Forward

Collaboration and Consensus – A Team Effort

The effort to produce this report was a complex and substantial task involving the coordinated engagement of state and federal working groups and staffs. Governors and their representatives, Adjutants General, National Guard operational leaders, staff members, and subject matter experts coordinated the assessment of the potential conversion of Title 32 Military Technicians to Title 5 Civilian Employees in series of collaborative face to face meetings, and regular coordination conference calls over several months. Members of the working group included executive leadership, human resource officers, staff judge advocate officers, personnel officers, and National Guard Bureau staff members.

As part of this assessment, The Adjutants General of the States, Territories, and District of Columbia provided their “best military advice” on the strategic and operational impacts of the Section 1053 conversion.

The baseline assessment is that converting Title 32 Military Technicians to Title 5 Civilian Employees raises serious constitutional issues and substantially degrades military readiness. Modernizing the Title 32 Military Technician program, on the other hand, would create enduring change through enhancements to the rights and benefits of individual Military Technicians while preserving the readiness of the National Guard as the nation’s combat reserve and the States’ first military responders.

The report that follows is a collaborative effort of our work. The report responds to the request for an analysis of the implementation of § 1053 of the FY16 NDAA.

Major General Glenn H. Curtis
TAG, Louisiana
Co-Chair T32-T5 Working Group

Major General H. Michael Edwards
TAG, Colorado
Co-Chair T32-T5 Working Group

Major General Robert E. Livingston, Jr.
TAG, South Carolina
Co-Chair T32-T5 Working Group

Major General Thaddeus J. Martin
TAG, Connecticut
Council of Governors, Co-chair, TAG

Major General Timothy E. Orr
TAG, Iowa
Council of Governors, Co-chair, TAG
Executive Summary

Since 1968, when the Technician Act was ratified, the National Guard has transitioned from a strategic reserve, intended for use only in the case of global conflict, to an operational reserve, serving alongside active duty forces across the spectrum of military operations. Further, with the rise of domestic and international threats to the homeland, the military essentiality of the National Guard’s domestic mission has increased significantly. The establishment of a combatant command dedicated to the continental United States demonstrates the extent to which our States are threatened today in ways not considered in 1968.

Since that time, the National Guard has remained relevant, ready, and engaged.

Most recently, in the early morning hours of Thursday, 23 June 2016, West Virginia was devastated by 8 to 10 inches of rain within a few hours, creating flash floods throughout 44 of the 55 counties. These floods claimed the lives of 24 citizens. In just a few hours, these floods destroyed roads, bridges, homes, and other infrastructure that is critical to the state. Thousands of people were left homeless, and widespread power outages effected over 70 percent of the State. First responders became immediately overwhelmed and depended on the quick response of the WV National Guard to aide in rescue and recovery efforts across the State. The use of Title 32 DS technicians as part of this response was critical to saving lives in the hours immediately following the torrential rainfall that morning. Within hours of the storm, Military technicians were assigned to Community Assessment Teams (CAT) that were part of the immediate search and rescue and stabilization efforts. One CAT lead by an Air Guard finance technician delivered much needed supplies and medications to stranded elderly citizens including military veterans. Without the Aid of that CAT team empowered by the WV Military technicians, those elderly citizens and veterans would have faced life threatening health issues due to the lack of critical medication and supplies.

“If being a full-time Mil-tech leads to building personal rapport with leadership, the JOC, and others who have the ability to make things happen and make quick decisions....The professional contacts and connections are so important. That’s solidified when things get done more quickly, and that’s important in an emergency situation – there’s not a minute to spare.”

CMSgt William Goassard
Maintenance Operations Flight Superintendent
167th Airlift Wing

If West Virginia’s Title 32 Dual Status Military Technicians had been converted to Title 5, twenty-four percent of those called to duty for this response could not have been used. This would have led to an increased risk of the life and safety of citizens.

In the Fiscal Year 2016 National Defense Authorization Act (NDAA) Congress directs converting a portion of Title 32 National Guard dual-status military technicians to Title 5 federal civilian
employees. As required by § 1053 of the FY16 NDAA, and requested by OSD M&RA, this report represents the best military advice of the National Guard of the United States, including the 54 Adjutants General of the individual States, Territories and District of Columbia and their respective Governors, and the National Guard Bureau.

This report provides a background on the National Guard, the foundation to the Military Technician Program and two analyses – a comprehensive quantitative analysis of the potential conversion of Title 32 dual-status military technicians to Title 5 civilian employees and a qualitative analysis of the mission impacts of such a conversion.

Surveys were conducted of all States’ National Guards to determine the impacts to readiness of the Title 5 conversion. The quantitative portion of the survey applied six criteria to the entire Technician population and screened out from possible conversion those positions that were directly tied to the readiness of the National Guard or met the direct intent on the Technician act of 1968. The qualitative portion of the analysis gathered impact statements from Adjutants Generals to get a direct understanding of the operational and mission readiness impacts on States, Territories, and the District of Columbia of the Section 1053 conversion requirement.

This report also conveys an alternative to the immediate implementation of Section 1053 of NDAA 2016. A key finding is that changes to the Title 32 military technician program are warranted. All interested parties should have the opportunity to collaboratively make enduring change. Furthermore, any implementation of the transition of Title 32 military technicians to Title 5 civilian employees will require more changes in law to facilitate the conversion and management of Title 5 civilian employees in the National Guard. To properly accomplish these and other required changes, the implementation of section 1053 of the 2016 NDAA should be delayed. This is supported in NDAA 2017, by both versions (HASC section 1088 and SASC section 1048). Additionally, NDAA 2017 calls for a comprehensive study of the Full time support program to assessment of what the size and mix of the Full time support force should look like. This delay and the assessment will allow congress, the states, DoD and other essential parties time to work together on broadly supported Military Technician Program modernization provisions as well as addressing the need to provide for proper management of existing Title 5 employees in the states’ National Guards within the existing legal structure of Title 5.

Most importantly, converting any Title 32 Military Technicians to Title 5 Civilian Employees will degrade military readiness and undermine the vital role the National Guard plays in emergency response for federal and state disasters. Additionally, any conversion adds a new employment category to an already complicated enterprise in an apparent attempt to address problems that can be resolved within the existing structure.

While any conversion of Military Technician positions is ill advised, the quantitative analysis indicates that 5.76 percent is the maximum level of positions that could be converted from Title 32 Dual Status Military Technicians to Title 5 Civilian Employees without critically degrading military readiness and the essential dual role the National Guard plays in our States and Nation.
# Table of Contents

**FORWARD** ........................................................................................................................................... 2

**EXECUTIVE SUMMARY** ......................................................................................................................... 3

**TABLE OF CONTENTS** ............................................................................................................................ 5

**INTRODUCTION** ................................................................................................................................... 6
   - **OVERVIEW** ........................................................................................................................................ 6
   - **SCOPE** ........................................................................................................................................... 6
   - **SUMMARY** ....................................................................................................................................... 6
   - **SECTION 1053, 2016 NDAA IN FULL TEXT.** ....................................................................................... 7

**HISTORY OF THE NATIONAL GUARD – THE NATION’S BEDROCK.** .......................................................... 8
   - **HERITAGE** ....................................................................................................................................... 8
   - **THE DICK ACT** ............................................................................................................................... 8
   - **THE GOVERNOR’S ROLE** ................................................................................................................ 9

**TITLE 32 DUAL STATUS TECHNICIAN PROGRAM** ................................................................................. 10
   - **TECHNICIAN PROGRAM FRAMEWORK** .......................................................................................... 10
   - **TECHNICIAN ACT** .......................................................................................................................... 10
   - **THE 2016 NATIONAL DEFENSE AUTHORIZATION ACT** ................................................................ 11
     - *Center for Naval Analysis Report* ...................................................................................................... 12
     - *Title 32 – Title 5 Differences* ........................................................................................................... 12
     - *Appellate rights* ............................................................................................................................... 13

**IMPACT OF CONVERTING TITLE 32 TO TITLE 5 – READINESS** .............................................................. 15
   - **FEDERAL MISSION READINESS** ...................................................................................................... 15
   - **STATE MISSION READINESS** ........................................................................................................ 16
   - **COST IMPACT** .................................................................................................................................. 16
   - **GOOD ORDER AND DISCIPLINE** ..................................................................................................... 17

**TITLE 32 – TITLE 5 CONVERSION ANALYSIS** ....................................................................................... 19
   - **ANALYTICAL METHODOLOGY** ...................................................................................................... 19
   - **RESULTS** ....................................................................................................................................... 22

**CONCLUSION** ..................................................................................................................................... 23
   - **KEY FINDINGS** ............................................................................................................................... 23

**ALTERNATIVE** .................................................................................................................................... 24

**APPENDIXES** ....................................................................................................................................... 26
   - **APPENDIX 1 - JUDICIAL AND LEGISLATIVE HISTORICAL DETAIL** .................................................. 26
   - **APPENDIX 2 - SYNOPSIS OF ADJUTANT GENERAL LETTERS** ...................................................... 31
     - *Overview* ....................................................................................................................................... 31
     - *Expertise of the Adjutants General* .................................................................................................. 31
     - *Key Themes from the Adjutants General on the Conversion of Title 32 Military Technicians* .......... 31
   - **APPENDIX 3 - ADJUTANT GENERAL LETTERS** .............................................................................. 36
Introduction

Overview

In the Fiscal Year 2016 National Defense Authorization Act (NDAA) Congress directed converting a portion of Title 32 National Guard dual-status military technicians to Title 5 federal civilian employees. This implementation report is provided in accordance with Section 1053 of the 2016 NDAA. This includes National Guard input and analysis from the 54 states and territories.

