

## Opinion No. 43-4394

October 8, 1943

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Brig. Gen. Russell C. Charlton, The Adjutant General, Santa Fe, New Mexico

We are in receipt of your letter of October 4, 1943, in which you ask our opinion on the following three questions:

"Is a soldier of the United States Army amenable to the State laws of New Mexico?"

"Does the military law of the United States Army supersede all State laws when the State makes an arrest of a soldier committing a criminal act within the State of New Mexico?"

"May civil authorities of the State of New Mexico hold a soldier in custody for a criminal act after military authorities have made request or demand for his removal from civil custody to the custody of military authorities for trial, providing such demand is properly made in writing and signed by the demanding authority?"

In answering these questions it is necessary to consult the various applicable federal statutes, since without appropriate congressional legislation the sole jurisdiction for the trial and punishment of offenders against the State laws would be vested in the State Courts. These enactments, which appear as the 74th, 92nd, 93rd and 96th Articles of War are:

Title 10, U.S.C.A., Section 1546, 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.

"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 the said court-martial sentence."

Title 10, U.S.C.A., Section 1564, is as follows:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

Title 10, U.S.C.A., Section 1565, is as follows:

"Any person subject to military law who commits manslaughter, mayhem, arson, burglary, house-breaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct."

Title 10, U.S.C.A., Section 1568, is as follows:

"Though not mentioned in these articles, all disorders and neglects to the prejudices 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 has long become established that in time of peace a person in military service who commits a crime is amenable to the laws of such State and subject to the jurisdiction of its courts. See U.S. v. Lewis, 129 Fed. 825, affirmed 26 S. Ct. 229; 200 U.S., 150 L. Ed. 343; 36 Am. Jur. 261; 6 C. J. S. 425.

It is seen that by the terms of Section 1564, supra, the State courts have exclusive jurisdiction as to murder and rape in times of peace. By Section 1565 and Section 1568 courts-martial are given jurisdiction of all other crimes; yet, as to such crimes the State courts are given a preference, since under Section 1546, upon due application being made, the commanding officer is required to deliver a person in military service charged with such a crime to the civil authorities, except where he is "held by the military authorities to answer or who is waiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles."

In time of war the situation is more complex. By Section 1565 courts-martial are given jurisdiction to try persons in military service for the crimes listed therein, and by Section 1568 jurisdiction is given to try such persons for any other crime not capital. By Section 1564 the duty of the commanding officer to deliver a person in military service to the State authorities no longer exists, due to the provision "except in time of war." By

Section 1564 courts-martial are given jurisdiction to try persons subject to military law for rape and murder, during war time, since the provision therein that no person shall be tried for such crimes when committed within the United States is limited to "time of peace." Thus, since courts-martial are given jurisdiction to try all types of crimes when committed by persons in military service in time of war, and since no provision is made for the delivery of such persons to State courts, the question arises as to whether Congress intended to give courts-martial exclusive jurisdiction as to such crimes in time of war.

In *U.S. v. Hirsch*, 254 Fed. 109, the court had before it certain provisions of the 1916 act, which are identical to the provisions of the 1920 act set forth above in all material particulars. There the court said:

"But the question involved in the present motion is simply whether the new Articles of War have repealed by act of Congress the concurrent jurisdiction previously vesting under the Constitution in civil courts for the trial of crimes committed by an officer or member of the army, and, if not, whether the new language produces that effect in time of war, even though the army does not act under the Articles of War, to exert its own, and in such case superior, jurisdiction to deal with the charge by retaining physical control of the accused, and by proceeding to hear and dispose of the case before relinquishing him for civil arrest (article 74).

"But in these respects the new Articles of War show no intent on the part of Congress to limit jurisdiction over crimes to courts-martial even in time of war. The language of the sections is in each case evidently intended to confer jurisdiction on the army; but it does not, except in express instances, restrict such other jurisdiction as may already exist. Nor does the language support the proposition that the changes were intended by inference to effect a different result."

