

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2138

BY DELEGATE MCGEEHAN

[Introduced February 10, 2021; Referred to the
Committee on Veterans' Affairs and Homeland
Security then the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §15-1B-1a, relating to the West Virginia National Guard; requiring an official
3 declaration of war or an action to call forth the state militia by the United States Congress
4 before members of the West Virginia National Guard may be released from state control
5 to participate in active duty combat.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1B. NATIONAL GUARD.

§15-1B-1a Mobilization of National Guard into Active Duty Combat.

1 (a) Short Title. — This section shall be known and may be cited as the “Defend the Guard
2 Act.”

3 (b) Findings. — The Legislature finds that:

4 (1) Article I, Section 8 of the Constitution of the United States vests in the United States
5 Congress the exclusive power of war;

6 (2) In spite of the clear language of the United States Constitution, vesting the power over
7 war exclusively in the United States Congress, the United States Executive Branch has
8 unconstitutionally assumed that power while the United States Congress has abdicated its
9 constitutional duty;

10 (3) Although the United States Congress has not declared war in over 70 years, the nation
11 has since gone to war repeatedly at the whim of the executive branch;

12 (4) When such unconstitutional actions are taken by the federal government, it is the
13 proper role of the states themselves to take action to remedy such situations, as outlined in the
14 Kentucky and Virginia Resolutions of 1798;

15 (5) A founder of this country, George Washington, once wrote: “The Constitution vests the
16 power of declaring war in Congress; therefore, no offensive expedition of importance can be
17 undertaken until after they shall have deliberated upon the subject and authorized such a
18 measure”;

19 (6) The Father of the Constitution, James Madison, once wrote: “The Constitution
20 supposes, what the History of all Governments demonstrates, that the Executive is the branch of
21 power most interested in war, and most prone to it. It has accordingly with studied care vested
22 the question of war to the Legislature”;

23 (7) The author of the Declaration of Independence, Thomas Jefferson, once wrote: “We
24 have already given in example one effectual check to the dog of war by transferring the power of
25 letting him loose from the Executive to the Legislative body. . .” and “Considering that Congress
26 alone is constitutionally invested with the power of changing our condition from peace to war, I
27 have thought it my duty to await their authority for using force in any degree which could be
28 avoided”; and

29 (8) Another Constitutional framer, Alexander Hamilton, once wrote: “The Congress shall
30 have the power to declare war’; the plain meaning of which is, that it is the peculiar and exclusive
31 duty of Congress, when the nation is at peace, to change that state into a state of war. . .”;

32 (c) Definitions. — For the purposes of this section:

33 (1) “Active duty combat” means performing the following services in the active federal
34 military service of the United States:

35 (A) Participation in an armed conflict;

36 (B) Performance of a hazardous service in a foreign state; or

37 (C) Performance of a duty through an instrumentality of war.

38 (2) “Official declaration of war” means an official declaration of war made by the United
39 States Congress pursuant to Article I, § 8, Clause 11 of the United States Constitution.

40 (d) Notwithstanding any other provision of this code, the West Virginia National Guard and
41 any member thereof shall not be released from the state into active duty combat unless the United
42 States Congress has passed an official declaration of war or has taken an official action pursuant
43 to Article I, § 8, Clause 15 of the United States Constitution to explicitly call forth the West Virginia
44 National Guard and any member thereof for the enumerated purposes to expressly execute the

- 45 laws of the union, repel an invasion or suppress an insurrection. The Governor shall take all
46 actions necessary to comply with the requirements of this section.

NOTE: The purpose of this bill is to require an official declaration of war or an action to call forth the state militia by the United States Congress before members of the West Virginia National Guard may be released from state control to participate in active duty combat.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.