

MOBILIZATION LEGAL HANDBOOK  
MEMBERS OF THE MAINE NATIONAL GUARD

This book's for YOU! - A legal Affairs Handbook for members of the Maine National Guard and their families.

YOU are a part of the long and great tradition of the citizen soldier. YOU are one of the elite American citizens who want to be there if your country, or the State of Maine, needs help. We, therefore, want to help YOU so that YOU will be better able to serve your country and your state.

This handbook cannot cover every situation. Furthermore, the laws are constantly changing. But this handbook will answer many of your legal questions which relate to your service in the Maine National Guard. This handbook will help you provide for and protect yourself and your family in legal matters. If you do not find your answers in this handbook, contact your Commander, your unit administrator, or the Judge Advocate for your command. We want to help you and your family.

The Judge Advocate Officers  
of the Maine National Guard

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## MOBILIZATION

You, as a member of the Maine National Guard, are a part of the long and great tradition of the citizen soldier. You are one of the elite American citizens who want to be there if your country, or the State of Maine, needs help in case of war, riot, natural disaster or some other national or state emergency.

You are one of the approximately 4,600 Maine citizens who are members of the Maine National Guard and one of the approximately 420,000 Americans who make up the National Guard of the United States--an integral and vital part of our nation's Total Force defense structure. As a member of the Maine National Guard, you wear three different legal hats:

1. As a citizen of your country and your community.
2. As a member of the Maine National Guard.
3. As a member of the National Guard of the United States.

Different laws affect you and your family when you wear each of these three hats.

This is a Legal Affairs Handbook for members of the Maine National Guard and their families. This handbook will help familiarize you with some of the laws that affect you and your family since you belong to the Guard. This handbook deals with your rights, benefits, duties, and obligations as a member of the Maine National Guard and the National Guard of the United States. You, the Guard, and the Law - a very important relationship.

This handbook is not intended to and cannot cover all fact situations or exceptions. Nor is it intended to be authoritative in any way. The laws and the interpretations of the laws are constantly changing. However, this handbook should answer some questions for you and give you and your family a better idea of your legal rights, benefits, duties and obligations as a member of the Maine National Guard. This handbook should assist you and your family in making necessary legal plans--plans which you should make whether or not you belong to the Guard.

### I. LEGAL BASIS OF THE NATIONAL GUARD

The tradition of the citizen soldier is as old as the settlement of the United States. It was a way of life on the frontier from the time of the war with the Virginia Indians in 1619 on through the Revolutionary War. However, the present legal basis for the establishment of state military forces is found in Article I, Section 8, clauses 15 and 16 of the United States Constitution, commonly referred to as the "Militia Clause"

"The Congress shall have power . . . .

To provide for calling for the Militia to execute the laws of the Union, suppress Insurrection and repel invasions; To provide for organizing, arming, and disciplining the Military, and for governing such part of them as may be employed in the Service of the United States, reserving to the states, respectively, the appointment of the Officers and the authority of training the Militia according to the discipline prescribed by Congress, . . . ."

In 1792, Congress provided for calling up the militia to execute the laws of the Union, suppress insurrection and repel invasion. Except for some time limits as to length of service and procedural modifications in the Act of February 28, 1795, permitting the President to call-up the militia without consent of the states for one of the three constitutional purposes, there was essentially no change in the 1792 Act until 1903. In 1903, Congress passed the Dick Act which named the "organized militia" the "National Guard", a name originally used in 1824 by certain units of the New York "militia" to honor Lafayette on his visit to the United States since he had once commanded the National Guard of Paris in 1789. The passage of the National Defense Act of 1916, as amended in 1920, was the biggest step by Congress in determining the role and status of the "National Guard". This Act, among other things, provided:

1. States were forbidden to maintain troops except for the National Guard provided by the Act or as the President might direct.

2. Required states to conform to the Act in order to receive Federal aid.

3. Federal recognition was required of National Guard officers, and all officers of the National Guard were also officers of the reserve of the United States.

4. All officers and enlisted men of the National Guard had to take an oath to the President as well as to the Governor of his state, and to defend the Nation as well as the states.

5. The President could draft the National Guard into Federal service upon Congressional authorization for the use of troops in excess of the regular forces.

In 1933, Congress made the National Guard a reserve component of the Army named the "National Guard of the United States," organized and administered under the Army Clause and subject to an order to Federal service.

## II. MOBILIZATION - THE MISSION OF THE NATIONAL GUARD

The legal basis, as well as the practical basis, for the existence of the National Guard, is "mobilization". The Mission of the Maine National Guard is to be ready to serve when called upon by the President or the Governor of Maine.

On "state active service" members of the Maine National Guard have been mobilized to assist in natural disasters recently during the 1 April 1987 spring flood and conducting island evacuations before hurricanes and cleanup in their aftermath. The Maine Guard has commonly fought forest fires, found lost children and adults, and assisted civilian law enforcement authorities on numerous other occasions.

On "active federal service" the Maine National Guard in prior times served bravely in the Civil War (as the militia). As part of the Spanish-American War effort, the Second Maine Infantry was sent to the Mexican border during the confrontation with Pancho Villa. The entire Maine Guard was called to duty in 1917-1918 for World War I. In World War II, the 240th Coast Artillery was the first Maine unit to mobilize in 1940, soon followed by the remainder of the state in 1941. During the Korean conflict, the 703rd Gun Battalion and the 101 Fighter Interceptor Wing were mobilized. Most recently, units and volunteer members of both the Maine Army and Air National Guard participated in Desert Shield/Desert Storm and the Somalia relief effort.

The Maine National Guard has always served proudly and professionally when it mobilized. Are you prepared if the Maine Guard is again mobilized?

## III. MOBILIZATION LEGAL COUNSELING

As part of the contingency planning of the United States, Congress has authorized the President to order selected service members or entire Reserve components, including the Maine National Guard, to active duty for a period of 90 days without further authorization by Congress. Currently selected Maine units are part of a contingency force pool designated for active service in an emergency even before a Presidential call up. You, therefore, must be prepared. Mobilization will separate you from your family and will take you away from your job or business. If you plan your legal affairs properly, most problems of mobilization can be avoided.

## A. PREMOBILIZATION LEGAL PREPARATION

### Organization of Your Personal Affairs

Assume that the Maine National Guard is mobilized, and that your family will have to manage without you. Are your personal affairs -- your legal affairs and financial affairs - in order? Putting and keeping your personal affairs in order will ease the burden on your family. Besides, it is something everyone should do. In the last 40 years, far more people have been killed or injured on our nation's highways than have died or been injured as a result of military service.

1. Organization of Your Personal Affairs (Estate Planning). One of the most important aspects of pre-mobilization legal preparation is what is known as "estate planning". What is "estate planning"? Estate planning is the arrangement of your legal and financial affairs in a manner best calculated:

a. To maintain and protect your property throughout your lifetime, and

b. To provide for the disposition of your property upon death in the fairest manner and with the least taxes and legal fees possible. It is absolutely essential that everyone plan his or her estate. This is especially true of anyone in the National Guard. You are not being fair to either yourself or your family if you do not plan your estate.

2. Identification of Your Property. The first step in getting your personal affairs in order is identifying your property. Some of it is particularly valuable and you will want to make special arrangements to take care of it. In the event of mobilization, you may take some of your property with you, but in most cases, you will leave behind valuable property. It will be important that you have made arrangements for the care, use, transportation, storage, safekeeping or disposition of that property.

Preparing a list of your personal and real property is simply good planning. Such a list should state what you own, what you owe, and where valuable papers are located. You will probably be surprised at the length of this list once you have completed it. Be certain to note the location, serial numbers, insurance policy numbers, amounts of insurance coverage on each policy and any other information about your property that would be useful in your absence. For example, are there outstanding loans on your insurance policies, or is any of your other property mortgaged? This estate planning inventory should be viewed as your map to your financial and business affairs.

3. Family Records. After inventorying your property, you should assemble your important legal documents in a safe place. Such documents include:

- a. Copies of birth certificates for you and your dependents.
- b. Names, places and dates of birth of your parents and your spouse.
- c. Social Security numbers of you and your dependents.
- d. Certified copy of your marriage licenses or certificates.
- e. An updated Will.
- f. Real estate deeds, abstracts, notes, mortgages and leases, real estate tax statements.
- g. List of life, health and other insurance policies, with list of premium due dates.
- h. Stocks, bonds, mutual funds.
- i. Automobile title, registrations, insurance, payment book.
- j. Bank books, savings accounts, credit union information, safe deposit box numbers.
- k. Credit cards.
- l. Installment contracts, bills of sale.
- m. List of debts and payment due dates.
- n. Federal and state income tax records for the last three years.
- o. Name and address of employer and list of pension and health benefits.
- p. Records of past illnesses with names and addresses of physicians and hospitals.
- q. Certified copies of death certificates or divorce decrees terminating any previous marriage of yours.

