



OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

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ATTORNEY GENERAL

October 26, 1976

OPINION LETTER NO. 22

Mr. Michael D. Garrett, Director
Department of Public Safety
P. O. Box 749
Jefferson City, Missouri 65101

Dear Mr. Garrett:

This is in response to your request for an opinion of this office on the following questions:

"a. Whether members of the Missouri National Guard may be tried by courts-martial, authorized by Chapter 41, Revised Statutes of Missouri, for offense(s) committed while performing duty described in Sections 316, 501 through 505, Title 32, United States Code, in light of Sections 17, 18(a) and 24, Article I, Missouri Constitution?

"b. Whether Commanders of the Missouri National Guard may administer non-judicial punishment for minor offense, under the authority of Part IV, Regulation for the administration of Military Justice for the State of Missouri, signed by the Governor on 12 December 1972, in the absence of statutory authority?"

The circumstances under which a member of the Missouri National Guard may be subject to trial by court-martial under state law are not clearly set forth in either the Constitution of Missouri or Missouri statutes. However, as your first question has noted, there are constitutional provisions which address themselves to the matter you have raised. The most significant provision in the Constitution of Missouri affecting state courts-martial is Article I, Section 17, which provides as follows:

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"That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be applied to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor to prevent arrests and preliminary examination in any criminal case."
(Emphasis added)

This section of the Missouri Constitution is nearly the same as the Fifth Amendment to the United States Constitution. The excepting clause in Article I, Section 17, Constitution of Missouri, is identical to the language in the Fifth Amendment to the United States Constitution.

Further, constitutional provisions of this state affecting jurisdiction of courts-martial include Article I, Section 24, Constitution of Missouri, which provides in part that:

"That the military shall be always in strict subordination to the civil power; . . ."

In addition, Article III, Section 46, requires that:

"The general assembly shall provide for the organization, equipment, regulations and functions of an adequate militia, and shall conform the same as nearly as practicable to the regulations for the government of the armed forces of the United States."

The only case in this state dealing with the trial of a member of the Missouri National Guard under state law is McKittrick v. Brown, 85 S.W.2d 385 (Mo.Banc 1935). It should be noted that although that case dealt with the application of the Constitution of Missouri 1875 (in effect in 1935), the sections of the 1945 Constitution, noted above, were the same in the Constitution of 1875. In McKittrick v. Brown, the court upheld the court-martial provisions of state law in a case in which a member of the Missouri National Guard was charged with second degree murder during his participation in state active duty, pursuant to a valid call by the Governor during a time of "public danger." The court held that the excepting language in Article I, Section 17, of the present Missouri Constitution (Article II, Section 12, Constitution of Missouri 1875) authorized state trial by court-martial under applicable state statutes. Even in view of the subordination of

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military to civil power under Article I, Section 24, of the present Constitution (Article II, Section 27, Constitution of Missouri 1875), the court held that:

". . . In other words, we hold that section 27, art. 2, of the Constitution, and the aforesaid sections thereof guaranteeing an accused the right of jury trial in the civil courts, interpose no constitutional obstacle to the enactment of state statutes authorizing the trial of persons in the military service for felony or misdemeanor by court-martial, in cases arising in the militia when in actual service in time of public danger--found and declared by the Governor--especially where such statutes conform to the regulations for the government of the Armies of the United States. . . ." Id. at 388

The state statutes enacted to provide for trial by court-martial of members of the militia have not been changed in any significant degree since McKittrick v. Brown, supra. The powers and procedure for court-martial under Missouri law are set forth in Section 41.590, RSMo 1969, and provide as follows:

"The military courts of this state shall be general courts-martial, special courts-martial and summary courts-martial, such as are now provided or may be hereafter provided by the laws and regulations covering the armed forces of the United States and shall be constituted and have cognizance of the same subjects and possess like powers as similar courts provided by the laws and regulations governing the armed forces of the United States, and, as far as practicable, follow the forms and modes of procedure prescribed for said similar courts; except that the word 'governor' shall be substituted for the word 'President' whenever the same shall appear in such laws and regulations. The prosecution in a general, special or summary court-martial of the militia of this state shall be in the name of the state. The governor, upon advice of the military council, shall promulgate or publish regulations covering military courts, as herein

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provided, not inconsistent with the constitution of this state and this chapter."

Section 41.590 seems to incorporate the subject matter jurisdiction of applicable federal law governing military courts-martial, i.e., the Uniform Code of Military Justice, 32 U.S.C. §§ 801-935. Sections 41.600-41.620, RSMo 1969, set forth the powers of general, special, and summary courts-martial in this state.

This assimilation of federal military law appears permissible since McKittrick v. Brown, supra, involved the trial of a member of the Missouri National Guard under existing Articles of War enacted by Congress.

