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**UNIONS IN THE NATIONAL GUARD:
A NATIONAL CONSOLIDATION, YES/NO?**

BY

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A NATIONAL CONSOLIDATION YES/NO?

ABSTRACT

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The purpose of this strategic research project is to present information on the proposed consolidation of 38 states technician unions into one national union under a single collective bargaining agreement, negotiated with the Department of Defense/National Guard Bureau, rather than the individual states' Adjutant Generals. The Adjutants General and union perspectives will be analyzed in view of their constitutional, case law, legislative, and Federal Labor Relations Administration settings.

The constitutional history of the National Guard will be set forth. The anticipated and stated impacts of such a union consolidation are discussed. States' rights issues bear careful scrutiny when weighed against the overarching federal authority and requirements.

The State sovereignty and residual rights aspects of the Tenth Amendment of the Constitution require consideration in that a consolidation would remove from the States control of the labor relations and employee supervision set forth by the founding fathers.

The National Guard will be evaluated in its "dual mission" serving the President and the people of the United States when activated for federal service, and while serving the Governor and state constituencies while in a state duty status.

The specific legislative milestones of the National Guard will be set forth to provide a backdrop against which this matter is being deliberated. The Military Technician Act of 1983 is set forth, with the congressional leaders intent to help our understanding of its purpose.

Finally, the Federal Labor Relations Authority criteria for such a proposed consolidation is weighed against the facts presented by the parties to reach a possible and probable outcome in this matter.

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INTRODUCTION

The General's cellular phone and digital pager go off simultaneously, as they so often do in these days of federal peacekeeping, peace enforcement, humanitarian aid, terrorism, counterterrorism, and state' natural disaster assistance missions. The Adjutant General of State X calmly pushes his receive button, and listens to the tersely communicated "mission" statement read to him by his/her higher headquarters emergency operations center (EOC), either at the United States Army Forces Command, National Guard Bureau - Washington DC, or the Governor's office in his own state. Now comes the easy part - notifying his organization: call the chief of staff, push the first speed dial button, secondly, link via conference call his emergency operations center, and then the subordinate commander who will actually execute the mission. But wait, he realizes he hasn't notified the local technician union president that he will need to once again suspend the collective bargaining agreement and initiate emergency operations...

Real world or make believe? You guessed it - real world. In 1998, the National Guard deployed soldiers and airmen to over 70 international sites on federal missions, 308 state active duty missions in 49 of 54 states and territories, totaling over 374,000 mandays.ⁱ The Adjutants General certainly must have added the union executive to their list of personal telephone speed-dial numbers during 1998. They called them often enough based upon the above summary.

What's the big deal with unions in the military? Nothing, in fact, the National Guard maintains an excellent rapport with 6 different unions representing fulltime technician employees.ⁱⁱ Furthermore, in compliance with President Clinton's Executive Order 12871(1993) the National Guard, throughout 54 states and territories negotiate appropriate work condition subjects in accordance with 5 U.S.C. § 7106(b).ⁱⁱⁱ Yet, the nagging question remains how do "unions in the National Guard" impact the Adjutants General as they execute their state and federal missions? Would a consolidation of the existing 42 local collective bargaining agreements in the states and territories into one national union impact the Adjutants General?

In order to analyze the constitutional and statutory issues to be discussed herein, it is critical to understand the fulltime technician employees - what do they do and who are they? They are the civil service employees who perform the administration, logistical, maintenance and training functions on a during a typical work-week. To be hired for a fulltime technician position, the individual must already be a member of the National Guard, a uniform wearer serving in an Army or Air National guard unit most

typically one weekend a month and for fifteen days of annual training. There are almost twenty five thousand fulltime technicians employed nationally in 1999 upon whom the Adjutants General rely for essential fulltime readiness services. The technician workforce keeps up the fleet of equipment ranging from M1A1 Abrams tanks to KC 135 aircraft, maintains the personnel records, and coordinates the unit training. Thus, the units of the National Guard are kept ready for state or federal missions.

In Washington State for example, 910 technicians make up the Adjutant Generals' fulltime union workforce. Every three years the local union, which represents both Army and Air Guard technicians, enter into collective bargaining for a new contract. The Adjutant General appoints a management team to represent him, and the union selects a group of local union officers and a national union representative to negotiate a new collective bargaining agreement. Essentially the conditions and manner of work is negotiated by the teams and once a collective bargaining unit is voted on and accepted, then the agreement is forwarded to the Department of Defense for review and final approval consistent with the Federal Labor Relations Authority guidelines. With very few difficulties or interruptions, this collective bargaining process has served the 54 states and territories since President Nixon initiated the process with Executive Order 11491 in 1969.

I. WILL CONSOLIDATION OF 42 STATE UNIONS INTO ONE COLLECTIVE BARGAINING UNIT ENHANCE NATIONAL GUARD READINESS FOR STATE AND FEDERAL MISSIONS?

This article will discuss and present information on both sides of this consolidation issue in the 1999 context of national security. One thing of which you can be sure – “Unions are in the Department of Defense...and they are here to stay.”^{iv} The most current union initiative “...consolidating the 42 National Guard jurisdictions represented by the Association of Civilian Technicians (hereafter, A.C.T.) into one national bargaining unit will be analyzed under the authorizing statute 5 U.S.C. § 7112(d): “...whether the Federal Labor Relations Authority considers the larger unit to be appropriate...”^v and how this possible change will effect the effectiveness and operational efficiency of the National Guard.

A.C.T. union counsel, Daniel M. Sember clearly articulated the reasons for consolidation: first, to provide greater legal rights for the majority of technicians represented by this union, and secondly, that a common collective bargaining agreement be negotiated with National Guard Bureau or the Department of Defense to save immense resources. On their face both positions make very good sense.

