

**UNCLASSIFIED**

**FOR RECORD**

**STATEMENT BY**

**MAJOR GENERAL TIMOTHY LOWENBERG  
THE ADJUTANT GENERAL – WASHINGTON NATIONAL GUARD  
AND  
DIRECTOR, WASHINGTON MILITARY DEPARTMENT**

**BEFORE THE**

**HOUSE HOMELAND SECURITY COMMITTEE  
SUBCOMMITTEE ON EMERGENCY COMMUNICATIONS,  
PREPAREDNESS AND RESPONSE**

**ON**

**EXAMINING THE MILITARY'S SUPPORT OF CIVIL AUTHORITIES  
DURING DISASTERS**

**APRIL 25, 2007**

**UNCLASSIFIED**

**TESTIMONY OF  
MAJOR GENERAL TIMOTHY J. LOWENBERG  
ADJUTANT GENERAL, STATE OF WASHINGTON  
BEFORE THE HOUSE COMMITTEE ON HOMELAND SECURITY  
SUBCOMMITTEE ON EMERGENCY COMMUNICATIONS , PREPAREDNESS AND  
RESPONSE**

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 Air Force General Officer, 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.

**The Role of Adjutants General in Support of Civil Authorities During Disasters**

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 developing and executing our statewide Homeland Security Strategic Plan and administering all of our 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 a 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 in Seattle during the World Trade Organization riots in November 1999.

I speak to you, therefore, as my state's senior official responsible for military support to civil authorities during disasters. 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).

Five and one-half years after the terrorist attacks of September 11, 2001, the federal government has unfortunately not come to grips with how federally controlled military force will be used

domestically or how federal military forces will operate with regard to ongoing National Guard response and recovery operations under the control of the governors – the Commanders-in-Chief of the several States and territories. In last year’s Defense Authorization conference, language was inserted that amends and substantially expands the President’s Martial Law powers notwithstanding the universal opposition of the nation’s governors. In doing so, the conference chairs reversed more than 100 years of well-established and carefully balanced state-federal and civil-military relationships. They did so without a single hearing, without calling a single witness and without any public or private acknowledgement of authorship of the change. HR 869 would repeal these ill-advised provisions. Although there are many issues concerning military support to civil authorities that I could address at this hearing, none are more important than those raised by HR 869.

HR 869 (and 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 HR 869 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 are 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 force is 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 in response to 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 military 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 conference amendments, 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.

### **The 2007 National Defense Authorization Act Expands Federal Martial Law by Amending the Insurrection Act**

The House-passed version of the 2007 National Defense Authorization Act (NDAA) proposed to 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. (See CRS Report RL33053, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*). 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 authority to the President 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 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 6 and 31, 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. I respectfully suggest that when laws are changed for the better, everyone who supports the change claims credit for its passage. These provisions, however, have no “DNA”, and no acknowledged author. In fact, state officials have been unable to identify anyone who will even acknowledge having reviewed or coordinated on the changes before they were inserted into the conference report.

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 ongoing 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 there was an unexpected emergency in their home 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 HR 869. AGAUS believes that, with the exception of 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).

### **Interference with 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 NDAA 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 official 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 federal operational plans nor have governors or their Adjutants General had any opportunity to present their concerns or to synchronize their state plans during the development and coordination of the 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 state and National Guard forces from other supporting states operating therein] “will likely be federalized (T10)” upon execution of the plan. Further, the plan requires each state’s National Guard Joint Forces Headquarters to develop the very plans under which the federal government would assume control over the 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 or local authorities lack the capability or the will to maintain order. This highly subjective operational standard 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 Urge Congress to swiftly enact HR 869**

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 HR 869: 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.

## EXHIBITS

1. State of Washington Substitute Senate Joint Memorial 8012
2. National Governors Association (NGA) letter – February 6, 2007
3. NGA letter – February 5, 2007
4. NGA letter – August 31, 2006
5. NGA letter (signed by all governors) – August 6, 2006
6. National Lieutenant Governors Association Resolution – March 16, 2007
7. National Conference of State Legislatures (NCSL) letter – March 27, 2007
8. NCSL Policy Statement
9. Adjutants General Association of the U.S. letter – February 7, 2007
10. Enlisted Association of the National Guard of the U.S. letter – February 6, 2007

---

**SUBSTITUTE SENATE JOINT MEMORIAL 8012**

---

**State of Washington**

**60th Legislature**

**2007 Regular Session**

**By Senate Committee on Government Operations & Elections (originally sponsored by Senators Brown, Hewitt, Franklin, Fraser, Oemig, Kline, Kilmer, Swecker, Hobbs, Hatfield, Marr, Spanel, Regala, Kohl-Welles, Berkey, Pridemore, Rasmussen, McAuliffe, Sheldon and Shin)**

READ FIRST TIME 02/27/07.

