use by both military and interagency organizations and personnel whose officials duties require specific knowledge of this plan, including those required to develop supporting plans. Information in USNORTHCOM CONPLAN 2502 may be disseminated to all interagency, National Guard Bureau, federal, tribal, state and local governments."

Although the 2007 NDAA provisions could be used to compel National Guard forces to engage in civil disturbance operations under federal control, states have had no notice of the development of these operational plans nor have governors or their Adjutants General had any opportunity to present their concerns or to synchronize their plans during the development and coordination of this USNORTHCOM plan.

The UNCLASSIFIED plan I have seen says National Guard forces conducting civil disturbance operations in the affected state(s) [both National Guard forces from the affected or supported states and National Guard forces from supporting states operating therein] "will likely be federalized (T10)" upon execution of the plan. Further, the plan requires the Joint Forces Headquarters of each state and territory to develop the very plans under which the federal government would assume control over their state's National Guard forces.

One key USNORTHCOM planning assumption is that the President will invoke the new Martial Law powers if he concludes state and/or local authorities no longer possess either the capability or the will to maintain order. This highly subjective operational assumption has been developed without any notice, consultation or collaboration with the governors of the several states and territories.

All States and Territories and numerous national associations join in urging Congress to swiftly enact S. 513

The Adjutants General Association of the U.S. (AGAUS) joins the following institutions and national organizations in urging Congress to repeal Section 1076 of the 2007 NDAA through swift enactment of S. 513: the Washington State Legislature, the National Governors Association (NGA), the National Lieutenant Governors Association (NLGA), the National Conference of State Legislatures (NCSL), the Enlisted Association of the National Guard of the United States

(EANGUS), the National Sheriffs Association (NSA), the National Emergency Management Association (NEMA) and the International Association of Emergency Managers (IAEM).

Conclusion

It is imperative that we have unity of effort at all levels - local, state and federal - when responding to domestic emergencies and disasters. Section 1076 of the 2007 National Defense Authorization Act is a hastily conceived and ill-advised step backward. It openly invites disharmony, confusion and the fracturing of what should be a united effort at the very time when states and territories need federal assistance - not a federal take over -- in responding to state and local emergencies.

Thank you for this opportunity to express the concerns of the State of Washington, the Adjutants General Association of the United States and the other national associations referenced herein.