SOLDIERS AND OTHER PERSONS IN MILITARY SERVICE:

Civil courts have jurisdiction concurrent with military courts to try for violations of civil laws.

August 18, 1941

8-19 #69

Honorable James L. Paul
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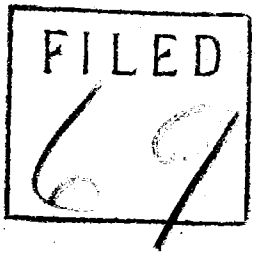

Dear Sir:

Under date of August 11, 1941, you wrote this office requesting an opinion as follows:

> "We have had the question arise in this county several times as to the right of county and state offidals to arrest and prosecute members of the United States Army who are on furlough and who violate the laws of this state. I would appreciate your opinion as to whether or not the officers of this state have concurrent, exclusively, or no jurisdiction with the Government Officers where the violation is committed while the members are on furlough?
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> "For your information, I might say that these violations consist mostly of careless and reckless driving and drunken driving."

Your question is quite broad, and it is possible that cases might arise which would be exceptions to the general statement of the law which is contained herein.

Military courts are courts of special jurisdiction, and they are created and their jurisdiction defined by the Articles of War, which are found in Chapter 36, Title 10, U.S.C.A. In the same chapter and title are the punitive sections of the Articles of War. Military Courts were created primarily for the punishment of military offenses. A number of acts, which are civil offenses, are not included specifically, but are covered by two very broad sections, the Ninety-fifth and the Ninety-sixth Articles of War, which are, respectively, Sections 1567 and 1568, Chapter 36, Title 10, U.S.C.A. These two Articles of War are as follows:

Section 1567

"Any officer or cadet who is convicted of conduct unbecoming an officer and a gentlemen shall be dismissed from the service."

Section 1568

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

It will readily be seen that while such acts as are mentioned in your letter might not be specifically made punishable by military courts, the two above sections would be sufficiently broad to cover them.

The general rule is that when the State laws and the Federal laws are in conflict that the Federal laws shall be paramount. There are reported cases of soldiers who had been arrested by civil authorities and were being punished, being released by Habeas Corpus from the civil authorities.

As mentioned above, Military Courts are primarily for the punishment of military offenses and this is recognized, and the right of civil authorities to punish for civil offenses is also recognized, by the Seventy-fourth Article of War, Section 1546, Chapter 36, Title 10, U.S.C.A., which is as follows:

> "When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.
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> "When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence

> of a court-martial, such delivery if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of said court-martial offense."

In addition to the Seventy-fourth Article of War above, there are other articles recognizing the right of the civil authorities to punish persons in the military service for violations of the civil laws. Numerous cases have been tried invovling the custody of persons in the military service by civil authorities, but we have found no case directly involving a person on furlough.

Your attention is called to the fact that there is a distinction between times of peace and times of war. And, as there has been no declaration of war by Congress, this opinion treats only of the right of civil authorities to try persons in the military service for civil offenses in times of peace.

Persons in the military service who are on furlough or leave of absence are merely temporarily released from duty and given permission to travel to some other point or points. The same rules which are applicable to persons not on furlough or leave of absence would be applicable to those who are absent from their posts of duty with permission.

No Missouri Case has been found involving the custody of a person in the military service of the United States by the civil authorities. But the Supreme Court of Missouri had occasion to apply the provisions of the Articles of War in the case of McKittrick, Attorney-General, for and in behalf of Donaldson, Sheriff v. Brown, 85 S. W. (2d) 385. This was a case involving the custody and right to try a member of the Missouri Militia for an act committed while on duty and in the service of the State of Missouri.

The Articles of war are applicable for the punishment of persons committing military offenses while in the military

service of the state. Section 15024, Article IV, Chapter 121, R. S. Missouri, 1929.