1 TO THE HONORABLE GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES,  
2 AND TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF  
3 REPRESENTATIVES, AND TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE  
4 UNITED STATES, IN CONGRESS ASSEMBLED:

5 We, your Memorialists, the Senate and House of Representatives of  
6 the State of Washington, in legislative session assembled, respectfully  
7 represent and petition as follows:

8 WHEREAS, The Washington National Guard has served Washington well  
9 and faithfully since territorial times; and

10 WHEREAS, Nearly 8,600 men and women of the Washington Air and Army  
11 National Guard continue to serve our state and nation, at home and  
12 abroad; and

13 WHEREAS, The National Guard supports civil authorities in a  
14 multitude of ways that are particular to our local communities and to  
15 our state and region; and

16 WHEREAS, The Militia clause of the United States Constitution  
17 guarantees to each state the right to maintain an organized militia  
18 (the National Guard) for the protection and defense of its citizens;  
19 and

1       WHEREAS, The National Guard plans, trains, and exercises with  
2 local, state, and federal officials to provide relief under the  
3 Governor's control during emergencies and disasters that may befall the  
4 state of Washington or any other state; and

5       WHEREAS, State control of the Guard in the event of such  
6 emergencies is critical to execution of the National Response Plan  
7 (NRP), the Washington State Comprehensive Emergency Management Plan  
8 (CEMP), city and county emergency plans, and all intrastate and  
9 interstate mutual aid arrangements such as the Emergency Management  
10 Assistance Compact (EMAC) and the Pacific Northwest Emergency  
11 Management Arrangement (PNEMA); and

12       WHEREAS, Placing the Washington National Guard under federal  
13 control without the consent of the Governor would undermine the Guard's  
14 effectiveness and deprive the state of Washington of the ability to  
15 perform its most essential function, the protection of its own  
16 citizens; and

17       WHEREAS, Section 1076 of the John Warner National Defense  
18 Authorization Act of 2007 (P.L. 109-364) was adopted without any public  
19 hearing and improvidently amended the federal Insurrection Act by  
20 authorizing the President to impose federal control over the National  
21 Guard, without notice, consultation, or consent of the Governor, in the  
22 event of a "natural disaster, epidemic or other serious public  
23 emergency, terrorist attack or *incident*" (emphasis added); and

24       WHEREAS, The unilateral Presidential authority conferred by Section  
25 1076 of P.L. 109-364 is similarly devoid of any required consultation  
26 or consent of the Congress; and

27       WHEREAS, The provisions of Section 1076 of P.L. 109-364 were signed  
28 into law despite the opposition of the nation's governors acting on  
29 behalf of their respective sovereign states; and

30       WHEREAS, imposing Presidential control over the National Guard for  
31 domestic purposes without the Governor's consent would negate the unity  
32 of local, state, and federal effort needed in times of domestic peril  
33 and would undermine the speed and efficiency with which the National  
34 Guard responds, under the Governor's control, to emergencies within the  
35 state of Washington and in support of other states through state-to-  
36 state mutual aid agreements such as the Emergency Management Assistance  
37 Compact (EMAC); and

1       WHEREAS, S.513 and HR 869, if enacted into law, will rescind the  
2 objectionable provisions of Section 1076 of P.L. 109-364;

3       NOW, THEREFORE, Your Memorialists respectfully urge the Congress to  
4 swiftly pass and the President to sign into law S.513 and HR 869.

5       BE IT RESOLVED, That copies of this Memorial be immediately  
6 transmitted to the Honorable George W. Bush, President of the United  
7 States, the President of the United States Senate, the Speaker of the  
8 House of Representatives, and each member of Congress.