The Department of Defense or National Guard Bureau would distribute one collective bargaining agreement for all the obligated 38 states and territories to execute. The states and territories would be freed up from an onerous task now requiring collective bargaining negotiations once every three years. Also, the A.C.T. would be able to negotiate more legal rights, that they currently cannot negotiate absent the showing of a "compelling need" on such subjects as ...hours of work, conditions of employment, qualifications of employees, merit promotions, disciplinary actions, and hiring/firing standards. Currently, these subjects are "Management Rights" which are not subject to negotiation absent a "compelling need" showing to meet the statutory and case law requirement. Surely, Adjutant Generals would be willing to open all of these topics to negotiation every three years, or would they? Today, the Adjutants General negotiate only the methods and means of applying the above topics. Within President Clinton's Executive Order, the urging for all federal agencies to enter into a "full partnership" with their respective labor unions couldn't hurt – or could it?

The Adjutants General espouse the position that there are fundamental legal issues associated with the union in this case, that raise constitutional questions regarding state sovereignty and basic labor law, in addition to questions of practicality in the discharge of their duties to both the Governor on state missions and to the President on federal missions. These key concerns, discussed herein, center around the legal history of the states' National Guards, provisions of the U.S. Constitution, and federal statutes which set forth the scheme under which the Association of Civilian Technicians seek consolidation, as well as numerous case decisions, and precedents established by the U. S. Supreme Court, U.S. Courts of Appeals, and the Federal Labor Relations Authority (hereinafter F.L.R.A.). This issue of consolidation will directly affect the ability of each of the 38 individual Adjutants General (who are state commanders of the individual state National Guard organizations) to conduct labor relations with their military technicians who are "inextricably intertwined" with their individual state Militia membership and role, and their ability to mobilize necessary units to meet state and federal missions.^{vi}

A. THE CONSTITUTIONAL HISTORY OF THE STATES' NATIONAL GUARDS ARE FOUNDED IN INDIVIDUAL STATE MILITIAS, CREATED AT THE BIRTH OF THE UNITED STATES, AND SUBSEQUENTLY MAINTAINED AS THE STATES' NATIONAL GUARDS.

To successfully grapple with the issues of this situation, it is helpful to understand the different institutions that constitute the states' National Guards, including their origins and history. At the outset, it is important to understand the military nature of the state National Guard from which soldiers and airmen as military technicians are drawn. An examination of United States' history reveals the original and continuing state government character and control over the states' National Guards, notwithstanding the introduction of federal government regulation beginning in the 20th Century. This "modern day" federal government provides guidance over many activities in the U.S. society, but it does not negate or diminish in any way the fundamental, state government origin, character and operations which are inherent in the states' National Guards. For a more lengthy and more exhaustive history, see The Militia Clauses, the National Guard, and Federalism, A Constitutional Tug of War, 57 George Washington L.R. 328-362 (1988).

1. **From the Constitutional Convention of 1787 to the Present, There Has Emerged a Growing Authority of the Federal Government to Utilize the State National Guards for Limited Federal Purposes.**
 - a. **In the Constitutional Convention of 1787, the Framers of the Constitution Crafted Clauses in the Constitution That Reflected State Controls Over the Militias.**

In the Constitutional Convention conducted in 1787, there were serious negotiations regarding the drafting of the "militia" clauses of the new Constitution: some delegates proposed a militia completely controlled by the federal government, while others proposed some state controls. Ultimately, a compromise was reached, and was set forth in Article I, Section 8, Clause 16 of the Constitution. It reflected that "the federal government would not have all the power over militia matters. The Article I language remains unchanged and is the constitutional basis for both the Federal and state power over the militia.

Id at 329, citing 1 The Records of the Federal Convention of 1787 at 386.

- b. **From 1789 – 1903, State Militias Were Maintained After the American Revolution and the Creation of the Regular Army.**

The states continued to maintain their own state militias following the American Revolution and enactment of the Act of September 29, 1789, a law which was the statutory birth of the Regular

Army. The Act also authorized the President to draft these state militias into federal service. Clearly, this maintained a separate state militia, separate and independent from the Regular Army, subject to the call of the President. The preservation of the separate state militias is key to the constitutional rights of states to organize and train the militias according to the guidance prescribed by Congress.

c. From 1903 – 1998, State Militias and Subsequent State National Guards Continue Principal State Governmental Service, But Witness the Introduction of Limited Federal Use and Limited Federal Regulation over Federal Military Functions Of The Respective States' National Guards.

Beginning in 1903 with the Dick Act (repealed in 1956) which labeled the states' militias as "National Guards", Congress enacted legislation which appropriated federal funds for the limited federal military roles it imposed on the states' National Guards. The federal legislation also empowered the federal government to utilize the states' National Guards for specific federal purposes, often conditioned upon state gubernatorial consent, and to impose federal regulations on the states' National Guards^{vii}

2. THE U.S. CONSTITUTION GRANTS STATE POWER OVER THE MILITIAS, AND IMPLEMENTS POWER THROUGH SEPARATE AND INDEPENDENT STATE ENTITIES – THE STATES' NATIONAL GUARD.

The states' National Guards are separate and independent state legal entities under Article I, Section 8, Clause 16 of the U.S. Constitution. The U.S. Supreme Court, citing constitutional and factual history, has recognized that the states' National Guards are independent entities subject to the exclusive jurisdiction of the respective states, except when called into active service of the United States, Maryland v. U.S., 381 U.S. 41, 85 S.Ct. 1993, 14 L.Ed.2d 205(1965), tracing this creation back to the Revolutionary War.

From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of a citizen-soldier army, but lacked the equipment and training necessary for their use as an integral part of the United States armed forces. The passage of the National Defense Act of 1916 changed significantly the status of the militias, designating them as the National Guard. Pursuant to power vested in Congress by the Constitution, "...the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being federalized by units, rather than by drafting individual soldiers." In return, Congress authorized the allocation of federal

equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state payments. The Governor, however, remained in charge of the National Guard in each State except when the Guard was called into active federal service; in most instances the Governor administered the Guard through the State Adjutant General, who was required by the Act to report periodically to the National Guard Bureau, a federal organization, on the Guard's reserve status. The basic structure of the 1916 Act has been preserved to this day. The F.L.R.A. Hearing Record, p. 1297,1298 (Oct. 1998).