You should be sure that all of these family records are kept current and are available to your family in event of your mobilization. Above all, you must keep your spouse, or other closest relative, advised as to the location of these family records and of your important transactions and business arrangements.

4. The "Will" the State of Maine has Made for You. Right now you have a will, whether you know it or not. This "Will" is provided by the Maine laws of inheritance.

Maine law provides that if you do not have a written will, any property which you own in your own name (not including joint tenancy property, life insurance with a named beneficiary) will be distributed as follows:

a. If you have a spouse and no children or surviving parents, all your property will go to your spouse.

b. If you leave a spouse and one or more children (after estate expenses and your debts are paid) your spouse receives the first \$50,000.00 of the value of your estate and one half your remaining property. Your children [and if none, your surviving parent(s)] receive the remaining one half of your property, after deduction of the \$50,000.00, in equal shares. If your children, however, are from a different spouse, then your spouse will not receive the \$50,000 off the top. Your spouse will also receive one half of your estate and your children by any relationships will receive the remaining one half.

c. If you are not married and have no children, your property will be distributed to your parents equally, and if your parents do not survive you then your property will go to your brothers and sisters in equal shares.

But this "Will" the state makes is inflexible. It can't be altered to fit your property, family and planning goals. It doesn't appoint a guardian for your children. It distributes the share of a child to a child at age 18. That is why in planning your estate you, and your spouse if you are married, should speak to your family attorney or to the staff judge advocates to see if you should prepare a written will which better serves your specific needs.

5. Your Will. A Will is a legally enforceable declaration by which you dispose of your property upon your death. Oral wills are not valid in Maine. Your Will must be in writing and be legally witnessed. You can control the distribution of your estate after your death, if you leave a valid Will. If you do not leave a valid Will, the laws of Maine that we have just discussed regarding intestate succession will control distribution of your estate. Even if your estate plan is close to what the state law provides, under normal circumstances it is still preferable to make a will to take care of such matters as appointing a guardian for your children, providing for a trust for your children until they reach age 21 or some other age, stating who should be in charge of winding up the affairs of your estate, setting forth specific gifts to certain persons or charities and other matters.

Who can make a valid Will? Any person 18 years of age or older who is of sound mind. To be of sound mind you must understand:

- a. The nature of your property.
- b. The persons who are the natural objects of your gifts of property.
- c. The disposition which you wish to make of your property.

A Will is not valid if it is the result of undue influence, fraud or mistake. To be valid, a Will must be:

- a. Signed by the person making the Will (call Testator), or in his name by another in his presence.
- b. Witnessed by two persons who have witnessed either the actual signing or the Testator's acknowledgement of his signature.

The main thing to remember is that your Will has no effect until your death, and then it only involves property that is in your sole name. That is why it is so important that both YOU and your spouse make Wills. In many cases it is not necessary to probate a Will upon the death of the first spouse to die since all of their property may be non-probate property (such as joint tenancy property and life insurance with a named beneficiary) which automatically passes outside the terms of a Will. A Will for the surviving spouse is then required to distribute the property of the couple, name a guardian, etc.

6. Joint Tenancy Property. As stated above, joint tenancy property is not affected by a Will. Joint tenancy property is property which is owned by two or more persons as joint tenants and not as tenants in common. It is a survivors arrangement. If one of the named joint tenants dies, then the surviving joint tenant or joint tenants will be the sole owners of the property. Placing property in joint tenancy in effect makes a Will as to that property by providing that the survivor of the named joint tenants will own the property. Typical wording used in creating joint tenancy property is:

a. John Doe and Mary Doe, as joint tenants and not as tenants in common.

b. John Doe and Mary Doe, as joint tenants, with right of survivorship.

c. John Doe and Mary Doe, or the survivor of them.

d. John Doe and Mary Doe, as joint tenants.

Sometimes the word "or" alone is used to indicate a joint tenancy. However, use of the word "or" alone is a shortcut, is never used as to real estate, and should normally be avoided. Probably well over 90% of married couples in Maine own their homes as joint tenants. Most couples also have their checking and savings accounts in their names as joint tenants. In most family situations, joint tenancy is advisable between husband and wife since joint tenancy property does not have to be probated through court. Discharge of the automatic estate tax lien and a death certificate are all that are normally needed to place sole title in the survivor as to real estate, and only a death certificate is required as to most bank accounts.

However, joint tenancy is not always the answer. In fact, in most cases a different arrangement is advisable between parent and child, brothers and sisters, or other persons. Joint tenancy can also have adverse tax consequences in larger estates. In any event, even if you and your spouse own all of your property in joint tenancy, you should still consider having Wills to appoint a guardian for your children upon the death of both of you, to dispose of property inherited in the future, [eg from parents], and for the other reasons stated in paragraph 5, above. It doesn't make much sense for you to have a Will, die, and then have your spouse subsequently die without a Will. You both need Wills.

7. Life Insurance. Life insurance provides readily available, and necessary, cash within a very short period of time after death. It may provide a young family with needed resources for their children, retirement income for older persons, or money to pay funeral, last illness, and estate settlement costs.

Life insurance is a unique asset. Insurance proceeds, where there is a named beneficiary, avoid the expense of probate court proceedings.

8. Other Legal Estate Planning Tools. Gifts, trusts, sales, and business organization are legal matters which may also be applicable as to your estate planning. For example, you should make business associates or employers aware of the role in the National Guard and advise them of a possible mobilization to active duty. Arrangements can be made to assure the continuation of your business despite your mobilization. However, to go into depth at this time as to such business arrangements would be of little value for many persons in the National Guard. Therefore, any further discussion as to business matters will be left to you and your family and/or business attorney. A judge advocate can give you some initial advice but cannot assist you in finalizing arrangements for a private business.

9. Estate and Gift Taxes. The laws affecting Federal and Maine gift taxes and estate taxes changed very drastically in the 1980s. Very few people will ever have to worry about paying either gift taxes or estate taxes.

a. Gift taxes. There is no Maine gift tax, no matter what the amount of the lifetime gift. As to any Federal gift tax, anyone can give up to \$10,000 to each of one or more persons in any and every year without any tax consequences. Furthermore, a husband and wife can "split" the gift of property either or both of them so that between them they can give \$20,000 each to one or more persons per year. Obviously, few gifts will ever exceed these annual exclusions. Even if the gift exceeds these amounts, the excess simply applies toward the unused Unified Credit mentioned in the next paragraph.

b. Estate Taxes. Most estates will have no estate tax whatsoever. Since January 1, 1982 there has been no Federal estate tax as to any property which goes upon death from one spouse to the surviving spouse. It makes no difference if the amount is \$10 or \$10,000,000. Upon the death of the surviving spouse, or upon your death if you are not married, \$600,000 can pass tax-free. Maine has amended its tax laws to conform basically with the Federal estate tax law.

As you can see, most folks will never have to worry about estate taxes. However, if you have net assets of a value greater than \$600,000.00, there are alternatives which you should discuss with your civilian attorney.

10. Powers of Attorney. A Power of Attorney is a legal document signed by you which authorizes another person to act on your behalf to the extent stated in the Power of Attorney.

a. **General Power of Attorney.** A general Power of Attorney authorizes another person, known as an attorney-in-fact, to do any legal act which you might do yourself. The most commonly used in Maine is the durable Power of Attorney given by an elderly parent to one of his or her children to handle the parent's financial affairs if the parent becomes mentally or physically disabled. However, in all other cases, the general Power of Attorney should be used with extreme caution! A general Power of Attorney can be revoked, but this may be difficult to do. If you do give a general Power of Attorney, be sure to put a time limit on it such as one year.

b. **Special Power of Attorney.** A special Power of Attorney involves risk since it authorizes the person you designate to act for you as to specific matters such as the sale of a car. The special Power of Attorney, with its limited authority, may be very useful for you if you are mobilized.

11. **Dependent Affairs.** There are several other legal matters which may affect you, or of which you should be aware, in the event you are mobilized.

a. **Family problems.** If mobilization is imminent and you have unresolved personal family problems, such as a pending divorce, you should make every effort to clear such matters up prior to mobilization while you are still at home and can personally attend to them. After you are activated, counseling will be available through a Judge Advocate Officer.

b. **Civil Rights.** In addition to the usual civil rights questions as to discrimination based on race, creed, sex, color and national origin, you and your spouse should be aware that you may encounter discrimination in such things as signing a lease, getting credit, installment purchases, employment or other business transactions. If either you or your spouse is treated differently from others simply because of your sex or because you are in the military service, a discrimination complaint may be appropriate. In such a case you or your spouse should go to a Judge Advocate for advice.

c. **Dependent Entitlements.** If you are mobilized, your dependents will be entitled to certain benefits and privileges. These are more fully explained in the separate "Family Assistance Handbook". A special section called the Family Program will be in operation as part of STARC headquarters and will serve as your initial point of contact and clearinghouse to guide you to the services you need. Briefly, these benefits and privileges include.

