LEGAL REVIEW NOTE

Bill No.: HB 404

LC#: LC 0892, To Legal Review Copy, as of January 22, 2025

Short Title: Require official action to release Montana national guard to active-duty combat

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

The Supremacy Clause establishes that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Where state and federal law "directly conflict," state law must give way. Wyeth v. Levine, 555 U.S. 555, 583, 129 S. Ct. 1187 (2009) (Thomas, J., concurring in judgment); see also Crosby v. National Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct.

2288 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute"), and PLIVA, Inc. v. Mensing, 564 U.S. 604, 617-18, 131 S. Ct. 2567, 2577 (2011).

Federal law, 10 U.S.C. § 12406, provides as follows:

> Whenever—
> (1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation;
> (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or
> (3) the President is unable with the regular forces to execute the laws of the United States;
> the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia. (Emphasis added.)

Additionally, the Supreme Court has concluded that Congress may authorize the President to order members of the National Guard to active duty for purposes of training outside the United States during peace time without either the consent of a state governor or the declaration of a national emergency. Perpich v. Department of Defense, 496 U.S. 334, 336, 110 S. Ct. 2418, 2420 (1990).

HB 404 is entitled the "Defend the Guard Act." Section 3 of HB 404 provides:

> [T]he Montana national guard and any member of the Montana national guard may not be released from the state into active-duty combat unless the United States congress has:
> (a) passed an official declaration of war; or
> (b) taken an official action pursuant to Article I, section 8, clause 15, of the United States constitution to explicitly call forth the Montana national guard and any member of the Montana national guard [. . .].

Section 3 of HB 404 restricts the President from calling up the National Guard, which is allowed under federal law. Therefore, HB 404 may raise a potential constitutional conformity question as to whether this legislation conflicts with the Supremacy Clause of the U.S. Constitution.

Requester Comments:

From the Legal Review Comments,

"The Supremacy Clause established that federal law 'shall be the supreme Law of the Land…any Thing in the Constitution or Laws of any State to Contrary notwithstanding.'" U.S. Constitution, Article VI, cl. 2.

This excerpt is incomplete. The clause in question reads, “This Constitution, and the laws of the United States which shall be made *in pursuance thereof* and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

In pursuance thereof is the key section of that clause. States are bound by the Supremacy Clause, if at all, to the laws of the U.S. made in compliance with the Constitution and not outside the authority granted to it.

In the reviewer’s comments the case Crosby v. National Foreign Trade Council (2000) is referenced. The apparent point of the reference is the sentence, (“State law is naturally preempted to the extent of any conflict with a federal statute.”) I doubt that the word any in the previous sentence would actually mean any-including unconstitutional statutes. Or the unconstitutional use of Federal statute to force compliance by the State of Montana with undeclared combat operations overseas.

Nothing in HB 404 conflicts with Federal statute. According to Federal law, 10 U.S.C. 12406, three conditions must be met before the President may call up the Montana Guard; Whenever-(1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation; (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or (3) the President is unable with the regular forces to execute the laws of the United States; **the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws**. Orders for these purposes shall be issued through the Governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard in the District of Columbia.

HB 404 does not prohibit the President from calling up the Montana Guard when those three conditions are met. It prohibits the Governor from releasing the Montana National Guard to combat operations outside the boundaries of the United States or its possessions without a constitutionally required declaration of war.

Perpich v. Department of Defense is irrelevant to HB 404 as the Courts only authorized the President to order the National Guard to active duty for the purposes of training overseas. This case does not address combat operations, just training.