The technician's union, A.C.T., does not contest that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control over them by the States make it apparent that military members of the Guard, are employees of the States, and so the courts of appeals have uniformly held as a matter of law. Sebra v. Neville, 801 F.2d 1135, 1140 (9th Cir. (1986); and Illinois National Guard v. FLRA, 854 F.2d 1396, 1397-1398 (D.C. Cir. 1988). In other words, Article I, Section 8, Clause 16 is fulfilled by the modern day National Guards of the States, and the delicate balance between state control and federal regulation is maintained even in limited federal call-ups.

Federal statutory law also recognizes that National Guard personnel are state employees unless called into federal service 10 U.S.C. 12401. Amplifying on the previous codification of this statute and citing Maryland v. U.S., supra, the U.S. District Court for the District of Puerto Rico held: "The critical element in determining whether a National Guardsman is an employee of the United States is whether or not he is in active, Federal service. Ursulich v. Puerto Rico, 384 F.Supp. 736 (D.C.P.R. 1974). Historically, and this will later become a key point, the Guard has been, and today remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard are provided for, to a large extent, by federal law. New Jersey Air National Guard v. FLRA, 677 F.2d 276 (3d Cir. 1982).

B. CONSOLIDATION OF 42 STATES' TECHNICIAN UNIONS INTO A NATIONAL BARGAINING ENTITY IS CONTESTED BY THE 38 AFFECTED STATES AS A CONSTITUTIONAL CHALLENGE TO THE FEDERAL SERVICE LABOR MANAGEMENT RELATIONS ACT, 5 U.S.C. 7112. THIS STATES' CHALLENGE IS PREMISED ON THE STATE POWERS GRANTED UNDER THE CONSTITUTIONAL AND FEDERAL STATUTES.

The Federal Labor Relations Authority is the forum that will hear and decide this issue. Here, the National Guard Bureau and 38 individual sovereign states have challenged the constitutionality or constitutional applicability of a section of the Federal Service Labor management Relations Act, 5 U.S.C. Section 7112(d), as it applies to separate and distinct state entities and employers. Section 7112(d) empowers the Federal Labor Relations Authority (hereinafter FLRA) to consolidate collective bargaining units into larger units if such a proposed consolidation meets certain tests. In this situation, the FLRA is exercising its power to consider combining the separate and independent employee workforces of the National Guard (military technicians) of some 38 states, from 42 jurisdictions (with the inevitable effect on the remaining 16 states and territories), for the first time ever into one national collective bargaining unit controlled by the Department of Defense. The states argue that such a proposed consolidation is an unconstitutional usurpation of state powers expressly granted under Article I, Section 8 of the Constitution, and flies in the face of 220 years of United States history, since control over the respective states' National Guards (and their predecessor Militias) has historically been the purview of the respective states and territories – not the federal government.

Furthermore, this constitutional grant of state control did not change with the enactment of the Military Technician Act of 1968 (hereafter referred to as Technician Act), which is relevant for our analysis. At this point in time, the first unions, the Association of Civilian Technicians(A.C.T.) and National Association of Government Employees(N.A.G.E.) first filed for and received recognition from the Federal Labor Relations Authority to represent fulltime National Guard technicians. It is necessary to understand the character of the military technicians who are the subject of this discussion – on whom the Adjutant Generals of each state rely to execute each and every one of their missions. With regard to the Technician work force, one court recently indicated:

... The Technician Act evidences Congress' intention that technicians while retaining their positions as civil servants inside the competitive civil service will serve simultaneously as employees of the appropriate military department, subject to its regulation. It is axiomatic that the National Guard is military in character. We think it follows that technicians are military in character. Indeed, under the Technician Act's composite regime, technicians are considerably more than nominal members of the military establishment. In referring to the National Guard's mission, Congress termed it "...essential as a matter of public policy that the strength and organization of the National Guard as an integral part of the first line defense of the United States be maintained and assured at all times."^{viii} Because National Guard Technicians serve as the Guard's support staff and are, in fact, those whose job it is to maintain and assure the Guard's strength and organization, they are indispensable to this nation's defense.

Given this situation, it is unsurprising that, no matter the context, every court having occasion to closely consider the capacity of National Guard technicians has determined that capacity to be irreducibly military in nature. See, e.g. Stauber v. Cline, 837 F.2d 395, 399 (9th Cir.), cert. denied, 488 U.S. 817, 109 S.Ct. 55, 102 L.Ed.2d 33 (1988); Illinois National Guard v. FLRA, 854 F.2d 1396, 1398 (D.C. Cir.1988); New Jersey Air National Guard v. FLRA, 677 F.2d 276, 279(3d Cir.), cert. denied, 459 U.S. 988, 103 S.Ct. 343. It is logical to conclude therefore, that, since National Guard technicians' positions are encompassed within a military organization and require the performance of work directly related to national defense, such positions are themselves military in nature, "...that while a technician's job is a composite, containing both civilian and military pieces, the job's dual aspects are inseparable; they are, like Chang and Eng, joined at the chest." Wright v. Park, 5 F.3d 586, 588-589, (1st Cir. 1993).

This issue of consolidation will directly effect the ability of each of the 38 individual Adjutants General (who are state commanders of the individual state National Guard organizations) to conduct labor relations with the "inextricably intertwined technician workforce." Wright, supra, at 589. The technician is as much a part of the organized militia of the states as he is a nominal federal employee - a civilian employee of the government. The Adjutants General will be impacted in their deployment readiness as these "inextricably intertwined" military technicians are relied upon in maintaining and assuring the Guard's strength and organization in the areas of training, logistics, and equipment readiness. The technicians are the readiness core, the foundation upon which the traditional guardsmen, airmen and soldiers, rely along with the Adjutant General for his fulltime preparedness.

C. THE POWER OF THE STATES OVER THEIR OWN NATIONAL GUARDS IS BEST ILLUSTRATED BY THE LACK OF ANY FEDERAL CONSTITUTIONAL REQUIREMENT FOR A STATE OR TERRITORY TO MAINTAIN A NATIONAL GUARD.