1) **Post/Base Facilities.** These include use of the PX/BX, commissary, theater, clubs and other facilities. You can use the facilities of any Department of Defense (not just Army or Air) installation. You will, of course, have to be able to identify yourself. It is important that you take action to see that your spouse and children (including your children not living with you) have proper ID cards prior to the time that you leave for duty at a location separate and apart from your family.

2) **Medical.** Your dependents will be provided medical benefits, either directly at a military medical facility or through CHAMPUS (Civilian Health and Medical Program of the Uniformed Services). The CHAMPUS program has many rules and levels of coverage. Before your dependents make use of CHAMPUS, they should become fully aware of the program's coverage levels by familiarizing themselves with the booklet CHAMPUS Handbook, available from DPA.

3) **Legal Assistance.** After you are mobilized, your dependents will be entitled to seek legal advice and assistance from any military installation where there is a Legal Assistance office. You should advise them of the availability of this free service and to take advantage of it in advance of any legal action they may be considering taking such as signing a contract. In Maine, the Legal Assistance Offices will be contacted through the State Area Command as set forth in the "Family Assistance Handbook". You should also bear in mind that even where the Legal Assistance Officer is not able to represent your dependents, as in the case of private litigation, he or she can assist them in obtaining a civilian lawyer.

12. **Claim for Property Damage.** In the event of mobilization you may be entitled to have personal property shipped at government expense to a duty station or into storage. If that property is lost or damaged in transit or storage, or if it is stolen or damaged while properly stored or secured at your military quarters, you may be entitled to compensation.

a. The loss or damage must occur incident to your service.

b. Normally you would be paid the cost of repairs for damaged property or the replacement cost, less depreciation, for lost property.

c. You will only be reimbursed for such types and quantities of property as is determined to be reasonable, useful and proper at the time and place of the loss.

d. Payment may not be permitted at all if the loss or damage is due to your negligence.

13. Survivor's Benefits and Assistance. As you know, death can occur at any time. If you should die while on active duty orders for 30 days or more, there are a number of benefits which the Armed Services will provide.

a. Burial Rights and Benefits. The armed services will assist your survivors with your burial. They will handle all arrangements if your next-of-kin desires, or leave it all to your next-of-kin, or work with them to any desired degree.

1) Reimbursement. Your family will be reimbursed to the extent allowed by law for expenses including the burial vault, transportation, church services, gravesites and other burial expenses.

2) Grave Site. Burial will be made in a military or other national cemetery provided there is space available in the chosen location.

3) Headstone or Marker. A headstone or marker will be provided at all gravesites in military or national cemeteries. If you are buried in a civilian cemetery, a regular marker will be provided upon request. Otherwise, an allowance will be made toward the cost of a marker of your family's choosing.

4) Military Honors. Military honors will be provided at the gravesite upon request, provided there is no military reason for not doing so.

b. Survivor Benefits. There are a number of financial benefits that are paid to a deceased service member's family. They are:

1) Death gratuity (minimum \$800.00, maximum \$3,000.00)

2) All outstanding pay and allowances, including accrued leave.

3) Your Servicemember's Group Life Insurance Coverage (presently up to \$200,000 if you elected the coverage in writing).

4) Social security benefits.

5) Dependent indemnity compensation payable monthly by the Veterans Administration for a long range period to the unmarried widow and children under age 18, or up to age 21 if they are in school, provided the death is service connected.

6) A social security lump-sum payment at the time of death (maximum \$255.00) if you are survived by a spouse or minor children.

7) Transportation for dependents and household goods at government expense to a location of their choice.

8) A broad program of college and other educational benefits for the surviving spouse and children of soldiers who die from service connected injuries and illnesses is available under the War Widows and Orphans Educational Assistance Act (38 USC 1701).

9) Continued use of military installation facilities, including medical care.

c. **Survivor Assistance.** In every case where a service member dies while on active duty, automatically a Survivor's Assistance Officer is appointed. He or she will provide whatever help is requested to the extent it can be provided. A Legal Assistance Officer is also a good source for advice and assistance. While neither of these people can relieve the loss suffered, at least they can relieve some of the burden as your family adjusts.

14. Suggestions as to Your Personal Affairs and Estate Planning. Good estate planning, and putting your personal affairs in order, is essential for everyone. But it is especially vital for members of the National Guard. Some of you will naturally need to do more than others to put your personal affairs in order. However, at the very least, you should consider doing the following six things:

a. Consider making a Will, especially if you have minor children and/or your own real estate or other substantial assets. If you already have a Will, make sure it is up to date. See your judge advocate or your family attorney. Review your estate plan and Will annually.

b. Be sure your Record of Emergency Data (DA Form 41 or 93) is current. Check your personnel file.

c. Maintain your own personal file of military records. Keep a list of your assets in this file (DD Form 1543, Annual Legal Checkup).

d. Keep your important papers in a safe place, preferably a bank safe deposit box. Tell your next of kin where they are located. Have your spouse's name or someone else's name on the deposit box along with your name for access in your absence.

e. Tell your family about government benefits and their entitlements should you die. Be certain you advise your family, that they can receive legal assistance from the Judge Advocate's offices of our Maine National Guard or the nearest Post/Base Judge Advocate Office while you are on active duty.

## B. POST-MOBILIZATION PROTECTIONS

There are also laws which will protect you and your family after you are mobilized. The two most important are the Soldiers' and Sailors' Civil Relief Act, which is designed to make sure that your legal rights are not jeopardized by your active military service, and the reemployment laws which are designed to make sure your job is there when you get back home.

1. The Soldiers' and Sailors' Civil Relief Act. This legislation was enacted by Congress at the beginning of the Second World War and updated following Desert Storm, for the purpose of affording protection and relief to civilians who were mobilized into the military, either voluntarily or involuntarily.

This law was so helpful that it has been retained for your benefit. It applies today. The Supreme Court of the United States has said that the legislation should be interpreted "with an eye friendly to those who dropped their affairs to answer their country's call."

Who has the protection and relief afforded by this law? Certain of its benefits apply not only to you, the person who is entering on active military service, but also to your dependents and to those persons who are primarily or secondarily liable on obligations for which you are also obligated. Its protection begins when you receive an order to report for extended active duty, and it ends a short period of time after separation from military service.

a. Application of the Act. It is essential you realize that this relief is not automatic. Ordinarily, the service member must "trigger" the Act or, stated another way, the service member must direct the court's attention to the fact that he or she is now in the active military service, and that the applicable provisions of the Soldiers' and Sailors' Civil Relief Act may apply. If the court decides that military service does materially affect the service member's ability to comply, appropriate relief under the Act will be granted. The basic idea is not to penalize a person because he or she enters into military service. Conversely, the law is not designed to give a service member an unfair advantage because of his or her military service.

b. Statute of Limitations. Maine law establishes time periods, known as statutes of limitations, within which a person must bring a legal action against another person, such as a lawsuit to collect a debt or to recover damages for injury. In most cases it is six years. Under the Soldiers' and Sailors' Civil Relief Act, this statute of limitations may be suspended while you are on active duty. As a result, you can bring claims and others can bring actions against you even though substantial, time has elapsed while you are on active duty.

c. **Financial Relief.** If you are mobilized, you may find that on your military salary you cannot continue to meet the financial obligations that you incurred while you were a civilian. The Soldiers' and Sailors' Civil Relief Act provides certain procedures you can follow to obtain relief, assuming that you have the opportunity to do so. If you are mobilized and immediately shipped overseas, you cannot effectively take steps to obtain relief, and in that event the Act gives you certain protections.

You can attempt to renegotiate your obligations either with individual creditors or with a group of creditors. But this is not mandatory and you are not required to renegotiate. You should not even attempt renegotiation until you are thoroughly familiar with your new military status. In the course of renegotiation, a creditor may offer to reduce the amount of installment payments to extend them for a longer period of payment at the same or higher rate of interest, or may make some other offer to change the existing relationship. You should not sign the proposed agreement until you consult with a Judge Advocate. You could lose the protections of the Soldiers' and Sailors' Civil Relief Act by signing an agreement after you are activated.