Scope

This report provides a background on the National Guard, the foundation to the Military Technician Program and two analyses: a comprehensive quantitative analysis of Title 32 dual-status military technicians and a qualitative analysis of the mission impacts from conversion.

The first is a comprehensive quantitative analysis of all Title 32 dual-status military technician positions. Using the same data collection criteria, the National Guard Human Resource Offices of each of the states, territories and the District of Columbia conducted individual data collection and analysis. State data was then tested against National Guard Bureau data to assure a statistically validated and intellectually honest report.

The second is a qualitative analysis of the conversion from the Adjutants General and their endorsement of the call of 46 governors to repeal § 1053 of the FY16 NDAA and maintain military technicians in the National Guard as currently authorized by 32 U.S.C. § 709.

Summary

The result of this analysis has validated the best military advice of the 54 Adjutants General, who serve the National Guard in their states and territories under the command and control of their respective Governors. Their individual and collective judgment is clear. Converting any Title 32 Military Technicians to Title 5 Civilian Employees will degrade military readiness and undermine the vital role the National Guard plays in emergency response for federal and state disasters. This report identifies significant consequences on the operation, flexibility, and responsiveness of the National Guard in federal and state missions if Title 32 dual status technicians are converted to Title 5.

Additionally, The Adjutants General were clear that regardless of how many positions could be converted this endeavor adds a new employment category to an already complicated enterprise to address issues that could be resolved in a more appropriate and enduring way within the existing Title 32 DS structure. Addressing the issues that Section 1053 attempts to solve should be handled by modernizing and strengthening the current Title 32 DS military technician program.
SEC. 1053. Management of Military Technicians.

(a) Conversion of certain military technician (dual status) positions to civilian positions.—

(1) IN GENERAL.—The Secretary of Defense shall convert not fewer than 20 percent of the positions described in paragraph (2) as of January 1, 2017, from military technician (dual status) positions to positions filled by individuals who are employed under section 3101 of title 5, United States Code, and are not military technicians.

(2) COVERED POSITIONS.—The positions described in this paragraph are military technician (dual status) positions as follows:

(A) Military technician (dual status) positions identified as general administration, clerical, finance, and office service occupations in the report of the Secretary of Defense under section 519 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 112–81; 125 Stat. 1397).

(B) Such other military technician (dual status) positions as the Secretary shall specify for purposes of this subsection.

(3) TREATMENT OF INCUMBENTS.—In the case of a position converted under paragraph (1) for which there is an incumbent employee, the Secretary may fill that position, as converted, with the incumbent employee without regard to any requirement concerning competition or competitive hiring procedures.

(b) Phased-in termination of Army Reserve, Air Force Reserve, and National Guard non-dual status technicians.—

(1) IN GENERAL.—Section 10217 of title 10, United States Code, is amended by adding at the end the following new subsection:

“(e) Phased-in termination of positions.—(1) No individual may be newly hired or employed, or rehired or reemployed, as a non-dual status technician for the purposes of this section after December 31, 2016.

“(2) Commencing January 1, 2017, the maximum number of non-dual status technicians employable by the Army Reserve and by the Air Force Reserve shall be reduced from the number otherwise provided by subsection (c)(1) by one for each individual who retires, is separated from, or otherwise ceases service as a non-dual status technician of the Army Reserve or the Air Force Reserve, as the case may be, after such date until the maximum number of non-dual status technicians employable by the Army Reserve or the Air Force Reserve, as the case may be, is zero.

“(3) Commencing January 1, 2017, the maximum number of non-dual status technicians employable by the National Guard shall be reduced from the number otherwise provided by subsection (c)(2) by one for each individual who retires, is separated from, or otherwise ceases service as a non-dual status technician of the National Guard after such date until the maximum number of non-dual status technicians employable by the National Guard is zero.

“(4) Any individual newly hired or employed, or rehired or reemployed, to a position required to be filled by reason of the amendment made by paragraph (1) shall be an individual employed in such position under section 3101 of title 5, and may not be a military technician.

“(5) Nothing in this subsection shall be construed to terminate the status as a non-dual status technician under this section after December 31, 2016, of any individual who is a non-dual status technician for the purposes of this section on that date.”.

(2) REPORT ON PHASED-IN TERMINATIONS.—Not later than February 1, 2016, the Secretary of Defense shall submit to Congress a report setting forth a plan for implementing the amendment made by paragraph (1).
History of the National Guard – the Nation’s Bedrock.

Heritage

The National Guard is the nation’s oldest military force, tracing its heritage to the militia that was formed with the first English settlement at Jamestown in 1607. The General Court of the Massachusetts Bay Colony organized the first militia regiments in 1636. From the Pequot War in 1637 until the present day, the National Guard has participated in every war or conflict this nation has fought. It can be said, in the context of our Nation, that the National Guard’s heritage is the country’s history. Today’s National Guard has evolved from these beginnings, and today is additionally shaped by 15 years of war.

The National Guard, as the modern day militia, has its roots in the U.S. Constitution and Federalist Papers. The U.S. Constitution provides the basis for sustaining this Militia, the National Guard. Additionally, it provides the foundation for dual-control of National Guard forces. The emphasis on this divided authority endures from the Articles of Confederation, through the Constitution, and through the 20th Century legislation that evolved the current system. However, states ultimately have supremacy over the National Guard except for national emergencies. This dual-control of National Guard forces has been validated every time the Guard has responded to emergencies, both for their states and the federal government.

This has also been validated by the courts; for example the Eighth Circuit Court of Appeals dissenting opinion by Judge Heaney and Judge McMillian in Perpich v. DoD, 880 F.2d 11, affirmed, 496 U.S. 334, 110 S.Ct. 2418 (1990), analyzed the framers’ intent when drafting the Militia Clause in Article I, Section 8, Clause 16, in the U.S. Constitution. This analysis is instructive in the manner in which authority over the militia is divided between the federal government and the States.

The Dick Act

Congress transformed the militia into the modern day National Guard with the passage of the Militia Act of 1903, commonly referred to as the “Dick Act.” The law required the states to divide their militias into two sections: the organized militia and the reserve militia. It further provided federal funding and equipment and required the militias to standardize their training. Congress could not constitutionally provide command and control of the militia to the President when it was not in federal service even though it provided federal resources.

Subsequently, Congress amended the 1916 National Defense Act in 1933 by creating two organizational entities: (1) the National Guard of the individual states and (2) the National Guard of the United States. Since this amendment, all National Guard members hold membership in a state National Guard and the National Guard of the United States. National Guard members retain their status as members of a separate state National Guard unless activated on federal active duty under Title 10 U.S.C. Under the 1933 amendment, National Guard members could be ordered into Title 10 U.S.C. active duty whenever Congress declared a national emergency and authorized troops in excess of those serving on active duty.
The Governor’s Role

The U.S. Constitution, Article I, Section 8, Clause 16, defines the delicate balance between the federal and state responsibilities for the National Guard:

To provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the appointment of the Officers, and the authority of training the Militia according to the discipline prescribed by Congress;

U.S. Constitution, Article I, Section 8, Clause 16

In 1952, Congress authorized the National Guard to be activated for active duty or active duty for training absent a national emergency. The activation may take one of two forms: in a Title 32 U.S.C. status, or in an active duty for training status, both of which require the Governor’s affirmative consent as state commander in chief. Although not required to do so, Governors now routinely extend such consent. Today's National Guard, the modern day Militia, is federally funded but still state controlled and administered. Conversely, the National Guard may be activated in a Title 10 U.S.C. status when and as permitted by the Constitution and conforming federal law. In this event, the National Guard is also federally funded but the President is the commander in chief of the federalized portion of the state military force.