State and territorial law, not federal law, statutorily creates the states' National Guards, for example, in Washington state it is the Revised Code of Washington, Chapter 38. Thus, it is the states that have the fundamental legal authority to create, organize and fund their respective state National Guards, and there is no legal mandate imposed by the U.S. Constitution which requires a state to create, maintain, and operate its National Guard. In fact, the only federal limit on the respective states' powers over the very existence of each state's National Guard is the limited, federal regulatory power arising out of federal funding of their limited federal roles: no National Guard whose members have received

compensation from the federal government as members of the National Guard may be disbanded without Presidential consent. 32 U.S.C. 104(f).

D. THE SUPREME COURT RECOGNIZES THE TENTH AMENDMENT AND RESIDUAL STATE SOVEREIGNTY TO BOLSTER CONSTITUTIONAL GUARANTEES OF FEDERALISM.

In Printz v. United States, 117 S.Ct. 2365 (1997), an Oregon case in which the U.S. Supreme Court struck down federal law that imposed duties on state government officials arising out of the Brady Handgun Violence Prevention Act, the Court delineated the “dual system of sovereignty” between the Federal Government and the States, thereafter underscoring the limits of congressional power and the applicability of the Tenth Amendment.

It is incontestable that the Constitution established a system of “dual sovereignty.” Gregory v. Ashcroft 501 U.S. 452, 457, 11 S.Ct. 2395, 2399 (1991). Although the States surrendered many of their powers to the new Federal Government, they retained a “residuary and inviolable sovereignty.” The Federalist, No. 39, at 245 (1778). **Residual state sovereignty was also implicit**, of course, in the Constitution’s conferral upon Congress of not all governmental powers but only discreet enumerated ones, Article I, Section 8, which implication was rendered **by the Tenth Amendment’s assertion that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.**

Printz, 117 S.Ct. at 2376 (emphasis added).

The states’ National Guards serve their state constituencies as they execute joint state and federal missions under the auspices of state sovereignty and the Tenth Amendment. Primarily, the National Guard executes state active service in times of natural disasters – floods, fires, hurricanes, or other overwhelming events that surpass the abilities of the local agencies to respond. The Governors rely upon their National Guard for this essential service as set forth in each states constitution.

States have an inherent interest that is tied to every function that they perform. This is the interest of the state to be free from restraint of intrusive federal control when attempting to meet the demands of its citizenry in the very real and necessarily pragmatic world of local government. This interest is most needful of protection in state executive branch areas, such as the control of the militia.^{ix}

E. ARTICLE I OF THE U.S. CONSTITUTION PRESCRIBES STATE LEGAL AUTHORITY OVER A RESPECTIVE STATE’S NATIONAL GUARD WHEN NOT IN FEDERAL SERVICE.

Article I, Section 8, Clause 16 empowers Congress: “...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 Officers, and the Authority of Training the Militia according to the discipline prescribed by Congress.*” U.S. Constitution, Article I

Section 8, Clause 16 (emphasis added).

II. The U.S. Supreme Court, Citing Constitutional and Factual History, Has Recognized That The Respective States National Guards Are Independent Entities Subject to the Exclusive Jurisdiction of the Respective States, Except When Called Into Active Service of the United States.

The U.S. Supreme Court, in Maryland v. U.S., 381 U.S. 41, 85 S.Ct. 1993, 14 L.Ed. 2d 205, (1965) recognized that the states' National Guards are state entities under the authority of the state governors, *except when called into active federal service* "...that Congress shall have the power to provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections, and repel invasions," (emphasis added). Justice Scalia's opinion, in the above case, highlighted that the powers of the states emanate from the Constitution as well as legal doctrines, and guarantee states independent authority from the federal government, "...that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."

Id at 2376.

Thus, the respective states' National Guards as well as the Court's prescription of state powers arising out of the Constitutional guarantees of federalism (specifically - residual state sovereignty and the Tenth Amendment), support the proposition that the states' National Guards are controlled, administered, and commanded by state officials in peacetime as they have been throughout the history of the nation. In his scholarly treatise, American Constitutional Law, Harvard Law School Professor Laurence Tribes elaborates on the federal-state relationship citing the same Article I, Section 8, Clause 16 set forth above, and warns against the federal usurpation of states' rights:

The Constitution expressly places only a few limits on the power of Congress in the interest of state sovereignty. Article I, Section 8, Clause 16 reserves "to the States respectively," the power to appoint officers of any militia for which Congress might provide, and to train the militia according to such discipline as Congress provides. The structure of state governments and their sphere of operations simply are not the subjects of the Constitution, except insofar as the Constitution shifts power from the states to the national government, or protects the rights of individuals government violations. There is little reason to expect, therefore, that the Constitution should contain more than a scattering of affirmative guarantees of state sovereignty; the states are simply "there."^x

Constitutional protection is provided to the states according to Professor Tribe and many other constitutional scholars. The constitutional framers set forth safeguards for the federal lawmaking and state lawmaking balance, recognizing the delicate nature and the ongoing efforts that would be essential for its maintenance. It is certainly understandable why states' Adjutant Generals would seek to protect their rights

against federal encroachment that would further expand labor relations controls in Washington DC. and delay or encumber National Guard response to state or federal missions.

On balance, however, the Constitution does presuppose the existence of the states as entities independent of the national government. This presupposition lies just below the surface of many constitutional provisions; it manifests itself most expressly in the language of the Tenth Amendment, which puts the states on an equal footing with 'the people' as holders of the powers which the Constitution neither grants to the national government nor prohibits to the states. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the states respectively, or to the people. Congressional action which treats states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the structural assumptions and the tacit postulates of the Constitution as a whole.^{xi}

In this situation, the states have the responsibility of vindicating their rights against federal encroachment, and these "states' rights" must be derived from the rights of the citizens according to the rationale of Professor Tribe. Therefore, the language of "states rights" must be used to protect individual rights and in this case the Adjutant Generals' rights against the Federal Labor Relations Authority encroachment in this consolidation action.

A. THE 1968 MILITARY TECHNICIAN ACT AND ITS LEGISLATIVE HISTORY EXPRESSLY REAFFIRMS STATE GOVERNMENT CONTROL OF TECHNICIANS.