--- END ---

NATIONAL  
**GOVERNORS**  
ASSOCIATION

*Jane Napolitano*  
Governor of Arizona  
Chair

*Tim Pawlenty*  
Governor of Minnesota  
Vice Chair

*Raymond J. Schuppert*  
Executive Director

February 6, 2007

The Honorable Carl Levin  
Chairman  
Committee on Armed Services  
United States Senate  
Washington, D.C. 20510

The Honorable John McCain  
Ranking Member  
Committee on Armed Services  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman and Senator McCain:

Section 1076 of the John Warner National Defense Authorization Act (Public Law 109-364) unnecessarily expanded the President's authority to federalize the National Guard during certain emergencies and disasters. The nation's governors opposed the inclusion of this section in the bill because responsibility for responding to disasters and other local emergencies to assure the security and wellbeing of our residents along with managing the Guard within a state must rest with the governor. The changes made in Section 1076 of the National Defense Authorization Act undermine governors' authority over the Guard, place the safety and welfare of citizens in jeopardy and should be repealed.

Unless activated in purely federal service, the National Guard is and should remain under state control with governors as commanders-in-chief. The dual mission of the Guard, a combat ready force that can be called on by the President and a first responder in domestic emergencies or disasters under the command and control of the governor, requires that federal law clearly delineate chains of command for each mission. The changes made to the "Insurrection Act" by Section 1076 of the National Defense Authorization Act are likely to confuse the issue of who commands the Guard during a domestic emergency. By granting the President specific authority to usurp the Guard during a natural disaster or emergency without the consent of a governor, Section 1076 could result in confusion and an inability to respond to residents' needs because it calls into question whether the governor or the President has primary responsibility during a domestic emergency.

The Insurrection Act, prior to passage of the National Defense Authorization Act served the nation well as an extraordinary remedy that allowed the President to take control of the Guard in the most rare and exceptional of cases. Despite the role of governors as commander-in-chief of the Guard in their states, Section 1076 of the National Defense Authorization Act was drafted without consultation with governors and without full discussion or debate regarding the ramifications of such a change on domestic emergency response. We urge Congress to repeal the provision in Section 1076 of the Act and open a dialogue with governors regarding how to best enhance the effectiveness of the Guard in responding to domestic disasters and emergencies.

Sincerely,



Governor Michael F. Easley  
Co-Lead on the National Guard



Governor Mark Sanford  
Co-Lead on the National Guard

NATIONAL  
**GOVERNORS**  
ASSOCIATION

*Janeé Napolitano*  
Governor of Arizona  
Chair

*Tim Pawlenty*  
Governor of Minnesota  
Vice Chair

*Raymond C. Scheppach*  
Executive Director

February 5, 2007

The Honorable Patrick J. Leahy  
United States Senate  
Washington, D.C. 20515

The Honorable Christopher "Kit" Bond  
United States Senate  
Washington, D.C. 20510

Dear Senator Leahy and Senator Bond:

Section 1076 of the John Warner National Defense Authorization Act (Public Law 109-364) unnecessarily expanded the President's authority to federalize the National Guard during certain emergencies and disasters. The nation's governors opposed the inclusion of this section in the bill because responsibility for responding to disasters and other local emergencies to assure the security and wellbeing of our residents along with managing the Guard within a state must rest with the governor. The changes made in Section 1076 of the National Defense Authorization Act undermine governors' authority over the Guard, place the safety and welfare of citizens in jeopardy and should be repealed.

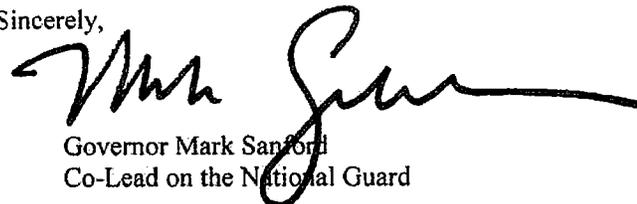
Unless activated in purely federal service, the National Guard is and should remain under state control with governors as commanders-in-chief. The dual mission of the Guard, a combat ready force that can be called on by the President and a first responder in domestic emergencies or disasters under the command and control of the governor, requires that federal law clearly delineate chains of command for each mission. The changes made to the "Insurrection Act" by Section 1076 of the National Defense Authorization Act are likely to confuse the issue of who commands the Guard during a domestic emergency. By granting the President specific authority to usurp the Guard during a natural disaster or emergency without the consent of a governor, Section 1076 could result in confusion and an inability to respond to residents' needs because it calls into question whether the governor or the President has primary responsibility during a domestic emergency.

