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OPINION	:	No. 81-1114
of	:	JULY 2, 1982
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THE HONORABLE NICHOLAS C. PETRIS, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

Are personnel on active duty with the armed forces of the United States exempt from jury duty in the state courts of California?

CONCLUSION

Personnel on active duty with the armed forces of the United States are exempt from jury duty in the state courts of California.

ANALYSIS

The question presented for resolution is whether personnel on active duty with the armed forces of the United States are exempt from jury duty in the state courts of California. We examine initially the pertinent state statutes. Section 198[1] provides:

> "A person is competent to act as juror if he or she is:
>
> "1. A citizen of the United States of the age of 18 years who meets the residency requirements of electors of this state;
>
> "2. In possession of his or her natural faculties and of ordinary intelligence, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which substantially impairs or interferes with the person's mobility; and
>
> "3. Possessed of sufficient knowledge of the English language.
>
> "Notwithstanding any provision in this section, a person may be challenged for cause upon any ground specified in Section 602."

Section 199 provides:

> "A person is not competent to act as a trial juror if any of the following apply:
>
> "(a) The person does not possess the qualifications prescribed by Section 198.
>
> "(b) The person has been convicted of malfeasance in office or any felony or other high crime.
>
> "(c) The person is serving as a grand juror in any court of this state."

The issue to be addressed is that of exemption solely by virtue of military status. It will be assumed, then, for purposes of this analysis, that the individual is a resident[2] of and

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[1] Unidentified section references are to the California Code of Civil Procedure.

[2] The term "elector" (see § 198(1)) refers to a person who is a United States citizen 18 years of age or older and a resident of an election precinct at least 29 days prior to an election. (Elec. Code, § 17.) The "residence" of a person is that place in which his habitation is fixed, wherein the person

stationed within this state, and satisfies all of the qualifications prescribed under sections 198 and 199.

Prior to the addition of section 200, *infra*, by the Statutes of 1975, chapter 593, section 3, former section 200, repealed by section 2 of said chapter, provided a general exemption from jury service for numerous occupations and professions including a "naval or military officer of the United States, or of this state, or a member of the armed forces of the United States, while on active duty . . . ."[3] These exemptions were based upon a recognized state interest in shielding certain professional occupations from the interference that would result from jury service. (*Zelechower* v. *Younger* (1970) 424 F.2d 1256, 1259.) Section 200 now provides:

> "The court shall excuse a person from jury service upon finding that the jury service would entail undue hardship on the person or the public served by the person."[4]

This section constitutes neither a general exemption nor a disqualification from jury service, but simply prescribes the standard upon which a court "shall" excuse a certain potential juror. (61 Ops.Cal.Atty.Gen. 88, 93 (1978); 59 Ops.Cal.Atty.Gen. 633, 636 (1976).) This change evinces the legislative intent that those who are actually called should be excused only on a case-by-case determination. (59 Ops.Cal.Atty.Gen., *supra*, at p. 637, n. 4.) Thus, the military status of an individual, per se, renders him neither incompetent under sections 198 and 199, nor excusable under section 200.

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has the intention of remaining, and to which, whenever he is absent, the person has the intention of returning. (Elec. Code, § 200; cf. Gov. Code, §§ 244 and 245.) The fact that a member of the armed forces from another state is stationed in this state neither precludes nor compels the establishment of residence here. (*Berger* v. *Superior Court* (1947) 79 Cal.App.2d 425; *Cothran* v. *Los Gatos* (1962) 209 Cal.App.2d 647.) Nor does a resident of this state on military duty elsewhere require a change of residence. (*Johnson* v. *Johnson* (1966) 245 Cal.App.2d 40.)

[3] Section 391 of the Military and Veterans Code provides:

> "Every member of the active militia shall be exempt from . . . jury duty (including service on coroners' juries) except that members of the National Guard who are not on active duty shall not be exempt from such duty in any noncriminal proceeding, . . . if he furnishes the certificate of his immediate commanding officer that he has performed the duties required of him for the year immediately preceding a summons to act as juryman or during the period of his service if less than one year."

Section 560(b) of said code provides that "[e]very officer and enlisted person of [the National Guard of this State], shall during his or her service therein, be exempt from . . . jury duty."

[4] Section 202.5 provides a general exemption for designated peace officers and judges.

While the Congress of the United States has provided an exemption for members in active service in the armed forces from jury duty[5] in the federal courts (tit. 28 U.S.C. § 1863(b)(6)), it has made no such provision with respect to state courts. Since such service is precluded neither by state nor federal statute, we turn to the principles of constitutional federalism.

Article VI, clause 2, of the United States Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

(See also Cal. Const., art. III, § 1; 65 Ops.Cal.Atty.Gen. 205, 210 (1982).) Where the power given by the constitution to the United States over the subject matter of regulation is not exclusive, the enforcement of a state statute in the absence of federal legislation, or in the presence of consistent federal legislation, does not violate the supremacy clause. (*Clark* v. *Allen* (1947) 331 U.S. 503, 516-517; 57 Ops.Cal.Atty.Gen. 42, 44 (1974).) In areas of law not inherently requiring national uniformity, a state statute is valid which is not in such actual conflict with federal regulation that both cannot stand, and which can be enforced without impairing federal superintendence of the field. (*Head* v. *New Mexico Board* (1963) 374 U.S. 424, 430; *Florida Lime & Avocado Growers, Inc.* v. *Paul* (1963) 373 U.S. 132, 141-142.)