The Act affords you certain protection if you can not make payments on property bought on the installment plan prior to mobilization when the inability to pay is caused by your reduced income. The Act provides that creditors cannot foreclose on or repossess the property unless the creditor brings a lawsuit and unless the court determines that your failure to comply was not materially affected by your being in the service. If the judge thinks it was affected, the judge can prevent foreclosure and can scale down the installment payment obligations or defer them until after you are separated from military service. You need not wait for this judicial protection. Whether or not you have attempted to renegotiate with the creditor, you can petition the court to obtain relief from financial obligations which you cannot continue to meet on active duty. The court can either defer the obligations or set up a schedule or plan of payment that you can meet. Or the court may determine that the most equitable solution is to permit foreclosure or repossession of your property. In such a case, the court can require as a condition of the repossession that the property be appraised and that its value, less the outstanding debt, be paid to you. This will avoid the common occurrence of a creditor foreclosing and purchasing the property at the foreclosure sale for far less than the property's value.

d. **Housing.** One of the most significant problems for the mobilized soldier concerns housing for his dependents while he is gone. If you have a mortgage with monthly payments, the same procedures just discussed apply. If you are leasing your house or apartment and you are mobilized, you or your dependents can lawfully terminate the lease even though it may be a long-term lease. This can be done only by written notice to quit the premises effective 30 days after the next rental payment is due, or effective on the last day of the month following the month in which written notice is delivered to the landlord. Upon termination, you or your dependents would be entitled to the return of any advance rental payments or security deposits, subject to the landlord's right to offset damages to the premises as allowed under Maine law. The ability of the soldier and his dependents to terminate a lease is important because the dependents may wish to return to family, secure a less expensive house or apartment, or obtain quarters that are more suitable.

e. **Interest rates.** Another section of the Soldiers' and Sailors' Civil Relief Act provides that if you owe money to anyone and the interest rate is more than 6% per annum, this stated rate will automatically be reduced to 6% while you are on active duty. The creditor can avoid this reduction only by bringing a lawsuit and by convincing the court that payment of the agreed high interest rate is not materially affected by your entry on active duty. This interest rate reduction was almost universally honored voluntarily by lenders during the Persian Gulf War without problems.

f. **Insurance premiums.** Another relief provision in the legislation allows you to obtain a government guarantee of premium payments on up to \$10,000 of life insurance owned by you prior to entry on active duty. In effect, you can obtain a moratorium on payment of premiums during the period of your active duty, but to do so you must first file an application with the Veterans' Administration.

g. **Legal defense.** In any circumstances when you are sued while on duty far from the court where the lawsuit is pending, you should contact your command's military Legal Assistance Officer. He or she can assist you by contacting the court and asking that a lawyer be appointed for you, or assist you in retaining an attorney local to the court. In that event, the court has the power to suspend the lawsuit until you are available to appear and defend yourself.

h. **Judgments.** If a judgment has been taken against you, either before or during active duty, and your failure to comply with that judgment is materially affected by your being on active duty, then the court has the power to prevent the judgment from being enforced-by the judgment creditor. As an example, if you had a judgment taken against you for alimony or child support, and you thereafter entered on extended active duty, your lower military pay might make it difficult or impossible for you to comply with the judgment for alimony or child support. You can then petition the court to prevent enforcement of the judgment, and can seek a modification of the judgment on the ground of changed circumstances from the time when the judgment was first entered.

i. **Income tax.** As to state income taxation, a soldier neither gains nor loses his domicile, or residence, solely by virtue of being absent from or present in a state due to military orders. Additionally, military pay is deemed to have been earned in the state of domicile and, therefore, is taxable only by the state of domicile. This means that if you are sent to various duty stations around the country, you do not become subject to the state income taxes of those states. You continue to be subject only to the Maine income tax. Note, however, that if your spouse moves to another state, her income and joint income of the family may be taxed by the new state of residence.

j. **Property tax and vehicle licensing.** A service member's tangible personal property, such as his car, is not subject to personal property taxes in the duty state. It is subject to taxation only in the state of domicile. Service members must keep their vehicles currently licensed, and if they do not comply with the licensing requirements of the state of domicile, they then will be required to license their vehicles in the duty state. Similarly, service members are required to maintain a current operator's license. If they do not keep their operator's license from their domicile state, then they must comply with the laws of the duty state in obtaining a new operator's license.

2. **Reemployment Rights.** Upon your release from active duty, you have the right to be restored to your former employment position or one of similar status, seniority and pay. You are also entitled to receive automatic pay increases which have been granted other employees during your absence. [see also Section IV, paragraph E on pages 21-22]

This particular paragraph deals only with your reemployment after a Federal mobilization. Because of the extreme importance of reemployment for National Guard members as it applies to active duty for training, annual training, inactive duty training and state duty situations, the question of reemployment is dealt with more fully in Section IV, paragraph E.

a. **Requirements.** To be eligible for restoration to a former position, you must meet the following requirements:

- 1) Your employment was not temporary.
- 2) You left the employment only because of your entry on active duty.
- 3) You did not serve more than five years of active duty.
- 4) You were released from active duty under honorable conditions.
- 5) You are qualified to perform the duties of the position. If you sustain a service connected disability and cannot perform the duties of your former position, you are entitled to receive the nearest comparable job with duties you can perform.
- 6) You must apply for restoration within 90 days after your release from active duty. If you were hospitalized at the time of your discharge, you have up to 90 days after your release from hospitalization to apply, provided the hospitalization does not exceed two years.

b. **Employer.** You are entitled to restoration regardless of whether you worked for a private company, the federal government, or the State of Maine or any of its subdivisions. The pertinent Federal law is found in Title 38, United States Code, Sections 2021 to 2024. The pertinent general Maine law is 37-B Maine Revised Statutes Annotated, Section 342. There are additional sections of Maine law which deal with particular professions. You should discuss your individual circumstances with your Legal Assistance Officer.

c. **Denial of Restoration.** If your employer refuses to restore you to your former position, you can contact federal agencies for help:

- 1) If you were a private sector employee, you contact the U.S. Department of Labor.
- 2) If you were a federal employee, you contact the Office of Personnel Management.
- 3) If you were an employee of the State of Maine or any of its subdivisions, you contact the Department of Labor. Your Legal Assistance Officer will help you with the complaint process.

Prevention of the problem. You may be able to avoid a reemployment problem by talking with your employer now. Find out what his or her attitude, policies and rules are now, before the situation arises. Ask for a written agreement of restoration to employment in the event you are activated. Contact an attorney or one of the agencies mentioned above immediately if you think you have a problem concerning reemployment.

### C. CONCLUSION

In the event of a Federal mobilization of all or a part of the Maine National Guard, there are many laws to protect you and your family. A great deal of additional information will be available to you. The "Family Assistance Handbook" available to you and other publications will be of great help. The Maine National Guard JAGs and other Judge Advocate officers will be available to help you and your family.

However, past mobilizations have shown that the best time to place your legal affairs in order is NOW, not after mobilization. Upon mobilization, there just will not be enough time available for you to put everything in order which should have been done on a continuing basis during your entire adult life. In addition, the time of Judge Advocate officers will be limited and the things to do, unlimited. Contact your attorney, talk to your banker, sit down with your family - NOW!! It is something everyone should do whether or not they belong to the Maine National Guard.

## IV. LEGAL BENEFITS WHICH APPLY IF YOU ARE ON ACTIVE DUTY FOR TRAINING, ANNUAL TRAINING, AND INACTIVE DUTY TRAINING

This Mobilization legal handbook has discussed the legal basis for the Maine National Guard and your legal rights, benefits, duties and obligations in the event of a Federal mobilization. It is absolutely necessary that every member of the Maine National Guard be fully prepared, both militarily and legally, for a possible mobilization.

At the same time, it is obvious that you must have concern as to your legal rights, benefits, duties and obligations while you are serving on active duty for training, annual training, inactive duty training and state active service.

### A. TYPES OF DUTY

The several types of duty in which we are normally involved are as follows:

1. Active Duty for Training. Active duty for training is the initial period of service of a Guard member in the full-time active military service of the United States. It is performed under the authority of the Reserve Forces Program and normally lasts from four to seven months.

2. **Annual Training.** Annual training is participation in training at encampments, maneuvers, or other exercises for at least 15 days each year as provided by 32 United States Code 502.

3. **Inactive Duty for Training.** Inactive duty for training is participation in drills and instruction at least 48 times each year as provided by 32 United States Code 502.

4. **State Active Service.** Service as "called" out by the Governor, normally for state emergencies such as floods, hurricanes, pursuant to Title 37-B M.R.S.A.

B. **LIABILITY FOR INJURY CAUSED BY A GUARD MEMBER.**

The greatest legal concern of members of the National Guard is "how far is my neck out" when I'm wearing my green or blue suit.  
YOU'RE IN GOOD HANDS!

1. **Active Duty for Training, Annual Training and Inactive Duty for Training.** Until December 29, 1981, legal protection of members of the National Guard was strictly a matter of state law. Guard members were not considered Federal employees for purposes of coverage by the Federal Tort Claims Act. However, Maine statutes as to immunity from liability and the Maine Tort Claims Act have adequately protected the Maine Guard person. There is no known case of any Maine Guard person being held personally liable for injury or damage to a third party while on duty pursuant to lawful order.