Regardless of the type of activation, the Governor’s role as the commander in chief of the National Guard when not in a Title 10 status is to train the force for all activations in all statuses.

A governor can – and often does – directly and independently activate National Guard personnel to “State Active Duty” in response to natural and human caused disasters, catastrophes, and Homeland Defense requirements. State constitutions, statutes and policies guide State Active Duty and the state provides the funding for personnel activated in State Active Duty status. The governor, through the Adjutant General, maintains command and control of the National Guard activated on State Active Duty status.
The National Guard is not a full time active force. However, the National Guard is the Nation’s primary combat reserve. Dual status technicians were a critical enabler to the National Guard’s evolution in recent decades from a Strategic Reserve to a combat-tested, globally deployable Operational Reserve force. Military Technicians are employed full-time as employees of the National Guard with responsibility for insuring the readiness of the National Guard.

Technician duties involve caring for National Guard material, armament and equipment and performing “such Guard functions as training, employment in State headquarters, air defense, military support of civil defense, and aircraft operations.” Before 1968, National Guard technicians were not generally considered federal employees.

The purpose of making military technicians federal employees, as outlined in the Senate committee report was to standardize retirement benefits for all National Guard technicians and to clarify technician’s legal status under the Federal Tort Claims Act. To effect this purpose, Congress created federal technician employees under 5 USC and then amended 5 USC to place the newly created positions under 32 USC and ensure compliance with the U.S. Constitution’s requirement that States would ‘train’ the National Guard.

When Congress passed the Militia Act of 1903 (the Dick Act), it also provided federal funding and equipment, and required the militias to standardize their training. Congress did not convert command and control of the militia to the President when it was not in federal service even though it provided federal resources, including resources that are the basis of the technician program. When Congress passed the Dick Act into law, it determined to ‘federalize’ the training standard of the National Guard, which until then was left to individual states consistent with the Militia Act of 1792. Beginning with the passage of the Dick Act, Congress has provided federal funds to the states in order to ensure that when called for active duty, the National Guard of the several states would have a uniform military standard. The Dick Act was modified under National Defense Act of 1916, Public Law 64–855, which organized the National Guard consistent with the U.S. Army and provided funds for military technicians, who served as state employees, for purposes of training personnel and caring for equipment and livestock.

In 1968, Congress altered the status of technicians through enactment of the National Guard Technician Act. Section 709(d) of the Technician Act explicitly states that a technician “is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States.” The Technician Act further expressly authorized the supervision of technicians by state Adjutants General under regulations prescribed by the Secretaries of the Army and Air Force. At the same time, Congress recognized the unique status of the technicians as employees in a state agency with federal constitutional underpinnings, and carefully provided for continuing administrative authority at the state level with respect to the technician program.
The Technician Act amended the definition of “employee” in Title 5 U.S.C. § 2105(a) to provide that an “employee” would include an individual who is appointed in the civil service “by an adjutant general designated by the Secretary concerned under section 709(c) of title 32.”

The Senate debated the merits of the National Guard Technician Act in a 1968 Senate report. This report provides key insight on why the dual-status technician program continues as a critical training component for the National Guard of the individual states (see Appendix 1). The 90th Congressional Senate fully recognized the delicate balance of responsibilities between the federal government and the states when it enacted the National Guard Technician Act of 1968.

This carefully balanced division of authority between the federal government and the States reflects the hybrid nature of the National Guard. Dual status technician employment is conditioned on current military membership in the National Guard, and technicians must meet military compatibility requirements “because the technician’s civilian and military functions are integrated.” Thus, National Guard dual status technicians constitute a special and distinct class of federal employees who perform full-time civilian work in their units that are irreducibly military in nature, perform military duty and training in their units, and are available to enter active Federal military duty service at any time. Military Technicians are also National Guard members; they are present in their National Guard roles on a fulltime basis working under the Adjutant General's authority and are immediately available for state emergencies and state active duty.

Congressional intent in enacting the 1968 Technician Act, which has its roots of federal funding for National Guard support in the 1903 Dick Act and the National Defense act of 1916, is clear in this excerpt from the Committee report: “(t)he concept of the full-time civilian technician program is that his/her civilian work will be performed in the same unit in which he holds a mobilization assignment. In other words, the technician would perform his civilian work, his training duty, and be mobilized to active duty in the same unit. It is the view of the Committee, therefore, that technicians who are required to be military members of the National Guard should occupy a military position which is compatible with their civilian technician position."

The Military Technician Program, to a large degree, enables the longstanding and far-reaching success of the National Guard.


Section 1053 of the 2016 NDAA breaks the link between the technician’s duties and readiness to respond to federal, state, and local emergencies. The adverse impacts of Section 1053 have therefore been the topic of countless hours of discussions, proposals, and analyses between Governors, Adjutants General, and federal leaders trying to ameliorate the unintended impacts of this legislation. There is broad agreement that certain rights and benefits of Title 32 Military Technicians should be enhanced, but these issues can and should be resolved by updating and modernizing Title 32, while preserving the value and legacy of the 1968 Technician Act, rather than introducing a new employment status that will bring its own set of insoluble complications and peculiarities.
Congress expressed an interest in the FY 2012 National Defense Authorization Act in the “elimination of the military technician as a distinct personnel management category of the Department of Defense” and required a study to be performed on the Technician Program. The required report was completed by the Center for Naval Analysis (CNA) and submitted to Congress in September 2013. Based on their analysis, CNA recommended “that Congress continue the program, although limited conversions to Title 5 civilian employees may be appropriate for positions that are inherently governmental but not military essential. Although the Military Technician program is complex, its complexity tends to manifest in terms of program management” as opposed to program execution within the states.

The CNA report found that the Military Technician program largely appeared to be both inherently governmental and military essential. Notwithstanding the CNA findings and recommendations, the Chairman and Ranking Member of the Senate Armed Services Committee – in a letter to the National Governors Association regarding the Governor’s collective opposition to the conversion – stated they “believe the program, in the "administer and train" category, has grown far beyond the initial scope and intent of Congress.” They cited a “bizarre assortment of positions” in addition to typical office support that they “find difficult to imagine are necessary to the administration and training of the Guard, and which certainly have nothing to do with maintaining and repairing equipment.” The Senators further stated that, “these sorts of occupations, to the extent they are justified, would in our view benefit from the stability provided by (Title 5) civilian employees. And yet, these employees have neither the full employment protection provided to every other federal civilian employee, nor do they enjoy the premium pay and benefits afforded to active military service members,” including “civilian whistleblower protections, Merit Systems Protection Board appeals rights, or Equal Employment Opportunity Commission appeals rights.”

Additionally, the House Appropriations Committee expressed concern that Adjutant Generals’ nor the National Guard Bureau’s views were not considered when Section 1053 was enacted. Part of the response to this deficiency has been an amendment proposed for the 2017 NDAA that would, if enacted, place technicians in the same category as military personnel (vice civilian personnel) with regard to furloughs, recognizing the essentiality of the military technician force.

**Title 32 – Title 5 Differences**

The National Guard full-time force is the foundation of National Guard readiness. All full-time NG personnel, dual and non-dual status, serve under Title 32. This status preserves the role over the National Guard reserved to the States, evidenced by Congress’s creation of Title 32 as section of U.S. C.

Governors depend on Dual-Status Military Technicians because their flexibility and accessibility in responding to state and local emergencies minimize threats to local, regional, and national security. The Alaska Adjutant General provides the following illustrative example.
Dual-Status Technicians are embedded in all Army and Air National Guard unit structures and bring their experience and job skills to all military formations, including drill periods and training assemblies when civilian employees are not present. Changing the legal status and force management of Military Technician positions fractures the continuous interchange and flow of knowledge between members of the weekday (fulltime) and weekend (M–Day) National Guard force due to the loss of military affiliation of converted Dual-Status military technicians.

Title 32 Dual Status Technicians are an immediately “ready” force relied upon by both the Governors and the President. These state-federal interests often merge as State emergencies escalate and spawn regional and even national consequences. National Guard Dual Status Technicians, both Soldiers and Airmen, are often the only resource available to state and federal authorities until traditional part-time (M-Day) Soldiers and Airmen can notify their employers and report to their assigned units. Dual Status Technicians fill a critical gap in the first stages of a crisis by providing crucial continuity over extended duty hours from the earliest moments to the final stages of domestic emergencies.