In the above mentioned case, a soldier had committed an act, while in the military service of the state, for which the civil officers desired to try him; the military authorities had preferred charges against him and were holding him in custody. The Attorney-General of Missouri, on behalf of the sheriff, having a warrant for the arrest of the person, instituted habeas corpus proceedings, seeking the release of the person from the custody of the military authorities. The Supreme Court refused to grant the prayer of the Attorney-General on the ground that the jurisdiction of the civil and military authorities was concurrent, and the person was already under the custody of the military authorities awaiting trial for the same act. From this case we quote at length, at l. c. 390 and 391:

> "The court-martial has, or will have, jurisdiction to try the prisoner on this charge of manslaughter. But this further question arises. Where the offense charged is one cognizable by the civil courts, the jurisdiction of the court-martial is not exclusive, but concurrent with that of the state courts. Caldwell v. Parker, 252 U. S. 376, 40 S. Ct. 388, 64 L. Ed. 621. And the first paragraph of article 74 of the articles of war, section 1546, USCA, title 10, p. 310, provides:
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> "'When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable

by the laws of the land, the commanding officer is required, except in time of war, upon application duly made to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.' (Italics ours).

"It would seem that the instant case comes squarely within the first exception in the above article. The prisoner is a person subject to military law; he is held by the military authorities to answer for a crime punishable under the articles of war; he is awaiting trial. We cannot find that this particular part of the article has ever been judicially construed. But in Caldwell v. Parker, supra, the Supreme Court of the United States reviewed the history of the articles of war and declared the meaning and effect of the other exception 'except in time of war' appearing in article 74. The opinion (252 U. S. 376, loc. cit. 387, 40 S. Ct. 388, loc. cit. 391, 64 L. Ed. 621, loc. cit. 625) expresses grave doubt 'whether it was the purpose of Congress, by the words "except in time of war" * * * * * to do more than to recognize the right of the military authorites, in time of war, within the areas affected by military operations or where martial law was contolling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified -- a doubt which,

if solved against the assumption of general military power, would demonstrate, not only the jurisdiction of the state courts (in the case under adjudication), but the entire absence of jurisdiction in the military tribunals.' In other words, the opinion indicates a view that the spirit and purpose of the articles of war was to confer upon the state courts a prior or paramount jurisdiction to try persons in the military service for criminal offenses cognizable by them, except in areas affected by military operations, or where martial law had been declared, or where civil authority is totally suspended or obstructed. And if this be true in time of war, all the more should it be true where the only reason supporting the military authorities in retaining jurisdiction against the state courts is that they had first asserted it.

"In the instant case, the civil authority, so far as this record shows, was neither totally suspended nor obstructed in Dunklin County; nor was the circuit court of that county unable to function and dispense justice. And the Governor did not declare martial law, as he might have done under section 13825, R. S. Mo. 1929 (Mo. St. Ann. Sec. 13825, p. 5039). But what was said in Caldwell v. Parker was purely arguendo. In its concluding paragraphs the opinion declines to enter upon an investigation of whether Congress 'intended by the provision "except in time of war" * * * * * to do more than meet the conditions exacted by the actual exigencies of war.' And the case was decided on the point that since both the state court and the court-martial had concurrent jurisdiction of the homicide there involved, and the state court had enforced its jurisdic-

tion and rendered judgment, the United States Supreme Court would not interfere by habeas corpus to nullify that judgment on the ground contended for by the petitioner that jurisdiction was exclusively vested in a court-martial to try the petitioner in time of war.

"The Caldwell-Parker Case was written by Mr. Chief Justice White. Later, in Kahn v. Anderson, 255 U. S. 1, 9, 41 S. Ct. 224, 226, 65 L. Ed. 469, he said, speaking of that case, that the sole question involved in it was 'whether the jurisdiction which it was conceded such a court (court-martial) possessed was intended to be exclusive of a concurrent power in the state court to punish the same act, as the mere result of a declaration of war and without reference to any interruption, by a condition of war, of the power of the civil courts to perform their duty.'

