

Remarks by the Honorable John O. Marsh, Jr.
National Transportation Safety Board Conference Center
429 L'Enfant Plaza, SW
Washington, DC
May 4, 2006

Commission on the National Guard and Reserve

OPENING

It is important to recognize the outstanding service of all of our Services in the Iraq War. We can be proud and grateful to those men and women who bear arms for our Country and serve with dedication, professionalism, and bravery.

The performance of our Guard and Reserve Forces has been especially gratifying, and is a tribute to the American Citizen-Soldier.

This is a distinguished Commission, charged with an important task, which you are well qualified to address.

COMMAND AND CONTROL

Any discussion of the organization, roles and mission of the Reserve Components in support of Homeland Security should begin with a review of Constitutional and statutory authorities. This is necessary to clearly establish command and control authority at the Federal, State and Local Government levels. Presently, this is not clear. The lack of clarity of command, and who is in charge, will contribute to mistakes and ineffectiveness in a real crisis situation.

These issues go to profound questions that relate to the nature of the Republic and Federalism. The use of Federal forces in civilian situations, and the restraints imposed on those forces, regardless of how well intentioned

their employment may have been. The nature of terrorism creates uncertainties in countering it here in the Homeland.

I call to the Commission's attention two excerpts from a letter of the Chairman of the Senate Armed Services Committee, Senator Warner, to the Secretary of Defense last September that sets out in greater detail statutory issues to which I have referred.

REGIONALISM

A catastrophic terrorist incident is likely to affect multiple contiguous jurisdictions and will cross-state and local political boundaries.

Consequently, Reserve Components must be prepared to operate regionally, and not be limited operationally by geography or political boundaries.

Statutory action may be necessary to achieve effective regional cooperation.

There presently exist interstate compacts to utilize the use of Guard troops and equipment across state lines; however it is suggested these compacts be reviewed by this Commission, and the Congress for adequacy in a Homeland Security disaster situation. Some states may not be included in these compacts.

NEW MISSIONS—OLD AUTHORITY

The terrorism war and Homeland Security are essential missions for the Reserve Components. This is especially true for the National Guard, because

of its origin and authorities under the Militia Clause of the Constitution. The war on terrorism and homeland security should be perceived as a dual mission equated in importance with overseas deployments for combat operations. Neither mission is an exclusive one. The Guard should be prepared for both.

COMPONENT TENSIONS

Tension between Active and Reserve Components is historic. General Washington, and especially Hamilton, both voiced concerns about militia capabilities.

Finger pointing still exists on both sides. The nature of the Homeland Security mission makes it imperative these differences be resolved, especially when an incident occurs requiring the introduction of Federal forces into a civilian catastrophe. If Active Forces are used, they must tread lightly with the civilian population and local leaders and first responders. The Guard and Reserve, particularly the Guard, should have primary responsibility in these situations, and be the force of choice. Regulars would be used to supplement, if necessary, their efforts.

INTEGRATION OF ACTIVE PERSONNEL INTO THE RESERVE AND GUARD

I suggest consideration be given to integration in the Guard and Reserve of small numbers of the Regular Forces, both officer and enlisted. This would

occur at the various levels of command of Reserve Components units. For the Regulars, this would be a two to three year tour.

These tours with the Reserve Components would increase understanding in the Active Force of the Guard and Reserve, and reduce friction between Active and Reserve Components.

It is my understanding the Marines have had notable success with the integration of Active duty personnel with their Reserves. The numbers integrated are relatively small.

THE FAMILY SUPPORT NET

Wives and children of Guard and Reserve play a key role in the effective service and retention of the member. Their support needs may be different than those of the Active families, but it remains a critical requirement.

Family support systems for the Active are centered on the military base of the unit to which they belong. However, Reserve Component dependents may be far flung with little communication between family members. There has been notable success in family support in the Iraq War, but we must ensure there is a Defense wide standard of care for all units.

EMPLOYER SUPPORT

The hardships that occur on employers, especially small businesses, often are not apparent. I would urge the Commission to consider this issue along with employer support as one of highest priority. There is the risk of

inequities to both employers and employees where the latter are Guard/Reserve members. Some employers are generous in compensating members called to duty by protecting them from loss of pay.

Small employers may not be able financially to make this type compensation. Consideration should be given to Federal tax advantages to employers who employ members of the Reserve Components. The Swiss experience in this regard is suggested as an example.

THE ROAD AHEAD

Funds to sustain Active and Reserve Components both for strength and readiness will be a major challenge for the future. Consequently, there should be developed a sustained educational program on the critical role and missions of the Reserve Components. This educational effort should be directed to the American people, the legislatures of the States, and especially the Congress.

THE BATTALION STRUCTURE

At the present time the most functional Citizen-Soldier military unit is, in my view, the battalion, especially the Infantry battalion. I am increasingly of the view it is the optimum unit for overseas deployment. Others may differ with this view.

I would suggest the Division unit would be an administrative unit, and would not deploy, except in an all out war. However, in a Homeland Security

mission, these higher echelon units could play an essential role in homeland security operations.