Now, however, members of the Maine National Guard now have even more protection from any potential liability. Since December 29, 1981, with the enactment of Public Law 97-124, Federal Tort Claims Act protects National Guard members as it does members of the active armed forces. The result is that if you negligently cause injury or damage to a third party while performing your duties while on active duty for training, annual training, or inactive duty for training, you will not be held personally liable. The Federal government will be responsible for any claim which might otherwise have been brought against you.

2. **Injury of Another Guard Member.** If the injury you cause is to another Guard or other armed services member, you are protected by what is known as the "Feres doctrine".

Simply stated, Feres stands for the basic proposition that a member of the military services cannot sue the federal government, another serviceman or a civilian government employee in tort for injuries that arise out of or are in the course of activity incident to his or her military service. As the United States Supreme Court recognized in the Feres case back in 1950, and still recognizes, the government has created "systems of simple, certain and uniform compensation for the injuries or death of those in the Armed Services". While some may feel it unfair, the preclusion of lawsuits by one service member against another service member arising out of service-connected injuries is a function of and a requirement for a strong and effective fighting force. To allow such suits would undermine the structure of the military.

C. **BENEFITS IF YOU ARE INJURED OR BECOME ILL**

There are many benefits available to you if you are injured while on military duty or become ill while on duty. However, there are some limitations.

If you as a Guard member are injured in the line of duty while performing training under Title 32, you will receive medical care, pay and allowances, a disability determination and other appropriate benefits as provided by 10 United States Code 1074a and 1212. If you are permanently disabled, you may be entitled to permanent or temporary disability retirement unless the disability is less than 30% and you do not have at least 20 years of active federal service. In such a case, a disability severance pay is paid equal to multiplying two months basic pay by the number of years of active service (but not over 12). However, such benefits are limited to "injury" and do not cover "disease" unless you have been ordered to active duty for more than 30 days. Furthermore, such benefits apply from the time you leave your living quarters to proceed directly to training until the time you re-enter your living quarters after returning directly home at the end of such duty. You should also keep in mind that it is not advisable to use your own car during inactive duty training (such as driving to the rifle range), since it presents complications in the event of death or serious injury.

D. **BENEFITS IF YOU DIE WHILE PERFORMING MILITARY DUTY**

The benefits available to your family in the event you should die while performing military duty also vary somewhat depending upon the type of duty you are performing. Benefits which will be provided if you die while on active duty for training (initial basic training) are essentially the same as those set forth in this pamphlet under the Federal Mobilization section. In the event of death during annual training or inactive duty training, a death gratuity would be paid, and certain Veterans Administration death benefits would be provided. However, continued medical coverage and some other benefits are not provided. Since there are many different factors involved in determining what benefits are available in the event of death, appropriate inquiry should be made by your supervisors at your local Veterans Administration office. Additionally, if you have purchased the Serviceman's Group Life Insurance, those benefits would be paid to your beneficiary regardless of whether you were on duty or not.

E. **REEMPLOYMENT**

A most common legal problem in the Maine National Guard is reemployment. You, therefore, should be aware of the basic reemployment rights provided you by our laws not only if you are mobilized (as was discussed in Section III, paragraph B 2 of this pamphlet) but also if you are just performing normal Guard duty.

1. **Uniformed Services Employment and Reemployment Rights Act of 1994** (38 USC § 4301 et seq.) was enacted October 1994 to simplify and solidify the existing Veterans' Reemployment law.

The law provides for a leave of absence for military duty from your employment, ensures that employers can not refuse to hire/rehire you because of your Guard status. Additionally, it requires employers to maintain your existing health insurance coverage for deployment of less than 30 days. Upon your return from duty, the law provides that you will be re-employed with the same seniority status, pay and vacation benefits which you would have had but for your military service.

The law applies if:

- a. you provide advance notice to employer (unless military circumstances dictate secrecy)
- b. the cumulative length of absence from each employer (after December 1994) doesn't exceed 5 years

However, these types of duty are not included in the 5 year cap: AT of 15 days per year; Drills 48 times per year; duty during war; national emergency, operational mission or riot control.

- c. you report back to work in a timely manner
  - 1) next work day if gone less than 30 days
  - 2) within 14 days if gone 30-180 days; or
  - 3) within 90 days if gone more than 180 days.

2. **State Re-employment Rights.** Maine law similarly provides re-employment protection. It provides that an employee will give notice of State or Federal military duty (and provide written proof, if asked) and in turn must be reinstated "without loss of pay, seniority and benefit status . . ." Furthermore, law does not use the 5 year cumulative cap of military duty with: any one employer. [26 MRSA S 811, 37-B MRSA § 342]

3. **Leave without Lose of Pay.** The laws also provide, in many cases, for military leave without loss of pay from the Guard member's regular employment.

a. **Federal Employees.** A member of the National Guard who is a Federal employee "is entitled to leave without loss of pay, time, or performance or efficiency rating for each day, not in excess of 15 days in a calendar year, in which he is on active duty or is engaged in field . . . training under Sections 502-505 of Title 32 as a . . . member of the National Guard" 5 United States Code 6323.

b. **State employees.** The present union contract provides that Guardsmen "shall be entitled to a leave of absence . . . without loss of pay . . . during periods of annual training not to exceed seventeen (17) calendar days in any federal fixed fiscal year . . .".

c. **Teachers.** A teacher in Maine may attend up to 17 days of training without a net loss of income as long as the teacher has made every reasonable effort to schedule training for non-school periods (20-A MRSAS 13603).

d. **Private sector employees.** No law provides for leave without loss of pay to employees in the private sector. However, many union contracts and private employers provide such benefits, or at least provide for payment of any difference between the employee's regular pay and military pay.

4. **Hiring and Firing.** An employer may not discharge an employee because of Guard membership and activity. Maine Statutes, 37-B MRSAS 341(5) provides that any employer who discharges an employee because of Guard membership, or refuses to hire a Guard member because of such membership, commits to a class E crime.

5. **Cautions.** Although Congress, the Maine Legislature, and the courts have continued to follow the basic principle that a person who serves in the Armed Forces should not be penalized for that service in civilian life, members of the Maine National Guard should give their employers as much advance notice of military leave as possible, and should at all times conduct themselves in such a manner as will not abuse the law or generate public animosity toward the Guard.

#### F. **RETIREMENT**

The United States Government provides members of its Armed Services with an excellent retirement program. This plan, known as the "Survivor Benefit Plan", also covers members of the National Guard who have 20 or more years of creditable service. Although this retirement plan does not begin payments until the Guard member attains age 60 under normal circumstances and does not pay as much as the payments to retired members of the active Armed Services since Guard membership is only part-time, it is indeed a very valuable benefit. Under the Survivor Benefit Plan, you have three basic options to choose from:

1. **Deferred Survivor Benefit.** This option provides for payment of the annuity entitlement to commence on the date a deceased retiree would have reached age 60. In this way, the surviving spouse and/or minor children will receive 55% of what retired pay would have been paid at age 60 reduced by the actuarial charge even though the Guard member dies before reaching age 60.

2. **Immediate Survivor Benefit.** This option provides for the annuity entitlement to commence immediately upon the death of an individual who has been properly qualified for age 60 retirement. As in option 1, payment is made to the surviving spouse and/or minor children of 55% of what retired pay would have been at the age of 60, except that the actuarial charge which is deducted is somewhat larger.

3 **Non-participation.** Participation may be declined with the understanding that the retirement plan of the Guard member will not be reduced as to the amount of the payment as it is under options 1 and 2. However, if he or she dies before age 60, the surviving spouse will not be paid any survivor benefit whatsoever.

The amount of the monthly retirement is generally compiled by adding together all retirement points and dividing by 360, and then multiplying this figure by 2½% then by the basic monthly pay. Inasmuch as you contribute no money toward this retirement plan, it is indeed a most valuable benefit.

#### V. LEGAL RIGHTS AND DUTIES -- THE MILITARY JUSTICE SYSTEM IN THE MAINE NATIONAL GUARD

Military justice is the legal system that affects you as a member of the Maine National Guard. In no way will this brief information make you an expert in military law. However, you should know:

- a. The need for a separate justice system for members of the military;
- b. When you will be subject to the Uniform Code of Military Justice and when you will be subject to the Maine Code of Military Justice;
- c. The basic concepts of our military justice system;
- d. Your legal rights in the Maine Military Justice System;
- e. The basic organization and procedures of the military justice system; and
- f. Other legal considerations that you should be aware of.

The military justice system deals with crimes and punishments. If you disobey a legal order (hit the First Sergeant in the mouth, are absent without leave, or steal someone's billfold) you will find out very quickly how the military justice system works. However, it is obviously better for you to learn about the military justice system before hand than have you find out about it through first-hand experience.

