

SLIDE 1 – NG SEAL

INTRODUCTION and DISCLAIMER

Good morning, thank you for joining us at this meeting of the AGAUS. My name is Don Dunbar and I am Wisconsin's Adjutant General. Today, I am speaking on behalf of the state of Wisconsin and the AGAUS. I am not on active duty orders and no one in the Defense Department has seen, reviewed or approved my remarks.

I command over 7,700 soldiers in the Wisconsin Army National Guard and I have sent the vast majority into combat operations since becoming Wisconsin's Adjutant General in 2007. Many of these units and soldiers have deployed multiple times.

I am not a soldier, but I know this - there is simply no substitute for land power in the joint fight of the 21st century. Further, only the active duty Army can provide the leadership necessary to assure effective land power for the joint fight.

However, one of the cornerstones of the total force Army is the ARNG, which is foundational to the defense of this nation. The purpose of this briefing is to share with you how we are foundational to the defense of this nation and how we are essential to the total force. It is an unfortunate truth that the vast majority of men and women who serve our nation in the military do not understand the legal framework under which the National Guard was created and operates.

SLIDE 2 - PREAMBLE

2) Our constitution created a limited, but powerful central government that is focused on a few simple missions – none of which is a higher priority than national defense as can be seen in the Constitution's preamble.

- **U.S. Constitution - Preamble:** We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, **provide for the common defense**, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

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To provide for the common defense, the founding framers debated at length whether to defend the nation with a large standing army or a militia. The debate, which was captured in the federalist papers, had passionate advocates on both sides of the issue. The debate was similar in many ways to today's debate with respect to the active duty and the National Guard. Comments – some of them ugly – are very similar.

- Things have changed – back then it was referring to the recent revolution, while today we refer to the 'complicated' threat spectrum.
- The National Guard is no substitute for the professional active duty army.
- The National Guard and active duty aren't interchangeable, etc.

Here is what we need to know. This was a big issue. In the end, to reach a constitutional compromise, our founding framers settled on both - a scalable active duty force and a National Guard (modern day militia). It is clear from our history, that without this compromise, key states would not have ratified the constitution.

This compromise endures in our constitution and can be seen in the enumerated powers for the Congress and the President with respect to national defense.

SLIDE 3 – CONGRESS (WAR POWER)

- **Art I, §8** – Scope of legislative powers:

Congress shall have the power:

- To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
- **To raise and support armies**, but no appropriation of money to that use shall be for a longer term than two years;
- To provide and maintain a navy;
- To make rules for the government and regulation of the land and naval forces;

SLIDE 4 – CONGRESS (MILITIA POWER)

- **To provide for calling forth the militia** to execute the laws of the union, suppress insurrections and repel invasions;
- **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;**

Congress as full authority for the defense of our nation, including both the war power and the militia power. The distinction of the two is the very compromise agreed upon for the Constitution and which endures today. Although Congress as full authority for the defense of our nation, States retain substantial authority over the National Guard (militia) until placed on active duty in the actual service of the United States.

It is highly likely that without these two militia clauses, the National Guard would have ceased to exist a long time ago. But, these clauses do exist and our National Guard endures. Here is a rough depiction of what our total force looks like.

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This President's power is covered in Article II of the Constitution.

SLIDE 6 – POTUS POWER

- **Art II, §2** – Presidential powers:

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States

SLIDE 7 – T10/32 BASIC LAY OUT

It is instructive to note that Congress has created two separate sections of positive law, when it comes to national defense – one (Title 10) is entitled “Armed Forces” and the other (Title 32) is entitled “National Guard.” Let’s explore why.

For the first 115 years of the republic, the states operated under the militia act of 1792, which allowed states to determine their own training standards and unit strength, which caused challenges when the nation called upon them for active duty. This came to a head during the Spanish American war and Congress subsequently passed the militia act of 1903 (Dick Act) which provided federal funding to the states and set a common federal training standard for the National Guard, which was organized consistent with the U.S. Army. Despite providing federal funding for a specific purpose, the state character of the National Guard remained unchanged. The state’s role in commanding, administering, and conducting the actual training of the National Guard remained in effect consistent with the constitution.