In light of the above-noted authority, can it be said that state court-martial jurisdiction extends to duty described in 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505? For reasons noted hereafter, it is our opinion that a distinction must be made between summary court-martial jurisdiction and jurisdiction for special and general courts-martial. First we will discuss state jurisdiction for special and general courts-martial.

It is most significant to note the type of military duty provided by those sections of federal law noted in your first question. 32 U.S.C. § 316 deals with the detailing by the President of national guardsmen ". . . to duty as instructors at rifle ranges for the training of civilians in the use of military arms." 32 U.S.C. §§ 501-505 requires training by the National Guard in the form of drills, field exercises, and military schools.

Clearly, duty pursuant to 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 is not "state active duty" within the provisions of Sections 41.480-41.500, RSMo 1969, which provide for the calling out of the militia and reserve forces to:

". . . execute the laws, suppress . . . insurrection . . . repeal invasion. . . .

". . . provide emergency relief to a distressed area in the event of earthquake, flood, tornado or other actual or threatened public catastrophe creating conditions of distress or hazard to public health and safety beyond the capacities of local or other established agencies."

In addition, it should be noted that compensation for duty described in 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 would properly be paid by the federal government under Title 32 U.S.C. since

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the state pays members of the Missouri National Guard only for "active duty in the service of the state." Section 41.430, RSMo 1969. Accordingly, it cannot be said that training under 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 constitutes duty which excepts the constitutional requirement of criminal prosecution by information or indictment under Article I, Section 17, Constitution of Missouri, since such duty is not "actual service in time of war or public danger."

This question has been litigated on rare occasions by other states. In State ex rel. Sage v. Montoya, 338 P.2d 1051 (N.M. 1959), the Supreme Court of New Mexico considered a writ of prohibition brought by members of the New Mexico National Guard to prevent trial in state court for crimes committed while said guardsmen were in active state service for administrative duty. The Constitution of New Mexico, at that time, required trial for such crimes only after indictment or filing of information except in cases arising in the militia when in active service in time of war or public danger, i.e., language identical to that in the Missouri Constitution. The court in State ex rel. Sage v. Montoya held that:

"The . . . constitutional provision is clear and unambiguous. Hence it is not subject to interpretation or construction by this court. [citation omitted]

"No war or state of public danger existed during the period in which the alleged felonious acts occurred and we will take judicial notice of this fact. [citation omitted] Such being the case, a military court would be wholly without jurisdiction to try relators for the felonies with which they are charged. Clearly then the civil courts must have jurisdiction . . ." Id. at 1053

For a similar holding, see State ex rel. Poole v. Peake, 135 N.W. 197 (N.D. 1912). See also, Note of the Joint Legislative Committee to Study the Military Law, N.Y. Military Law, Article VII (McKinney 1953).

It could be argued that a member of the Missouri National Guard could be tried by special or general courts-martial under state law while performing duty described in 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 since trial after indictment or information is not required for "cases arising in the land or naval forces"

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as well as for cases arising "in the militia when in actual service in time of war or public danger." Article I, Section 17, Constitution of Missouri 1945.

It is our opinion, however, that the state of Missouri has no "land or naval forces" distinct from the militia. The National Guard of each state is the modern militia reserved to the state by Article I, Section 8, Clause 15, Constitution of the United States. Maryland v. United States, 381 U.S. 41, 85 S.Ct. 1293, 14 L.Ed.2d 205 (1965). Furthermore, the Constitution of Missouri 1945 provides for the organization and regulation of a "militia" and not a distinct "land or naval force." Article III, Section 46, Constitution of Missouri 1945. The only logical explanation for the inclusion of the phrase "land or naval force" in Article I, Section 17, Constitution of Missouri 1945, is that the excepting clause containing that phrase is identical to the language in the Fifth Amendment to the United States Constitution from which Article I, Section 17, Constitution of Missouri, was adopted. The excepting of "land or naval forces" in the Fifth Amendment to the United States Constitution has been interpreted to mean that members of the armed forces during periods of active duty in federal service may be tried for capital crimes without indictment or information. Even then, the jurisdiction of military courts under the Uniform Code of Military Justice has been limited. Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969).

Accordingly, we believe that Article I, Section 17, Constitution of Missouri 1945, permits criminal prosecutions in this state without information or indictment only in cases arising in the militia when on state active duty at the call of the Governor pursuant to Chapter 41, RSMo 1969. Therefore, it is only pursuant to such duty that a member of the Missouri National Guard may be trial by special or general courts-martial.