In *Caldwell v. Parker*, 252 U.S. 377, 40 S. Ct. 388, 64 L. Ed. 621, the court said, at page 385:

"Comprehensively considering these provisions, it is apparent that they contain no direct and clear expression of a purpose on the part of Congress, conceding for the sake of the argument that authority existed under the Constitution to do so, to bring about, as the mere result of a declaration of war, the complete destruction of state authority and the extraordinary extension of military power upon which the argument rests. \* \* \*"

See, also, the following cases, wherein the respective courts upheld convictions by State courts of persons in the military service where no demand was made for such person by the proper military authorities. *Funk v. State*, Tex. , 208 S. W. 509; *People v. Denman*, 179 Cal. 497, 177 P. 461; and *U.S. v. Hirsch*, supra.

In view of these cases it appears that both the State courts and courts-martial have jurisdiction over offenses committed by persons in military service within the territorial limits of the State, yet it does not follow that such courts have concurrent jurisdiction in

the usual meaning of that term. If the jurisdiction were actually concurrent the court that first obtained jurisdiction of the person could retain such jurisdiction until it had disposed of the matter, without any right in the other court to intervene. Yet, in time of war not only do the courts-martial have the prior right to deal with such offenders, but only if the proper military authorities waive their right to the custody of such person in military service, either directly or by failing to make a demand upon the State officials (See *Caldwell v. Parker*, supra), may the State courts proceed with the trial secure from future interference from the military authorities. Further, if demand is made by the proper military authorities, the State officials must deliver up the custody of the person in military service held by the State officials for trial of a criminal offense committed within their jurisdiction.

The reason for this rule, as set down in *Ex parte Sumner*, Tex. , 158 S. W. 2d 310, is that:

"\* \* \* the civil authorities ought not -- especially in time of war -- to be empowered to interfere with the military authorities in the exercise of control and jurisdiction over their military subjects. But, whether the delivery of a particular military subject into the custody of civil authorities for trial would or would not interfere with or hamper the military establishment is a matter primarily within the knowledge of the officers in charge thereof. Such being true, there is nothing to prevent the military authorities from waiving the exceptions mentioned."

The leading case upon this question is *Ex parte King*, 246 Fed. 867. There a soldier accused of murder was delivered to the civil authorities by his Sergeant. His Captain and Major stated at the preliminary hearing that they did not want him, yet, as it was not shown that these officers had authority to waive the prior right of the military authorities, when proper application was later made for the custody of the prisoner, the court said:

"My conclusion, therefore, is that if the Campbell circuit court will, in any contingency, have jurisdiction to try the prisoner under the indictment against him returned therein, it does not have such jurisdiction now, and that the military authorities are entitled to have him delivered to them, at least for trial under the charges pending before them against him."

In conclusion, I wish to call attention to two exceptions to what has been said above; first, when the offense was committed within the geographical limits of the State, but upon land which the State had ceded jurisdiction to the United States. (See *People v. Denman*, supra; *Battle v. U.S.*, 209 U.S. 36, 52 L. Ed. 670). Secondly, when the purported offense was committed by a soldier in the performance of his duty.

In view of the foregoing, it is my opinion that as to persons subject to the military law of the United States who commit crimes within the territorial jurisdiction of the State, in times of peace, the State courts have exclusive jurisdiction over the crimes of murder and rape; that as to other crimes committed in times of peace, both state and military courts have jurisdiction, with the preference being lodged in the State courts, which may

be exercised upon proper application to the military commander, unless the military authorities have taken the action noted above.

It is further my opinion that in time of war both State and military courts have jurisdiction over all crimes, provided that the military courts have the preference, which they may exercise or waive, as the military authorities see fit, so that even though a State court has obtained prior jurisdiction the military authorities may require the State officials to deliver the custody of the prisoner. It is also my opinion that only the military authorities may invoke this privilege, so that, at least where no proper demand is made to the State authorities for the return of such prisoner, the jurisdiction of the State court is complete and cannot be questioned by the prisoner.

I am inclosing copy of this opinion for your convenience.

Trusting that the above sufficiently answers your inquiries, I remain,

By ROBERT W. WARD,

Assistant Attorney General