

# Understanding All of Terrorism's Domestic Threats

**David L. McGinnis**

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**An American Analyst**

“An American Analyst” is a Citizen and U.S. combat veteran, with experience in Force Structure, Strategic Planning and Programming, and Public Policy, who retired from public and private employment to exploit his First Amendment rights to provide an ingenuous source of analysis in the public interest. The contents represent his conclusions.

# Understanding All the Domestic Threats of Terrorism

## Executive Summary

**Using national security as the process to insure domestic tranquility justifies pause.**

The use of the Federal Military to maintain or reestablish domestic tranquility represents the complete failure of our government, not a legitimate act to protect us. This provides strong justification for Americans to doubt the legitimacy, appropriateness and the value of the Department of Defense (DOD) efforts to establish military headquarters for domestic operations within the Unified Command Plan process as a response to domestic terrorist threats. These types of headquarters are not the best solution to this need. To do this without consultation with the States adds to this concern.

**Domestic tranquility must be left with the people;** it is one of the five basic objectives of our government and a power reserved to the respective states. It is accepted as a function of law enforcement; not an arena where the Federal Government is always welcome, especially the Federal military. The expectation of the Armed Forces is to protect the respective States and the people from invasion by outside threats.

**Congress has characterized terrorist acts within the United States as crimes.** The Congress has correctly defined domestic terrorism in a criminal, not a national security context, but has allowed military technical expertise and logistical prowess to be shared with civilian agencies. However, Presidents have used classified Presidential Decision Directives to unilaterally place domestic counter terrorism activities under the guise of national security.

**America has a sound tradition of dealing with domestic dangers.** Should law enforcement fail and a terrorist event occur, the mediation and consequence management will follow tested plans already in place at the state and local level for nuclear, chemical and explosive accidents or medical epidemics. The introduction of military forces would come from the organized militia of the state, commanded by the Governor through the Adjutant General. This response will range from supporting governmental agencies to direct law enforcement. New York's response to 09-11-01 is the latest example of this.

Cold-War national security processes, such as domestic application of the Unified Command Plan conflict with our need and American tradition. The need for this more focused joint capability beyond our traditional resources now, when the potential is a small number of events initiated by a few international criminals, is highly questionable.

Of added concern is the disregard for Executive Order 13132, entitled Federalism, dated August 5<sup>th</sup>, 1999, which recognized a need for consultation with the States and the limitations on Federal powers inherent in the Tenth Amendment. As the Governors have stated: "The principle of avoiding preemption by the federal government in areas of primary state responsibility is applicable across the board, covering issues such as education; insurance; crime control..."

The possibility of martial law must be viewed as a last resort, because its implementation represents the failure of our system of government not a measure to protect it. It is the opinion of this study that DOD's unilateral action increases the probability of martial law where no emergency powers need exists.

**In Exploring This Issue Two Conclusions Were Reached:**

**1. DOD's Efforts to Establish a Domestic Foothold By Establishing a Dedicated Military Headquarters Takes the Nation Where No Emergency Powers Need Exists.**

The Common Defense, General Welfare, Justice, Domestic Tranquility and Liberty are too important to be collectively or individual left solely inclusive of the Constitutional power to command. The separation of power provisions makes this clear. Congress needs to address this uninvited *national security* incursion into the Constitutional realm of the Congress, the states and civilian law enforcement, beginning with a national debate on how America chooses to preserve its domestic tranquility without surrendering its basic character.

**2. There Are More Acceptable And Realistic Alternatives For The Congress To Explore.**

History and logic encourages the Congress to use the Organized Militia to help our Governors and the Attorney General execute the laws on terrorism. Of the tools available to the Congress in our Constitution, staffing a headquarters with members of the organized militia in Federal Service to execute the laws of the union, would be the most correct and least intrusive method should the Congress validate this need. This makes the vast technology and logistics of the DOD domestically available as Congress desires, facilitate rapid, lawful expansion of local, state and Federal law enforcement while actually decreasing the danger of domestic military activity outside of the Constitution.