The Insurrection Act, prior to passage of the National Defense Authorization Act served the nation well as an extraordinary remedy that allowed the President to take control of the Guard in the most rare and exceptional of cases. Despite the role of governors as commander-in-chief of the Guard in their states, Section 1076 of the National Defense Authorization Act was drafted without consultation with governors and without full discussion or debate regarding the ramifications of such a change on domestic emergency response. We urge Congress to repeal the provision in Section 1076 of the Act and open a dialogue with governors regarding how to best enhance the effectiveness of the Guard in responding to domestic disasters and emergencies.

Sincerely,



Governor Michael F. Easley  
Co-Lead on the National Guard



Governor Mark Sanford  
Co-Lead on the National Guard

NATIONAL GOVERNORS ASSOCIATION

Janet Napolitano Governor of Arizona Chair

Tim Pawlenty Governor of Minnesota Vice Chair

Raymond C. Scheppach Executive Director

August 31, 2006

The Honorable Donald Rumsfeld Secretary Department of Defense The Pentagon Washington, D.C. 20301

Dear Mr. Secretary:

Governors oppose statutory changes in the House and Senate Department of Defense authorization bills to federalize the National Guard during emergencies and disasters. Provisions in both the House and Senate bills to expand the President's authority over the National Guard during natural and manmade disasters were developed without consultation with governors and encroach on our constitutional authority to protect the citizens of our states.

Fifty-one governors recently sent a letter to Congress opposing Section 511 of the House-passed bill because it would usurp the authority of governors to command the National Guard in response to a "serious natural or manmade disaster." Since then, governors also have become increasingly concerned with the Senate's proposal to expand the President's authority to intervene in a state under the Insurrection Act (Section 1042) and proposals to federalize disaster response through the use of reserve forces. Each of these proposals represents 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.

As we reiterated during our meeting with you in February, any issue that affects the mission of the Guard in the states must be addressed in consultation and coordination with governors. 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 governors throughout the policy process.

Governors welcome the opportunity to improve the nation's disaster response capabilities, but we must work together to ensure that any changes do not hinder our ability to respond to those in need. We therefore urge you to join us in calling for the House and Senate to remove Section 511 of the House bill and Section 1042 of the Senate bill from the final conference report.

Sincerely,

Handwritten signature of Janet Napolitano and Michael F. Easley. Below: Governor Janet Napolitano, Governor Michael F. Easley, Co-Lead Governor on the National Guard

Handwritten signature of Tim Pawlenty and Mark Sanford. Below: Governor Tim Pawlenty, Governor Mark Sanford, Co-Lead Governor on the National Guard

NATIONAL  
**GOVERNORS**  
ASSOCIATION

*Mike Huckabee*  
Governor of Arkansas  
Chairman

*Janet Napolitano*  
Governor of Arizona  
Vice Chair

*Raymond C. Schappach*  
Executive Director

August 6, 2006

The Honorable Bill Frist  
Majority Leader  
United States Senate  
Washington, D.C. 20510

The Honorable Harry Reid  
Minority Leader  
United States Senate  
Washington, D.C. 20510

The Honorable J. Dennis Hastert  
Speaker  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Nancy Pelosi  
Minority Leader  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Senator Frist, Senator Reid, Speaker Hastert and Representative Pelosi:

The nation's governors strongly oppose legislation to allow the President to federalize the National Guard in a state without the consent of the governor. The House-passed version of the National Defense Authorization Act (H.R. 5122) would authorize the President to take control of the Guard in case of "a serious natural or manmade disaster, accident, or catastrophe that occurs in the United States, its territories and possessions, or Puerto Rico." This provision was drafted without consultation or input from governors and represents an unprecedented shift in authority from governors as Commanders and Chief of the Guard to the federal government.

We take very seriously our constitutional duty to protect our citizens and lead our Guard. We are responsible for the safety and welfare of our citizens and are in the best position to coordinate all resources to prepare for, respond to and recover from disasters. The current process by which we use our National Guard in emergencies and request federal assistance when necessary works well and should not be changed.

We urge you to drop provisions that would usurp governor's authority over the National Guard during emergencies from the conference agreement on the National Defense Authorization Act.