The Military Technician Act of 1968 reaffirmed the legal authority of the respective states over their respective technician employees, by and through the power of the respective states' Adjutant General. The Act requires the Adjutant General of each state to administer the technicians employed by the respective states' National Guards – regardless of the technicians' nominal federal employee status for purposes of pensions. See, American Federation of Government Employees v. Federal Labor Relations Authority, 730 F.2d 1534(D.C. Cir. 1984) within which the legislative history of the 1968 Technician Act is set forth. This unanimous decision by Circuit Judges Scalia, Wald, and MacKinnon enunciated the specific reasons for which Congress deliberately chose to enact the National Guard Technician Act.

...it provided that all employed technicians shall be members of the National Guard, hold the military grade specified for that position and be considered in some respects as federal employees. As federal employees, they would have available to them the same federal retirement and fringe benefits available to other federal employees and be covered by the Federal Tort Claims Act. To confer federal employees benefits and tort claims coverage were the principal reasons for the enactment of the statute and in so providing *the Congress made it clear that it recognized that the states' authority in other respects would continue as before. This included generally that reductions-in-force, discharge, and other personnel actions*

would be accomplished by the Adjutant General of the National Guard of the particular state and that a right to appeal from such decisions would NOT extend beyond the state's Adjutant General. The government in general and the National Guard in particular cannot be easily analogized to private sector firms dealing with employees. Neither can national guardsmen be easily analogized to other federal employees because, except for federal benefits and tort claims coverage, it was the intent of Congress in the 1968 Technician Act that they be the equivalent of state employees subject to employment, supervision and control by the state adjutants general.

Id. At 1536-1537 (emphasis added). Summing up Congress' intent, the Court stated:

It thus appears that the scheme of the act is to create the technicians as *nominal federal employees* for a *very limited purpose* and to recognize the military *authority of the states through their Governors and Adjutants General* to employ, command, and discharge them. *The employment, discipline and discharge of technicians remains completely with the state officials, and their day-to-day activities on the job, are controlled at the state level. In addition, no appeal lies from personnel decisions of the Adjutants General.*

Id. At 1537-1538 (emphasis added).

The Court of Appeals continued to recognize the primary role of the states in the day-to-day employment, command, and administration of military technicians. The placement of the oversight of those activities with the Adjutant General and the lack of any appeal from the decisions of the Adjutant General speak significantly as to both Congress' and the Courts' recognition of the inherent state power over the Militias/ National Guards and the integral play that the military technician has in the day-to-day preparedness and administration of the National Guard. The AFGE court also recognized the intertwined nature of the military technicians position within the National Guard.

Almost everyone who spoke on the bill recognized the unique status of the Guard technician and made mention of the Guard's military mission. In discussing the act, Senator Stennis, the sponsor and floor manager of the act, stated: 'The concept of the technician program is that the technician guardsmen will serve concurrently in three different ways. First, perform his fulltime civilian work in the unit; second, perform his military training in the unit; and, third, be available at all times to be called to active Federal service...I shall now discuss the statutory controls which the committee felt were essential in order to recognize the military requirements and state characteristics of the National Guard. The underlying premise of these controls which would supercede the normal civil service rules and regulations is the fact *that the National Guard until it is called into active Federal service is a state organization subject to the sole command and control of the Governor concerned.*

Id. At 1545 (emphasis added).

Applying the above precedents to the situation before us, the **central fact** driving a conclusion is that **the Adjutant General is the one central figure where employment and labor relations historically lies with regard to employment and labor issues for the military technician who is a member of an individual National Guard/Militia (emphasis added).**

B. THE LEGISLATIVE HISTORY OF THE TECHNICIAN ACT FURTHER UNDERSCORES THE LEGAL POWERS OF THE INDIVIDUAL STATES.

In the same opinion cited above, the District of Columbia Circuit reviewed the specifics of the Technician Act, concluding that the individual states – not the federal government were the legal authority under which technicians operated.

The intent of Congress in conferring federal employee status on National Guard Technicians in the Technicians Act of 1968 was set forth in the House Report accompanying S. 3865, H.R. Rep. No. 1823, 90th Cong., 2d Sess. July 31, 1968, U.S. Code Cong. and Admin. News 1968, p. 3319, as follows:

PURPOSE OF LEGISLATION

In authorizing Federal employee status for National Guard Technicians, the purpose of the legislation is –

- (a) To provide a retirement and fringe benefit program which will be both uniform and adequate;
- (b) To recognize the military requirements and the state characteristics of the National Guard by providing certain statutory administrative authority at the state level with respect to the technicians programs;
- (c) To clarify the technician's legal status which in certain areas has been the subject of conflicting court decisions, especially on the matter of whether technicians are covered under the Federal Tort Claims Act regarding third party actions against the U.S. Government.

As Senator Stennis, then a senior member of the Senate Armed Services Committee, characterized it:

The basic purpose of this bill, Mr. President, is to provide Federal employee status for the technicians thereby establishing for them a uniform and adequate retirement and fringe benefit program at the same time provide *for statutory administrative authority at the state level for the technician program in recognition of the military requirements and state characteristics of the National Guard.* 114 Cong.Rec. 23,251 (July 25, 1968)(emphasis added). The foregoing italicized statement in the Senate Report and Senator Stennis' remarks make it clear that the mandate of the act embodied both the federal employee benefits and the preservation of the "military requirements," which are inseparable from command and control by the state adjutant general. And, as the statute was bringing essentially state military personnel under some of the retirement and benefit provisions of statutes designed for federal civilian employees, it was necessary to carefully craft the legislation so as not to compromise the essential military requirements of state National Guard service.