"And in Grafton v. U. S., supra (206 U. S. 333, loc. cit. 348, 27 S. Ct. 749, loc. cit.752, 51 L. Ed. 1084, loc. cit. 1089, 11 Ann. Cas. 640, loc. cit. 643), it was held 'that the civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier, if such court had jurisdiction to try the offense set forth in the charge and specifications; this, notwithstanding the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even one of higher grade arising out of the same facts.' In this Grafton Case the accused was acquitted on a homicide charge by a court-martial in the Phillippine Islands and the civil courts thereafter tried and convicted him upon the same homicide, the latter judgment being reversed on a writ of error by the United States Supreme Court. It is

not precisely in point on the question presented here, perhaps, but it goes to show that a court-martial, having jurisdiction, may bar a further prosecution in the civil courts even though on a more aggravated charge growing out of the same act.

"In U. S. v. Hirsch (D. C.) 254 F. 109, 110, it is said, speaking of the articles of war prior to those now in force, that 'under this law both courts-martial and civil courts necessarily respected the jurisdiction which was being exercised by the other, and the court first apprehending the defendant was thus able to proceed with a trial, without reference to the concurrent jurisdiction of the other. In the same way double jeopardy was avoided.'

"While the expressions in Caldwell v. Parker, supra, strongly appeal to us, and we would be inclined to give them effect in the instant case if we felt at liberty to do so, yet the language of the statute is so plain that we feel bound thereby, in view of the fact that the United States Supreme Court in the Caldwell-Parker Case did not base its judgment on those reasons. It may be that Congress was unwilling to permit the civil courts to interfere with a criminal proceeding first started by the military authorities, save with the consent of the latter. It appears that the article stood substantially as it is now, but without the exceptions which we have italicized abo ve, from 1776 until 1916, when they were first inserted."

The case of Caldwell v. Parker, referred to in the foregoing quotation, is one of the leading cases involving the custody of a person in the military service by the civil

authorities. In the case the Supreme Court of the United States upheld the right of the civil authorities to try a person in the military service, even in time of war.

An earlier case on the subject is the case of United States ex rel. Drury, et al. v. Lewis, Warden of the Common Jail of Allegheny County, Pennsylvania, 50 L. Ed. 343. In this case the right of the civil authorities, in peace time, to try persons in the military service for an act committed while soldiers were in the performance of their duty, but not on United States property, was upheld. From this decision we quote ate length, at l. c. 345-6:

> "Mr. Chief Justice Fuller delivered the opinion of the court:
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> "In Baker v. Grice, 169 U. S. 284, 290, 42 L. Ed. 748, 750, 18 Sup. Ct. Rep. 323, an appeal from the final order of the circuit court of the United States for the northern district of Texas, in habeas corpus, it was said:
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> "'The court below had jurisdiction to issue the writ, and to decide the questions which were argued before it. Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868, 6 Sup. Ct. Rep. 734; Whitten v. Thomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears, as the settled and proper procedure, that while circuit courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of habeas corpus, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency; and that instead of discharging, they will leave the prisoner to be dealt with by the courts

of the state; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court, and subject to its laws, may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases Re Loney (Thomas v. Loney) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584, and Re Neagle (Cunningham v. Neagle) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court.'

"The rule thus declared is well settled, and, in our judgment, it was properly applied in this case. Crowley was a citizen of Pennsylvania, not in the service of the United States, and was killed in or near a street of the city of Pittsburg, and not on property belonging to the United States or over which the United States had jurisdiction.

"The homicide occurred within the territorial jurisdiction of the court of oyer and terminer, which, as Judge Acheson observed, was the only civil court which could have jurisdiction to try petitioners for the alleged unlawful killing, and the indictment presented a case cognizable by that court.

"The general jurisdiction, in time of peace, of the civil courts of a state over persons in the military service of the United States, who are accused of a capital crime or of any offense against the person of a citizen, committed within the state, is, of course, not denied."

CONCLUSION.

It is the conclusion of this department that the courts of the State of Missouri have concurrent jurisdiction with military courts to try persons in the military service for offense against the laws of the State, of the nature indicated in your letter, which offenses were committed outside the limits of a military reservation. In connection with this conclusion, it is suggested, if the authorities of your county find it necessary to arrest and hold for trial a person in the military service, that the commanding officer of the person held be notified immediately.

Respectfully submitted,

APPROVED:

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VANE C. THURLO
(Acting) Attorney-General

WOJ/rv