In response to an Attorney General opinion that prevented the National Guard from serving south of the border in the Mexican American War, Congress amended the Dick Act in the National Defense Act of 1916. The statute expressly provided that the Army of the United States would include, not only the Regular Army, but also the National Guard while in the service of the United States. This act required all Guardsmen to take a dual oath to obey the President and the Governor, and authorized the President or Congress to ‘draft’ or mobilize the National Guard for active duty service. The language expressly provided that when drafted (mobilized) for federal service, members of the National Guard should from the date of mobilization, stand discharged from the militia and from such date, be subject to the rules and regulations governing the Regular Army.

Note, this was a one way action. You were discharged from the militia or National Guard of your state when mobilized or drafted. This occurred in World War I when most of the National Guard was mobilized for service, and where they performed brilliantly; however, when mobilized for active duty, it virtually destroyed the National Guard as they stood discharged from the National Guard with no method to return to the National Guard following active duty service.

This was addressed in 1933, when Congress required that all persons enlisting in the National Guard also enlist in the National Guard of the United States, a federal reserve of the United States Army. These organizations – the National Guard of

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the Several States and the National Guard of the United States are legally distinct but overlapping. When mobilized for federal service, members or units of the National Guard are discharged from state command and control and are subject to the rules and regulations of the active duty. Upon being relieved from active duty in the military service of the United States, all individuals and units revert to their status in the National Guard of the respective states.

Today, we find these foundational concepts codified in U.S. Code, in Title 10 (Armed Forces) and Title 32 (National Guard). I will highlight key aspects of these laws.

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10 USC 101 (definitions):

- The term **“armed forces”** means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

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- The term **“department”**, when used with respect to a military department, means the executive part of the department and all field headquarters, forces, **reserve components**, installations, activities, and **functions under the control or supervision of the Secretary of the department.**

This is an area where Adjutants General often frustrate our colleagues in the active duty. They refer to this definition and tell us that we are a reserve of the Army and Air Force, and that the respective Chief of Staff has the final say. Since we are only two-star officers, we shouldn't disagree with the Army and Air Force – ever. Makes us sound like we are rogue officers, but that is not the case.

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10 USC 10101: (Reserve Components generally)

- The **reserve components** of the armed forces are:
 - (1) The Army National Guard of the United States.
 - (2) The Army Reserve.
 - (3) The Navy Reserve.
 - (4) The Marine Corps Reserve.

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- (5) The Air National Guard of the United States.
- (6) The Air Force Reserve.
- (7) The Coast Guard Reserve.

You will note that the term “National Guard” is not included and the “reserve components,” referred to in the definition of a department, only includes the National Guard of the United States. So, is that significant? If so, what is the difference?

10 USC 101(c) Reserve Components: The following definitions relating to the reserve components apply in this title:

(1) The term “National Guard” means the Army National Guard and the Air National Guard.

(2) The term “Army National Guard” means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that

(A) is a land force;

(B) **is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;**

(C) is organized, armed, and equipped **wholly or partly at Federal expense;** and

(D) is federally recognized.

(3) The term “Army National Guard of the United States” means **the reserve component of the Army** all of whose members are members of the Army National Guard.

These definitions flow from the constitution with respect to the National Guard and from the 1933 amendment to the National Defense Act of 1916, which created the National Guard of the United States as a reserve of the United States Army. Congress clearly explains the distinction in law.

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**10 USC § 10105: ARMY NATIONAL GUARD OF THE UNITED STATES:
COMPOSITION**

The **Army National Guard of the United States** is the reserve component of the Army that consists of—

- (1) federally recognized units and organizations of the Army National Guard; and
- (2) members of the Army National Guard who are also Reserves of the Army.