Id. At 1542-1543 (emphasis added). The Sixth Circuit succinctly stated this view:

The legislative history of the 1968 Act explicitly reveals the several purposes of that Act; *federalizing the National Guard's administration was not amongst them.*

Johnson v. Orr, 609 F.2d 259 (6th Cir. 1979). See also, Rowe v. Tennessee, 609 F. 2d 259 (6th Cir. 1979)

C. THE STATES SUBMIT THAT THE FEDERAL LABOR RELATIONS AUTHORITY RENDERED A DECISION IN 1983 REGARDING THE TECHNICIAN ACT UNDER ALMOST IDENTICAL FACTS WHICH SHOULD CONTROL THIS ISSUE – UNDERSCORING STATE GOVERNMENT EMPLOYER AUTHORITY OVER TECHNICIANS.

In Department of Defense/National Guard Bureau v. NFFE and NAGE, 13 FLRA 40 (Nos. 3-UC-29 and -30, September 30, 1983), the Federal Labor Relations Authority rendered a decision on nearly identical facts regarding the 1968 Technician Act. It reinforced the *legal authority of the respective states' Adjutants General to administer the military technicians programs* under the 1968 Technicians Act, including line management authority, budget and labor/personnel authority and collective bargaining authority. In addition, the Authority pointed out that the National Guard Bureau, a joint bureau of the Army and Air Force, has no command over any state activity where technicians serve, including the employment of technicians, but only acts as a resource for federal funds, and promulgating regulations covering technician employment and employs no technicians. This 1983 decision reflects that which has been enunciated in the cases previously cited: that the individual states National Guard units are legal creatures of the states, each with its own individual mission and operational character:

All personnel programs, including employment, recruiting, training, records, retention, career development, and merit promotion systems, are administered by state officials. Competitive areas for purposes of both merit promotions and reductions in force are established by the states. It is difficult for a technician to move from a position in one state to another or from a position in an Air National Guard unit to one in an Army National Guard unit, as not only must there be an available civilian position, but the employee must find an equivalent military position. There is no appeal beyond the Adjutant General of EACH STATE regarding disciplinary actions or reductions in force. The responsibility for administering labor relations programs, including negotiations rests with the Adjutants General.

13 FLRA 40 at 235(emphasis added).

Thus, the FLRA has spoken clearly to emphasize that it is the states that are the de facto employers of the technicians, and that it is the states – not NGB nor the Department of Defense that has the historic and current legal authority to conduct collective bargaining regarding these technicians. It is again a reflection of historic practices that employment and collective bargaining already resides under the Adjutant General. It is also a reflection that at any other level – particularly in the federal government – the command, control, and discipline of military technicians is remote and tenuous at best, due to the historical, constitutional and statutory precepts associated with the state militia/National Guard. A clear

illustration, that the Adjutants General were intended by Congress to exercise the above powers, is the statutory mandate that there is no appeal above the respective States' Adjutants General on any matter that arises under this statutory section.

The arguments of the A.C.T., while seemingly well placed under the Federal Service Labor-Management Relations Act, provide expedient proposals which would unduly concentrate power over the very backbone of the respective State Militias/National Guards in the hands of the Department of Defense or the National Guard Bureau, thus usurping the states of their historic employment control of these nominal federal employees. Case decisions, constitutional precepts, and statutory provisions all provide guidance that dictates against concentrating a bargaining unit at the federal or national level.

National Guard technicians are governed under and employed by the separate and distinct states, and those National Guard personnel and organizations operate under color of state law. Military technicians are, for all intents and purposes, de-facto state employees. The court decisions reviewed, including the construction of the legislative history of the 1968 Act, essentially create a legal scheme of separate, independent and distinct legal entities and employers, one in each state, similar to separate and distinct, independent private corporations in the several states, with their separate and differing missions.

Another fundamental rule observed in collective bargaining is "the establishment of multi-employer bargaining units depends upon the consent of the parties."^{xii} The essential criterion for the establishment of a multi-employer unit is the unequivocal manifestation by each member of the group that all be bound in collective bargaining by one group, rather than as individuals. The history of collective bargaining – not only in the particular history but also with respect to particular units – is always an important consideration in determining the appropriateness of the unit. In the multi-employer context, bargaining history assumes unique significance. **The absence of any history of multi-employer bargaining in a proposed multi-employer unit is usually determinative against such a unit.**^{xiii}

In the consolidation matter, not only has there been *no consent* to such a multi-employer bargaining unit by any of the states' National Guards, but there has been *no history of multi-employer collective bargaining whatsoever*. To the contrary, each state's National Guard, chartered as statutory entities under their own state law, have negotiated independent collective bargaining agreements.^{xiv} In addition, with each of the respective states' National Guards opposing the Union-A.C.T.'s petition through their formal filing of

opposing briefs, the F.L.R.A. in its San Francisco hearing in 1999 will be urged to deny the petition on this ground alone.

D. 5 U.S.C. 7112 PRESCRIBES THE CRITERIA FOR APPROPRIATENESS OF ANY BARGAINING UNIT, AND THE ASSOCIATION OF CIVILIAN TECHNICIANS FAILS TO MEET THE CRITERIA. THE CONGRESSIONAL MANDATE CONTAINED IN 5 U.S.C. 7112(a) SETS FORTH SPECIFIC CRITERIA FOR FLRA DETERMINATIONS WHICH MUST BE EXPLICITLY FOLLOWED.

5 U.S.C. 7112(a)(1) states:

“The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional or other basis and shall determine any unit to be an appropriate unit *only* if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of operations of, the agency involved.”

Thus, the specific language of the statute is mandatory: any FLRA determination –

- **must ensure employees the fullest freedom in exercising the rights guaranteed** under this chapter (the Federal Service Labor Management Relations Act);
- can be made **only if** such FLRA determination **ensures** a clear and identifiable community of interest among the employees of the unit; **AND**
- can be made **only if the unit will promote** effective dealings with, and efficiency of operations of, the agency involved.

Id at Section 7112(a)(1) (emphasis added).

As a matter of statutory construction, Congress’ inclusion of specific, prescriptive terms such as “must ensure”, “only if”, “ensure”, and “will promote” identify Congress’ clear mandate that any FLRA determination must strictly meet all three of these criteria. If one or more of the above criteria are not met, then the Authority may not find the proposed unit to be appropriate.

