The original documents are located in Box 34, folder "Nixon Pardon - Legal and Historical Precedents (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

October 25, 1974

MEMORANDUM FOR: KEN LAZARUS

FROM: PHIL BUCHEN T.W.B.

Please see attached memo from Jack Marsh; also article from Minn. Law Rev., starting at p. 152.

I am not sure of the public value of a Presidential discussion of the subject. But if it is decided upon, I believe your memo of October 14, 1974 at pp. 9-10, part C suffices, plus probably language from the Burdick case and some recounting of historic examples not necessarily involved in any of the court cases.

However, I would think it desirable for you to get copies in hand of the Attorney General's opinions cited, if you do not have them already, and be sure there are no problems with any parts of them, so that if they are publicized we can know what prompted the opinions and how applicable and supportive they are.

Would like to discuss this with you.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 23, 1974

TO: RON NESSEN
DONALD RUMSFELD
PHIL BUCHEN

FROM: JACK MARSH

Minority Leader John Rhodes spoke with me on the telephone on a matter which I think would be helpful if the President could develop at his next press conference. This relates to the pardon matter, with a special discussion by the President on the historical background in reference to pardons. Mr. Rhodes is referring to the constitutional history on pardoning before indictment and how it is a part of the basic law. At the hearing, Congressman Hogan developed this theme.

John Rhodes feels that if the President were to speak to this it would have a good deal of interest and would be helpful in explaining the pardon power.

Perhaps Phil Buchen's office might give us a one page summary that could be used as background by the President for remarks on this subject.

Minnesota Law Review

Journal of the State Bar Association

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gent circumstances as to be unable to support himself without the assistance of his country," do not comprehend those only who are incapable, without the aid of the government, of supporting themselves, except by private or public charity?

Answer.—I think that it was the intention of Congress to make the amount of the schedule the test of the indigence of the applicant; and that, consequently, the relief given by the former act is to be continued in every case in which the schedule shall exhibit proof of such indigence, that the income of the property is inadequate to the support of the applicant.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF WAR.

PARDON OF PIRATICAL MURDER.

The power of pardon neither requires nor authorizes the President to enter into an investigation of facts, not set up nor proven at the trial, which, if true, should have been thus interposed to the indictment, after a trial, conviction, and an appeal, and decision adverse to the accused has been made by the Supreme Court of the United States; nor to pardon the accused.

OFFICE OF THE ATTORNEY GENERAL,
May 9, 1820.

SIR: I have examined attentively the petitions for pardon presented by Rosewaine, Hornes, and Warrington, convicted of a piratical murder before the circuit court of the United States for the district of Massachusetts, which have been referred to me by the direction of the President.

The ground taken by the prisoners is, that they sailed from Buenos Ayres in a regularly-commissioned privateer of that government, called the Tuckerman; that by this privateer a Spanish ship was regularly captured, and ordered for Buenos Ayres for adjudication; that, not being willing to go back to that country, the prize crew (of which they were part) rose on the prize-master, who was killed in the affray; after which, they brought the ship into the United States, and delivered her up to the original Spanish owners; that from the regularity of

the privateer's commission, and the consequent regularity of the capture, it results that the offence (if one has been committed) is an offence against the government of Buenos Ayres, and not against the United States; and hence, that they have been convicted before a court which had not jurisdiction of the offence; that they were not able on the trial to avail themselves of this ground of defence, because their poverty disabled them from procuring evidence of the leading fact—the regularity of the privateer's commission.

If the fact be as they have stated it, I believe they are right in the conclusion of law; and that, instead of being executed in the United States, they are amenable for this offence to the laws of Buenos Ayres only.

But why was not an affidavit made of this fact, and a continuance asked, to give them time to produce the proof of it? It is scarcely conceivable that a continuance thus asked would have been refused; and considering the masterly ability with which they were defended on their trial, (of which there was full proof in a written argument before the Supreme Court,) it is as little conceivable that the motion would have been omitted, had there been any ground for it in the facts of the case. These facts now come to the President on a statement entirely *ex parte*, not supported by one tittle of testimony—not even by the oath of the petitioners themselves. There is no certificate of facts from the judges who presided at the trial—from the jury, from the counsel of the United States, nor even the counsel for the prisoners. All the questions of fact which were made in the case on the trial have been settled by a jury, who have not recommended the prisoners to mercy. All the questions of law were referred to the Supreme Court, where they were most ably argued in behalf of the prisoners, and most solemnly decided against them. And now the case is presented to the President on a new set of facts, which it is admitted was not before the jury—these facts, too, entirely unsupported by proof; and from the posture in which the case now stands before the President, entirely unsusceptible of any but *ex parte* proof, because there is no one to cross-examine a witness, nor to collect proof on the part of the prosecution.

These facts, and the question of law growing out of them,

belonged to the merits of the case on the trial. The petitioners propose to the President nothing less than to enter into a new trial of the cause, on a new set of facts leading to new conclusions of law—and this in the absence of the accuser and his witnesses; for the President must either do this, or take the facts for granted as they have been stated by the petitioners, and found an immediate pardon on that assumption.

I do not think that the power of pardon either requires or authorizes him to do the one or the other of these things; but that, on the contrary, to do either would be an abuse of that power.

I have the honor to be, sir, very respectfully, your obedient servant,

WM. WIRT.

To the SECRETARY OF STATE.

NEW MADRID LAND CLAIMS.

Patents under the act of 17th February, 1815, must issue to the owner at the date of the act, if alive; and if dead, to the heirs or devisees. The act attaches no assignable quality to the charity which it bestows; and being the only authority for issuing a patent, its terms must be strictly pursued.

The rectangular system of public surveys must be observed and conformed to in the location of certificates.