Appellate rights

There appears to be a perception that the Military Technician program does not serve the purposes and intentions of the Technician Act of 1968. Some also appear to believe that technicians are treated unfairly when compared to other Federal civilians, especially with regard to appeal rights. Other perceptions appear to be that technicians are often involuntarily separated from military service before reaching full civilian retirement age, and that in the Technician Act, Congress granted the Adjutants General too much power by making Adjutants General the final authority on employee appeals. These perceptions and beliefs are generalized, and can give an unfounded appearance of wide system failures, ignoring the specific policy and administration that have evolved over the more than 50 years since passage of the Technician Act and the successful, satisfying, and highly honored careers of hundreds of thousands of retired National Guard technicians.
There is - and has long been - an independent Hearing Examiner process for Military Technician appeals. Hearing Examiners provide an independent review of appeal requests and then make recommendations to Adjutants General for final disposition. In the past 3 years, 26 cases have used this process, advancing appeals outside the purview of the Adjutant General. In 20 of the 26 cases, the respective Adjutants General have adopted the recommendations of the Hearing Examiners. With the new Title 5 class of employees in the National Guard comes an entirely new – and vastly broader – system by which states’ technicians can appeal personnel actions. Unlike Title 32 technicians whose personnel actions are adjudicated at the state level (with some narrow exceptions for EO), Title 5 employees are entitled to appeal personnel actions through the Merit System Protection Board (MSPB) process. This process, which more closely resembles civil litigation, will require additional funding to employ attorneys and paralegals to represent the state in MSPB proceedings or, at a bare minimum, additional funding to bring the state’s JAG attorneys onto orders at intermittent periods throughout the four to six-month MSPB process. This major shift with its detrimental, costly, and complicating impacts, would have effected no more than six cases in the last three years assuming such cases were worthy of expanded review. This drives an additional costs for which funding must be provided for litigation expenses such as court reporters, process servers and expert witnesses.

With regard to the current appeal process, only cases specifically and directly related to the National Guard technician’s military duty performance end with the Adjutant General exercising his or her military judgment. “The Technician Act specifies only four situations in which technicians have lesser rights than other Army and Air Force employees: (1) separation from civilian employment in instances involving loss of a required military Guard membership or a military grade specified for the positions; (2) separation from civilian employment as a result of failure to meet military standards; (3) separation for cause by the Adjutant General; and (4) reduction in force or adverse action involving discharge, suspension, furlough without pay, or reduction in rank of compensation.”

The MSPB concluded that since the matter before the board did not fall within any of the four exceptions specified in law, that this employee had the same rights as any other civilian employee of the Army and Air Force. The exceptions noted are based on military necessity and removing them would be detrimental to the readiness of the National Guard and the good order and discipline of the state military chain of command.

With regard to the second issue, the risk to a technician’s civil service retirement caused by the secondary requirement to retain military membership (therefore qualifications), it is important to understand the unique nature of technicians and the fact that all technicians are employed with this condition paramount in their acceptance of their job. In Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984) the 10th Circuit Court of Appeals ruled on a case involving a technician who sued because he lost his technician job when militarily reassigned to a different military position. In analyzing the legislative history of the Technician Act of 1968, the court concluded that the military mission of the technicians was paramount and that technician’s duties were inseparable from his or her military obligations.
The policy changes codified by Section 1053 of the 2016 NDAA negatively affect National Guard readiness for federal and state military missions. The changes will also result in increased personnel costs to the federal government as indicated in the cost section below. Further, the changes will adversely affect the good order and discipline of the National Guard and run counter to Congressional attempts to streamline employee discipline elsewhere in government employment.

National Guard Readiness is different than federal military readiness. National Guard organizations depend on layers of full time and part time organizations to be ready to respond whether for an international need or for a need local to their community. Those local needs are the most common, and the wisdom of our constitution in providing forces for Governors is a hallmark of our ability to serve our citizens when they are in need. At the time this report was written, the Governor of West Virginia made 500 National Guardsmen available to provide airlift and rescue support to thousands of victims of floods that are said to be of a “once in a thousand year” scale. This governor is able to count on these forces immediately because he has technicians who are devoted singly to their National Guard duty and can therefore put immediate attention on fulfilling the needs while others who have dual careers in the civilian sector and the Guard prepare for later response.

Diminishing the domestic response capability in this 21st century ignores the more commonly understood notion that today there is a greater need for emergency response than ever, especially since 2001. The scale of threats to communities along with more rapid public communications and the high cost of maintaining local responder enterprises is greater now requiring cuts in personnel, and therefore the potential of local responders being overwhelmed early has increased more than ever. To weaken the very responders who exist to fill this gap by reducing their available full time support strength does not align with today’s domestic threat environment. However, it does make sense to find areas to improve and strengthen the technician program while preserving it as the first element of the ready force our President and Governors depend on.

Federal Mission Readiness

Dual-status Military Technicians are the most flexible and accessible full-time force available to Commanders-in-Chief (i.e. the President and Governors) because of the ability to rapidly convert Military Technicians from technician to Title 32 military status or Title 10 military status to execute the diverse federal military missions of the National Guard.

The Center for Naval Analysis (CNA) Report on the Termination of Military Technician as a Distinct Personnel Management Category acknowledges the adverse impact of converting Dual-status Military Technicians to Title 5 civilian employee status by warning, “...unit readiness would be degraded in terms of supporting compatible functions that provide seamless continuity to units when they deploy.” The CNA Report further acknowledges, “[t]he ability of [full-time support] personnel to support compatible functions that enable the seamless continuity to units when
they deploy would be lost and readiness would be impaired.” The CNA Report does not support dismantling the full-time, Dual-status Military Technician work force and, in fact, cautions against changes that would introduce confusion and disunity in military organizations that depend on Military Technicians for their mission readiness.19

Readiness is, in part, a function of continuity and experience. The requirement for Dual-status Military Technicians to also be members of their state’s National Guard creates the opportunity for a deeper experience base and enhanced readiness levels in both the technician and military duties. The CNA study recognized this.20 It follows, therefore, that conversion to Title 5 employees, who will not have the same requirement of membership in their state’s National Guard, will reduce this experience base over time and will result in reduced readiness.

**State Mission Readiness**

Readiness for federal missions directly affects readiness for state missions. Today’s complex global environment now includes domestic vulnerabilities that in many respects make U.S. states and communities “ground zero” in a new transnational battle space (e.g., the Boston Marathon bombing) in addition to natural disasters. The National Guard provides essential capabilities the nation depends upon for saving lives, protecting property, and helping communities respond to and recover from adaptive human threats and other emergencies in every state and territory.21

If the Section 1053 conversion of federal technicians to Title 5 civilian employees is implemented as enacted, there will be approximately 10,000 fewer Dual-status Military Technicians available for no-notice/time-sensitive state responses in support of civil authorities across all states and territories, which make up the majority of domestic support missions.22 Title 5 civilian employees cannot be converted to State Active Duty (SAD) status in the manner that Dual-status Military Technicians can. Likewise, Title 5 federal civilian employees are not subject to a Governor’s emergency powers and their use in state emergency responses is problematic. This will result in a loss of response capacity for domestic emergencies, natural disasters, and acts of terrorism.

**Cost Impact**

The conversion of Dual-status Military technicians to Title 5 civilian employees will add costs to the National Guard budgets, in Operation and Maintenance and Military Personnel appropriations.

Dual-Status Technicians do not receive overtime pay. Instead, they receive compensatory time only. Title 5 personnel will qualify for overtime. Overtime costs will increase as well due to a Fair Labor Standards Act rule change that directs overtime pay for employees earning up to approximately $50,000 annually, up from the previous ceiling of $23,000.23

Administrative costs will also increase with Title 5 employees. For example, in the state of Utah it is estimated that, based upon a 10 percent turnover rate, the $1850 cost to advertise each position would result in an increase of $145,000 per year in administrative costs.24 If budgets do not increase accordingly, the only option will be to reduce the workforce. There are also cost associated with recruiting and training new military personnel to fill TDA and MTOE vacancies
left by Title 32 military technicians converting to Title 5 that choose not to remain members of the National Guard.

Although these and other costs would be generated in all states and territories, a full analysis of conversion costs has not been completed as of the date of this report.

Good Order and Discipline

Good order and discipline is the foundation of military service, without which the readiness required of United States military units and personnel would be impossible to obtain. Due to the inherently military nature of Dual-Status Technicians, statutory administrative due process employment protections differ from the protections afforded Title 5 federal civilian employees generally. In creating the Technician Act, Congress expressly recognized “the military requirements and State characteristics of the National Guard by providing for certain statutory administrative authority at the State level with respective to the Technician program.” This authority included the provision that dual-status technicians be members of the National Guard and that the State’s adjutant general retained authority over the technicians to separate them (for cause) and administer adverse actions, for which the right of appeal shall not extend beyond the adjutant general of the jurisdiction concerned.