Sincerely,

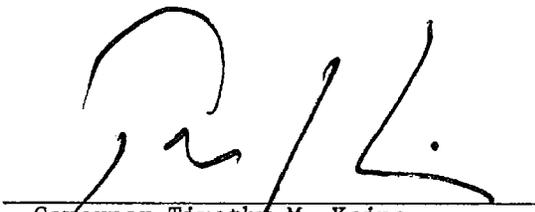


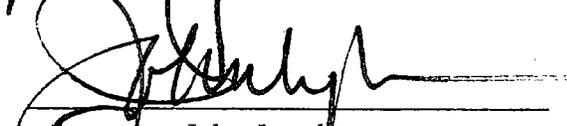
Governor Mike Huckabee

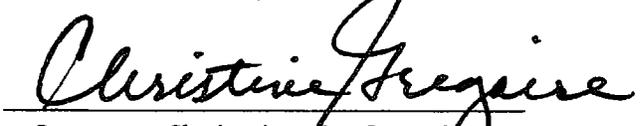


Governor Janet Napolitano

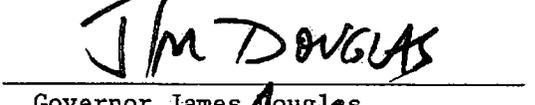
  
Governor Haley Barbour

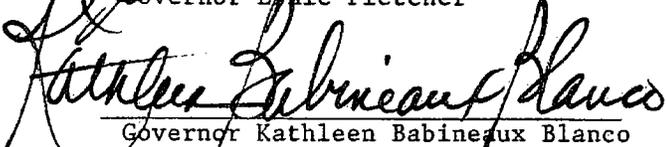
  
Governor Timothy M. Kaine

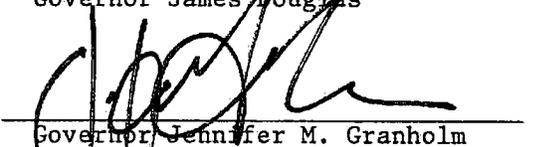
  
Governor John Lynch

  
Governor Christine O. Gregoire

  
Governor Elin F. Fletcher

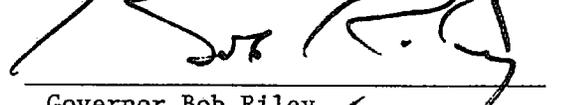
  
Governor James Douglas

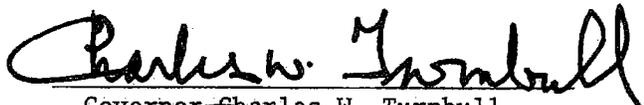
  
Governor Kathleen Babineaux Blanco

  
Governor Jennifer M. Granholm

  
Governor Tim Pawlenty

  
Governor Matt Blunt

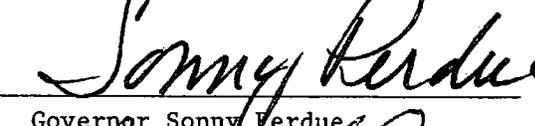
  
Governor Bob Riley

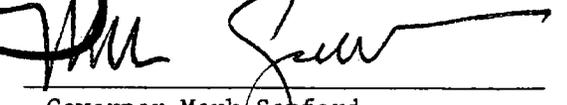
  
Governor Charles W. Turnbull

  
Governor Ruth Ann Minner

  
Governor Joe Manchin III

  
Governor James Risch

  
Governor Sonny Perdue

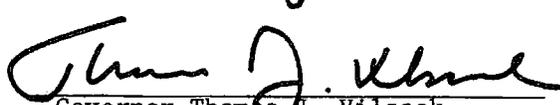
  
Governor Mark Sanford

  
Governor Brad Henry

  
Governor John Baldacci

  
Governor Rod Blagojevich

  
Governor Dave Heineman

  
Governor Thomas J. Vilsack



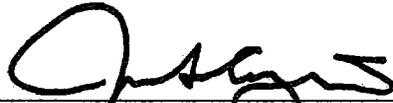
Governor Arnold Schwarzenegger



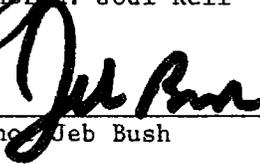
Governor Bill Richardson



Governor M. Jodi Reil



Governor Jon S. Corzine



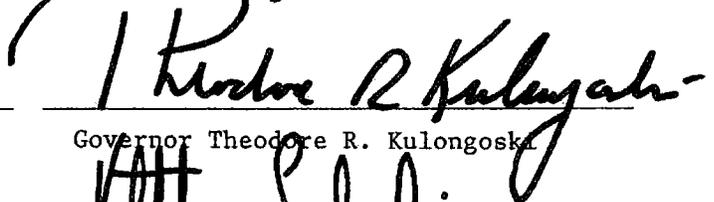
Governor Jeb Bush



Governor George E. Pataki



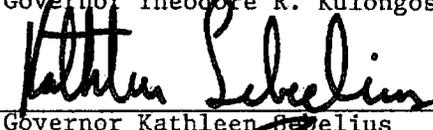
Governor Mitt Romney



Governor Theodore R. Kulongoski



Governor Robert L. Ehrlich Jr.



