



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

SPONSOR'S REBUTTAL TO FISCAL NOTE

House Bill Number: HB 404

Date Requested: 2/21/25

(4 day turnaround per Joint Rule 40-110)

Fiscal Note version: Original Revised

Short Title: Require official action to release Montana National

Sponsor: Guard to active duty combat

Deming

Generally, why do you disagree with the fiscal note?

See attached

Specifically, what in the fiscal note do you feel is flawed?

What is your estimate of the fiscal impact?

Sponsor Signature: _____

Rebuttal to HB 404 Fiscal Note

Virginia, Georgia and Missouri had no fiscal notes attached and their bill is similar or identical to HB 404.

There was no fiscal note on HB 527 in 2023.

These are the assumptions upon which the rest of the fiscal note is based.

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“In 32 USC Section 108, ‘Forfeiture of Federal Benefits’, it states, ‘If within a certain time fixed by the President, a State fails to comply with a requirement of this title, or a regulation prescribed under this title, the National Guard of that State is barred, in whole or in part, as the President may prescribe, from receiving money or other aid, benefit, or privilege authorized by law.’”

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“The Montana National Guard is federally funded to be prepared for federal missions, to include overseas contingency operations. The Montana National Guard is subject to a withdrawal or withholding of federal funds, equipment, and personnel if it is not available at the call of the President and Secretary of Defense.”

Rebuttal Begins

Opponents of Defend the Guard legislation often claim that enacting such laws would result in the federal government defunding a state's National Guard as a punitive measure. This argument, however, is based on a fundamental misunderstanding of federal appropriations law, statutory protections, and constitutional constraints that govern military funding. A thorough analysis reveals that such retaliatory defunding would not only be illegal but also constitutionally and procedurally impossible without explicit congressional action.

What follows are counter claims to the fiscal note assumptions.

I. The Federal Government Cannot Arbitrarily Defund a State’s National Guard

**1. The Power of the Purse Belongs to Congress, Not the Executive Branch.
The U.S. Constitution firmly places control of all federal spending in the hands of**

Congress, not the President or the Department of Defense (DoD). Article I, Section 9, Clause 7, known as the Appropriations Clause, states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." This means that the Executive Branch lacks unilateral authority to withhold or reallocate funds that Congress has appropriated. In the case of the National Guard, Congress determines how much funding each state's Guard units receive, and the DoD does not have discretionary power to revoke those funds for political or policy-related reasons. If the federal government attempted to punish a state for enacting Defend the Guard by cutting funding, it would be in clear violation of the Impoundment Control Act of 1974 (31 U.S.C. §§ 1511-1519), which prohibits the Executive Branch from withholding funds appropriated by Congress unless Congress explicitly authorizes such action. Without explicit legislative approval, the DoD cannot legally defund a state's National Guard simply because that state passes a law limiting deployments to undeclared wars.

2. Title 32 Funding is Mandated by Federal Law and Cannot Be Withheld Arbitrarily.

Title 32 of the U.S. Code governs the organization, administration, training, and funding of the National Guard when it is under state control but receiving federal financial support. Title 32 funding is specifically designed to ensure that each state maintains a fully functional and operational Guard force—and this funding is not conditional on a state's policy decisions.

Key Statutes That Protect National Guard Funding from Political Retaliation:

- **32 U.S.C. § 101 – Defines the National Guard as a component of both the state and federal military framework.**
- **32 U.S.C. § 104 – Establishes the federal-state compact that guarantees funding for state Guard units unless a state fails to meet training or organizational requirements.**
- **32 U.S.C. § 108 – Outlines the specific conditions under which National Guard funding could be withheld—which are strictly related to compliance with training and readiness standards, not state policy decisions.**
- **32 U.S.C. § 109 – Clarifies the dual role of the National Guard as both a state and federal entity, further protecting its funding from arbitrary revocation. Since Defend the Guard does not interfere with federally mandated training, readiness, or organization, it does not meet the criteria under which the federal government could lawfully cut funding under 32 U.S.C. § 108.**

3. The National Guard Appropriations Process Ensures Financial Stability. National Guard funding is established through multiple congressional appropriations channels, including:

- **National Guard and Reserve Equipment Appropriation (NGREA) – A dedicated congressional funding program that the DoD cannot arbitrarily**

withhold.