We do not mean to imply that Article I, Section 17, Constitution of Missouri, is an absolute barrier to all levels of state courts-martial. This provision of our state constitution addressed only criminal prosecutions for felonies or misdemeanors. In Middendorf v. Henry, _____ U.S. _____, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), the Supreme Court of the United States held that a summary court-martial under the Uniform Code of Military Justice is not a "criminal prosecution" in view of the nature of the proceedings and the fact that it occurs in a regimented military community. See also Parker v. Levy, 417 U.S. 733, 749, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

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We believe the holding in Middendorf v. Henry to be equally applicable to a summary court-martial under Chapter 41, RSMo 1969. The extensive assimilation of federal military law into Chapter 41 has previously been noted by reference to Article III, Section 46, Constitution of Missouri 1945, and Section 41.590, RSMo 1969. Additionally:

"All acts of the Congress of the United States providing for the administration, control, equipment, government and organization of the armed forces of the United States, together with the rules and regulations promulgated thereunder, now in effect and hereafter enacted or promulgated, may by appropriate rules and regulations be adopted by the governor for the operation and regulation of the militia of the state insofar as the same are not inconsistent with rights reserved to this state under the constitution of the state and provisions of this code." (Section 41.020, RSMo)

"The system of discipline and training for the federally recognized components of the organized militia shall conform generally to that of the United States armed forces except as otherwise provided in this military code. The system of discipline and training for the Missouri reserve military force, when organized, shall be as prescribed by the governor." (Section 41.460, RSMo)

In light of Middendorf v. Henry and the obvious intent of our state constitution and General Assembly to conform the state military code to the Uniform Code of Military Justice (10 U.S.C. §§ 801-940), we conclude that a summary court-martial under Section 41.620, RSMo 1969, is not a criminal prosecution and thus need not be preceded by indictment or information.

There is, however, a practical barrier to the use of trial by summary court-martial under Chapter 41. Article 20 of the Uniform Code of Military Justice (10 U.S. § 820) provides, in part, that:

". . . No person with respect to whom summary courts-martial have jurisdiction may

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be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. . . ."

The powers of summary courts-martial under state law are set forth in Section 41.620, RSMo 1969. This section is silent as to specific jurisdiction. Therefore, we believe that Section 41.620 must be read with the clear assimilating provisions of Section 41.590 which provide that a summary court-martial in Missouri ". . . shall be constituted and have cognizance of the same subjects and possess like powers" as summary courts-martial under the Uniform Code of Military Justice. Accordingly, we conclude that, although the punishment provisions of summary courts-martial have been statutorily modified in Missouri by Section 41.620, the basic structure and jurisdiction are identical to a summary court-martial under federal law by virtue of Section 41.590, RSMo 1969.

Since Middendorf, supra, is limited only to trial by summary court-martial, we believe that trial by special or general courts-martial are criminal proceedings within the scope of Article I, Section 17, Constitution of Missouri. Therefore, an accused facing trial by summary court-martial can defeat jurisdiction (unless the offense occurred during a period of duty pursuant to a call of the Governor) by merely objecting as would be his right under Article 20 of the Uniform Code of Military Justice.

It is conceivable that the General Assembly could revise Chapter 41 to provide specifically for jurisdiction and procedure for summary courts-martial in this state and to prohibit an individual from refusing trial by summary court-martial. Certainly, Article III, Section 46, Constitution of Missouri, does not require mandatory conformity with federal military law, but only that Missouri's military law "shall conform . . . as nearly as practicable." Similar language is found in Sections 41.460 and 41.590, RSMo 1969.

We believe that the General Assembly could properly establish summary court-martial jurisdiction and procedure under state law which does not provide an accused the right to refuse trial by summary court-martial and thus subject certain members of the Missouri National Guard to such jurisdiction during periods of duty set forth in 32 U.S.C. §§ 501-505. However, because of the provisions of Article 20, Uniform Code of Military Justice, assimilated by Section 41.590, RSMo 1969, we believe that presently no summary court-martial jurisdiction exists except during periods of state emergency duty as previously discussed.

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Your second question concerns the authority of commanders of Missouri National Guard to administer nonjudicial punishment under the authority given them by Part IV, Regulation for the Administration of Military Justice for the state of Missouri, a regulation signed by the Governor on December 12, 1972. The power to promulgate regulations dealing with the training and discipline of the Missouri National Guard seems clearly to be vested in the Governor. Although Article III, Section 46, Constitution of Missouri 1945, provides that the General Assembly "shall provide for the . . . regulation . . . of an adequate militia," the power to promulgate regulations necessary for the operation and discipline of the Missouri National Guard rests with the Governor. The Governor is commander-in-chief of the militia when the militia is in state service. Article IV, Section 6, Constitution of Missouri 1945; Section 41.120, RSMo 1969. Additionally, Section 41.090, RSMo 1969, provides:

"The governor shall make and publish such regulations governing the organization, discipline and training of the militia of the state as may be necessary to the efficiency thereof, and such regulations shall have the authority of law, provided that in the case of the national guard, or air national guard and naval militia, regulations promulgated by the governor shall conform to the statutes and regulations of the United States concerning the same."