**From these conclusions this paper recommends that the Congress and the American People rely on the National Guard, in its Civil Role, to Help Our Governors and the Attorney General Enact the Laws Congress Has Enacted on Domestic Terrorism.**

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# Understanding All of Terrorism's Domestic Threats

## Introduction

There is strong justification for Americans to doubt the legitimacy, appropriateness and the value of the Department of Defense (DOD) efforts to establish military headquarters for domestic operations within the Unified Command Plan process as a response to terrorist threats. These types of headquarters are not the best solution to this need. This paper will explain why and provide alternatives.

The concern over establishment of domestically oriented DOD Task Forces is that they:

- Can be construed as Constitutionally Intrusive.
- Are redundant to capabilities already available to America's civilian leadership.
- Limit the scope, timeliness and flexibility with which the Congress and the President can respond to the needs of local, state and Federal civilian authorities.

## Domestic Tranquility Must Be Left With the People

In the United States, domestic tranquility is one of the five fundamental objectives of our national government<sup>1</sup> and a power reserved to the respective states unless their legislatures petition the national government for assistance.<sup>2</sup> Domestic tranquility is a cherished possession accepted as a function of law enforcement at every level of government. It is not an arena where the Federal Government is always welcome, especially the Federal military. The Constitutional expectation for the Federal Military is to protect the respective States and the people from invasion by outside threats.<sup>3</sup>

The authorizations established in law for the domestic use of the Armed Forces<sup>4</sup> by the President include specific limitations on their use and the types of support they can provide to law enforcement agencies.<sup>5</sup> Using armed forces raised under the Armies clause of the Constitution to enforce the law is a crime<sup>6</sup> and more important a violation of trust between the people and their Government.<sup>7</sup>

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<sup>1</sup> Preamble, US Constitution

<sup>2</sup> Article IV, Section 4, US Constitution.

<sup>3</sup> Ibid.

<sup>4</sup> The armed forces are the Army, the Navy, the Air Force and the Marines and their Federal Reserves

<sup>5</sup> 10 USC Chapters 15 and 18

<sup>6</sup> 18 USC 1385

<sup>7</sup> Warren, Earl. The Bill of Rights and the Military. The Third James Madison Lecture, New York University Law Center, New York, NY. Feb. 1, 1962

The Federal courts have traditionally viewed the constitutional issue of domestic tranquility as political in nature and found that the Congress best handles it<sup>8</sup>. The Congress has characterized acts of terrorism within the United States as crimes, including those using statutorily defined Weapons of Mass Destruction (WMD).<sup>9</sup> These acts can also be categorized as criminal activity within the jurisdictions of the respective states. In this regard the Attorney General and the Justice Department (DOJ) are accurately designated as the Lead Federal Agency (LFA) in protecting Americans against this danger and the FBI has the lead in the DOJ. Congress has also acted to allow the Secretary of Defense to provide limited assistance to the Attorney General and the Director, FEMA, on a case-by-case basis in a similar manner to what they have authorized for other law enforcement activities.<sup>10</sup>

President Clinton, through several findings, orders, directives and public statements, has hyped the threat of terrorism since the end of the Cold War. This hype has been used to justify the use of classified Presidential Decision Directives (PDD) 39 (Terrorism) 62 (Counter terrorism) and 63 (Critical Infrastructure) to unilaterally plan for domestic counter terrorism as a Federal national security responsibility. This can be characterized in the views of the Father of the Constitution as a decade removed unjustifiable extension of Cold War emergency powers accepted when our existence as a people was threatened, but is no longer the case. As Madison cautioned, “In time of actual war, great discretionary powers are given to the executive magistrate. Constant apprehension of war, has the same tendency to render the head too large for the body.”<sup>11</sup>

Terror “threats” have been further hyped by Secretary of Defense William Cohen to the point of holding a press event to proclaim that a five-pound bag of sugar represented enough weaponized Anthrax spores to kill 40,000 citizens or the nation’s Capital City and it’s surrounding population. The Secretary and other leaders within DOD exploited this hype to expounded on the need to constrain our civil liberties<sup>12</sup> as the price of protection against a still undefined threat of domestic terrorism<sup>13</sup>.

Yet history since 9-11-01 has and continues to show that all of this Executive/DOD effort was more spin than substance and we are the worse off for it.

