

## THE WYOMING STATE GUARD – Critical Manpower at Minimal Cost

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### INTRODUCTION AND BACKGROUND

It is important to begin this discussion with a recognition of the legal and constitutional definitions of the militia – what it is, and what it is not, and its historical basis. State militias date back to colonial times, and are firmly established in the U.S. Constitution, state constitution, and current federal and state statutes.

The Wyoming state guard is identified in state statute (**W.S 19-8-101**) as a component of the *organized militia* of the state. It is distinct from the national guard in that it can receive no federal funding and has no federal function. If organized, it remains solely under the authority of the Governor, who can deploy it to support the national guard or other state, county, or local civil authorities in order to “preserve the public peace, to execute the laws of the state, to suppress insurrection or repel invasion” (**Wyoming Constitution, Article 17, Section 5**). In practice most state guards (often called state defense forces) serve mostly in a supporting role to traditional state missions of the national guard:

- Protection of life and property
- Emergency relief and support
- Search and rescue
- Infrastructure protection
- Maintenance of vital public services

State militia have a firm and enduring place in American history. The militias of Britain's North American colonies were vital in the defense of their people and territories from the early 1600s until U.S. independence in 1776. They were founded in the colonies in accordance with a British militia tradition reaching back to the early Middle Ages. The Anglo-Saxon fyrd was a local militia that required military service from all able-bodied free men, who assembled to defend their community, preserve order, and when summoned by royal authority to serve – for short periods – in a larger army.

The American colonial militias were similarly comprised of men who assembled with their own arms, in locally recruited companies under officers elected from within their own ranks, and which were in turn organized into regiments under the orders of their respective colonial governor. Service was frequent, and many militia members developed considerable experience, both in the defense of their communities and in service alongside British army regulars in wartime. The colonial militias were well-organized, trained, drilled and led. The Massachusetts militia alone was many thousands strong, organized into 47 regiments, with many enlisted militiamen and most of their officers more experienced than the British regulars they faced in 1775. This is all well described in John Galvin's 1989

book, *The Minute Men: The First Fight: Myths and Realities of the American Revolution*.

After independence, the state militias played an important role throughout the American Revolution, which had begun with their effective armed resistance to British forces in 1775. It took a professional, long-service standing army – the Continental Army – drilled to European standards to defeat large British forces in the field; but in almost every campaign and battle of the war, militias fought alongside a core of Continental Army regulars, most of whom were themselves recruited as individuals or whole regiments out of the various state militias.

The Founders recognized the vital role of the militia and addressed it in Article I, Section VIII of the U.S. Constitution:

*"[The Congress shall have Power] . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions. . . [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."*

The importance of the militia is also recognized in the Second Amendment's prefatory clause, *"A well regulated Militia, being necessary to the security of a free State. . ."*

**10 U.S. Code 246** currently defines the militia as follows, and is echoed with several variations in most State constitutions and statutes:

*"The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard."*

State militias in the early years of the republic served under the authority of the State until called into federal service; they could be called up into federal service by the President to augment the tiny U.S. military at need, as in the War of 1812, the Civil War (on both sides), and the Spanish-American War. Over time, this arrangement proved less than perfect, and it was amended several times through the 19<sup>th</sup> century and into the 20<sup>th</sup>. It was the **Militia Act of 1903** that created the National Guard, standardizing the organization, training, and equipment of the state militias in accordance with current U.S. military standards. They explicitly remained state forces under authority of their governors, except when activated by the federal government under specific limits as to how long they could be deployed, and how far from their home state.

The **National Defense Act of 1916** removed the prior limits on the duration of federal activation of the national guard, and removing restrictions on their foreign deployment. Since then, the national guard has been subject to federal activation for the duration of any war or other emergency, and fully deployable overseas.

The next year (1917), the entire strength of the Army National Guard (more than 300,000 men) was

mobilized for active duty in the First World War. Stripped of their national guard resources, state governors who were concerned about their inability to respond to sabotage, espionage, civil unrest, insurrection or natural disaster called for the creation of organized state militias that would not be subject to federal activation and removal from their state of origin.

In the **Home Defense Act of 1917**, the federal government answered these concerns by authorizing the states to raise such forces when the national guard had been federalized. That was not a practical solution, because recruiting, organizing, and training a coherent and effective force would take months at least, and that effort would be largely wasted by disbanding it when the national guard demobilized. Still, by the end of 1917, 42 States had raised state defense forces independent of federal funding or obligation, totaling approximately 100,000 men.

These forces were largely disbanded at the end of World War I, but they were raised again in 46 states during the Second World War, with a total strength of 150,000, and again in many States from the Cold War to the present day.