A. **NEED FOR A SEPARATE MILITARY JUSTICE SYSTEM**

The basic source which allows a separate military justice system is the Constitution of the United States. The Constitution allows Congress to provide for a separate military justice system. Congress has in fact adopted a separate military justice system. It is called the Uniform Code of Military Justice. The Uniform Code of Military Justice was enacted by Congress in 1951. The Uniform Code of Military Justice replaced the Articles of War dating back to 1775.

But why a separate system of military justice? Aren't our civilian courts good, or bad, enough? The main reason for a separate military justice system is discipline. The role of military justice in maintaining military discipline in the Army was clearly stated in the Powell Report on the Uniform Code of Military Justice:

Discipline -- a state of mind which leads to a willingness to obey an order no matter how unpleasant the task to be performed -- is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness of justice is indispensable.

B. **UCMJ or MCMJ, WHICH ONE?**

The Uniform Code of Military Justice is a federal law adopted by Congress. The State of Maine has also adopted a system of military justice. It is called the Maine Code of Military Justice. Confusing? Yes and no. The systems of military justice established by the Uniform Code of Military Justice is similar to the Maine Code of Military Justice, but it is important to know which applies to you at which time.

The Uniform Code of Military Justice applies to members of the active Army and Air Force. It applies to you, as a member of the Maine National Guard, when you are on active duty training, your 4 to 7 months initial active duty, when you are on active duty outside the United States and if you would be mobilized by the President. The Maine Code of Military Justice applies to all members of the Maine National Guard during any period when the member is not in federal service, including but not limited to:

1. inactive duty training (armory or base drills) unless outside the United States
2. annual training (unless outside the United States)

3. any other military capacity that the guard member is serving, except on Title 10 orders

4. state active duty which includes mobilization to State Active Service to assist State civilian law enforcement officials in riots, forest fires, etc. at the call of Maine's Governor.

As you can see, the Maine Code of Military Justice, and not the Uniform Code of Military Justice, applies to you most of the time when you are wearing your "green" suit or "blue" suit. However, the basic organization and principles of the two systems are the same.

### C. BASIC CONCEPTS OF MILITARY JUSTICE

The Uniform Code of Military Justice (UCMJ) is a federal law and is the basis of our military system of criminal justice. It identifies conduct which is criminal. It establishes the various types of courts (which are known as courts-martial in the military) and sets forth basic procedures. It is made up of 140 separate articles. It can be found in Appendix 2 of the Manual for Courts-Martial, 1984 (Revised). The Manual for Courts-Martial sets forth the detailed rules for military justice. For example, it explains military crimes; sets forth the rules of evidence; and contains a list of maximum punishments for each offense. The Manual for Courts-Martial has the force and effect of law. In addition, there are regulations issued by the Secretary of the Army and the Secretary of the Air Force which must be followed in the administration of military justice.

This system of military justice established by the Uniform Code of Military Justice, Manual for Courts-Martial, and Regulations preserves many of the basic procedures and rights of our civilian system of justice, but it adds the additional procedures and safeguards necessary to make it work in the military environment. Our Maine Code of Military Justice is based upon the Uniform Code of Military Justice and preserves many of the same basic procedures, rights and safeguards. However, the criminal acts punishable under the Maine Code of Military Justice are primarily military in nature, unlike the UCMJ. The Maine Code of Military Justice is set forth in 37-B MRSA. Although it is very similar to the Federal Uniform Code of Military Justice, it was written to apply primarily to "military" crimes. It does not apply to serious crimes such as aggravated assault, murder, arson, rape, etc. because such crimes will be prosecuted under the regular criminal laws of the State of Maine or the state where the crime occurred. The specific provisions, procedures and forms to be followed under the Maine Code of Military Justice are found in the Maine National Guard Regulation MENG Reg 27-10. This regulation is distributed to all National Guard units in the State of Maine. Only a few of its provisions will be referred to in this pamphlet.

The two persons who are most involved in the administration of military justice are the commander and the Staff Judge Advocate. Commanders have important responsibilities and duties in administration of military justice. The unit (company, battery, troop, squadron, wing, detachment, etc.) commander is usually the first person to learn of misconduct by a unit member. The commander must promptly investigate the circumstances of the alleged crime. From this preliminary investigation, the commander will consider the seriousness of the offense, the past record of the soldier, and the state of morale and discipline in the unit. The commander must decide whether to refer the matter up the chain of command for a court-martial, or to dispose of the matter within his unit by nonjudicial punishment or administrative action. Each commander is responsible for both enforcing the law and protecting the rights of the soldier.

D. **BASIC LEGAL RIGHTS OF MILITARY PERSONNEL**

A member of the military has many basic rights in military law. Some of these are:

1. Right to a defense lawyer.
2. Right to due process of law.
3. Right to remain silent.
4. Rights to be free from unlawful search and seizure.

1. **Defense Lawyer.** A defense lawyer is provided free of charge to advise any member of the military suspected or accused of committing a crime. This military lawyer is fully qualified. The lawyer is obligated to advise and defend his clients to the best of his ability. He is the military member's representative and acts solely in the member's interest. This means the lawyer cannot reveal anything told to him under the attorney-client relationship. Any military member who wants legal advice can go to the first sergeant or unit commander and ask to see a military lawyer. The accused also has the right to retain a civilian lawyer, but he or she must pay for these services.

2. **Right to Due Process of Law.** "Due process" means that an accused person must be considered innocent until proven guilty at a trial by legal and competent evidence. At that trial, the accused has the right to confront and cross-examine all the witnesses against him. He also has the right to present evidence on his own behalf. The accused cannot be found guilty of a crime unless the government proves beyond a reasonable doubt that he committed the crime.

3. **Right to Remain Silent.** No member of the military can be forced to speak against himself or herself. Anyone suspected of a crime has the absolute right to say nothing and to talk to a lawyer. Under military law, no one in the military may question a suspect without first telling the suspect about his rights and determining that he understands the right to remain silent and the right to have a lawyer. If these rights are violated, either by the commander or the military police, no evidence obtained as a result may be used against the accused at a court-martial.

4. **Rights Under Search and Seizure.** The examination of a military member's person or property in an attempt to discover evidence of a crime, and the taking of that evidence, is governed by the Fourth Amendment to the Constitution of the United States, by the Manual for Courts-Martial, and by Maine Law if on state status. Searches are only permitted under limited circumstances. These include:

a. **Searches authorized if probable cause.** A commanding officer has the power to order a search of military persons or property within the command. The decision to conduct the search must be based upon probable cause which will be reviewed by a court-martial. A military judge may also issue warrants to search persons and property subject to military control upon a showing of probable cause.

b. **Search incident to apprehension.** When a military member is legally apprehended, the person making the arrest may search his or her person without regard to probable cause. The purpose of the search is to discover weapons and to prevent the destruction of evidence. The search is limited to the person and the area within his or her immediate control, including the entire passenger compartment of a motor vehicle.

c. **Consent to search.** A search is lawful when made with the free consent of the military member.

d. **Inspection.** This is an examination authorized by a commander to determine the military readiness of the person, organization, or equipment. An inspection is a test of unit readiness. Evidence of a crime discovered in an inspection may be seized and admitted into evidence at a trial by court-martial. The purpose of such inspection is to promote the health, welfare, and safety of the personnel in the unit. The primary purpose of the inspection cannot be an excuse for an unlawful search.

In addition to these basic rights, a member of the military also has additional rights such as the right to prompt action on his or her case.

## E. ORGANIZATION OF THE MILITARY JUSTICE SYSTEM

As was stated, the purpose of the military justice system is to enforce discipline. The most familiar measures used in the military to enforce discipline and good order are Nonjudicial Punishment (often called Article 15 company punishment on active duty or section 415 on State duty) and the court-martial.

1. Non-judicial Punishment. Nonjudicial punishment is not a court proceeding but is punishment imposed by a commander upon a member of his command. Article 15 of the Uniform Code of Military Justice authorizes officers and warrant officers who are serving as unit commander to impose nonjudicial punishment for minor offenses. Before punishing the soldier under Article 15, the commanding officer must make sure that:

- a. An offense was actually committed.
- b. The offense can be punished under the Uniform Code of Military Justice.
- c. The soldier committed the offense.
- d. Nonjudicial punishment is proper after considering the type of offense and the record of the soldier.

After that, a commanding officer makes a decision to give an Article 15, he must tell the military member, in writing, that he plans to give the Article 15. The military member has the right:

- a. To know the type of offense committed.
- b. To a public hearing.
- c. To speak to a lawyer.
- d. To present witnesses.
- e. To refuse the Article 15.
- f. To say nothing.