As already noted the Congress has responded responsibly to concerns over potential domestic terrorism through legislation to insure military technical expertise and logistical prowess are shared with civilian agencies and to give the President and Attorney General the tools needed to prevent such attacks within the context of criminal law. This was accomplished, in large part within the Nunn-Lugar-Domenici legislation contained in the

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<sup>8</sup> US Government Printing Office (GPO). The Constitution of the United States of America, Analysis and Interpretation. Washington, D.C. 1973. Pg. 850 - 853

<sup>9</sup> 18 USC 175a

<sup>10</sup> Title XIV, Public Law 104-201

<sup>11</sup> Collier, Christopher and Collier James Lincoln. Decision in Philadelphia; The Constitutional Convention of 1787. Ballantine Books, New York, NY. June 1987. Pg. 316

<sup>12</sup> Holmes, H. Allan. Countering Terrorist Challenges, AFJI, February 1998

<sup>13</sup> Freeh, Louis. Testimony before Appropriations Subcommittee. February 4, 1999

Defense Authorization Act for Fiscal Year 1997, in 1996.<sup>14</sup> This Act included detailed findings by the Congress regarding the potential threats from WMD, generally and domestically. It further defined functional responsibility with direction for immediate action by the Executive Departments to address immediate concerns, while amending U.S. Code to provide direction over the long term. These amendments unquestionably make domestic terrorism, and all terrorist acts against Americans, a crime. They also clearly limit the support the Secretary of Defense can provide.

By declining to define domestic terrorism as a national security matter, the Congress remains within the framework of Constitutional history. Therefore, concern over this danger being placed under the guise of national security by the Clinton and Bush Administrations, as an effort to set aside the powers reserved the States to preserve domestic tranquility, is justified and necessary.

From the legislative language it has produced the Congress clearly understands the Constitutional context of domestic tranquility, in agreement with the Governors<sup>15</sup>. In its own findings the Congress recognized the potential treat, the lack of planning and countermeasures at all levels; and the need for exercises with well coordinated participation at the Federal, state and local levels<sup>16</sup>. The Congress further found that training and exercises would expand the desired expertise at the State and local levels and provided the instructions and funds for that purpose.

The Government Accounting Office (GAO) has reported that the response by the departments of the Federal Executive Branch to Congressional instruction has been less than stellar. Departmental efforts seem more in line with consolidation or preservation of bureaucratic power than protecting the American people or their institutions. Eight years after the first implementing PDD 39 the FBI's work were represented by a draft plan and guidelines that are still unfamiliar to many state and local officials responsible for domestic tranquility. Much of this delay may be credited to reported bureaucratic infighting that is not entirely the fault of the FBI. Part of this friction could also be the result of the broad divergence of policy requirements between the applicable national security PDD's and law enforcement statutes in this area.

Louis Freeh, former Director of the FBI, provided an outline of an extensive strategy for the period 1998 –2003 in his 1999 testimony before the Congress and focused his remarks on two strategic goals, both of which logic strongly supported and history unfortunately has already validated: prevent, disrupt and defeat terrorist operations before they occur; and deter the unlawful exploitation of emerging technologies by terrorists and criminal elements.

The findings related to our vulnerabilities that were exploited on 9-11-01, in the context of Director Freeh's strategic proposal, further highlight the misguided nature of DOD's

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<sup>14</sup> Title XIV, Public Law 104-201

<sup>15</sup> National Governors' Association Policy Statement HR-10 Domestic Terrorism, Feb 1999.

<sup>16</sup> Title XIV, Public Law 104-201.

post-Cold War domestic focus. Americans would be better served if the DOD and all its Federal elements aligned with their rationale for existence by focusing on identifying, disrupting and neutralizing these external threats.

### **America Has a Sound Tradition of Dealing with Domestic Dangers**

Law enforcement at the state and local level will be in the best position to detect activities of terrorists that are necessary to perpetrate terrorist events. This will be made much easier by the program envisioned by Director Freeh, providing good intelligence that will give the local and state agencies a better idea of what they are looking for. Unfortunately this hasn't happened yet as indicated by concerns expressed by mayors, police chiefs and police commissioners.