1. FLRA HAS INTERPRETED AND ESTABLISHED PRECEDENT FOR SECTION 7112(a)(1) DECISIONS WHICH SHOULD BE FOLLOWED IN THIS CASE.

a. 7112(a)(1) Sets Forth Three Criteria for FLRA Determinations of Appropriate Units, Including Consolidation of Unit Petitions.

In Department of the Air Force, Air Training Command, Randolph Air Force Base and National Federation of Federal Employees, 12 FLRA No. 60 (1983), the Authority reiterated its holding regarding 7112(a)(1):

In Department of Transportation, Washington, D.C., 5 F.L.R.A. No. 89 (1981), the Authority noted that Section 7112(a)(1) of the Statute requires that any unit found appropriate *must conform to the*

three criteria established by that section – a clear and identifiable community of interest among the employees of the unit, and the promotion of effective dealings with, and the efficiency of the operations of, the agency involved. The Authority further noted that Section 7112(d), which provides for the consolidation of existing units, states the same three criteria for any proposed unit.

Thus, all three criteria must be met for any consolidation.^{xv} Failure to meet any one of these criteria will foreclose any consolidation.

b. The FLRA “Community of Interest” Test for Unit Determination Requires Appropriate Locus and Scope of Labor Relations Authority.

In multiple decisions on the “Community of Interest” requirement for any consolidated bargaining

units, the FLRA has articulated several factors:

Primary among these factors, in determining whether there was a community of interest, were: the degree of commonality and integration of the mission and function of the components involved throughout the organizational and geographic components of the agency; the degree of similarity in the occupational undertakings of the employees in the proposed unit, *and the locus and scope of personnel and labor relations authority and functions.*^{xvi}

In the A.C.T. argument, the locus and scope of personnel and labor relations authority clearly lies in the states rather than at the national level. Each state and territory currently maintains a labor relations and human resources office, supporting their Adjutant General – rather than at the national level.

c. The FLRA Test for Unit Determination Requires That Consolidations “Promote Effective Dealings With and Efficiency of Operations of the Agency, and Among Other Things, Employees Who Are In The Same Operational Chain of Command and Who Are Interchangeable.”

In Naval Submarine Base, New London et al and National Association of Government Employees, 46

FLRA No. 132(1993), the FLRA identified several factors it considers in determining if any proposed unit consolidation will “promote effective dealings with and efficiency of operations of the agency”:

- **mission similarity;**

- **whether employees in the proposed unit are subject to the same operational chain of command;**

- **the degree and nature of functional and organizational integration;**

- **employee interchange;**

- **job classifications, skills, and duties similarity; and**

- **whether common or uniform policies regarding personnel and labor relations apply throughout the existing units.**

Id. at 1362.

At variance with these criteria, the employees in the proposed national unit do not share the same operational chain of command unless they are members of a common individual state National Guard. Pursuant to the Technician Act, they are required to be a member of a state's National Guard and to have a compatible military position with the Guard for the position that they occupy as a technician. As a result, these employees are rarely interchangeable between the respective states' National Guards, due to the statutory requirement of being recognized and accepted into a military position in another state where the operational chain of command is completely different from their own state. Moreover, different positions in different states have differing job classifications, skills, and duties as well as differing policies regarding personnel and labor relations.^{xvii} The FLRA explicitly recognized this very principle in Department of Defense/National Guard Bureau v NFFE and NAGE, 13 FLRA 40 (1983). Accordingly, this test will not be met due to the separate individual nature of the fifty-four states' and territories' National Guard organizations.

III. CONCLUSION

Due to the historical and legal control of the Militia/National Guard by the 54 different and distinct states and territories: including control over personnel/ labor relations and efficient collective bargaining at the state level – there is absolutely no question that the proposed unit fails to satisfy the “Community of Interest” test as well as failing to promote effective dealings with, and efficiency of operations of, the respective states' National Guards. Underscoring this, each and every one of the separate states and territories, as well as the National Guard Bureau itself, have indicated the lack of such common “Community of Interest” and the unmanageability of the A.C.T. proposed consolidation.^{xviii}

Furthermore, a nationwide unit will not ensure rank and file employees the fullest freedom in exercising the rights guaranteed under the Federal Service Labor-Management Relations Act due to friction between a centralized nationwide unit and the delegation over employment matters given to the fifty-four (54) states and territories through their respective Adjutants General under the National Guard Technician Act. To the

and territories through their respective Adjutants General under the National Guard Technician Act. To the contrary, it will unduly encumber the lines of authority between the individual employees and those charged with management and control of the employment relationship. Additionally, individual employees will inevitably be frustrated in defining the roles of their collective bargaining unit activities at the local level where the employment relationship is managed. Employees in such a national bargaining unit will be deprived of virtually any ability to change their union representation at the local level where the employment relationship is managed if they desire to do so; a national bargaining unit controlled by one union will, to the exclusion of any and all others, deprive individual national guardsmen/technicians of any real choice in who each wishes to represent them at collective bargaining sessions.^{xxix} To be candid, a nationwide collective bargaining unit will ensure that there is no competition for employees' representation amongst different labor unions. All of these matters are indications of the failure to meet the specified test for an "appropriate bargaining unit" as well as unduly restrict the fullest freedom for employees to exercise their rights under the Technicians Act. The Association of Civilian Technicians strongest point is the number of local bargaining units they represent. However, the number of local units or any showing of interest under existing union certifications does not meet the statutory tests.^{xxx} It is well settled law and FLRA policy to render decisions regarding appropriateness of a bargaining unit upon the criteria set forth in 5 U.S.C. 7112(a) and in this proposal the three central questions require a constitutionally consistent ruling against the Association of Civilian Technicians and in favor of the Adjutants General as they lead the states' National Guard.

The consolidation of technician unions into a national entity with one collective bargaining unit would defeat the constitutional, statutory and case law precedents described repeatedly throughout this article. While the Association of Civilian Technicians would have you believe that the above is just "... bad law,"^{xxxi} common sense and the precedents cited above weigh heavily against this opinion "... the individual state National Guard units are legal creatures of the states, each with its own individual mission and operational character. Department of Defense/National Guard Bureau v. NFFE and NAGE, 13 FLRA 40(Nos. 3-UC-29 and-30, September 30, 1983). And moreover, "the National Guard Bureau does not participate in collective bargaining, and the responsibility for negotiating contracts for units within any particular state lies with the Adjutant General and his subordinates." Id at 13 FLRA 235.