- **Military Construction Appropriations (MILCON) – Provides funding for National Guard facilities and infrastructure, requiring explicit congressional approval for any reallocation.**

- **Operations & Maintenance (O&M) Funds – Pays for training, salaries, and readiness operations, and is governed by statutory spending guidelines. Since Congress has full control over these funding streams, the DoD lacks authority to unilaterally remove or restrict funding for a state's Guard in retaliation for Defend the Guard.**

II. Why 32 U.S.C. § 108 Cannot Be Used to Justify Defunding a State's Guard
A frequent but erroneous claim made by opponents of Defend the Guard is that 32 U.S.C. § 108 provides the federal government with a mechanism to defund a state's National Guard if the state refuses to comply with Title 10 mobilization orders. However, a close reading of the statute demonstrates that this argument is legally unfounded.

1. What 32 U.S.C. § 108 Actually Says;

The statute provides that:

"If within a time to be fixed by the President, a State or Territory, or Puerto Rico, fails to comply with any requirement of this title, the National Guard of that jurisdiction shall be barred from receiving federal funds until compliance is achieved."

Critical Analysis:

- The statute applies only when a state fails to meet Title 32 requirements related to training, organization, or readiness.

- It does not allow the federal government to defund a National Guard unit due to disagreements over Title 10 deployment decisions (which govern combat deployments).

- A state's decision not to deploy troops under Title 10 without a congressional declaration of war does not constitute noncompliance under Title 32.

2. Defend the Guard Does Not Violate Title 32 Requirements;

Defend the Guard legislation does not:

1. Impede federally mandated training or drills.

2. Prevent Guard members from meeting annual training requirements.

3. Interfere with the Guard's ability to respond to domestic emergencies.

Since all training and readiness benchmarks remain intact, there is no legal basis under 32 U.S.C. § 108 for withholding funds.

3. Title 32 and Title 10 are Separate Legal Authorities

One of the most fundamental misconceptions used to argue against Defend the Guard is the idea that Title 32 and Title 10 are interchangeable. They are not.

- **Title 10 governs the National Guard when it is federalized for active duty.**

- **Title 32 governs the National Guard when it remains under state control but receives federal support.**

A Title 10 mobilization order is not a requirement under Title 32. A state does not violate Title 32 by refusing to deploy troops under Title 10 in the absence of a congressional declaration of war.

III. Additional Legal Protections Against Retaliatory Defunding

If the federal government attempted to cut a state's National Guard funding in retaliation for enacting Defend the Guard, it would violate multiple federal laws and

trigger immediate legal challenges.

1. The Antideficiency Act (31 U.S.C. § 1341)

The Antideficiency Act makes it illegal for federal agencies to:

- **Withhold or reallocate appropriated funds without congressional authorization.**

- **Spend money for purposes not authorized by Congress.**

Any attempt to defund a state's Guard over Defend the Guard would be a clear violation of this statute.

2. The Impoundment Control Act (31 U.S.C. §§ 1511-1519)

The Impoundment Control Act prevents the Executive Branch from unilaterally:

- **Withholding funds that Congress has appropriated.**

- **Reallocating appropriated funds for unauthorized reasons.**

This law explicitly prevents the DoD from using funding as a political weapon against a state.

Conclusion: Federal Retaliation is Unlawful, Unconstitutional, and Unprecedented

In summary:

- **Congress controls National Guard funding, not the DoD or Executive Branch.**

- **32 U.S.C. § 108 applies only to training and readiness, not Title 10 disputes.**

- **The Impoundment Control Act and Antideficiency Act prohibit unauthorized defunding.**

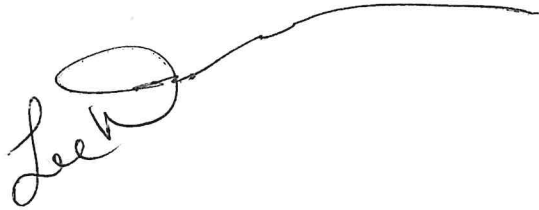
- **There is no precedent for a state losing Guard funding due to policy disagreements.**

If the federal government attempted to defund a state's Guard over Defend the Guard, legal and congressional challenges would immediately follow.

Bottom Line:

Defend the Guard does not threaten National Guard funding, and any claim to the contrary is legally and constitutionally indefensible.

And so, in conclusion, the assumptions which began the fiscal note which threatens the loss of \$132,000,00 is completely flawed and irrelevant.



Lee