

2-6-24

#1 Marshal  
Michael

## HB 1191 LIMIT GUARD DEPLOYMENT

HB 1191

**An Act to require an official declaration of war or other Congressional action before the South Dakota National Guard may be deployed by the federal government.**

- China and other world actors that seek to harm us and democracy around the world. We live in a dangerous world. This bill if passed, would inhibit the South Dakota National Guard's ability to support the National Defense Strategy to deter, defend, and win.
- The defend the guard legislation conflicts with federal law and is very likely unconstitutional. Art. I Sec. 8 of the constitution gives congress the authority to organize, arm and discipline the militia, and govern those parts employed in the service of the United States, reserving solely for the states the authority to appoint officers and execute the training of the forces as proscribed by congress.
- The constitution makes no distinction between armed conflict and other types of military functions or service in Art. I Sec. 8 when it uses the phrase "employed in the service of the United States."
- This is the fourth time this bill has been presented to the South Dakota Legislature and has yet to pass out of committee. A House Concurrent Resolution related to the subject was passed by the House but failed in the Senate in 2022.
- Similar legislation has been proposed in at least nine states now. (AZ, ID, KY, MD, ME, MI, MO, SC, and TN) source *Tenth Amendment Center*
- **Since 2022, 31 states considered this bill to date, no state has adopted this dangerous legislation! That should tell you something about this proposed legislation.**
- This legislative proposal is unwise, ill informed, and present a common misunderstanding of federal Constitutional law applicable to the National Guard. If adopted, individually and collectively, this legislation would promote an incorrect narrative about the National Guard and risk losing its standing as the primary combat integrated reserve of the Army and Air Force.
- The idea that states can force the Federal government's use of Declaration of War -- via states trying to remove their National Guards from Federal use without a Declaration -- is tactically bad and constitutionally impossible.
- Much is made by the proponents of the bill about protecting the members of the National Guard, however this concept seems to assume most Soldiers and Airmen who sign up for the National Guard do not understand what they are doing when

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they enlist. Any recruit over the past 20 years and each Guard member understands that when they join the SDNG they can and likely will be deployed.

- The woman and men who join the South Dakota National Guard are patriots. They join to support and defend their Nation and their State. They are not joining the South Dakota Militia.
- Since 9/11 the SDNG has deployed almost 10,000 Airmen and Soldiers.

### **This bill is unnecessary:**

- The bill title indicates that an “official declaration of war or other Congressional Action” be made before the SDNG may be deployed.
- Currently Congress must approve what National Guard (NG) units are being used. This is called the Authorization Use of Military force or AUMF. Congress and the President have enacted authorization for use of NG units, rather than formal declarations of war.
- While declarations of war authorize “total war”—providing the president with the entire and unqualified use of the U.S. military—AUMFs authorize a more limited use of force. AUMF approved by Congress is consistent/equivalent with a declaration of war.
- Again, going back to the bill’s title, “official declaration of war or other Congressional Action”, there is nothing that defines other Congressional Action in this bill, I would argue that an AUMF is a “congressional action” since is any legislation that is approved by Congress and passed into law, signed by the President.
- The current AUMF 2001 (*Senate Joint Resolution-23, 18 Sep 2001*) and 2002 (*House Joint Resolution 114 16 Oct 2002*) were approved by Congress and signed into law by the President. To me this looks like a “congressional action”

### **This bill is dangerous:**

- Limiting federal access to the SDNG would hinder our National Security and place our country at risk.
  - The National Defense Strategy requires accessibility of all military personnel to support and defend US interests when required.
- Proposed bill would limit federal access to the SDNG units.
  - Lack of federal access would reduce federal funding.
  - Reduced federal funding would:
    - Reduce SDNG personnel and equipment required during state emergencies.
    - Increase the State’s cost to respond to state emergencies.

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## This is a federal matter.

- Federal courts have long recognized that because of the hybrid nature of the National guard as a state and federal agency, “each member of a State National Guard is also a member of the National Guard of the United States and may be activated to federal status at any time”, and that in exchange for following federal regulation “the State National Guard receive federal recognition, arms, equipment, and funding.
- States that fail to comply with federal regulations risk forfeiture of federal funds allocated to organize, equip, and arm state guards.” See Association of Civilian Technicians, Inc. v United States, 601 F.Supp.2d 146, 151-52 (DC Dist.Ct. 2009).
- Perpich v. Department of Defense (DOD), 496 U.S. 334 (1990),
  - Court held that the Congress of the United States may authorize members of the National Guard of the United States to be ordered to active federal duty
- Based on those constitutional provisions and United States Supreme Court opinions it very likely that this bill would be struck down as unconstitutional.
- If this bill is passes it would most likely be challenged by the Federal Government in the Supreme Court.
  - Defending this case would cost the South Dakota taxpayers resources that would be better utilized elsewhere.
- Federal law allow allows for the federal activation of the National Guard
  - 10 U.S.C.A. Section 12301—allows the Secretary of a military department, “in time of war or of national emergency declared by Congress, or when otherwise authorized by law,” to order any reserve unit or member to active duty without their consent for the duration of the war or emergency and up to six months thereafter, and allows reserves on inactive or retired status to be called up if those on active status or in the inactive National Guard are insufficient.

**Please Oppose HB 1191**

Questions:  
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