### **LEGAL BASIS IN WYOMING**

Wyoming statutes addressing the state guard are outdated in two respects. They currently authorize the organization of a state guard only under the conditions established by Congress in 1917 – when the national guard has been activated and deployed out of state by the federal government. They also contain language conferring federal influence and authority that was not a component of federal law even then, and is not today. These elements are outlined below:

#### ***“Article 17, Title 19, Chapter 10 – Wyoming State Guard***

#### ***“W.S. 19-10-101. Organization by Governor; appointment of council; removal; control.***

*(a) “If the national guard of Wyoming is ordered into the service of the United States, the Governor may organize and maintain within this state during that period, under such regulations as the secretary of defense may prescribe, such military forces as may be authorized by the secretary of defense or as the Governor deems necessary for the defense of the state. The forces shall be known as the Wyoming state guard. Insofar as practicable, the existing laws, rules and regulations governing the national guard shall be applied to the control of the Wyoming state guard. The force shall be of such strength as directed by the secretary of defense, with such expansion in the future as may be authorized. The Wyoming state guard shall be armed, trained and equipped in such manner as may be prescribed by the secretary of defense or the Governor of Wyoming.”*

During the Cold War, the possibility that a major war might once again lead to full federal activation of the national guard resulted in a 1983 amendment to the National Defense Act, enacted as **32 U.S. Code § 109**, which authorizes every state to maintain a state defense forces on a permanent basis, no longer linked to federal activation or deployment of the state’s national guard.

In order to pave the way for Wyoming's governor to organize the state guard should he choose to do so, it is necessary to mend **W.S. 19-10-101** to align with current federal law, authorizing the Governor to organize the state guard at his discretion without regard to the status or presence of the national guard; and (2) delete the curious language in **W.S. 19-10-101** referencing the "secretary of defense," since the federal government asserts and exercises no authority over state defense forces.

Senator Dan Laursen's bill (SF0106 ), introduced in the 2024 Budget Session of the Wyoming legislature, does this. It does not call for the organization of the state guard, or for any expenditures by the state; it only streamlines and clarifies the authority of the governor to do so.

### **PRIVATE MILITIAS AND THE "UNORGANIZED MILITIA"**

Under U.S. and state law, most adult, male citizens of the United States are currently considered members of the militia. The vast majority, who are not serving in the U.S. military, the National Guard, or a State defense force, are considered "unorganized" militia, which consists of all persons liable to serve, but not commissioned or enlisted in the "organized" militia. They have no special power or privileges as members of the unorganized militia, a status that connotes an obligation more than it does a right. Members of the unorganized militia are, under U.S. and State law, subject to being called into service at need by either the state or federal government; this is not widely understood.

The organized militia in Wyoming comprises the national guard and "state guard forces, when organized" (**W.S. 19-8-101**).

Wyoming's "unorganized militia" is also clearly defined in statute as simply the recruiting pool of citizens who are qualified under state law for militia service but not enrolled in either branch of the organized militia. There is no provision in law for private, local, or community militias, and any organizations claiming such status are expressly illegal in Wyoming:

**"W.S. 19-8-104. Other organizations parading with arms prohibited; penalty.**

*"No group or assembly of persons other than the regularly organized national guard or the troops of the United States shall associate themselves together as a military company or organization, or parade in public with arms without license of the Governor. . ."*

**Title 19** clearly identifies the Wyoming state guard as part of the organized militia "licensed by the Governor," and not among the prohibited "other organizations."

The Wyoming state guard, if organized, would be a military force under the command of the Governor and fully authorized by both state and federal law. It would be attractive to a broad spectrum of people willing to volunteer their services and place themselves under the command and discipline of an organized force. It would be entirely distinct from any illegal, private, so-called "militia."

### **THE PURPOSE AND FUNCTION OF STATE DEFENSE FORCES IN MODERN TIMES**

As of 2014, 26 states and territories had active state defense forces, often called state guard or home guard (we will hereafter use the generic abbreviation SDF). At least three more states (including

Wyoming) have enabling statutes on the books but no active force at this time.

Where these forces are organized and active, their personnel constitute a valuable but low-cost, easily and quickly deployed force multiplier, capable of supporting national guard, homeland security, law enforcement, search and rescue, wildland firefighting and disaster response efforts with in-state, often local volunteers, versus relying upon federal or other-state resources which may be delayed, over-tasked, committed elsewhere – and in most cases, substantially more expensive.

They have performed all these roles and more in recent years, including recovery efforts after the terrorist attacks of September 11, 2001, Hurricane Katrina in 2005, Hurricane Sandy in 2012, wildfire suppression, and multiple roles during both pandemic response and civil disorders nationwide in 2020-2021.