Humpty Dumpty said it long ago, "Words mean only what I take them to mean nothing more."^{xxii}

The Adjutants General need to be able to rely upon the words of the U.S. Constitution, The Military Technician Act of 1968, and the 1983 Supreme Court decision to put this most recent challenge to rest. The Adjutants General of the respective states, are state employees, until federalized, directly accountable to the Governors of their respective states. The fact that the National Guard Bureau or the Department of Defense prescribes regulations and guidance regarding the employment and administration of the functions of the employee does not detract from the central employment relationship which is borne, operated, and maintained by the state or territory. It is at the state level or below that appropriate bargaining units must continue to reside. The Association of Civilian Technicians should it prevail in this instance would have an undue concentration of power over the very framework of the State Militias/National Guards. The Department of Defense or the National Guard Bureau would then usurp the states' control of these nominal federal employees. Case decisions, constitutional precepts, and statutory provisions all provide guidance that dictates against concentrating a bargaining unit at the federal or national level. Taken in concert, the U.S. Constitution and the court's ruling above essentially create a legal scheme of separate, independent, and distinct legal entities and employers, one in each state, one that requires support for the Adjutants General in their dual state-federal mission readiness.^{xxiii}

ⁱ LTG Russell R. Davis, *The National Guard Annual Report*, 1999, p.2.

ⁱⁱ A.C.T., A.F.G.E., N.A.D.A., N.A.G.E., N.F.F.E. and L.I.U.N.T.A.,

ⁱⁱⁱ The Federal Service Labor Management Relations Act, 5 U.S.C. 7106(b) (1964).

^{iv} Association of Civilian Technicians, Exhibit 1, *The F.L.R.A. Hearing Record*, p.6 (Oct. 1998)

^{vi} Adjutants' General Testimony p.2-1095, *The F.L.R.A. Hearing*, Wash. D.C. (Oct. 1998).

^{vii} **Evolution of State Militias Into States' National Guards.**

The 1902 Dick Act, Ch. 196, 32 Stat. 775 (1903) (repealed 1956), represented Congress' first real exercise of its power to organize the militia, and labeled the state militias "National Guards." Again, these were separate and distinct from the Regular U.S. Army, which was authorized under the federal government.

1908: Congress Dictates That the Respective States' National Guards Are Available for Federal Government Use.

In 1908, Congress enacted the Militia Act of 1908, which provided that the states' National Guards were available for use by the federal government, though the Judge Advocate General issued a 1912 opinion, subsequently concurred to by the U.S. Attorney General, which prohibited such use of the states' National Guards overseas.

1916: Congress Enacts Law Allowing Federal Government Use of States' National Guards Overseas.

The legislative purpose for the 1916 National Defense Act included the federal government authority to draft any member of these states' National Guards into federal service, thus authorizing their federal use overseas. The Act increased the federal powers to utilize the states' National Guards for federal purposes anywhere, and provided more federal appropriated funds by which the state entities operated for such federal purposes.

1920: Federal Regulation Grows Over Limited, Federal Military Role of the States' National Guards With Increased Federal Appropriations to States' National Guards.

With additional federal appropriations to the states' National Guards, the federal government – as was the case with other federal appropriations to the states – increased its regulatory role of the states' National Guards through the enactment of the Army Reorganization Act of 1920.

1933: States' National Guards In The Service of the United States Form Part of the New "National Guard of the United States."

The Act of June 15, 1933 created a federal government entity known as the "National Guard of the United States", which was thereafter composed of those *portions of the states' National Guards which Were in the service of the United States.*

1952: Authority for States National Guardsmen To Be Called Out by the President for 15 Days with the Consent of the States' Governor.

The Armed Forces Reserve Act of 1952 codified the modern system, providing the legal authority By which the President of the United States, on the consent of a state's Governor, could federalize a State's National Guardsmen for a maximum of 15 days, for any reason.

^{viii} 32 U.S.C. 102.

^{ix} **The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War**, 57 *George Washington L.R.* 352-353 (1988).

^x *American Constitutional Law*, 2d Ed. (1988) at 378-383.

^{xi} *Id* at 383.

^{xii} **The Developing Labor Law**, 3d Edition (1992), Vol. 1, pp. 511-513.

^{xiii} *Id* at 513 (emphasis added).

^{xiv} Exhibit #1, The F.L.R.A. Hearing Record, (Oct. 1998).

^{xv} U.S. Army Training and Doctrine Command, 11 FLRA No. 28 (1983); Department of the Navy, Navy Publications and Printing Service Branch Office, Vallejo, California, 10 FLRA No. 108 (1982).

^{xvi} U.S. Department of Justice and American Federation of Government Employees, 17 FLRA No. 16 (1985); see also, Department of Air Force Air Training Command, Randolph Air Force Base, 12 FLRA No. 60 (1983); and Department of Agriculture and National Federation of Government Employees, 20 FLRA No. 20 (1985); and Naval Submarine Base, New London and National Association of Government Employees, 46 FLRA No. 132 (1993).

^{xvii} All 54 states and territories have their own merit promotion program/policies. See any state's collective bargaining agreement with A.C.T., A.F.G.E., N.A.D.A., N.A.G.E., N.F.F.E., or L.I.U.N.T.A..

^{xviii} The FLRA Hearing Record, p. 1399 (Oct. 1998).

^{xix} *Id.* at p. 1541-1562.

^{xx} Walter Reed Army Medical Center and NAGE, 52 FLRA No. 83 (1997).

^{xxi} Daniel J. Sember, Counsel for the Association of Civilian Technicians, interviewed 11 February 1999, in his Washington D.C. office.

^{xxii} Carroll, Lewis Through the Looking Glass, p.66 (1932).

^{xxiii} Adjutants' General Testimony, The F.L.R.A. Hearing Record, (Oct. 1998).

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