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Laura Kelly, Governor

January 30, 2025

Committee on Federal and State Affairs
Kansas Senate
Chairman Mike Thompson
Attn: Angela Gantzer, Committee Assistant
State Capitol, Room 144-S
300 SW 10th Ave
Topeka, KS 66612

Dear Chairman Thompson and Members of the Committee,

Over the last hundred years, there has been little question surrounding the legality of activating the National Guard for federal missions. One of the hallmark characteristics of the National Guard is its ability to serve both locally and nationally. Our unique ability to serve where we are needed has played a prominent part in our Nation's history.

The National Guard consists of two overlapping, but legally distinct organizations. Congress, under its constitutional authority to 'raise and support armies' has created the National Guard of the United States, a federal organization comprised of state national guard units and their members. *Perpich v. Dept. of Defense*, 496 U.S. 334, 338 (1989). Since 1933 all persons who have joined a State National Guard unit have simultaneously joined the National Guard of the United States. *Id.* at 345. Under the "dual enlistment" concept a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her duties in the State Guard for the entire period of federal service and subject to such laws and regulations of the Regular Army. *Id.* at 346.

The "Montgomery Amendment" authorizes the President to order members of the National Guard to active duty outside of the United States without gubernatorial consent. *Id.* at 336. When challenged, the Supreme Court held "that the Montgomery Amendment is constitutionally valid." *Perpich*, 496 U.S. at 355. *Perpich's* holding "recognizes the supremacy of federal power in the area of military affairs." *Id.* at 351. The dual enlistment system is constitutionally valid and therefore members "who are ordered into federal service with the National Guard of the United States lose their status as members of the State militia during their period of active duty." *Id.* at 347.

The Defend the Guard Act states the Kansas National Guard may only be called forth under a declaration of war or for the three "enumerated purposes" of article I, section 8, clause 15 of the United States Constitution. Kansas Senate Bill No. 38, Section 1(c). The Supreme Court's holding in *Perpich* specifically addresses this and holds that federal authority to activate the National Guard of the United States is not constrained by the militia clauses.

Additionally, the Supreme Court ruled on a similar argument arising out of Camp Funston, Kansas in 1918. In *Cox v. Wood*, 247 U.S. 3, the Court heard petition from a militiaman objecting to a call to federal service for purpose of military duty in a foreign country. *Cox*, 247 U.S. at 4. The militiaman alleged he could only be called to service for the three purposes of article I, section 8 of the

Constitution. *Cox*, 247 U.S. at 4. The Court rejected the militiaman's argument and held that Congress' power to compel military service is "not qualified or restricted by the provisions of the militia clause." *Cox*, 247 U.S. at 6.

The dual enlistment concept has been overwhelmingly positive. Thousands of Kansans are proud to voluntarily serve their state and to fight their nation's wars. The dual enlistment concept also provides thousands of jobs and the ability to protect Kansans from natural disasters, civil unrest, and other emergencies. This bill endangers all of this with no commensurate advantage to the state.

Thank you for the opportunity to provide testimony on this matter. You may contact me at 785-646-0050 or Jacob.d.mcelwee.mil@army.mil.

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