The Technician disciplinary process set out in 32 USC Section 709 was created to "accommodate the civilian interests of [technicians] without intruding upon the Guard’s military and security needs"[emphasis added]. Congress clearly intended that National Guard dual status technicians not be treated like other federal employees by limiting the applicability of federal labor relations and other laws to preserve the unity of command and supervision required by the states’ National Guards, when not in federal or state military status.

The Section 1053 conversion risks this balance by creating an additional federal employment category, with a separate disciplinary system, for a small number of National Guard employees in the States’ National Guards and with potentially different terms of work. This makes an already complex personnel system even more so. Title 32 Dual-Status Technicians will continue to serve under the provisions of the Technician Act, under which all disciplinary actions end at the Adjutant General level. The Title 5 employees will be subject to a different process, the terms of which have not been determined, and which may or may not involve the Adjutants General.

As the CNA study acknowledged, different employment terms can contribute to divisive attitudes across a given military organization, which is “a leadership responsibility for service and unit commanders to manage.” Adding additional layers to this process, outside the Adjutant General level will negatively affect the unit cohesion and good order and discipline in the states’ National Guards.

In addition, should section 1053 take effect as enacted, the management of Title 5 employees will rest outside of the states’ Adjutant Generals. This will create problems with mission accomplishment. As a recent National Guard Bureau Title 5 Audit made clear, Adjutants General have no directive or supervisory authority over Title 5 employees in their organizations. At best, this creates uncertainty for both state National Guard leadership and the Title 5 employees
in the states. At worst, it creates the situation where Title 5 employees may determine on their own what tasks they will accept from the Adjutant General.\textsuperscript{30}

Finally, the impacts of using the Title 5 disciplinary system in critical national services programs has been recognized by the current Congress in its consideration of the Veterans First Act, which seeks to change the disciplinary process for some categories of Veterans Administration (VA) employees.\textsuperscript{31} The proposed legislation seeks to remove certain VA employees from the disciplinary provisions of Title 5 in order to make imposition of discipline, in particular termination for cause, timelier and less protracted. Military readiness is no less critical than effectively and efficiently providing health care services to veterans. The impacts of the Title 5 system to the VA’s ability to accomplish its mission have been well documented and would likely be equally serious in the National Guard.
Title 32 – Title 5 Conversion Analysis

Data collection was accomplished through surveys of each of the 54 States’ National Guards through the Adjutants General in combination with analysis completed by an established working group consisting of representatives from the National Guard Bureau and the State National Guards. The purpose of the data collection was to ascertain whether converting Title 32 dual status technicians to Title 5 was accomplishable within the scope of the conversion. The scope of collection was twofold. The first component is an analysis of technician positions by job series to determine which job series could convert with least effects on unit readiness. The second component records how converting Title 32 to Title 5 will affect readiness for each State through Adjutants General impact statements.

Analytical Methodology

The first component of the data collection, analyzing job series and associated numbers for suitability for conversion to Title 5, is a quantitative analysis of Title 32 Technician positions. This portion of the data call defines how many Title 32 technicians could convert to Title 5 given certain screening criteria, a defined functional description, and without severe effects to unit readiness. Data was collected from the Defense Civilian Personnel Data System (DCPDS) system and evaluated using established criteria to analyze job positions by state.

The pool of data analyzed was All Title 32 Dual Status (DS) Military Technician positions.

The following screening criteria for evaluation were established based on consultation with ASD–M&RA, CNGB, and the Adjutants General.

1) Does position have an affiliated wartime requirement/is it military essential?

   Definition: Any position where the technician would perform their civilian work, their training duty, and be mobilized to active duty in the same unit is exempt from consideration for potential Title 32 to Title 5 conversion.

   Rationale: Positions that have a direct affiliation with a unit’s wartime mission should be excluded due to the following reasons:

   a. The original concept of the Title 32 DS military technician program is explained in the Senate report on the National Guard Technician act of 1968 (report number 1446)

      “The concept of the technician program is that the technicians will serve concurrently in three different ways: perform full time civilian work in their units; perform military training and duty in their units; and be available to enter Federal service at any time their units are called.”

   b. DODD 1100.4, Section IV states that civilian personnel will be used in positions which do not require military incumbents for reasons of law, training, security, discipline, rotation, or combat readiness, that do not require a military background for successful
performance of the duties involved... (DODD 1100.4 Section IV). Therefore, if they do have a wartime requirement, they must be military (dual status).

2) Is the position in the Federal Wage System?

Definition: Any position where the technician position is classified as Wage Grade (WG) is exempt from consideration for potential T32 to T5 conversion.

Rationale: These positions have a direct contribution to the military essential readiness of equipment in units as identified in the technician act of 1968.

a. 32 USC sec 709 reads that, “persons may be employed as technicians in the...maintenance and repair of supplies issued to the National Guard”. Wage Grade Title 32 DS technicians are the primary maintainers of equipment, commonly referred to as “wrench turners” or “blue collar” workers.

b. (Definition of Wage Grade) 5 U.S.C. 5102 (c)(7) exempts from coverage under the General Schedule those “employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semi-skilled, or skilled manual-labor occupations, and other employees including foremen and supervisors in positions having trade, craft, or laboring experience and knowledge as the paramount requirement.” The Federal Wage System covers such positions. (Handbook of Occupational Groups and Families dated, May 2009). These positions have a clear attachment to the readiness of units and therefore should be exempted from conversion to Title 5.

3) Does the position meet the intent of the Technician Act of 1968 with respect to training personnel, and the maintenance and repair of equipment?

Definition: Any position where the technician performs work in training personnel, and maintaining/repairing equipment is exempt from consideration for potential Title 32 to Title 5 conversion.

Rationale: Title 32 USC 709 states that technicians may be employed in the areas of Administration* and training of the National Guard, and the maintenance and repair of supplies issued to the National Guard. Therefore, any position that conducts this type of duty is excluded from the data pool.

“(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in—

(1) The organizing, administering, instructing, or training of the National Guard;

(2) The maintenance and repair of supplies issued to the National Guard or the armed forces; and”
*Note: This criterion is additive to criteria #2 and addresses additional positions not in the wage grade category. Administration was purposely left out of this criterion so that all administrative positions could be evaluated.

4) Does the position require current military knowledge and skills or have unique working conditions that are not conducive to civilian employment?

Definition: Any position where the DS technician requires current military knowledge and skills as outlined in DODD 1100.22 is exempt from consideration for potential Title 32 to Title 5 conversion.

Rationale: Certain positions exist that require specific knowledge of military skills:

“Military personnel shall be assigned only to those tasks that directly contribute to the military effort, except positions that require military incumbency for reasons of law or esprit de corps; when alternate manpower is not available; or, when military-unique knowledge and skills are required for successful performance of the duties.” DODI 1100.22 paragraph 4f

5) Is this position a key advisory role to the TAG to recommend military engagement options of the capabilities in the National Guard?

Definition: Any position where the DS technician is a key advisor to the Adjutants General (fulfilling the duties as outlined in DODD 5105.83 - National Guard Joint Force Headquarters State (NG JFHQs-State)) is exempt from consideration for potential Title 32 to Title 5 conversion.

Rationale: Certain positions exist which are key advisors to TAGs to fulfill their military role. These positions are inherently military in nature due to the requirement to maintain the most current military skills and knowledge in the execution of missions using the assigned military capabilities within the State.

6) Is the position outside the description of “general administration, clerical, finance and office service occupations”?

Definition: Any position where the DS military technician does not perform a job function that is general administration, clerical, finance and office service is exempt from consideration for potential Title 32 to Title 5 conversion.

Rationale – Scope of Section 1053 of NDAA 2016 and OASD memorandum dated 20 Jun 2016 to ASA and ASAF and CNGB on the implementation plan for management of military technicians defined the scope of positions to be considered as general administration, clerical, finance and office service. Note: Positions that were identified in the SASC letter to the National Governor’s association dated February 26, 2106 were also considered for possible conversion.
The second part of the data collection was conducted using qualitative methods. Adjutants General were asked to provide narratives describing the impacts on converting dual status technicians to Title 5. These narratives can be found in Appendix 3 of this report. They include specific examples of how readiness would be affected through illustrations of real world situations. For example, the effectiveness of the Maryland National Guard response to the Baltimore riots would have been negatively impacted if the TAG of Maryland were not able to use her Technicians in preparation for potential riots, and the subsequent stand-down of operations after the riots.

Results

The results of the analysis (based on the single point in time of 18 July 2016) found that no more than 5.76% of Title 32 DS Military technicians could be converted to Title 5 civilian with the least amount of impact to the National Guard. However, even this percentage of conversion is ill advised and consequently would have significant adverse impacts.

The charts below indicate the values used in calculating the results and the possible conversions.