By accepting an Article 15, the military member agrees to let the commander use the procedure of Article 15. By agreeing to accept the Article 15, a soldier is not admitting guilt or dispensing with a hearing. The soldier is only agreeing to a particular fact-finding procedure. The type and amount of punishment depends on two factors: the rank of the commander giving the punishment, and the rank of the person being punished. A commander who gives an Article 15 also has the right to lessen the punishment or suspend the punishment for up to 6 months. A superior commander may also set aside, remit, or mitigate the punishment. In addition, every person who receives an Article 15 has a limited right to appeal. The military member may appeal if he or she does not believe that he or she should be found guilty on the facts presented.

This form of appeal does not allow for a rearguing of the facts or the discretionary weight given to any particular evidence out of that presented to the commander in the Article 15 proceeding, but would be strictly limited to whether the conclusion is based on the facts alone, or is logical. An appeal may also concern whether the commander failed to follow the rules for giving an Article 15, or whether the punishment is comparatively too severe. Normally the appeal is made to the commander immediately above the commander who gave the Article 15. There are no hard and fast rules about how much time one has to appeal. However, as a general rule, 15 days is considered a reasonable length of time.

The major differences as to nonjudicial punishment under the Uniform Code of Military Justice and the Maine Code of Military Justice are:

a. Nonjudicial punishment under the Maine Code of Military Justice is not called an Article 15 but is under Maine Title 37-B, Section 415.

b. The punishments permitted under the Maine Code of Military Justice are much more limited. Nonjudicial punishment under the Maine code is restricted to admonitions, reprimands, reduction, restriction, forfeitures and other punishments in 37-B MRSA § 415(2).

c. Unlike the procedures governing Article 15s under the UCMJ, when a Guardsman receives an Article 415 from his or her own commander, the soldier may elect a three member panel formed from the next higher level of command which will be empowered to decide on the soldier's innocence or guilt, and then punishment if appropriate.

2. Courts-martial. Alleged crimes under the Uniform Code of Military Justice, except for minor offenses which are handled by nonjudicial punishment as we have discussed, are tried by military courts-martial. Just as with other American criminal courts, courts-martial are adversary proceedings. That is, the Government and the accused present matters which advocate their positions. In doing this, each side must follow certain rules. The military judge decides questions of law (for example, determining whether or not a search is legal is a question of law). The members of the court-martial serve in a function similar to jury members and decide questions of fact (for example, whether or not the heroin found during the search belonged to the accused).

There are three types of courts-martial under the Uniform Code of Military Justice. Procedurally, there is only one level of court-martial provided for by the Maine Code of Military Justice, namely the Special Court-Martial, as will be explained in more detail below.

a. Summary Court-Martial. The Summary Court-Martial under the Uniform Code of Military Justice is made up of one officer and is a court which tries minor crimes. The maximum punishment depends upon the rank of the accused, but is normally limited to a maximum confinement at hard labor for one month, forfeiture of two-third's pay over a one month pay period, and reduction in grade. The accused may consult a lawyer concerning the case but is not entitled to have an appointed military lawyer actually present at the trial. An important limitation on the lack of defense counsel is that an accused cannot be sentenced to confinement by a Summary Court-Martial if he did not consult with an attorney, unless this right was given up.

b. Special Court-Martial. A Special Court-Martial consists of at least three court members and a military judge. Normally, defense counsel will be a qualified lawyer. A military judge is normally appointed for the trial. The maximum sentence under the Uniform Code is confinement at hard labor for six months, and reduction to the lowest enlisted grade. In some instances, the sentence may include a bad conduct discharge.

c. General Court-Martial. A General Court-Martial tries the most serious offenses. It consists of at least five court members and a military judge. The counsel must be qualified lawyers. An investigation must be conducted before the case may be tried. The General Court-Martial may sentence an accused to any punishment authorized by law.

d. Review and Appeal of Courts-Martial. The result of every trial by a Court-Martial is always reviewed by the person who ordered the court-martial and by the staff judge advocate. Under the Uniform Code, all general courts-martial are also reviewed by the Judge Advocate General or the Court of Military Review. The accused may appeal certain convictions to the Court of Military Review and the Court of Military Appeals. The Court of Military Appeals consists of three civilian judges.

3. There are four other matters that you should know about courts-martial. These matters are:

a. Trial by Military Judge alone. Military judges are experienced lawyers who are trained as military judges, on active duty, and are outside the normal chain of command. An accused in a general or special court-martial has the right to be tried by the military judge without the court members. If the accused is tried by the judge alone, the judge decides if the accused is guilty or innocent. If the accused is found guilty, the judge determines the sentence.

b. Trial with court members. Court members are military personnel selected by the commander who creates the court. An enlisted person can request that at least one-third of all the members of the court be enlisted. However, enlisted members sitting on a case cannot be from the same unit as the accused. All members of the court have an equal voice and vote. An accused has the right to challenge members of the court or the military judge if they are not impartial. In addition, the accused can challenge one member of the court without stating a reason. Any court member who is successfully challenged takes no further part in the trial.

c. Pleas. An accused may plead guilty or not guilty. If the accused does not make a plea, a plea of not guilty is entered by the judge. It is possible for an accused to agree to plead guilty before the trial in exchange for a promise by the convening authority to approve only a certain sentence. This is called a pre-trial agreement.

#### F. OTHER LEGAL CONSIDERATIONS

The main purpose of this discussion of military justice has been to introduce you to the military justice system. However, you should also be aware of certain administrative law matters.

1. Administrative law. The conduct and rights of military personnel are affected by more than the Uniform Code of Military Justice and the Maine Code of Military Justice. Various federal laws, military directives and regulations determine how claims are processed and paid, whether a discharge can be given prior to a person's normal discharge date, how complaints may be submitted, and many other subjects. This entire area is often referred to as "Administrative Law" since it deals with how the military is administered.

2. Administrative Discharges. A discharge is a separation from the military service which results in a complete end of military status. Such a discharge can be an involuntary discharge where a member of the military is considered unsuitable for further service or has engaged in misconduct which makes continued service questionable. Involuntary discharges may be given for misconduct such as fraudulent enlistment or patterns of misconduct. Involuntary discharges may also be given for unsuitability such as inability to learn duties or personality disorders. A voluntary discharge may be given for a member's personal hardship or for the good of the service.

3. Non punitive Disciplinary Measures. We have already discussed the role of nonjudicial punishment and courts-martial in enforcing discipline and good order. However, there are also administrative actions which a commander may take in cases of poor duty performance or misconduct of a minor nature. For instance, the unit commander has the authority to withhold many of the privileges granted a military member, such as the pass privilege, when necessary to maintain good order and discipline. Commanders are also given the authority to reduce enlisted personnel from one grade to another grade for inefficiency or a civilian conviction.

4. Investigation and Board of Officers. A member of the military may also become involved with an investigation and/or Board of Officers. One example of this is the determination of whether the military member who was injured was "in the line of duty" at the time. If the member was not in the line of duty or if the injury was due to his or her own intentional misconduct (such as being shot while committing a robbery) or willful neglect (such as being injured while driving on the wrong side of the road while intoxicated), the military member may lose entitlement to disability retirement, if appropriate. Also, the time spent in the hospital will be classified as "lost time" which will have to be made up at the end of the enlistment. Other examples of such investigations are those concerning the loss of funds or equipment, damage to or loss of government property.

5. Complaints by Military Personnel. There are also administrative procedures available to the military member who has a complaint. For example, under the provisions of Article 138 of the Uniform Code of Military Justice, a military member who thinks that he has been wronged by his commanding officer may make formal complaint which can be investigated and action taken. The complaint must concern an action of the commander which was under his authority, and which was unauthorized, discriminatory, or unjust. Other laws cover discrimination on the basis of race, color, religion, national origin and sex. A military member can visit the Legal Assistance Office, the Equal Opportunity Office, or the Inspector General. The military member must sign a sworn statement about the incident.

6. Restrictions on Private and Public Activities. Military personnel have the same basic rights as all citizens. However, many rights are different for an active duty military member because of the need for discipline and the nature of his or her position as a member of the military. Among these are:

a. As a general rule, military personnel may not sell goods or services to others who are junior in grade to themselves. This also applies to spouses of military members.

b. When on active duty, off-duty employment is not permitted if it interferes with official duties, brings discredit upon the military service, or violates basic ethical considerations.

c. A military member usually cannot accept presents from other military or civilian personnel who receive less pay.

d. A military member's freedom of expression does not permit him to speak out in public criticizing civilian leaders, unless he or she is able to do so under circumstances which in no way suggest that the criticism is made in an official military capacity. Any soldier in a visible position of authority would have a difficult time meeting that standard.

e. Military personnel on active duty must avoid active participation in partisan elections or politics.