THE CATASTROPHIC INCIDENT

Should there be a catastrophic incident, either terrorist or natural disaster, significant military forces will likely be needed to augment the efforts of first responders. I am of the view it is best that forces employed should, if possible, be those organized under the Militia Clause of the Constitution.

POSSE COMMITATUS

This statute, adopted in the 1870's, and directed to the Army, is a cornerstone in limiting the use of the Active military in domestic law enforcement situations. Because of amendments, the scope and effectiveness of its authority is in question. The Congress should review the law, and make those changes it deems advisable for Homeland Security situations.

FULL TIME PERSONNEL

"Full time personnel" contribute immensely to the readiness and effectiveness of the units in which they serve. It is important to continue, and to strengthen, this program. However, for the Reserve Components, it becomes a cost issue. The number assigned will vary by Service. It is my recollection during my tenure as Secretary of the Army the AGR count in the

Army Guard was around 6% and in the Air Guard around 25%. The Army Reserve may have been slightly less than the Army Guard.

ARTICLE IV, AND INSURRECTION STATUTES

I would suggest this Commission review the authority of Article IV of the Constitution, and especially Section IV of that Article. It is a lesser-known provision of the Constitution. It guarantees to each State of the Union a Republic Form of Government. In a Homeland Security incident, this could be a source of authority. The Insurrection Statutes are associated with this Article.

QUARANTINE FOR BIOLOGICAL ATTACK

The power of Quarantine as a general rule is a state and local power. However, there can be a Federal role under the authority of the Interstate Commerce clause.

Quarantines may be necessary, but difficult to achieve. Police and military forces may be required to accomplish it. However, this Commission should review this issue to define Federal, State and Local responsibilities, especially if there were a biologic attack.

EQUIPMENT FOR RESERVE COMPONENTS

The status of equipment for Reserve Components has ranged from non-existent, to aged, worn-out and obsolete. For Army Reserve Components

units, this situation has been significantly improving in recent years for certain types of equipment, but has lagged in others. With the activation of units for overseas deployment, equipment in many cases deploys with the unit, and often is left there when the unit returns to its home station.

It is vital this equipment be restocked, particularly in light of the Homeland Security Mission. Costs will be a factor, and Congressional action necessary.

STATE DEFENSE FORCES

Most, if not all, states provide by statute for state-defense units to augment their local National Guard in the event the latter is deployed. They could play a vital role in Homeland Security.

The strength, capability and readiness of these auxiliary forces varies. Therefore, it is suggested the states be inventoried, and Congressional action sought to increase their readiness.

CONNECTING LINKS

It is important the military has ties to, and enjoys the support of the civilian population. With an All Volunteer Force, there is the risk of alienation as the military is perceived as more of a mercenary force. A growing national population, now in excess of 300m, increases the risk of alienation because the ratio of civilian to military widens. This makes the Reserve Components of even greater importance because they have a dual status that is both

civilian and military. In this dual role, they become connecting links between two very different cultures. These ties become important in explaining to the civilian world military needs and goals, as well as fostering support for those in military service.

NAVY MILITIA

Because of the vulnerabilities of US ports to terrorist attack, and the increasing volume of water borne commerce, militia naval forces should be established in coastal and maritime states. These naval forces should be a part of the National Guard of these states. Presently, Navy militia units exist in a few states, and there is historical precedence and statutory authority for their establishment.

This could be a mission of the Navy Reserve, or Coast Guard Reserve, or both, under the National Guard of the coastal/maritime state.

CIVIL AFFAIRS UNITS

Civil Affairs units are found in the Army and the United States Marine Corps. They are a valuable asset. The largest representation is in the Army. It has been suggested such units be represented in the other Services. This suggestion has merit and one, I would recommend, the Commission consider.

Civil Affairs units offer many skills that could be helpful in recovering from a catastrophic incident. The performance of the units in the first Gulf

War was widely acclaimed, once field commanders became aware of the units and their capabilities. They are under the Special Operations command.

These units should also be State military assets under the Militia Clause.

VETERANS IN THE RESERVE COMPONENTS

Prior to the Iraq War the number of active duty veterans in the Reserve Components was higher than many realized; however, that number could not be established, in part because of different recruiting chains of the Guard and Reserves. This is an important statistic for evaluating the force, and the Department of Defense should implement a system to accomplish this. This is especially true in light of the active duty experience and combat experience of Reserve Component forces that have served in the Iraq War.

DOMS REVISITED

DOMS (Director of Military Support) was an historic component of the Army dedicated to providing military support to disasters and other civil emergencies. Through long standing arrangements it drew on and coordinated the resources of other Federal agencies. Commanded by a Major General, civilian control was assured by his reporting directly to the Secretary of the Army. DOMS was generally recognized as being effective. Over objections this mission was removed from the Army, and apparently resides in

Northern Command. In the deliberations of this Commission DOMS may be a template to evaluate its successor entity.