Should law enforcement fail and a terrorist event be successfully initiated, the mediation and consequence management will follow tested plans already in place at the state and local level for nuclear accidents (Three Mile Island/Chernobyl), industrial chemical and explosive accidents or medical epidemics. Most of these plans came into existence well before the President first acknowledged a domestic terrorism threat publicly in 1994<sup>17</sup> and many are well exercised at the state level<sup>18</sup>. Localities, counties and state governments maintain significant emergency response capabilities to concentrate and share resources in domestic crisis. These plans have evolved and matured, literally, from the time of the first European settlers in North America. They are the product of natural and man-made disasters and their possibility of occurrence. This is exactly what happened in response to 9-11-01 and the anthrax attacks that occurred outside of Washington, DC.

Responses under these plans is implemented spontaneously at the lowest level of government having the capability to respond – city, county or state<sup>19</sup>. The first introduction of military forces would come from the organized militia of the state under the command of the Governor and his Adjutant General, supported by the command and control system of the State Area Command (STARC). This is a proper and one of the intended uses of the Nation's organized militia established in law.<sup>20</sup> In most cases this response and the controlling headquarters would be Joint in the current Federal Military Definition of that type organization.<sup>21</sup>

The response of the Constitutional militia will range from supporting governmental agencies with a wide range of services to direct law enforcement all within the context of long established law. Reinforcement of the State's military forces would come from adjacent states based on existing congressionally sanctioned inter-state agreements under

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<sup>17</sup> President Clinton first recognized these threats in Executive Order 12938, November 14, 1994

<sup>18</sup> Holmes. Op. cit.

<sup>19</sup> National Governors' Association Policy Statement HR-10 Domestic Terrorism, Feb 1999.

<sup>20</sup> Article I, Section 8. One of the three specified roles of the militia is enforcing the laws of the Union.

<sup>21</sup> Organized militia forces include Army and Air National Guard units, and in New York State Marine and Naval Reserve units of company and battalion size. This "jointness" has existed since 1947

the Emergency Management Assistance Compact (EMAC)<sup>22</sup>, with the help and support from all the States of the union orchestrated by the Chief, National Guard Bureau, a National Guard officer on active duty nominated by the Governors, appointed by the President and confirmed by the Senate.

Since the Congress has directed that the units and organizations of the organized militia “shall be the same as those prescribed for the Army (and the Air Force)...”<sup>23</sup> there should be no difference in functional capability if these units are properly resourced and allowed to train properly on a regular basis<sup>24</sup>. The level of maturity and experience of National Guard personnel<sup>25</sup>, relative to the Active forces, as well as familiarity with the domestic contingency plans in place and providing support to civil authorities in general, reinforce their credentials for this role.

Should Federal involvement or assistance be requested by a state for a terrorist event, unity of command and simplicity would dictate using the Joint Headquarters already controlling the situation, in this case the STARC. If Federal control is expanded these and other elements of the organized militia of the United States should be called into Federal Service as the organized militia – not as a Reserve of the Army or the Air Force. This option provides a Federal command and control element capable of supporting the Justice Department and the Federal Emergency Management Agency (FEMA) with broader possibilities for employing the militia in Federal service, similar to those available to the Governors, not constrained by the statutory limitations on the Federal armed forces that would require the implementation of Martial Law to expand beyond current statutory support parameters.

### **Don't Create Other Fears When the People Are Already Confronted with Terrorism**

Efforts to establish a domestically focused Federal military headquarters under DOD to date has been a unilateral act of the President and the Secretary of Defense under a statute and system designed to defend America from potentially cataclysmic foreign aggression – specifically the Soviet Union during the Cold War – and no longer Constitutionally legitimate as we have already established. This belief is reinforced by DOD intent for these organizations:

- To provide DOD command and control headquarters for Weapons of Mass Destruction (WMD) Consequence Management (COM).
- To command standing joint task forces with an operational focus.... responsible for the planning and execution of DOD response for the COM of WMD incidents.

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<sup>22</sup> National Governors' Association Policy Statement HR-25 Emergency Management.

<sup>23</sup> 32 USC 104

<sup>24</sup> National Governors' Association Policy Statement HR-10 Domestic Terrorism, Feb 1999.