Note: The technician population fluctuates daily and the total number of Technicians and the number within each job classification change daily, sometimes by as much as three percent. This means that the results of this analysis could change daily based on the population size and series distribution of the Title 32 DS Military technician population.

<table>
<thead>
<tr>
<th>T-32 Military Technicians</th>
<th>ARNG</th>
<th>ANG</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017 Total T32 technicians required</td>
<td>45,053</td>
<td>29,693</td>
<td>74,746</td>
</tr>
<tr>
<td>2017 T32 technicians Authorized</td>
<td>25,507</td>
<td>22,103</td>
<td>47,610</td>
</tr>
<tr>
<td>2017 Dual Status T32 technicians Authorized</td>
<td>23,907</td>
<td>21,753</td>
<td>45,660</td>
</tr>
<tr>
<td>2017 Non Dual Status T32 technicians Authorized</td>
<td>1,600</td>
<td>350</td>
<td>1,950</td>
</tr>
<tr>
<td>Total T32 technician positions filled</td>
<td>27,327</td>
<td>22,288</td>
<td>49,615</td>
</tr>
<tr>
<td>Dual Status T32 technician positions filled</td>
<td>25,888</td>
<td>21,963</td>
<td>47,851</td>
</tr>
<tr>
<td>Non Dual Status T32 technician positions filled</td>
<td>1,439</td>
<td>325</td>
<td>1,764</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Analysis Results</th>
<th>ARNG</th>
<th>ANG</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>% possible conversions of T32 Technicians filled</td>
<td>9.61%</td>
<td>1.04%</td>
<td>5.76%</td>
</tr>
<tr>
<td>% possible conversions of T32 Technicians authorized</td>
<td>10.30%</td>
<td>1.05%</td>
<td>6.00%</td>
</tr>
<tr>
<td>% possible conversions of T32 Technicians required</td>
<td>5.83%</td>
<td>0.78%</td>
<td>3.82%</td>
</tr>
</tbody>
</table>
Conclusion

Elimination of the Technician Program because of perceived inequalities between Military Technicians and the more generalized Government Civilian Employee workforce under Title 5 ignores the specialized reasons for creating the National Guard Military Technician Program that was established by Congress in 1968. Those reasons are based squarely on military necessity and the imperative of readiness for both Federal Military purposes and State/Domestic Response purposes. These baseline mission requirements have not diminished; in fact, they have expanded significantly since 1968. It therefore makes sense proceed with great caution in any implementation of converting Title 32 Military Technicians to Title 5 civilian employees. It would be more prudent to develop policy that will modernize the Military Technician Program in an equitable and enduring way while preserving national and state military readiness while protecting the Nation and States as the 1968 Technician Act provided.

Key Findings

- National Guard has critical federal and state missions.
- Title 32 Military Technicians are vital to both National Guard missions.
- Title 32 Military Technicians are essential for readiness.
- The Military Technician Program should be improved and modernized.
- If required to convert, no more than 5.76% of Title 32 DS Military technicians could be converted to Title 5 civilian with the least amount of impact to the National Guard.
- Substantive changes to Title 5 and other authorities must be made in order to implement any conversion.
Congress can reaffirm the military necessity of the Technician Program with legislation that (1) allows for the modernization of the Military Technicians program consistent with our year-long study and (2) affirms the enduring need for a Military Technicians Program that differs fundamentally from the generalized “Title 5” government civilian employee program. When the Technician Act of 1968 was adopted, technicians accounted for approximately eight percent of the total National Guard end strength. In converting then-existing federally funded state technicians to federal technicians, Congress specifically noted that state control was essential due to the Constitution and the military nature of the National Guard. The need to preserve that fundamental state-federal balance has not changed.

Congress further noted that the technicians as full-time civilian employees were an essential element with respect to training and the maintenance of equipment for the National Guard. That has also not changed. What is different today than in 1968 is that the nation has increased its reliance on the National Guard for domestic safety and security needs. The establishment of a combatant command (USNORTHCOM) dedicated to the continental United States demonstrates the extent to which our states are threatened today in ways not considered in 1968.

Technicians come into their positions understanding that military membership is a condition of employment. Consequently, there are circumstances that can be avoided or mitigated if Title 32 were amended to allow technicians who lose their military membership for reasons other than cause to be placed in a Priority Placement Program list just as many civil service employees are when their civil service job is eliminated.

Again, The Title 32 Military Technician Program is substantially the same today as it was in 1968. The National Guard is not. In converting then-existing federally funded state technicians to federal technicians, Congress specifically noted that state control was essential due to the Constitution and the military nature of the National Guard. That has not changed. Congress further noted that the technicians as full-time civilian employees were an essential element with respect to the training and the maintenance of equipment for the National Guard. That has also not changed.

There are a several ways in which the Technician Act could be modernized to account for the changes in the National Guard and to address areas in which labor-management relations under the Act could be improved. For example, the Technician Act could be amended to provide that a dual-status technician who is involuntarily separated from technician status for reasons other than cause maintains the highest priority placement consideration for technician employment. This would apply within the National Guard of the state from which the technician was separated, or for federal civilian employment in DoD, the federal military departments, and any other federal agency subject to regulations prescribed by the agency.

Although the Technician Act has remained relatively static, the National Guard has not. Since 1968, the National Guard has transitioned from a strategic reserve, intended for use only in the case of global conflict, to an operational reserve, that serves daily alongside active duty forces...
across the spectrum of military operations. Further, with the rise of domestic and international threats to the homeland, the military essentiality of the National Guard’s domestic mission has increased significantly.

A binding appellate process outside the Adjutant General could also be provided. This process could be based upon the existing adverse action appeal, with which Adjutants General are already familiar and which provides an expeditious third party review or a CNGB appointed review process, within 32 USC 709. Alternatively, there could be appropriate review and implementation of Alternative Dispute Resolution (ADR) under DoDI 5145.05, Alternative Dispute Resolution (ADR) and Conflict Management (27 May 2016) to effect advice to the Adjutants General. See also the Chief, National Guard Bureau Manual and Instruction on this same topic.

Even given the inherently military nature of dual status technicians, Civil Rights and Whistleblower protections similar to those available to Title 5 employees could also be added to the Technician Act.

To accomplish these and other required changes, the implementation of section 1053 of the 2016 NDAA should be delayed. This is supported in NDAA 2017, by both versions (HASC section 1088 and SASC section 1048). Additionally, NDAA 2017 calls for a comprehensive study of the Full time support program to assessment of what the size and mix of the Full time support force should look like. This delay and the assessment will allow congress, the states, DoD and other essential parties time to work together on broadly supported Military Technician Program modernization provisions as well as addressing the need to provide for proper management of existing Title 5 employees in the states’ National Guards within the existing legal structure of Title 5.
Appendix 1 - Judicial and Legislative Historical Detail

This appendix provides additional historical detail.

From Perpich v. Department of Defense, 880 F.2d 11, affirmed, 496 U.S. 334, 110 S.Ct. 2418 (1990) we draw that the military power of the United States is based on a system of checks and balances. The Framers divided authority over the military, not only between the coordinate branches of the federal government, but also between the federal and state governments.

The latter division is emphasized in several ways. First, because of the Framers' fear that a large standing army would lead to military abuses by the federal government, state militias were intended to comprise the bulk of the nation's defensive force. Second, control over these militias was explicitly shared between the federal government and the states. (The states were to appoint the militia's officers and to control the actual training of militiamen.) Third, while the Framers did not want the states to make positive national policy in the areas of defense or foreign relations matters, they did intend the states to use their control over the militia to prevent the federal government, except in circumstances where national security was threatened, from using state troops in military undertakings objectionable to the states and their citizenry.

Under the Articles of Confederation, the states were required to “keep up a well regulated and disciplined militia * * *.” U.S. Articles of Confederation art. VI. The central government had the power to declare war and the supervisory authority to order the states to produce quotas of armed and trained troops. Id., art. IX. This system proved unworkable. The states had too much independent power to resist the requests of the central government. The troops provided were often inadequately trained and equipped and thus difficult to coordinate into a cohesive and effective force.

Thus, as the delegates assembled during the summer of 1787 to draft a more viable instrument of government, a pressing objective was the creation of a stronger, more reliable armed force. This aim was widely shared. The effort to find a specific solution, however, proved extremely divisive. From the outset, it was agreed that the problem would not be solved by the creation of a large, federally controlled standing army. The Framers identified such a force with British tyranny, potential oppression of states and individual citizens, and expensive, unpopular military adventures. Thus, while the Framers would ultimately provide for a standing army, they would limit its power by declaring that military appropriations had to be approved every two years. U.S. Const. art. I, § 8, cl. 12. More importantly, for the purposes of this discussion, the Framers stated their intent to have state militias provide for the nation's basic defense, with reliance on a standing army only as a last resort.

