

HEAD OF MILITIA HERE UNAFFECTED BY ARMY RULING

July 20
Judge Advocate General Finds
Adjutants General Not Of-
ficers of National Guard

DECISION DOES NOT COVER CASE OF GENERAL JOHNSON

Defense Bill Excepts Hawaii and District of Columbia From Provisions

The judge advocate general of the army, in a ruling that reached Hawaiian Department headquarters yesterday, has decided that adjutants-general of a State, Territory or District, is not, under the new national defense act, an officer of the national guard of the United States, within the meaning of that act.

This ruling does not, however, affect the Territory of Hawaii nor the District of Columbia, for these two sections of the country were specifically excepted from the operation of the section, upon which the judge advocate general bases his decision. This section is No. 66, and after enumerating the duties of adjutants-general of State, Territories and Districts, adds:

"Provided, that the adjutants-general of the Territories and of the District of Columbia shall be appointed by the President with such rank and qualifications as he may prescribe, and each adjutant-general for a Territory shall be a citizen of the Territory for which he shall be so appointed."

Aimed At Hawaii

At the time congress was debating this measure this particular section was amended so as to contain the provision quoted, with an eye expressly for the conditions in Hawaii, and at the instance of army officers familiar with the status of things here, from the militia point of view.

It was pointed out at hearings of the military committees of both houses that the conditions here necessitated the appointment of men thoroughly familiar with the Islands, and the needs and requirements of the people, and that a stranger from the mainland probably would undo much of the work that has been so well done.

In military circles yesterday this was emphasized, and it was pointed out that the question upon which the judge advocate general of the army was passing, was raised to meet some specific case that has arisen in the mainland, probably connected with the payment of some state officer under the provisions of the defense act, providing for payment of national guard officers.

Text of Opinion

In his opinion the judge advocate general of the army says:

"You have submitted to me the following questions: 'Is the adjutant-general of a State, Territory or District an officer of the national guard within the meaning of the national defense act?' and my opinion is that the response thereto must be in the negative. The well known relation of the office of adjutant-general of a State to the national guard thereof, the familiar functions of the office which are and of necessity must be essentially the same in the several States, the general intent and purpose of the national defense act, and the language of the act itself, all combine to compel me to that conclusion.

"The controlling intent and purpose of the act, certainly in so far as it concerns the national guard, is to create in the several States, out of the militia thereof, a dependable body of citizen soldiery controlled for its purpose by the national government, organized, armed, equipped and trained as prescribed by that government; and so far as may be, made fit and dependable for the defense of the Nation.

Defines National Guard

"The national guard is to be a national army composed of men, while normally engaged in civil pursuits and available to the States for the purpose of local government, are nevertheless federal soldiers under a special obligation to the federal government and subject to its paramount control, organized, trained and equipped to engage in warfare promptly and effectively whenever occasion shall require. Congress has sought thus to provide an effective fighting force for the Nation.

"But in so doing congress has recognized the duty of the several States, has required or relied upon their cooperation, and has legislated in view

litia, nor is he necessarily regarded as an integral part thereof. Like other heads of departments of State government appointed by the governor, he generally holds his office at the pleasure of the governor appointing him, and goes out of office with him. His duties are those of the head of an administrative department, and they require his continual presence and service at the seat of government. He is a member of the governor's official family.

"His powers over the organized militia are largely derived from his capacity as representative of the local commander-in-chief, and are not those inherent in a military office and recognized as such by the common law military. Going to the federal government to find an analogy, his position is closely like that of the secretary of war rather than that of the adjutant general of the army. The fact that he is the communicator of orders and the channel of correspondence in local administration does not affect the distinction as to the course and character of his powers. As representing the governor, he, in a sense, may command militia, and as departmental head may administer its affairs, without in either case belonging to it. So also as adjutant-general of the State he may function for the national guard without functioning in it.