The power to provide for and to regulate the national armed forces, however, is *exclusively* federal. (U.S. Const., art. I, §§ 12, 13, 14.) Of such forces the President shall be commander-in-chief. (U.S. Const., art. II, § 1.) It is axiomatic that a state statute may not impair the performance by the United States of its proper functions. (63 Ops.Cal.Atty.Gen. 647, 656 (1980).) As stated by Mr. Justice Marshall in *McCulloch* v. *Maryland* (1819) 17 U.S. (4 Wheat.) 316, 427, 436:

> ". . . It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.

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[5] The exclusion of military personnel from jury duty does not impair the right of a defendant to trial by jury. (*Government of the Canal Zone* v. *Scott* (1974) 502 F.2d 566, 569.) Nor does the individual excluded have an interest in serving on a jury which may be deemed a fundamental right. (*Adams* v. *Superior Court* (1974) 12 Cal.3d 55, 61.)

". . . . . .

". . . the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. . . ."

A century later, in *Johnson* v. *Maryland* (1920) 254 U.S. 51, 55-57, involving an attempt by a state to license a federal postal carrier, Mr. Justice Holmes expounded:

". . . Here the question is whether the State can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch* v. *Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. *Farmers & Mechanics Savings Bank* v. *Minnesota*, 232 U.S. 516, 525, 526. A little later the scope of the proposition as then understood was indicated in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 867. 'Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.' In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations: it was said that the federal officer was not 'subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority.' *Ohio* v. *Thomas*, 173 U.S. 276, 283. It seems to us that the foregoing decisions establish the law governing this case.

"Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States* v. *Hart*, Pet. C. C. 390. 5 Ops.Cal.Atty.Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Commonwealth* v. *Closson*, 229

> Massachusetts, 329. This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence. But even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States. *In re Neagle*, 135 U.S. 1.
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> "It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. *Keim* v. *United States*, 177 U.S. 290, 293."

The California Supreme Court has also observed the principle, both "familiar and unimpeachable," that ". . . a state cannot be permitted to assert jurisdiction over one acting under the authority of the United States for acts by him done in furtherance of the duty he owes to the federal government." (*Vallejo F. Co.* v. *Solano Aquatic Club* (1913) 165 Cal. 255, 269; cf. *Pundt* v. *Pendleton* (1909) 167 F. 997; and see *United States* v. *McLeod* (1967) 385 F.2d 734, 751-752.)

In its discussion of the exemption of military personnel from federal jury service the court, in *Government of the Canal Zone* v. *Scott*, *supra*, 502 F.2d at p. 569 alluded to the fundamental conflict between military duty and competing concerns:

> "[T]he relevant language . . . merely tracks the language of its predecessor section, 28 U.S.C. § 1862 (1966) . . . . *The underlying rationale of the section was that members of such classes as military personnel were better left undisturbed at their usual occupations*.
>
> "Justice Holmes stated the appropriate standard in *Rawlins v. Georgia,* 1906, 201 U.S. 638, 640, 26 S. Ct. 560, 561, 50 L.Ed. 899 (1906): certain occupations may be categorically excluded from jury duty on the 'bona fide ground that it [is] for the good of the community that their regular work should not be interrupted.' . . . Because it is the '*primary business of armies and navies to fight or be ready to fight wars should the occasion*

> *arise,*' *Parker v. Levy*, 1974, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439, 451, the exclusion of military personnel from jury duty is reasonable and for the good of the community under the *Rawlins* standard." [Emphasis added.]

Such military duty and availability are, of course, similarly inconsistent with state statutory jury duty.

In view of the foregoing, a service member on active duty with the armed forces and subject to the exclusive jurisdiction of the federal government is "exempt" from jury duty in the state courts of California. As used in common parlance and in the inquiry presented, the term "exempt" connotes that an individual, or a group or class of individuals, is not subject to specified statutory duty. In our view, the nature and effect of the exemption of military personnel are the same as those referred to in subdivision (a) of section 205:

> "The qualified jury list shall be drawn from a master jury list or source lists and shall include persons suitable and competent to serve as jurors. In making such selections *there shall be taken only the names of persons who are not exempt from serving*, who are in the possession of their natural faculties, who are of fair character and approved integrity, and who are of sound judgment." (Emphasis added.)

As in the case of designated peace officers and judges (§ 202.5, fn. 4, *supra*), and members of the active militia (Mil. & Vet. Code, § 391, fn. 3, *supra*), persons on active duty with the federal armed forces should not be included[6] on the qualified jury list in the absence of a general waiver[7] by lawful federal authority.

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[6] Exclusion of such individuals from the list is also consistent with the federal scheme: designated groups or classes, including members in active service in the armed forces, "shall be barred from [federal] jury service on the ground that they are exempt." (28 U.S.C. § 1863(b)(6).)

[7] Persons exempt from compulsory service may nevertheless serve in the event of a lawful waiver. (Cf. *United States* v. *Golden* (D.C. Mass. 1964) 235 F.Supp. 1020.)