As a corollary to the decision to rely largely on the militia for the nation's defense, it was believed necessary to provide a degree of federal control over these forces in order to achieve military effectiveness. The Convention rapidly agreed that the state militias would be placed under the control of the federal government in emergency situations, such as when insurrection or invasion was threatened, or when the militias were needed to enforce the laws of the country. See U.S. Const. art. I, § 8, cl. 15 (Clause 15) (“Congress shall have the power * * * [t]o provide for calling
forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions * * *
* *.
). However, in other cases, the degree of control the federal government would exercise over state militias was a point of contention.

Nationalist delegates believed in strong federal control of the state militias in order to create a dependable, coordinated defensive force. States’ rights delegates profoundly opposed such federal power. These delegates voiced fears that powerful federal authority over the state militias would, like the existence of a large standing army, lead to military abuses by the new government. They particularly feared that such authority would allow the federal government to tyrannize defenseless individual states and their citizens and could leave the states without the means to meet their own public needs.

The debate between these factions was vigorous, for neither extreme had sufficient support at the Convention for its position to prevail. After several months of discussion and many days of hard-fought exchange on the floor of the Convention, delegates, such as George Mason, began to seek a compromise which would provide the federal government with sufficient control over the militia to meet its defensive needs, while at the same time assuring the states sufficient authority to check the potential abuse of military power by the federal government.1

The power of states-rights delegates to exact significant concessions from the nationalist delegates is demonstrated in the course of the debates at the Federal Convention. Mason offered three successive proposals to the Convention, each providing the states more authority over the militia than the last. Mason’s final proposal sought to provide the federal government “regulatory” authority over the militia insofar as this was necessary to establish uniformity in training and arms so that the state forces could be melded into a cohesive force when the need arose. In the states' interest, Mason proposed that this federal regulatory authority would be limited to one-tenth part of each year, that appointment of officers would be in state hands, and that the states would be exempt from federal authority whenever they needed to use their militia on state business. This, however, did not satisfy the states-rights delegates, and the matter was referred to a central committee for resolution. The Militia, supra note 6, at 31-35.

On August 21, 1787, the Convention was presented with a workable compromise. The new proposal provided the federal government the authority “[t]o make laws for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the U.S.,” while concurrently “reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by the States.” This compromise, with minor stylistic changes, was ultimately approved by the Convention. U.S. Const. art. I, § 8, cl. 16 (Clause 16).

Delegate Hamilton declared that the authority to appoint officers was given to the states in order to secure for them “a preponderating influence over the militia.” The Federalist No. 29, at 185 (A. Hamilton) (J. Cooke ed. 1961) (Cooke). Moreover, the debates indicated that the training clause was retained in the text of the Constitution to ensure that the power to “organize, arm, and discipline” state forces given the federal government by the Militia Clauses did not surreptitiously extend federal control over the actual training of the militia.
Clause 16 provides Congress with the power to “discipline” the militia and reserves to the states “the Authority of training the Militia according to the discipline prescribed by Congress.” Amicus curiae, the National Guard Association of the United States, argues that the term “discipline” provides a constitutional basis for federal control over the training process. During the debates at the Constitutional Convention, Delegate Sherman suggested that the clause relating to training should be deleted, because he believed it “unnecessary.” He believed that the states would obviously retain this authority unless they specifically ceded it to the federal government. The Militia, supra note 6, at 35.1 In response, Delegate Elsworth cautioned Sherman on this point. Madison’s notes contain the following:

Mr. Elsworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be so expounded as to include all power on the subject.

After hearing Elsworth, Mr. Sherman withdrew his motion to delete the training clause.

Moreover, the debates at the Constitutional Convention indicate the power to discipline, at its broadest level of interpretation, means the power to prescribe methods of training, rules of conduct for the militia, penalties for the violation of such rules, and the means to administer these penalties. This power was believed necessary to assure potential coordinated movement on the field of battle. It also assured the federal government of troops who uniformly understood military rules of conduct and who understood that they were uniformly subject to the same penalties for infraction of these rules. See The Militia, supra note 6, at 35; see also Perpich v. United States Dep’t. of Defense, 666 F.Supp. 1319, 1325 n. 9 (D. Minn. 1987).

Madison ... declared that the authority of the states “as coequal sovereigns,” together with the political power of the people, would form a significant check on the potential use of state militias for military adventures by the federal government. He stated:

Can we believe that a government of a federal nature, consisting of many coequal sovereigns, and particularly having one branch chosen from among the people, would drag the militia unnecessarially to an immense distance. This, sir, would be unworthy of the most arbitrary despot. They have no temptation whatever to abuse this power; such abuse could only answer the purpose of exciting the universal indignation of the people, and drawing on themselves the general hatred and detestation of their country.

During the ratification debates, many of the delegates to the state conventions feared that the federal power to suppress domestic violence in individual states provided by this clause, together with the federal power over the militia set forth in Clauses 15 and 16, posed a serious threat to the states in the form of unchecked federal military power. James Madison responded forcefully to these suggestions and, in so doing, provided clear support for the principle that reserved state authority over the militia was designed as an explicit check on the potential abuse of military power by the federal government. In the Virginia convention, Madison stated:

The authority of training the militia, and appointing the officers, is reserved to the states. Congress ought to have the power to establish a uniform discipline throughout the states, and to
provide for the execution of the laws, suppress insurrections, and repel invasions: these are the only cases wherein they can interfere with the militia.

Several days later, Patrick Henry declared that Clauses 15 and 16, together with the Guarantee of Republican Government Clause, gave the federal government “unbounded control over the national strength” and “unequivocally relinquished” the states' control over their militias. In like manner, William Grayson repeatedly argued that under the proposed Constitution, Congress could call out the militia whenever it desired and thus there was “no check” on federal control over the militia. In response, Madison reasoned that practical necessities required dividing power over the militia between the federal government and the states. Following from this, he continued:

*If [power over the militia] must be divided, let him [Henry] show a better manner of doing it than that which is in the Constitution. I cannot agree with the other honorable gentleman [Grayson], that there is no check. There is a powerful check in that paper. The state governments are to govern the militia when not called forth for general national purposes; and the Congress is to govern such part only as may be in the actual service of the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the Service of the United States. It is, then, clear that the states govern them when they are not.*

Congress transformed the militia into the modern day National Guard with the passage of the Militia Act of 1903, commonly referred to as the Dick Act. The law required the states to divide their militias into two sections: the organized militia and the reserve militia. It further provided federal funding and equipment and required the militias to standardize their training. Congress did not convert command and control of the militia to the President when it was not in federal service even though it provided federal resources. In essence, Congress paid homage to Article I, Section 8, Clause 16, in the U.S. Constitution.

Federal law continued to evolve in The National Defense Act of 1916, 39 Stat. 166:

*That the Army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law.*

Congress amended the 1916 National Defense Act in 1933 by creating two organizational entities: (1) the National Guard of the individual states and (2) the National Guard of the United States. Since this amendment, all National Guard members hold membership in a state National Guard and the National Guard of the United States. National Guard members retain their status as members of a separate state National Guard unless activated on active duty under Title 10 U.S.C. Under the 1933 amendment, National Guard members could be ordered into Title 10 U.S.C. active duty whenever Congress declared a national emergency and authorized troops in excess of those serving on active duty:

*All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective States, Territories, and the District of Columbia so long as they shall remain in the active military service of the United States, and during such time shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army whose permanent*
retention in active military service is not contemplated by law. The organization of said units existing at the date of the order into active Federal service shall be maintained intact insofar as practicable. Section 18, 48 Stat. 160 - 161. . . . Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status.
Appendix 2 - Synopsis of Adjutant General Letters

Overview

This appendix provides a synopsis of the Adjutants’ General assessment of converting Title 32 Military Technicians to Title 5 Civilian Employees. First, this section briefly provides a snapshot of the qualifications and expertise of the Adjutants General to provide an assessment on a critical component of the National Guard – the Title 32 Military Technician.

Expertise of the Adjutants General

The 54 Adjutants General, from our 50 States, Puerto Rico, Guam, the Virgin Islands, and the District of Columbia’s Commanding General, together represent all the Soldiers, Airmen, and civilians of the National Guard. Individually, they are the principal military advisor to a governor; consequently, they face unique, sovereign populations and cultures with individual, unique centuries-old histories.

Independently and collectively, they are the most uniquely qualified experts on the effectiveness, utility, morale, complexities, and potentials of the National Guard including the Title 32 Dual Status Technician Program. The Adjutants General represent states, territories that are the smallest, largest, most isolated, most tranquil, richest, poorest, most, and least populated, urban, rural, diverse, and uniform. Nevertheless, all states and territories are subject to natural and man-made disasters.

