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May 6, 2009

The Honorable Martin J. O'Malley  
Governor of Maryland  
State House  
Annapolis, Maryland 21401-1991

**RE: House Bill 1473**

Dear Governor O'Malley:

We have reviewed House Bill 1473, "Military Department - Classification, Organization, and Authority" for constitutionality and legal sufficiency. While we approve the bill, we write to discuss the oath provisions.

House Bill 1473 separates the provisions governing the Maryland National Guard and the Maryland Defense Force into two different subtitles to clarify the differences between them, and also makes other changes. One of these changes is that the oath taken by commissioned officers in the Maryland National Guard is amended as follows:

"I, ....., do solemnly swear that I will support and defend the Constitution of the United States and the Constitution of the State of Maryland, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the President of the United States and of the Governor of the State of Maryland; that I [make] **TAKE** this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of ..... in the National Guard of the United States and of the State of Maryland upon which I am about to enter, so help me God."

The title of the bill reflects that it is "correcting the wording of the oath of office for commissioned officers of the National Guard." In fact, the current language, which

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has been in the law since 1922, Chapter 490 § 16, Laws of Maryland 1922, accurately reflects the oath mandated for members of the National Guard by federal law with respect to the matter that is changed. The oath required by federal law is set out at 32 U.S.C. § 312, as follows:

“I, XXXXXX, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of XXXXXX against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the President of the United States and of the Governor of the State of XXXXXX, that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of XXXX in the National Guard of the State of XXXXXX upon which I am about to enter, so help me God.”

Because of this, we recommend that the change from “make” to “take” be reversed in next year’s corrective bill. We also note that the current version of the oath precisely reflects the federal oath as it was enacted in § 73 of the National Defense Act of 1916, 39 Stat. 166, but does not reflect later changes. As a result, it may be desirable to amend the section to reflect these changes, including the option of affirmation.

The bill also creates a new oath parallel to the oath for the commissioned officers of the Maryland National Guard for the commissioned officers of the Maryland Defense Force. Page 8, lines 25 to 34. While the oath appears as a new section, it is not a new requirement - the existing oath requirement currently applies to commissioned officers in both the Maryland National Guard and the Maryland Defense Force.

Article I, § 9 of the Constitution provides that:

Every person elected, or appointed, to any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto, shall, before he enters on the duties of such office, take and subscribe the following oath ...

Declaration of Rights Article 37, provides, in relevant part, that the Legislature may not “prescribe any other oath of office other than the oath prescribed by this

Constitution.” Thus, to the extent that commissioned officers of the Maryland Defense Force hold an “office,” the Constitution bars the imposition of an additional oath.<sup>1</sup>

The test for whether a person holds an office looks to whether the position is created by law, whether the person serves a definite term for which a commission is issued, whether an official bond is required and an oath prescribed, and whether the position is one that calls for the exercise of some portion of the sovereignty of the State. *Moser v. Howard County Board*, 235 Md. 279, 281 (1964); *Jackson v. Cosby*, 179 Md. 671, 675 (1941). The most important of these factors is that the public servant exercise in his own right some of the sovereign power of government for the benefit of the public. *76 Opinions of the Attorney General* 347, 348 (1991).

The officers of the various commissioned officers in the Maryland Defense Force are created by law. See Public Safety Article (“PS”), Title 13, Subtitle 6; *7 Opinions of the Attorney General* 460 (1922). A commission is issued, and they take an oath. PS §§ 13-601(a) and 13-602. The duties of the various commissioned officers, set out in PS §§ 13-207 and 13-208, make clear that they exercise a portion of the sovereignty of the State. As a result, it is our view that commissioned officers of the Maryland Defense Force hold offices within the meaning of Article I, § 9 of the Constitution. See also *28 Opinions of the Attorney General* 161 (1943) (Delegate who accepts commission in United States armed forces would vacate his seat);<sup>2</sup> *23 Opinions of the Attorney General* 383 (1938) (Associate Judge on Supreme Bench may not accept commission as Brigadier General in the Maryland National Guard);<sup>3</sup> *20 Opinions of the Attorney General* 598, 600 (1935) (Ranking line officer in the Military Department holds an office); *11 Opinions of the Attorney General* 238 (1926) (Commanding Officer in Maryland National Guard may not also serve as State’s Attorney);<sup>4</sup> *7 Opinions of the Attorney General* 460 (1922)

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<sup>1</sup> While the oath taken by commissioned officers of the Maryland National Guard appears in the Code, it is “prescribed by” federal law. As a result, the oath taken by those officers is not affected by the constitutional provisions.

<sup>2</sup> This specific holding is no longer valid in light of the amendment to Article III, § 10 of the Constitution which permits legislators to serve in the military.

<sup>3</sup> This specific holding is no longer valid in light of the amendment to Article 33 of the Declaration of Rights which allows judges to serve in the military.

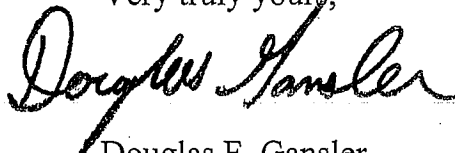
<sup>4</sup> This specific holding is no longer valid in light of the amendment to Declaration of Rights Article 35, which provides that non-elected membership in the militia of the State “shall not be considered an office of profit” for purposes of the prohibition on a person holding more than one office of profit.

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(Clerk of the Circuit Court may not accept a commission in the Maryland National Guard); 5 *Opinions of the Attorney General* 499 (1920) (Comptroller of the Treasury may not accept commission as Major in the Maryland National Guard). Therefore, these officers cannot be required to take an additional oath. Article 37 of the Declaration of Rights.

Because House Bill 1473 does not impose a new oath, but continues an existing requirement, it does not increase the unconstitutionality of the provision. As a result, we would not recommend veto of the bill. We do, however, recommend that the oath requirement not be enforced.<sup>5</sup>

Very truly yours,



Douglas F. Gansler  
Attorney General

DFG/KMR/kk

cc: The Honorable Peter A. Hammen  
The Honorable John P. McDonough  
Joseph Bryce  
Karl Aro

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<sup>5</sup> We note that a separate oath provision has been in force since at least 1860, See Article 63, § 104 (Code 1860). At that time, the Legislature had the authority to impose additional oaths. *Davidson v. Brice*, 91 Md. 681, 689 (1900).