Governor Kathleen Sebelius



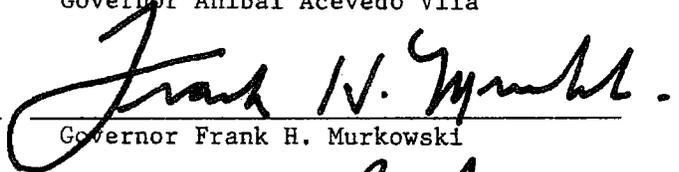
Governor Edward G. Rendell



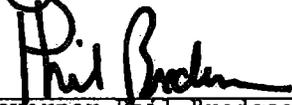
Governor Anibal Acevedo Vila



Governor Jim Doyle



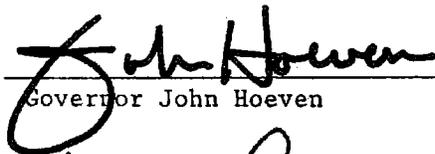
Governor Frank H. Murkowski



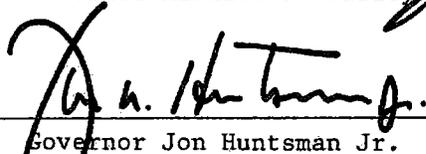
Governor Phil Bredesen



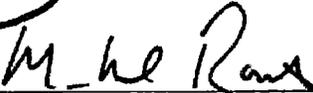
Governor Michael F. Easley



Governor John Hoeven



Governor Jon Huntsman Jr.



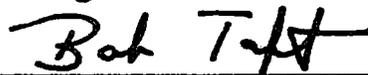
Governor M. Michael Rounds



Governor Kenny Guinn



Governor Mitch Daniels



Governor Bob Taft



---

Governor Brian Schweitzer



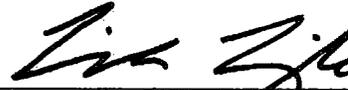
---

Governor Dave Freudenthal



---

Governor Donald L. Carcieri



---

Governor Linda Lingle



---

Governor Rick Perry



National Lieutenant Governors Association

**RESOLUTION REGARDING URGED CHANGE TO  
THE NATIONAL DEFENSE AUTHORIZATION ACT**

WHEREAS section 1076 of the John Warner National Defense Authorization Act (Public Law 109-364) unnecessarily expanded the President's authority to federalize the National Guard during unspecified emergencies and disasters, and

WHEREAS responsibility for responding to disasters and other local emergencies to assure the security and wellbeing of our residents along with managing the Guard within a state must rest with the governor, and

WHEREAS the changes made in Section 1076 of the National Defense Authorization Act undermine governors' authority over the Guard, place the safety and welfare of citizens in jeopardy, and

WHEREAS unless activated in purely federal service, the National Guard is and should remain under state control with governors as commanders-in-chief; the dual mission of the Guard, a combat ready force that can be called on by the President and a first responder in domestic emergencies or disasters under the command and control of the governor, requires that federal law clearly delineate chains of command for each mission; the changes made to the "Insurrection Act" by Section 1076 of the National Defense Authorization Act are likely to confuse the issue of who commands the Guard during a domestic emergency; and by granting the President specific authority to usurp the Guard during a natural disaster or emergency without the consent of a governor, Section 1076 could result in confusion and an inability to respond to residents' needs because it calls into question whether the governor or the President has primary responsibility during a domestic emergency, and

WHEREAS the Insurrection Act, prior to passage of the National Defense Authorization Act served the nation well as an extraordinary remedy that allowed the President to take control of the Guard in the most rare and exceptional of cases; and despite the role of governors as commander-in-chief of the Guard in their states, Section 1076 of the National Defense Authorization Act was drafted without consultation with governors and without full discussion or debate regarding the ramifications of such a change on domestic emergency response,

SO NOW, THEREFORE, BE IT RESOLVED the members of NLGA urge Congress to repeal the provision in Section 1076 of the Act and open a dialogue with governors regarding how to best enhance the effectiveness of the Guard in responding to domestic disasters and emergencies; and

BE IT RESOLVED THAT the National Lieutenant Governors Association strongly urges that changes made in Section 1076 of the National Defense Authorization Act should be repealed.