It is our opinion that the above-noted constitutional and statutory authority clearly permits the Governor to issue those regulations necessary for the administration of discipline in the Missouri National Guard. The portion of the particular regulation to which you refer gives any commanding officer power to impose nonjudicial punishment for minor offenses without trial by court-martial. Section 13(2), Regulation for the Administration of Military Justice for the state of Missouri dated December 12, 1972.

Part IV (Section 13) of the Regulation in question is obviously intended to conform to Article 15 of the Uniform Code of Military Justice which provides for similar nonjudicial punishment for those subject to the Uniform Code of Military Justice. 10 U.S.C. § 815. Promulgation of a regulation to conform discipline in the Missouri National Guard to that of the armed services of the United States seems required in light of Article III, Section 46, Constitution of Missouri 1945, Section 41.020,

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Section 41.090, and Section 41.460, RSMo 1969. However, it is significant to note that Section 13 of the Missouri Regulation in question does not conform to Article 15 of the Uniform Code of Military Justice in one important area. Article 15 of the Uniform Code of Military Justice provides in part that:

" . . . punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. . . ." (10 U.S.C. § 815(a))

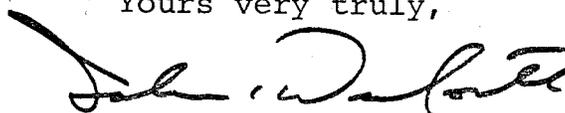
Section 13 of the Regulation for the Administration of Military Justice for the state of Missouri does not provide an opportunity for a member of the Missouri National Guard to demand trial by court-martial in lieu of the nonjudicial punishment. Therefore, a fundamental, statutory principle of nonjudicial punishment, as it exists in the armed forces of the United States, is not present in the state regulation. The absence of this provision, in our opinion, renders Section 13 of the Regulation void in that Section 13 clearly fails to conform to 10 U.S.C. § 815 (Article 15 of the Uniform Code of Military Justice).

The opportunity for a member of the Missouri National Guard to demand trial by court-martial in lieu of nonjudicial punishment, in our opinion, represents a substantial component of nonjudicial punishment in the Uniform Code of Military Justice. Since nonjudicial punishment in Missouri is not a separate statutory means of discipline for the militia, any regulation creating it must conform in all substantial respects to Article 15 of the Uniform Code of Military Justice. Article III, Section 46, Constitution of Missouri 1945; Section 41.020, RSMo 1969; Section 41.090, RSMo 1969; Section 41.460, RSMo 1969. It is obvious that if the state regulation in question were amended to conform with Article 15, Uniform Code of Military Justice, a dilemma would remain because of our opinion that no summary court-martial jurisdiction presently exists. However, this is a defect that only the General Assembly can cure. Accordingly, it is our belief that Part IV of the Regulation for the Administration of Military Justice for the state of Missouri cannot be the basis for the imposition of nonjudicial punishment for members of the Missouri National Guard unless Part IV of the Regulation conforms to the provisions for demanding trial by court-martial as found in Article 15 of the Uniform Code of Military Justice (10 U.S.C. § 815).

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It is our view that: (1) members of the Missouri National Guard may not be tried by special or general courts-martial, authorized by Chapter 41, RSMo 1969, for offenses committed while performing duty described in 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 since such duty does not constitute actual service in time of war or public danger and, therefore, any such court-martial would be contrary to the requirements set forth in Article I, Section 17, Constitution of Missouri 1945, which requires indictment or information to precede criminal prosecution for felonies or misdemeanors; (2) members of the Missouri National Guard may not be tried by summary courts-martial for offenses committed while performing such duty, even though a summary court-martial is not a criminal prosecution within the meaning of Article I, Section 17, Constitution of Missouri 1945, because 10 U.S.C. § 820 provides an accused the right to refuse trial by summary court-martial and such a right is present in Missouri by virtue of the assimilation of federal military laws and regulations; (3) commanders of the Missouri National Guard may not administer nonjudicial punishment for minor offenses, under the authority of Part IV, Regulation for the Administration of Military Justice for the state of Missouri, dated December 12, 1972, because Part IV of the Regulation does not provide that a person subject to its provisions can demand trial by court-martial in lieu of nonjudicial punishment and, therefore, Part IV of the Regulation does not conform with the federal statute governing nonjudicial punishment as required by Article III, Section 46, Constitution of Missouri 1945; Section 41.020, RSMo 1969; Section 41.090, RSMo 1969; Section 41.460, RSMo 1969.

Yours very truly,



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