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**10 USC § 10106: ARMY NATIONAL GUARD: WHEN A COMPONENT OF
THE ARMY**

The Army National Guard **while in the service of the United States** is a component of the Army.

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**10 USC § 10107: ARMY NATIONAL GUARD OF THE UNITED STATES:
STATUS WHEN NOT IN FEDERAL SERVICE**

When **not on active duty**, members of the Army National Guard of the United States **shall be administered, armed, equipped, and trained in their status as members of the Army National Guard.**

That is how and why the Governor is commander in chief of the National Guard unless and until called to active duty. It is also why Adjutants General are not being disrespectful of any senior officer in the active duty when we advocate for the National Guard. It is our job and we work for the Governor until mobilized or activated for service on active duty. Let's take a look at Title 32.

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32 USC § 102 (General Policy)

In accordance with the traditional military policy of the United States, **it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times.**

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32 USC § 314 (Adjutant General)

(a) There shall be an adjutant general in each State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands. **He shall perform the duties prescribed by the laws of that jurisdiction.**

(d) The adjutant general of each State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands, and officers of the National Guard, **shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him.**

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32 USC § 501 (Training Generally)

(a) The discipline, including training, of the Army National Guard **shall conform to that of the Army**. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard **shall be conducted by the several States**, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands **in conformity with this title**.

This is a critical point. Here again, when this is pointed out to some of our colleagues on active duty, they will say that we don't believe we are accountable to the Army and the Air Force. But, nothing could be further from the truth. We are provided federal funds for a specific purpose – to train the National Guard – and

we are responsible and accountable for every dime. This is where our relationship with the National Guard Bureau comes into play.

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10 USC 1011 – NATIONAL GUARD BUREAU

10 USC 10501:

(a) National Guard Bureau. — There is in the Department of Defense the National Guard Bureau, which is a joint activity of the Department of Defense.

(b) Purposes. — The National Guard Bureau is the **channel of communications on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States between**

- (1)** The Department of the Army and Department of the Air Force, and
- (2)** The several States.

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10 USC 10503: Functions of the National Guard Bureau (Charter):

- The Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, the Secretary of the Army, and the Secretary of the Air Force, **shall develop and prescribe a charter for the National Guard Bureau. The charter shall reflect the full scope of the duties and activities of the Bureau, including the following matters:**

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(1) Allocating unit structure, strength authorizations, and other resources to the Army National Guard of the United States and the Air National Guard of the United States.

(2) The role of the National Guard Bureau in support of the Secretary of the Army and the Secretary of the Air Force.

(3) **Prescribing the training discipline and training requirements** for the Army National Guard and the Air National Guard and the allocation of Federal funds for the training of the Army National Guard and the Air National Guard.

(4) **Ensuring that units and members of the Army National Guard and the Air National Guard are trained by the States** in accordance with approved programs and policies of, and guidance from, the Chief, the Secretary of the Army, and the Secretary of the Air Force.

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(5) **Monitoring and assisting the States** in the organization, maintenance, and operation of National Guard units so as to provide well-trained and well-equipped units capable of augmenting the active forces in time of war or national emergency.

(8) **Granting and withdrawing, in accordance with applicable laws and regulations, Federal recognition of**

(A) **National Guard units, and**

(B) **Officers of the National Guard.**

The National Guard Bureau has a substantive role to play in the oversight and management of the National Guard, but nowhere in the charter do you see the word command. NGB is a channel of communication.

SLIDE - T10/32 BASIC LAY OUT

Clearly, the National Guard is constitutionally unique – it is the only military force fully available to the Governors and citizens of the respective states, territories and the District and fully available to the President or Congress when required.

Our mission is two-fold:

- We are the primary combat reserve of the U.S. Army and U.S. Air Force, and
- We are the first military responder in the homeland.