Wyoming in recent times has been largely unaffected by civil unrest or natural disasters beyond extreme winter weather and wildfires, but the availability of a trained, disciplined volunteer force to augment and support the national guard, and civil authorities could be reassuring, given the distances, dispersal, long response times, and increasing recruiting and retention issues faced especially by many state and local organizations. There are also growing concerns, once again, about the potential for large-scale federal activation of the national guard, and about infrastructure protection and recovery from potential terrorist actions or asymmetric warfare on American soil by foreign adversaries.

As a state-controlled force, an SDF would be exempt from *Posse Comitatus*, the body of federal law and regulations which prohibit federal forces (and national guard who have been activated under Title 10 into federal service) from performing law enforcement roles. The state is presently free to regulate and assign those roles as it chooses, when the Wyoming national guard is serving under state authority – and the same would hold true for the Wyoming state guard.

### **ORGANIZATION, EQUIPMENT, TRAINING, AND CAPABILITIES**

**W.S. 19-10-101** calls for the Governor to appoint a “state council of defense” to address “all matters pertaining to the Wyoming state guard...” while also stipulating that, “Insofar as practicable, the existing laws, rules and regulations governing the national guard shall be applied to the control of the Wyoming state guard.”

We can therefore only speculate and discuss issues that may arise, drawing from the experience and examples of other states where appropriate.

The traditional militia model – reaching back to pre-independence colonial days – would be based upon companies recruited from a local area and trained over time to realistic standards, with low or no cost training from state-certified trainers. They would be subject at all times to regulations and a clear chain of command through the Adjutant General to the Governor.

The size, composition, training, and capabilities of an SDF can be freely determined by the State. It would no doubt start small and grow slowly. From their origin in 1917 through the Cold War and after, many state defense forces included combat or combat support units such as infantry or engineers;

while more recently, military police and a variety of technical and civil support specialties have predominated.

As is the case with many national guardsmen, SDF volunteers tend to be older and more experienced than young military recruits, are often veterans themselves, and have many useful skills and specialties. Recruitment, vetting, and personnel processes should recognize prior training, education, experience, and military rank, in order to attract qualified candidates and leverage their strengths and experience; while still providing and requiring appropriate entry-level training for less experienced volunteers.

Arms may be a contentious issue, based on assumptions about cost, training requirements, and perceived liability. State guard members might be armed or not, depending on their expected roles, qualifications, and the availability of training and resources. Units that do not have a combat or combat support role might not require arms for primary mission accomplishment, but as a military organization they should be authorized individual small arms for contingencies, or strictly for self-defense and defense of others in performance of their assigned missions. Clear standards for training and qualification, and tightly enforced rules for the use of force, would be necessary to avoid unnecessary risk or liability to the State.

If the state were unable to provide equipment due to funding constraints, state guard volunteers might provide their own arms, under clearly delineated and enforced standards. An example of how this can work is found in the armed public school staff members authorized by **W.S. 21-3-132**, who provide their own weapons and equipment that must be regularly inspected and approved by certified armorers or trainers as meeting specific requirements established in the governing school district rules and regulations.

**W.S. 21-3-132** also provides useful examples in the selection of volunteers, and their vetting through background checks and psychological examinations similar to those applied to law enforcement applicants.

### **COST**

Unlike the national guard, federal and state statutes are clear that SDF receive no funding support from the federal government. This clear demarcation ensures that national guard funding is protected from diversion to the SDF.

SDF everywhere in America receive very limited state funding. In most states, they are entirely volunteer organizations, paid if at all, then only when activated under orders of their governor for limited duration specific missions. They receive only limited administrative support from the office of the Adjutant General.

Limited funding creates challenges in administration, training, equipment, transportation and other areas, but these are not prohibitive.

**Cost of training.** State guard training would consist primarily of a basic training equivalent for members

who have not completed this training in prior service; and advanced individual training as required for their unit's intended missions and for award or recertification of their military occupational specialties. Creative solutions are called for, and examples can be found in other states' experiences, where, for example individual SDF members have been offered training opportunities alongside national guardsmen when this incurs no additional cost, essentially filling empty slots in specific classes or training sessions. Another low-cost method, widely used by law enforcement reserves, is to solicit volunteer training support outside work hours by certified law enforcement, national guard, other-agency or private sector training instructors. This author has trained in reserve organizations toward full law enforcement certification, to academy standards, in two other states, at no cost to those states.

An intriguing example of two-way cooperation and mutual support in training by national guard and SDF is the creation of a firearms training unit in the California State Guard, staffed by experienced former military, law enforcement, and private sector trainers, which conducts no-cost advanced firearms training for national guard personnel.