Sponsored by: Lt. Governor Brian Dubie, Vermont

Additional Co-Sponsors:

Lt. Governor John Bohlinger, Montana

Lt. Governor Michael Fedele, Connecticut

Lt. Governor Elizabeth Roberts, Rhode Island

Lt. Governor Rick Sheehy, Nebraska

Lt. Governor Patty Judge, Iowa

Lt. Governor Mark Parkinson, Kansas

Lt. Governor Anthony Brown, Maryland

As finally passed by the Executive Committee and General Business session this 16<sup>th</sup> day of March, 2007.



NATIONAL CONFERENCE of STATE LEGISLATURES

*The Forum for America's Ideas*

March 27 2007

The Honorable Patrick Leahy  
United States Senate  
433 Russell Senate Office Building  
Washington, DC20510

The Honorable Christopher Bond  
United States Senate  
274 Russell Senate Office Building  
Washington, DC 20510

Dear Senators Leahy and Bond:

The National Conference of State Legislatures (NCSL) applauds you for introducing legislation (S. 513) to repeal Section 1076 of the Defense Authorization Act of 1076 (P.L. 109-364), which expands the President's authority to federalize the National Guard during certain emergencies and disasters.

The National Guard serves as the primary emergency response unit in every state. In nearly half the states, the National Guard fills the role of state emergency management agency. State legislators across the country believe the historic domestic mission of the National Guard in emergency management under state authority must be strengthened rather than co-opted by federal decree. Section 1076 could potentially compromise each state's ability to respond to those in need and preempt a viable public safety system. Preemption in this instance could not be more blatant or more dangerous to the public safety and welfare of our states.

We look forward to working with you on this important issue. For additional assistance and information, please have your staff contact Molly Ramsdell (202-624-3584; [molly.ramsdell@ncsl.org](mailto:molly.ramsdell@ncsl.org)) or Garner Girthoffer (202-624-7753; [garner.girthoffer@ncsl.org](mailto:garner.girthoffer@ncsl.org)) in NCSL's Washington, D.C. office.

Respectfully,

Senator Richard T. Moore  
Massachusetts General Court

Senator Thomas J. Wyss  
Indiana General Assembly

Co-Chairs, NCSL Task Force on Homeland Security  
and Emergency Preparedness

Denver  
7700 East First Place  
Denver, Colorado 80230  
Phone 303.364.7700 Fax 303.364.7800

Washington  
444 North Capitol Street, N.W. Suite 515  
Washington, D.C. 20001  
Phone 202.624.5400 Fax 202.737.1069

Website [www.ncsl.org](http://www.ncsl.org)

Leticia R. Van de Putte, R. Ph.  
State Senator  
Texas  
President, NCSL

Stephen R. Miller  
Chief, Legislative Reference Bureau  
Wisconsin  
Staff Chair, NCSL

William T. Pound  
Executive Director



NATIONAL CONFERENCE *of* STATE LEGISLATURES

*The Forum for America's Ideas*

**FEDERAL PREEMPTION OF STATE AUTHORITY OVER NATIONAL GUARD**

**NCSL EXECUTIVE COMMITTEE**

**Whereas**, the National Guard has an historic role as guardian of public safety in the states during times of natural and man-made disasters, major accidents or other catastrophes since the birth of the republic that began when ordinary citizens answered the alarm to defend freedom in Lexington, Massachusetts, and has continued for more than two hundred years, and

**Whereas**, the National Guard serves as the primary emergency response unit in every state, even filling the role of state emergency management agency in nearly half of the states and the National Conference of State Legislatures (NCSL) believes that the historic domestic mission of the Guard in emergency management under state authority must be strengthened rather than pre-empted by federal decree, and

**Whereas**, the United States House of Representatives has passed its version of the National Defense Authorization (DoD) Act (H.R. 5122) including a provision in Section 511 that would allow the President to federalize the National Guard of the states without the consent of the governor in case of “a serious natural or manmade disaster, accident, or catastrophe that occurs in the United States, its territories and possessions, or Puerto Rico,” and