Often former technicians themselves, the Adjutants General provide daily leadership, management, and oversight to a force largely made up of military technicians. Their leadership tasks range from the care of technicians to enabling technicians for routine and emergency requirements that their states and military units depend.

Together the Adjutants General have hundreds of years of experience supporting the Nation and their individual state with trained and ready forces. To the leader, they understand both their federal mission and their often no-notice state mission. Most importantly, the Adjutants General genuinely and uniquely understand how to lead, develop, motivate, train, and sustain National Guard members.

Key Themes from the Adjutants General on the Conversion of Title 32 Military Technicians

All the replies from the Adjutants General were resoundingly similar. Without any prompting or presumption, each Adjutant General had replies with similar refrains. The overarching theme from the Adjutants General is that the converting Title 32 Military Technicians to Title 5 degrades readiness thus significantly jeopardizing the National Guard’s capability to respond to state disasters and national threats. In general, six themes flow through each assessment.

Theme 1 – Conversion will degrade State Response Capability.

This transition will degrade the state’s ability to respond to an emergency. While to someone outside of the National Guard and its beneficiaries this might seem out of scope for the Dual
Status Technician’s purpose, it is fair to wonder “if they were not available who would do this vital work?” Illustrative and real-world passages from the Adjutants General include:

“Response degradation and mobilization readiness will be severely affected if the TAG is unable to utilize T32 technicians immediately. “

“…the worst floods in the state’s history ravaged 24 of 64 counties, resulting in 8 fatalities, 218 injured, 18,882 homes and 200 commercial buildings destroyed, and over 20,000 oil wells impacted…. almost 1,000 soldiers and airmen responding, rescued/evacuated over 2,500 civilians and over 1,000 pets, including over 83 helicopter live hoists, …such a significant impact to the lives, property, and well-being of … citizens … to respond so rapidly hinged largely on the ability of Title 32 technicians…”

“…Without the ability to immediately transition Air and Army T32 technicians into a state active duty status, the levy breaches would have deteriorated further and caused widespread damage….”

Theme 2 – Conversion will negatively affect recruiting, retention, and management the National Guard force.

This transition will complicate the process to manage, lead, and promote the full time National Guard force. Illustrative and useful passages from the Adjutants General include:

“…Title 5 conversion will increase the full-time work force complexity, raise recruitment and placement costs, challenge technician career management and progression and limit the State’s flexibility to adapt to ever-changing federal and state missions…”

“…The perspective of converting the full time piece of the dual-status technician force to a Title V civilian force at the expense of a proven tenured force lends to speculation, skepticism, and hesitation…”

“…Discipline would become more difficult, costly, and time consuming…”

Theme 3 – Conversion degrades military readiness.

Military readiness is the baseline capability for the National Guard. This has become more evident since the attacks of September 11, 2001. Illustrative and concrete passages from the Adjutants General include:

“…Perhaps the greatest impact to readiness is the direct loss of experience and talent every Friday afternoon…”

“…Section 1053 of the 2016 NDAA is very vague, and it elicits far more questions than it provides answers. It will reduce the readiness and effectiveness of the National Guard nationwide…”
“...We have repeatedly demonstrated the technician force ability to respond quickly as we did with the Libya operations where the 108th Wing was in theater and flying missions within 2 days of notification...”

“...subverts the National Guard’s role as an Operational Force...”

“...Every major unit movement within the National Guard commences with indispensable actions on the part of the full-time Military Technician force...”

“...Changing the legal status and force management of military technician positions fractures the continuity, interchange, and flow of knowledge between members of the weekday (Full-Time) and weekend (M-Day) National Guard force due to the loss of military affiliation of converted DS technicians...”

“...dual-status technicians are critical to the readiness of our formations...”

Theme 4 – Conversion will raise costs while reducing effectiveness.

In an era where reducing budgets is essential it needs to highlighted that the conversion of Title 32 Military Technicians to Title 5 Civilian Employees will raise costs for the federal government and the states. Illustrative and sensible passages from the Adjutants General include:

“...The conversion to Title 5 would drive more cost in a time where budget reduction is the goal...

“...Currently to hire a new employee using OPM’s DEU (Office of Personnel Management’s Delegated Examining Units) process the cost on average is $1,640.00...”

“...the replacement cost for those military personnel is estimated at $421.41M over the next 10 years nationwide...”

“...overtime cost for this state alone using time used in FY15 is $537,741.22...”

“...(OPM) does not currently charge for recruitment and placement costs associated with hiring title 32 dual status technicians through the USA Jobs website... OPM charges $2,000 to $5,000 to advertise and staff non-dual status positions...”

“...adding the requirement to use USA Jobs instead of in-house administration will increase the cost by approximately $1850 per hire. With a 14% turn-over, we will be spending roughly $145K per year in administration costs, without an increase in productivity...”

Theme 5 – Conversion does not address any real and existing problems.

The Military Technician Program can be modernized and improved to enhance readiness, safeguard employee rights and control costs. Illustrative and useful passages from the Adjutants General include:
“...Impression that the Technician program is not managed properly, but no evidence is given to substantiate...fix to a problem that has not been defined, documented, or substantiated...”

“...In summation, this initiative is a solution (and a bad one, at that) looking for a problem that the States do not have...”

“...General Milley, Chief of Staff of the Army, has been very clear that the number one priority for all components of the Army is readiness. Considering any legislation which all involved parties agree will reduce readiness is incongruent with that mandate...”

“... We should be finding ways to reduce complexity not add to it...”

“...I believe we need to be very careful about fixing something that isn’t broken...”

Theme 6 – The conversion should be repealed, but if it was imposed, it should be done minimally, greatly limited, and with caution.

In a perfect world, the Adjutants General would repeal the conversion of Title 32 Military Technicians to Title 5 civilian employees. Moreover, the predominant theme from the Adjutants General is that the Military Technician Program should be modernized. Illustrative and pragmatic passages from the Adjutants General include:

“...the resulting confusion and obstacles are untenable...”

“...work to legislatively fix the problems with the T32 program that drove us to this discussion...”

“...recommend that we work together to legislatively fix those concerns rather than expanding the non-dual status T5 workforce with its very real limitations and severe operational impact...”

“...This proposal is unacceptable and must be modified to provide State-level authority over Title 5 National Guard employees...”

“...There are opportunities to improve the Title 32 Military Technician program that would benefit all National Guardsmen while balancing the constitutionally protected role of the Arizona Governor, rather than a few select individuals...”

“...repeal it...”

“...the resulting confusion and obstacles are untenable...”

“...work to legislatively fix the problems with the T32 program that drove us to this discussion...”
“...recommend that we work together to legislatively fix those concerns rather than expanding the non-dual status T5 workforce with its very real limitations and severe operational impact...”

“...the overall risks of conversion, in any amount, we anticipate direct loss of consequence management, military career management, greater challenges in retention, increased management overhead, loss of significant experience and readiness in units, and lack of continuity between full time personnel and our military units...”

“...While it would be possible to convert some of the T32 positions, I believe every position you convert weakens the culture. With the conversion, you place an influential individual into the equation who does not have to pass a physical fitness test, who does not have to train on weekends and who does not have to prepare to deploy...”

“...the conversion of dual status T32 positions to non-dual status T5 decreases the readiness of my force for both its State and Federal mission and I strongly recommend that we do not proceed down this road....”

“I remain befuddled as to why T32 cannot simply be amended...”

The individual letters from each of these General Officers are contained in Appendix 3
Endnotes

1 Perpich v. Department of Defense, 880 F.2d 11, affirmed, 496 U.S. 334, 110 S.Ct. 2418 (1990) The military power of the United States is based on a system of checks and balances. The Framers divided authority over the military, not only between the coordinate branches of the federal government, but also between the federal and state governments.


3 Title 32 U.S.C. § 709


5 Maryland v. United States, 381 U.S. 41, 46, vacated and modified on other grounds, 382 U.S. 159 (1965)


8 Title 32 U.S.C. § 709(a)


11 Title 32 U.S.C. § 709(e)(1)


14 Ibid, 3.


16 Ibid.


19 Id., at 105.

20 Id., at 45.

21 See, for example, 2014 National Guard Bureau Posture Statement, Sustaining an Operational Force, at 7.

22 Based upon 20 percent conversion of FY 2016 ARNG and ANG dual-status and non-dual status authorizations. (26,099 + 22,104 = 9640.)


24 Utah Adjutant General Narrative.


26 New Jersey Air National Guard, 177th Fighter Interceptor Group and Department of Defense v. FLRA, 677 F.2d 276, 279.
27 CNA Study, at 53.

28 Id.


30 Wyoming Adjutant General Narrative, page 3.