<sup>25</sup> Over 60% of the National Guard personnel have completed a tour of service in the Active armed forces and all have completed the same training curriculums and testing prescribed for the Active force.

- To respond when the President issues a Federal emergency declaration and the National Command Authority (NCA) approves through the Joint Operations, Planning and Execution System (JOPES) the domestic use of the Federal military.

Throughout the Cold War, in spite of direct Soviet targeting of the United States, with thousands of nuclear warheads, no such headquarters was established. In the event of war, plans called for U.S. Forces Command and the Continental U.S. Armies (5 each) to orchestrate Federal military support through the STARC in each state in the manner similar to that already discribed.

The criminal threat of terrorism we now face, while potentially devastating upon localities attacked, cannot be compared with the consequence of failure of our Cold War strategies that fostered such vast emergency powers in the Executive Branch such as the NCA and JOPE systems. This raises the question: Is it Constitutional to place a “combatant commander” with the authority to “employ forces within that command as he considers necessary to carry out missions assigned to the command;”<sup>26</sup> in a position to act domestically? It appears that it is not proper and amounts to a legacy response to a new challenge that cries out for creativity and conformity to deal with a few international criminals<sup>27</sup>.

The concern identified here is obviously shared in the Congress, who did not give the President a vehicle in legislation to create a domestically focus a wartime combatant headquarters to combat terrorism, but instead a limited authorization to assist DOJ within closely defined guidelines.<sup>28</sup> While Senator Bond has proposed such a headquarters in the current Congress, it remains to be seen how the Congress will embrace it.

Of added concern is the establishment these headquarters in the face of Executive Order 13132, entitled Federalism, executed on August 5<sup>th</sup>, 1999 and the circumstances that led to its execution by the President. This Executive Order clarified the Clinton Administration’s definition of Federalism in a manner much more aligned with the Reagan administration. The Governors liked the Reagan order<sup>29</sup> that recognized a need for consultation with the states and the limitations on Federal powers inherent in the Tenth Amendment. As the Governors have stated: “The principle of avoiding preemption by the federal government in areas of primary state responsibility is applicable across the board, covering issues such as education; insurance; crime control...”<sup>30</sup>

Commenting on an earlier DOD proposal of this nature in 2000, Gregory T. Nojeim, legislative counsel on national security for the American Civil Liberties Union said, “The

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<sup>26</sup> 10 USC 164(c)(D)

<sup>27</sup> On July, 6, 1999 Louis Freeh, Director of the FBI announced Usama Bin Laden was added to the FBI’s *10 Most Wanted List*.

<sup>28</sup> Title XIV, Public Law 104-201

<sup>29</sup> National Governors Association Principles for Federal – State Relations, Feb 1997

<sup>30</sup> *ibid*.

danger is in the inevitable expansion of that authority so the military gets involved in things like arresting people and investigating crimes.”<sup>31</sup>

While DOD has vast logistics and technical capability developed to support Cold War military operations that can not be ignored, there are better and more efficient methods of making both more available to civilian leadership than by employing the Federal armed forces domestically and establishing a system that requires the Nation to invoke martial law much quicker than is necessary or prudent.

## **Conclusions:**

**1. DOD’s Efforts to Establish a Domestic Foothold Takes Us Where No Emergency Powers Need Exists.** The possibility of martial law must be viewed as a last resort, because its implementation represents the failure of our system of government not a measure to protect it. Congress needs to address this uninvited *national security* excursion into the Constitutional realm of the Congress, the states and civilian law enforcement. The ability for DOD to bypass the laws of Congress through Executive *national security* mandate must be withdrawn until we again confront sufficient danger to justify this deviation. The Constitutional separation of powers recognizes that the Common Defense, General Welfare, Justice, Domestic Tranquility and Liberty are too important to be collectively or individual left solely to the Constitutional power to command.

The framers were as concerned as the States at the time of drafting and ratification of the Constitution about this specific issue. As a result, a national debate on how America chooses to preserve its domestic tranquility without surrendering its basic character, especially following 9-11-02 is in order and it is the Constitutional role of the Congress to lead that debate, so that the Congress can expand on the solid work it has already accomplished in this regard (Public Law 104-201).