Cites His Authorities

"Federal legislation has always recognized him as a necessary State functionary, but without thereby establishing for him any official federal status. See Militia Act of May 8, 1792 (1 Stat. 271), section 3, et passim; Revised Statutes, Title XVI, section 1634, 1636, et passim; the Dick Bill (32 Stat. 775), section 13. See, also, Circular 8, division of militia affairs, August 1, 1913, which, in requiring conformity of militia organization to the regular establishment, regarded the adjutant general not as an officer of the organized militia recognized by the federal government.

"The present act, following a policy as old as the federal government, continues to recognize the adjutant-general of the State as a State official only, and not as an officer of the national guard. That he is not regarded as an officer of the national guard is indicated throughout the act. Section 60 thereof, similarly to the Dick Bill, requires that the organization of the national guard, including the composition of the units thereof, shall be the same as that prescribed for the regular army. But such an official, with such duties, with such title and with such rank as he usually has, has no place in the scheme of organization provided for the regular army, as will be seen by consulting the tables of organization.

May Run Department

"I do not say that there may not be an adjutant-general's department maintained in the several States; but if so the personnel of such a department must be officers of the national guard with places in the organization thereof, that is, must be a part of the personnel of the force which it was the purpose of congress to create. The fact that in local administration adjutants of divisions and brigades may be carried as members of the so-called adjutant-general's department, having at its head the adjutant-general of the State, obviously does not, in view of what has here been said, indicate such a relation as would, for the sake of consistency, require us to recognize the federal military status of the head or, as an alternative, to deny that those officers have a well defined position in the military organization.

"In this connection, there is another cogent consideration. To hold that this head of a department of local government is an officer of the national guard, a member of a national force trained for the purpose of taking the field, would introduce chaos in state administration, disturb its machinery, and, when the organization takes the field, deprive the State of the service of such an official when most needed, or leave an organizational place in the field force unfilled.

"These general indications of legislative intention go to show that such official is to be regarded as a State official only.

"The letter of the act points to the same conclusion. In the only instance in which adjutant-general of the several States are expressly mentioned, the language clearly indicates that they are not to be regarded as officers of the national guard within the contemplation of that legislation. Section 66 provides that

"The adjutants-general of the States, Territories and the District of Columbia and the officers of the national guard shall make such returns and reports to the secretary of war or to such officers as he may designate, at such times and in such form as the secretary of war may from time to time prescribe. . . ."

Distinguishes Offices

"Such language distinguishes adjutant-general of the several States from the officers of the national guard so plainly that the implication cannot be ignored. Further, whatever suggestions come from a consideration of the concluding provision of section 109 and the concluding paragraph of section

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"But in so doing congress has recognized the duty of the several States, has required or relied upon their cooperation, and has legislated in view of and with dependence upon the continuance of certain existing state functions and the performance of still others. Although such functioning of the local government may be necessary to the accomplishment of the national purpose, and certain State officials may be ever so intimately related to the national guard, it does not follow that such an official, though at local law he may be regarded as a military official, acquires under this act the status of an officer of such national army.

"The question must be whether he is an official whom the act contemplated the State would provide and maintain in the performance of its duties, or one who has an organizational place and a duty to perform in the national fighting force which it was the sole purpose of congress to create. In my judgement of the adjutant-general of a State is an officer of the former kind.

Not Part of Militia

"All are familiar with the position and its duties. His position is like and coordinate with that of the other State officials at the head of departments of local government. He is appointed by the governor, as other officials are, and is not generally required to be chosen from the organized mi-

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Distinguishes Offices

"Such language distinguishes adjutant-general of the several States from the officers of the national guard so plainly that the implication cannot be ignored. Further, whatever suggestions come from a consideration of the concluding provision of section 109 and the concluding paragraph of section 110, are in entire accord with this conclusion.

"In view of this relation of the adjutant-general to State administration and the character of his duties, he ought not to be regarded as a 'staff officer' within the meaning of that term as employed in said provision, nor is there sufficient reason why he should have the physical capacity and technical military experience required by the act of officers belonging to this national force.

"For these reasons I have to answer your question in the negative."