It is also important to note that there is no conflict between the federal and state law as respects the National Guard or the National Guard of the United States. The

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Constitution and federal law are is preeminent. Every legal reference in this presentation was federal.

In addition to the Constitution and federal law, we can find this same framework adjudicated in the Supreme Court.

In 1872, the court held in *Tarble's Case* that, “in light of the Constitution’s more general plan for providing for the common defense, the powers allowed to the states by existing statutes are significant.” In this case, the court had occasion to observe whether the constitutional allocation of powers in this realm – providing for the common defense – gave rise to a presumption that federal control over the Armed Forces was exclusive. They determined that it did not, as the Militia clauses subordinate any such structural inference to an express permission (for States to form a militia) while also subjecting state militia to express federal limitation.

In 1990, the court held in *Perpich v. Department of Defense* that the unchallenged validity of the dual enlistment system means that the members of the National Guard who are ordered into federal service with the National Guard of the United States, lose their status as members of the state militia during their period of active duty. They cite 32 U.S.C. §325(a) which states “each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his state, territory, or the District, as the case may be, from the effective date of his order to active duty until he is relieved from that duty.”

The court furthers stated that notwithstanding the brief periods of federal service, the members of the State Guard continue to satisfy this description of a militia. In a sense, all of them now must keep three hats in their closets – a civilian hat, a state militia hat, and an Army hat – only one of which is worn at any particular time.

Clearly – status matters and the trigger for moving from the National Guard of the several states to the National Guard of the United States is the order to active duty or actual federal service. Some believe that you are in both organizations all the time, but the law and the Supreme Court disagree. National Guard personnel maintain membership in both the National Guard and the National Guard of the United States; however, they can be active in only one at any given time based on status. Status is key and the normal status of the National Guard is a state status. Federal status only applies when serving on active duty.

SLIDE (FINAL – Minuteman now and then)

Which brings us to today. The National Guard is still the militia codified in the Constitution and our legacy endures. However, what we have seen in our total force Army since 9-11 is substantive – nothing short of the fulfillment and validation of the Abrams doctrine. That being said, neither our founding framers nor General Abrams – in their wildest dreams – envisioned a National Guard this good.

The National Guard has mobilized repeatedly, performed every required mission and maintained record recruiting and retention numbers. The National Guard connects the Army and Air Force to America in ways they simply cannot accomplish on their own and this has increased public support for required missions over a protracted period of high operations tempo.

The National Guard has proven its capability and reliability over a sustained period of expeditionary combat operations. The National Guard meets or exceeds the USA and USAF readiness standards and is prepared to fight today if needed. Our nation has the requisite laws and policy in place to access the National Guard using mobilization and/or volunteerism – laws and policy that have a proven track record. The National Guard is fully capable of supporting the USA & USAF by meeting or exceeding the 4:1 dwell-to-deploy ratio.

We generate foundational readiness by being forward deployed in America's communities with personnel who live in those communities, which assures unit cohesion and essential military skills. This structure assures our ability to meet training standards and fulfill our responsibility as the primary combat reserve of the United States Army and United States Air Force; and allows us to provide highly skilled and disciplined forces to the Governor for domestic emergencies.

Today, the National Guard is at a level of readiness, reliability, accessibility, and combat experience never before seen in our nation's history. It is a national treasure.

Going forward, the National Guard should remain an operational force. Our readiness must be assured through an approved and validated force generation model that includes all National Guard units. The net result is better soldiers, better airmen, better units, and better preparedness for unforeseen contingencies.

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I do not possess a crystal ball. I do not know when the next Pearl Harbor or September 11th will occur - but it will occur. We can never be fully prepared as a nation, but we can and must mitigate risk. The best framework for the defense of this nation is the one we inherited from our founding framers. A total force military led by a scalable active duty and supported by an operational National Guard, which is capable of achieving both core missions – primary combat reserve and first military responder in the homeland.

Thank you.