**2. There Are More Acceptable And Realistic Alternatives For The Congress To Explore.** As an initial step in this National effort, the Congressional delegations and executive and legislative leaders of each state should be encouraged to confer, as our Governors have requested, in a bipartisan atmosphere and determine through this exploration America’s collective wisdom for the new era.

The result of this process must give the civilian leadership of Government at the local, state and Federal level the ability to prevent, disrupt and defeat any criminal act against our domestic tranquility. This must include the ability to cope with the unforeseen and escalating dangers through the appropriate and correct application of power, enhanced by

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<sup>31</sup> Broad, William J. and Miller, Judith. Pentagon Seeks Command for Emergencies in the U.S. New York Times. January 28, 1999.

its legitimacy, preparation, practice, and clarity of purpose. Bureaucracy must be subordinated to the public good, rather than allowed to perpetuate itself on public fear.

If the Congress desires the Attorney General and/or the FEMA Administrator to have a national headquarters for the purpose of assisting in the prevention of domestic terrorism or to help mitigate the consequences of a successful criminal attack, then in keeping with Judicial interpretation cited above, such a headquarters should be created in law by the Congress. The founders gave the Congress the tools and the authority to use them in Article I -- especially in the Militia Clause -- to meet their responsibility for insuring domestic tranquility in line with Article IV, Section 4.

### **Recommendation: Use the Organized Militia In a Civil Role to Help Our Governors and the Attorney General Enact the Laws.**

Of the tools available to the Congress in our Constitution, staffing a headquarters to leverage National Guard and DOD capabilities through the members of the organized militia of the several states in extended Federal Service to perform the civil function of executing the laws of the union (rather than as a Reserve of the Army or Air Force), would be correct and least intrusive. Since the object of government is more to protect (as Director Freeh asserts) than to respond (as DOD plans for) Congress could also put a mechanism in place for the President to call the organized militia into Federal Service to augment and reinforce the Attorney General's regular capabilities to prevent, intercept and respond to crimes of terrorism under the command of this headquarters.

Based on events leading up to the 1999 holiday season, in the United States and abroad, a strong case can be made for the capacity to swiftly augment law enforcement officials to reduce or preclude the likelihood of such a domestic event occurring. The capability to increase law enforcement presence on our border by several powers over the existing capacity in a non-intrusive manner is one example that should encourage such a capability. Similar benefits to improve surveillance of potential targets, routes, agents; to increase intelligence capacity or direct action against identified enemy capabilities are all possible by leveraging National Guard personnel and resources.

Procedures already exist for funding such a traditional yet innovative program. Working with the DOJ, Congress could provide Federal monies through the National Guard Appropriation to allow such a headquarters to be directly responsive to the Attorney General, support the Governors and assist local, state, and Federal law enforcement with a concept similar to the one the Congress is employing to support counter-drug operations<sup>32</sup> but on a larger scale. As an example, Guard aircraft, communications, logistics, physical security and a broad range of other capabilities could be on "short recall" or a form of "alert" when not deployed or training for military readiness. This concept would make the vast technology and logistics of the DOD available while actually decreasing the danger of domestic military incursions.

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<sup>32</sup> 32 USC 112

In creating such a headquarters, or even a national and regional command and control structure, the Congress should consider amending Title 32 of the United States Code – The National Guard – for this purpose, as these are the statutes that apply to the National Guard in its Common Law and Constitutional roles. These amendments should include:

- Specific Congressional authorization to use the National Guard in its civil role and procedures for bringing it into Federal Service for this purpose.
- Further definition and expansion of the National Guard Appropriation that provides funding through this vehicle for the use of the National Guard in Homeland Security, to obviously include training and equipping.
- Organization for one, or more, headquarters staffed in part by Guard members in extended Federal Service to provide a planning and operational nuclei, with the remainder of personnel traditional Guard members designated, assigned and on alert to enter Federal Service on very short notice.
- Provisions for appointment and retention of the commanders and principle staff officers of these headquarters, including the requirement that they be appoint by the President, from officers nominated by their Governors, and confirmed by the Senate without the involvement of the Department of Defense.