FORCE PACKAGE FOR HOMELAND DEFENSE

These comments relate principally to the Army. Preparation for Homeland Security missions requires assessing the potential threat, and collateral damage, and the resources that would be needed to respond, especially the force package.

As mentioned earlier my view is the Militia Clause is the cornerstone for deployment of forces into a civilian emergency. Consequently, it may be helpful to migrate certain Reserve units with special capabilities into the Guard. Medical units, Engineer units, Transportation and Maintenance units would be considered. Perhaps by statute these units could be dual-hatted.

MILITIA STATUTE – U. S. CODE

A copy of the U. S. Code relating to the Militia is attached. It is noted that all males between 17 and 45 unless in the Guard or Navy Militia are members of the unorganized Militia. Similar provisions can be found in the codes of the States. It finds its precedence in pre-colonial England.

The following is not a recommendation to abandon the All Voluntary Force, but only suggests an alternate manpower approach if a catastrophic incident presents a need for manpower that exceeds forces available, or Guard strength cannot be maintained. In that event, service might be required

under the United States Militia Statute in a Civilian Auxiliary Force (CAF). This service would be performed in the local Guard. It would be for a short term with initial training in the State, and educational benefits for those taking part.

INFORMATION INFRASTRUCTURE AND
HOMELAND SECURITY DIRECTIVE 7

This Presidential Directive 7 protecting the information infrastructure. The use of cyber assets by military forces is rising rapidly. By far most of the information resources are in the private sector. It is important that Reserve Components develop their capabilities in this area, and it is suggested this Commission might explore the issue further.

United State CodeTITLE 10 - ARMED FORCESSubtitle A - General Military LawPART I - ORGANIZATION AND GENERAL MILITARY POWERSCHAPTER 13 - THE MILITIA**CHAPTER 13—THE MILITIA**

- Sec.
311. Militia: composition and classes.
312. Militia duty: exemptions.

§ 311. Militia: composition and classes

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, 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.

(b) The classes of the militia are—

(1) the organized militia, which consists of the National Guard and the Naval Militia; and

(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

(Aug. 10, 1966, ch. 1041, 70A Stat. 14; Sept. 2, 1958, P.L. 85-861, § 1(7), 72 Stat. 1439; Nov. 30, 1993, P.L. 103-160, § 524(a), 107 Stat. 1656.)

§ 312. Militia duty: exemptions

(a) The following persons are exempt from militia duty:

(1) The Vice President.

(2) The judicial and executive officers of the United States, the several States and Territories, and Puerto Rico.

(3) Members of the armed forces, except members who are not on active duty.

(4) Customhouse clerks.

(5) Persons employed by the United States in the transmission of mail.

(6) Workmen employed in armories, arsenals, and naval shipyards of the United States.

(7) Pilots on navigable waters.

(8) Mariners in the sea service of a citizen of, or a merchant in, the United States.

(b) A person who claims exemption because of religious belief is exempt from militia duty in a combatant capacity, if the conscientious holding of that belief is established under such regulations as the President may prescribe. However, such a person is not exempt from militia duty that the President determines to be noncombatant.

(Aug. 10, 1956, ch. 1041, 70A Stat. 15; Sept. 29, 1988, P.L. 100-466, § 1234(a), 102 Stat. 2059.)

Excerpts of letter 14 September 2005,
Senator John Warner, Chairman
Senate Armed Services Committee to Secretary of Defense Rumsfeld, reference
Hurricane Katrina

The regular armed forces may afford humanitarian assistance to persons affected by disasters of this sort, but may not maintain public order in such emergencies. The 1878 Posse Comitatus Act generally prohibits the use of the armed forces to enforce civilian law, unless Congress specifically authorizes it. While the Act does not apply to the National Guard while under the control of the governor, the command and control of such forces, depending as it does in multistate situations on comity and reciprocity among governors, presents its own problems. The use of the National Guard under title 32, U.S. Code, presents the federal government with a situation in which the federal government is expected to provide funding while leaving command and control to the States. The insurrection statutes found in chapter 15 of title 10, U.S. Code, do bypass the Posse Comitatus Act, but they were enacted in the 1860s and 1870s to deal with primarily different situations. Presidents, however, have had to invoke them in contemporary times. Assistance to civilian law enforcement under chapter 18 of title 10, the modern statute, cannot extend to the core law enforcement functions—arrests, searches, and seizures—that may be essential on a temporary basis to the restoration of public order in a situation like the present one.

I recommend that you conduct a thorough review of the entire legal framework governing a President's power to use the regular armed forces to restore public order in those limited situations involving a large-scale, protracted emergency like the present one. This review should include the Posse Comitatus Act itself; the insurrection statutes found in chapter 15 of title 10, U.S. Code; the statutes relating to military support for law enforcement found in chapter 18 of that title; the statutes governing the federalization of the National Guard; and any other authorities that the Department deems relevant. The inquiry should not be limited to natural disasters, but should also include large-scale public health emergencies, terrorist incidents, and any other situations which could result in serious breakdowns in public order.