

**Testimony of Jeh Charles Johnson
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Before the Senate Armed Services Committee
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Mr. Chairman and Senator McCain, thank you for the opportunity to testify here today.

You have asked me to discuss a provision of the proposed “National Guard Empowerment and State-National Defense Integration Act of 2011” – specifically, the provision that would make the Chief of the National Guard Bureau a member of the Joint Chiefs of Staff. Before I get to the specifics of the proposal, however, I thought it might be helpful to the Committee if I provided some general legal background on the National Guard, the Chief of the National Guard Bureau and the Joint Chiefs of Staff.

The National Guard is a unique entity that operates at different times under federal and state authorities. All members of the Guard are members of both their State National Guard and the federal National Guard of the United States. The Army and Air National Guards of the United States are two of the six reserve components of the Department of Defense; the Army, Navy, Air Force and Marine Corps Reserves are the other four reserve components.

Members of the National Guard can serve in three distinct statuses, each of which has differing responsibilities and authorities.

First, National Guard members may serve in what is known as “State Active Duty.” State law dictates when Guard members assume this status; typical “State Active Duty” missions include first responder responsibilities after a natural disaster. The State pays for, and the State Governor commands, the National Guard when it is on “State Active Duty.” The Department of Defense plays no direct role.

Second, National Guard members may be ordered to duty under Title 32 of the United States Code, which I will call “Title 32 Duty.” When the Guard performs “Title 32 Duty,” it is performing federally-funded military training subject to Federal standards or domestic missions, both of which are under the command-and-control of the State Governor. Examples of “Title 32” missions include post-9/11 airport security, Southwest border security, and counter-drug support.

Third, the Department of Defense may call the National Guard to “federal service,” including in times of national emergency, as authorized by law. National Guard members ordered to active duty lose their status as members of the National Guard and become members of the Reserves of the Army or the Reserves of the Air Force. For example, this is the status of Guard members who have been called to serve in Iraq and Afghanistan. The Department of Defense both commands and funds the Guard when it is in “federal service.”

Thus, at different times, the National Guard may act as either a state or a federal entity. Indeed, many of the functions the Guard

performs are under neither the command nor the control of the Department of Defense; rather, for much of what the Guard does, State Governors are in command. And when the National Guard does act in federal service, it does so as part of the Reserves of the Army or Air Force.

Thus, the Chief of the National Guard Bureau does not command the National Guard acting in any of its three statuses. Rather, by federal statute, the Chief of the National Guard Bureau acts as a principal adviser to the Secretary of Defense on all matters involving non-federalized National Guard forces, and he also has the statutory duty to advise the Secretaries and the Chiefs of Staff of the Army and Air Force on all National Guard matters. A Department of Defense Directive further explicates the Chief of the National Guard Bureau's authorities and responsibilities, consistent with guidance provided by Congress.

Finally, I will briefly provide some legal background on the Joint Chiefs of Staff. The Joint Chiefs of Staff serve as the senior military advisers to the President, the National Security Council, the Homeland Security Council, and the Secretary of Defense. The Joint Chiefs are currently composed of six statutory members: the Chairman and Vice-Chairman of the Joint Chiefs and the Chiefs of the four Services. The Service Chiefs have a broad range of leadership and command responsibilities that extend throughout their respective services, encompassing both the active and reserve components of the Service.

Each of the Service Chiefs is the senior military officer of his respective Service.

Against this backdrop, I turn to the proposed legislation, which would make the Chief of the National Guard Bureau a member of the Joint Chiefs of Staff. I understand that the Chief of the National Guard Bureau currently attends meetings of the Joint Chiefs. The purpose of the proposed legislation is thus to make the Chief of the Guard Bureau's attendance at Joint Chiefs meetings a statutory entitlement, with its attendant statutory authorities and responsibilities.

There are no outright legal barriers to enacting this legislation. Nothing in the Constitution prohibits it, and the Joint Chiefs are a statutory creation. Congress can therefore change the membership of the Chiefs by statute if it so desires.

I think it is important, however, that the Committee is aware of some of the legislation's legal implications and complexities. Here I make two points.

First, I note that the Goldwater-Nichols Department of Defense Reorganization Act of 1986 struck many carefully crafted balances of both intra- and inter-service equities. The Chief of the National Guard Bureau represents only the Army and Air National Guards, and the proposed legislation would thus seem to me to alter some of Goldwater-Nichols's careful balances by, for example, (a) altering the fact that each Service is statutorily represented by one Service Chief in the Joint

Chiefs and (b) providing only two of the Department of Defense's six statutory reserve components with additional Joint Chiefs representation.

Second, elevating the Chief of the National Guard Bureau to represent National Guard equities to the Joint Chiefs could create legal confusion as to whether the Army and Air Force Chiefs of Staff continue to represent their total force. Current law already requires the Chief of the National Guard Bureau to advise the Army and Air Force Chiefs of Staff on all National Guard matters.

In closing, I would note that you have already received letters from the Chairman of the Joint Chiefs of Staff and the Service Chiefs that detail their concerns with the proposed legislation. Although Congress legally *could* make the proposed change, the much more important question would seem to be whether it *should*. With respect to this latter question, the Chairman of the Joint Chiefs of Staff, the Vice-Chairman and the Service Chiefs are far more conversant than I with respect to the operational and administrative consequences of adding the Chief of the National Guard Bureau to the Joint Chiefs. From my perspective, I only hope that any legislation does not add ambiguities with respect to authorities in the place where we can tolerate such ambiguity the least: at the top of the Service hierarchies, especially in time of war.

I thank you again for the opportunity to appear here today, and I look forward to your questions.