## VI. LBGAL BRIEFING ON MAINE STATE MOBILIZATION

The Governor, as Commander-in-Chief of the Maine National Guard, has the authority to call to state active service members of the Maine National Guard to insure the protection of life and property and to support civilian law enforcement agencies when a natural disaster, civil disorder or other requirement for assistance to civil law enforcement agencies occurs or is likely to occur that is beyond the capability of local authorities to contain, military assistance from the Maine National Guard may be requested.

Title 37-B Maine Revised Statutes Annotated § 181, 183 and 741 authorizes the Governor to order the Maine National Guard into active state service in case of imminent danger of insurrection, invasion, riot, or offer of violence to persons or property and in cases of human health emergencies and public emergencies beyond the capabilities of the local emergency and public safety resources.

It can be expected that almost every instance involving the use of National Guard troops in civil disturbances will be in support of the civilian law enforcement. However, the only task force commander can commit troops. The chain of command in the National Guard must and will be followed to insure accomplishment of the mission and appropriate coordination with local law enforcement agencies. Personnel of the National Guard will not "take sides", attempt to impose their own ideas or convictions on anyone, or take independent action. The National Guard is on state mobilization duty to protect life and property and to support civil law enforcement agencies.

### A. LEGAL RIGHTS OF GUARD MEMBERS.

1. Pay. When called into active service by the Governor for state active service, all members of the National Guard will be paid by the State of Maine the pay and allowances, when not furnished in kind, provided by law for persons of similar rank or grade, rating and length of service in the armed forces of the United States. However, 37-B MRSA § 143 further provides that active state duty shall include a minimum pay based upon at least 12 hours a day at the state minimum wage rate.

2. Immunity from Liability. Members of the National Guard, while acting under lawful orders and in the performance of duty, are granted civilian and criminal immunity by Maine Statute 37-B § 183 & 185. The individual Guard member is further protected under the provisions of the Maine Tort Claims Act, 14 MRSA § 8101 et seq. Members of the Maine National Guard can, therefore, perform their duties with little fear of any personal liability.

3. Benefits if Injured. In the event that a member of the Maine National Guard is injured while on state active service, he or she will be covered by the state Workers' Compensation Law, not by Federal incapacitation benefits. The daily wage of the National Guard member, for the purposes of calculating compensation payable under State Worker's Compensation, shall be based on the member's usual earnings in civilian life. If the member, however, has no previous occupation or earnings then such compensation is based on the member's military earnings as a member of the military forces.

4. Reemployment. All National Guard personnel are entitled to be reemployed upon termination of their State Active Service. Maine law requires that reemployment shall be with the same accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if the member had been actually employed during the time he or she was on State Active Service. The National Guard member must immediately notify the employer as soon as notification of mobilization is received and should immediately request reemployment upon being relieved from State Active Service.

5. Other Benefits. Members of the Maine National Guard are provided other benefits and protections if they are ordered to state active service. These include such matters as being free of discrimination while wearing their uniforms, exemption from being served legal papers, freedom from interruption of duties by others.

## **B. LEGAL DUTIES AND OBLIGATIONS OF GUARD PERSON**

Every member of the Maine National Guard who is ordered to state active duty must at all times obey all lawful orders and must keep in mind the mission to be accomplished. While on state active duty, members are subject to the provisions of the Maine Code of Military Justice.

The Maine Code of Military Justice, set forth in Title 37-B of the Maine Statutes, applies to all members of the state military forces (MENG Reg 27-10 sec. 1-2). The Maine Code of Military Justice deals with military crimes and punishments. The jurisdiction of courts-martial is limited to violations of the punitive articles of the Military Justice Code. Any person subject to this code who is charged with an offense which is not a military offense may be surrendered to civil authorities for process in accordance with the civil law.

The Military Justice Code applies to military crimes. These military crimes, among others, include desertion, absence without leave, disrespect towards a superior commissioned officer, insubordinate conduct, failure to obey orders or regulations, loss, damage or destruction of government property, drunk driving, being drunk on duty, sleeping on post, abandoning a post before being properly relieved, and dereliction of duty.

The Military Justice Code does not apply to felonies such as aggravated assault, murder, arson and rape. These offenses may be prosecuted under the regular criminal laws of the state in which the crime is committed.

If you are charged with a violation of the Maine Code of Military Justice, the military justice system will provide you with many basic rights. These rights include the right to due process of law, the right to remain silent, and the right to have a lawyer defend you, among other procedural protections.

### **C. OTHER LEGAL CONSIDERATIONS.**

1. Arrest or Apprehension. Normally arrests will be made by the civilian authorities. However, your orders may permit or require you to arrest people who have committed or are committing a crime. Since it is unlikely that any Guard personnel will be deputized, National Guard members on state active service will be acting as private persons in performing arrests. You will be briefed on the procedures and requirements of making arrests.

As much as possible, arrest should be left to civilian authorities. If arrest is necessary, follow the guidelines given in the briefing.

2. Search and Seizure. Other than the search conducted at the time of the arrest, any search must be guided by civilian authorities or orders from military superiors.

3. Use of Force. The use of force must be restricted to the minimum degree consistent with the mission accomplishment. No ammunition will be carried in any weapon or upon one's person without the express authority of the commander of the task force.

In no event will blanks ever be fired or a weapon set on automatic.

4. Other Considerations. Although they are not legal considerations, there are some other matters which should be briefly reviewed in order to maximize the effectiveness of your role in any state active service mission.

a. Present a neat military appearance at all times and carry out your assigned duties in a military manner. The appearance of a control force which is obviously neat, military, well-disciplined and determined can have an immense effect in calming a disorderly crowd. Be sure that everything you do reflects credit upon your country, the State of Maine, the military service, your unit and yourself.

b. Have regard for the civil rights of all persons. Be as courteous toward civilians as possible under the circumstances. Do not mistreat anyone or withhold medical attention from anyone needing it. Do not damage property unnecessarily. Do not give the appearance, either through attitude or action, of being an alien, invading force. Do not let personal feelings or bias affect your conduct.

c. Allow properly identified news reporters freedom of movement, so long as they do not interfere with the mission of your unit. Maintain a cooperative but formal relationship with news media at all times.

d. Do not speculate with news media or voice personal opinions about the operation or the participants in the disorder. Limit conversations to name, rank, unit and military occupation. Do not talk about an operation or pass on information or rumors about it to any unauthorized persons. Refer all civilians who ask for information about what you are doing to your commanding officer.

#### **CONCLUSION: WHAT THE GUARD WILL DO FOR YOU AND AT YOU MUST DO FOR THE GUARD**

As a member of the Maine National Guard, you have legal rights and laws which will protect you as long as you belong to the Guard. You will receive many benefits. But you also have certain duties and obligations.

#### **What the Guard will do for you:**

1. Pay, feed and clothe you while you are on duty.
2. Provide you valuable training.
3. Provide you with camaraderie and recreational opportunities.
4. Provide you the legal protection under the Soldiers' and Sailors' Civil Relief Act if you are mobilized.
5. Provide you, if you are mobilized, with many legal benefits such as legal assistance, medical care for you and your dependents, post/base facilities, and travel for dependents.

6. Provide you with medical care and other benefits if you are injured while on federal or state duty.

7. Pay up to \$200,000 to your survivors (unless you elected lesser insurance coverage in writing) in the event of your death on or off duty. Additional benefits are provided if you should die while you are on duty.

8. Provide for your reemployment if you give proper notice to your employer before you begin your duty.

9. Protect you from liability for injury or damage caused by you to Guard members or to third parties while on duty.

10. Pay you a substantial retirement *annuity* starting at age 60, if you serve 20 or more "good" years.

#### **What you must do for the Guard:**

1. Be of high integrity and moral character. The Guard does not need or want persons who can't be trusted.

2. Keep a good military appearance, use military courtesy, and stay physically fit.

3. Be prompt, decisive, and professional.

4. Learn, know and do your job.

5. *Maintain* discipline. Discipline is essential for any military organization to accomplish its mission.

6. Obey the orders of your superiors, both officer and enlisted. Disobedience of a lawful order is a violation of the Maine Code of Military Justice.

7. Protect all government property. You will have to pay for any government property, including the clothing and field gear issued to you, which you lose, damage or destroy.

8. Attend all drills and *annual* training. Your job can't be done and your unit will have a tougher time accomplishing its mission if you aren't there. If you miss or leave a drill or other duty without proper authorization, you will have violated the Uniform Code or the Maine Code of Military Justice. This may result in your commander imposing nonjudicial punishment upon you or seeking *initiation* of court-martial proceedings against you.

9. Be a representative of the Guard. Talk up the Guard! People in your community will get a good or bad impression of the Guard based upon your conduct and your attitude.

10. Keep your legal affairs in order. This is true whether or not you are in the Guard. Not having your legal affairs in order is like telling your family that you don't care for yourself or for them.