**Whereas**, it has long been the policy of the National Conference of State Legislatures to vigorously oppose federal preemption of state authority, be it hereby

**RESOLVED**, that the National Conference of State Legislatures (NCSL) strongly opposes Section 511 of H.R.5122 that would amend Title 10 of the United States Code to give authority to the President to federalize and take control of the National Guard at a time when its services are most needed by the respective states in responding to major disasters, and be it further

**RESOLVED**, that NCSL instructs its officers and staff to notify the House and Senate conferees working on resolving differences between H.R. 5122 and S.2766 and other members of Congress that the National Conference of State Legislatures opposes Section 511, in the House bill, and any other effort to preempt domestic control of the National Guard from state authority, and to work against passage of any such provision by the Congress, and be it further

**RESOLVED**, that NCSL work cooperatively and in a bipartisan manner with the National Governor's Association and other organizations to oppose this egregious attempt at preemption of state authority.



7 February 2007

The Honorable Patrick Leahy  
United States Senate  
Washington, DC 20515

The Honorable Kit Bond  
United States Senate  
Washington, DC 20515

The Adjutants General Association of the United States (AGAUS) represents the 54 Adjutants General of the fifty states, three territories, and District of Columbia who are responsible for training and readiness of Army and Air National Guard units under their jurisdiction. We are united in support of your legislation that repeals all language contained in the John Warner National Defense Authorization Act for Fiscal Year 2007 that significantly altered existing law known as the Insurrection Act.

The language in the NDAA seriously upset the delicate balance between Governors and the President in determining the authority under which the National Guard will be used to respond to domestic conditions endangering citizens. The language significantly broadens the President ability to declare martial law and mobilize the National Guard under national command without consulting with the Governors. It may in fact cause factions to pressure the President into ill advised actions because the constructive ambiguity of the original language which encourages consultation with Governors no longer exists. For the National Guard this can mean being federalized prematurely thereby losing important capabilities available under State Active Duty and Title 32.

The National Guard has proven capable of operating flexibly and responsively when retained under governor control. This is well documented from the airport security mission in the aftermath of 9/11 to sending 6,000 National Guard Soldiers and Airmen to the southwest border in 2006 (with over 50,000 citizen-soldiers rapidly deployed under EMAC and Title 32 to support Hurricane Katrina recovery sandwiched in between). The language in NDAA 2207 would likely discourage using the National Guard in these innovative, responsive, and cost effective ways.

NDAA 2007 enabled something completely unnecessary without committee or floor debate in either legislative chamber and with explicit opposition from the Governors. Your bill restores the Insurrection Act to a proper balance. Expect willing and energetic support from the AGAUS.

Sincerely,

ROGER P. LEMPKE  
Major General  
President



**EANGUS**

3133 MT. VERNON AVENUE  
ALEXANDRIA, VA 22305

[www.eangus.org](http://www.eangus.org)

(703) 519-3846  
FAX (703) 519-3849

February 6, 2007

The Honorable Patrick Leahy  
United States Senate  
Washington, D.C. 20510

The Honorable Christopher Bond  
United States Senate  
Washington, D.C. 20510

The Enlisted Association of the National Guard of the United States (EANGUS) is the only military service association that represents the interests of every enlisted soldier and airmen in the Army and Air National Guard. With a constituency base of over 414,000 soldiers and airmen, their families, and a large retiree membership, EANGUS engages Capitol Hill on behalf of courageous Guard persons across this nation.

On behalf of EANGUS, and the soldiers and airmen it represents, I'd like to communicate our support for legislation to repeal the changes to the Insurrection Act as passed in Public Law 109-364, Section 1076, and to restore the authority of the Governors as our founding fathers designed over 230 years ago.

Public Law 109-364 stripped the nation's Governors of their rightful authority to use the militia of the United States (to wit, the National Guard) in times of natural disasters and major public emergencies. Congress made this move without any consultation with those Governors, duly elected by the people of this great nation. It was an obvious knee-jerk reaction to the events surrounding Hurricane Katrina in 2005, yet without merit.

We applaud you for taking legislative steps to repeal this law, and to restore to the Governors their rightful authority over the militia when not in Federal service. The people of America have a unspoken need for the National Guard in times of public emergencies, and Washington is too far removed from the challenges in each state. We look forward to working with your staff as this legislation works its way into law.

Working for America's Best!

MSG Michael P. Cline, USA (Ret)  
Executive Director