### **ASSERTIONS OF PROHIBITIVE COST**

Holding costs down would require thinking outside the box, which is not apparent in the fiscal note appended to Senator Laursen's bill in the 2024 Budget Session. To assert that state guard units should mirror their national guard counterparts in all respects is presumptuous and subject to debate, since the governor has not convened a council, as required by statute, to address the many issues and options involved. For instance, it is not a given, as stated in the fiscal note, that:

“Pay would need to follow pay for national guard and include all additional allowances in addition to base pay. Benefits would also need to be established through legislation for unique retirement, medical/health care, and loss of life statutes.”

In fact, **W.S. 19-10-102** clearly states members would be paid out of the general fund “when serving under orders of the governor of Wyoming;” which is similar to law and practice across the United States, where SDF members are not paid unless they are activated under orders for specific missions. Time spent on administration or in training is not compensated, and no members are legally entitled to salary or allowances when not serving under orders.

**W.S. 19-10-107** authorizes coverage under Worker's Compensation, but no other benefits. **W.S. 19-10-105(b)** establishes that “No person may be enlisted or reenlisted in such service for more than two (2) years,” which implies that retirement benefits could not be earned by any state guard members. Other benefits might be considered, but are not presently required in law.

Uniforms for state guard members need not be issued on the same basis as the national guard. Dress uniforms and service uniforms will have little relevance given the intermittent, mission-specific nature of state guard service. Two complete sets of combat uniforms (ACU) and appropriate outerwear for inclement conditions would cost less than \$1,000 per person, versus the \$1,600 to \$2,400 cost of full uniform issue for army or national guard enlisted persons; while officers in those services receive a

\$400 allowance and pay the balance of their higher uniform costs out of pocket.

There should be no expectation that the Wyoming state guard would mirror the equipment, strength, or capabilities of the national guard. Their supporting role in national guard state missions, and to civil authority, will not require specialized and expensive equipment – no C-130s or Blackhawks. Trained manpower in responsive local units, with minimal infrastructure and support, would be the state guard’s most probable – and practical – profile.

In any case, all these issues of cost could be addressed by the governor’s council of defense, with legislative oversight and consent, well before any members were enrolled, should he exercise his authority to stand up the state guard. The bill under consideration in this session will not cost the state one cent.

### **OTHER CONSIDERATIONS**

One pitfall that Wyoming should avoid is where SDF membership is limited to a small number of senior officers and noncommissioned officers, ostensibly as cadre allowing rapid expansion at need. This is a not a robust or practical concept. “Top-heavy” rank structures and a shortage of young, fit, motivated volunteers are indications of a less than serious organization.

A model that may be applicable to Wyoming’s circumstances is the establishment of platoon-sized units or detachments in each county, starting with an initial cadre of carefully selected officers and NCOs, who are tasked with filling their unit with qualified local volunteers. These small foundational units could be organized into companies, battalions or specialized task forces, to maintain a clear chain of command and leverage capabilities for the benefit of the State.

Specialization, in terms of roles and missions, could be managed at the State level but a flexible approach could leverage the availability of certain skills and knowledge in local communities. For instance, a large local population of information technology/cyber qualified candidates might drive the formation of a unit that exploits those abilities, and can support other SDF, national guard, or state agencies with their expertise.

In addition to supporting the Wyoming national guard in its state roles and missions, the state guard could support county sheriffs and other state or local agencies through memorandums of agreement or understanding (MOA/MOU) authorized by the state chain of command, in roles and under conditions that the state defines.

In Wyoming, we have many examples of volunteer organizations such as county search and rescue teams and volunteer fire departments, which seldom lack for enthusiastic volunteers. A properly organized, well-led state guard would benefit from the same volunteer spirit, and from our broad pool of military veterans who could offer much to its training, discipline and efficiency.

### **A PATH FORWARD**

A necessary precursor to organizing the Wyoming state guard is to clarify and streamline the Governor’s authority by amending **W.S. 19-10-101** to update and align it with **32 U.S. Code § 109** in two



specific areas:

- a. Authorizing the Governor to organize the state guard on a permanent basis, without regard to the activation status or deployment of the Wyoming national guard;
- b. Removing references to the U.S. Secretary of Defense, who has no regulatory authority or advisory role regarding state defense forces.

Senator Dan Laursen's SF0106, introduced in the 2024 Budget Session of the Legislature and assigned to the Appropriations Committee, can accomplish this; and attempts no more.

The next step would only be taken at the discretion of the Governor, exercising his authority by appointing a council of defense as directed by statute, and tasking that council – in cooperation with the office of the Adjutant General – to develop a comprehensive plan for organizing, staffing, training, equipping and utilizing the Wyoming State Guard.