OFFICE OF THE ATTORNEY GENERAL,
May 11, 1820.

SIR: I have examined the letter of the Commissioner of the General Land Office, with its enclosures, referred to me yesterday; and after an attentive consideration of the act of Congress of the 17th February, 1815, "for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," I am of opinion—

1. That the patent must, under the provisions of this act, issue to the person who was the owner at the date of the act; or, in case of his death, to his heirs or devisees. The act attaches no assignable quality to the charity which it bestows; and the act being the only warrant of authority to the Commissioner to issue a patent at all, he must pursue that authority

In one sense, the amount of Governor Call's default, as ascertained by the accounting officers, has been paid into the treasury. It is there, and liable to be applied to the satisfaction of the government's claim the moment the amount of it shall be judicially ascertained. Over and above that amount, I am of opinion the government ought not to retain; and the sum of eighteen hundred dollars applied for by the Hon. John H. Eaton, as the assignee of Governor Call, being only a part of the excess due for salary, beyond the amount of the alleged default, may, I think, be legally and properly paid.

I have the honor to be, very respectfully, sir, your obedient servant,

JNO. NELSON.

Hon. JOHN C. SPENCER,
Secretary of the Treasury.

POWER OF THE PRESIDENT TO REMIT FINES FOR CONTEMPT.

The power vested in the President to grant reprieves and pardons for offences against the United States is sufficient to authorize him to remit a fine imposed upon a citizen for contempt in neglecting to serve as a juror.

ATTORNEY GENERAL'S OFFICE,
April 15, 1844.

SIR: In reply to the inquiry submitted to me by your note of the 13th instant, I have the honor to state that, if you consider the facts set out in the petition and accompanying papers of Isaac W. Conger such as to call for the exercise of your constitutional power to grant reprieves and pardons for offences against the United States, I do not think the nature of the offence for which the fine was imposed interposes any obstacle. The pardoning power clearly embraces the case.

I have the honor to be, very respectfully, sir, your obedient servant,

JNO. NELSON.

To the PRESIDENT.

I will only, therefore, say, in conclusion, sir, that with the utmost deference to the contrary opinion of two of the Judges of the Supreme Court of the Territory, I entertain a clear conviction that the act of the Legislative Assembly of New Mexico, requiring the Judges, respectively, of the Supreme Court, to hold semi-annual district courts in the several counties of their districts, is a valid legislative act, and to be respected and obeyed as the law of the Territory.

I have the honor to be, very respectfully,

J. J. CRITTENDEN.

Hon. D. WEBSTER,
Secretary of State.

PARDONING POWER OF THE PRESIDENT.

It is not competent for the President, in the exercise of the pardoning power, to remit pecuniary penalties attached to an offence, unless those penalties accrue to the United States.

The punishment in the District of Columbia, for the unlawful transportation of slaves, by the laws of Maryland applicable to the District, is by fine, which the statute appropriates, and cannot be remitted by the President.

ATTORNEY GENERAL'S OFFICE,
April 22, 1852.

SIR: In answer to your letter respecting the case of Daniel Drayton and Edward Sears, I state:

That these persons were severally indicted for numerous offences against a statute enacted by the General Assembly of the State of Maryland, at November session, in the year 1796, (Ketty's ed. of the laws of Maryland, chap. 67, sec. 19,) in these words:

"That any person or persons who shall hereafter be convicted of giving a pass to any slave or person held to service, or shall be found to assist, by advice, donation or loan, or otherwise, the transporting of any slave or person held to service from the State, or by any other unlawful means, depriving a master or owner of the service of his slave or person held to service, for every such offence, the party aggrieved shall recover damages in an action on the case, against such offender or offenders, and such offender or offenders also shall be triable, upon indictment and conviction, verdict, confession, or otherwise, in this State, in any county court where such offence shall

happen, be fined a sum not exceeding two hundred dollars, at the discretion of the court, one half to the use of the master or owner of such slave, the other half to the county school, in case there be any, if no such school, to the use of the county."

The act of Congress concerning the District of Columbia, approved 27th February, 1801, (2 Stat. at large, p. 104, ch. 15,) enacted in section the first, "that the laws of Virginia, as they now exist, shall be, and continue in force, in that part of the District of Columbia which was ceded by said State, to the United States, and by them accepted for the permanent seat of government. And that the laws of the State of Maryland, as they now exist, shall be, and continue in force, in that part of said District which was ceded by that State, to the United States, and by them accepted as aforesaid."

By the second section, the District was divided into two counties, Washington and Alexandria, the county of Washington to contain "all that part of the said District which lies on the east side of the river Potomac, together with the islands therein," the other county of Alexandria, to contain "all that part of said District which lies on the west side of said river;" and the said river in its whole course through the said district, shall be taken and deemed to all intents and purposes to be within both of said counties.

By an act supplementary to the act entitled "An act concerning the District of Columbia," approved 3d March, 1801, (2 Stat. at large, p. 115, ch. 24, sec. 2,) it is enacted, "that all indictments shall run in the name of the United States, and conclude against the peace and dignity thereof: and all fines, penalties and forfeitures, accruing under the laws of the States of Maryland and Virginia, which, by adoption, have become the laws of this District, shall be recovered with costs, by indictment or information in the name of the United States, or by action of debt in the name of the United States and of the informer: one half of which fine shall accrue to the United States, and the other half to the informer; and the said fines shall be collected by or paid to the marshal, and one half thereof shall, by him, be paid over to the board of commissioners hereinafter established, and the other half to the informer; and the marshal shall have the same power regarding their collection, and be

subject to the same rules and regulations as to the payment thereof, as the sheriffs of the respective States of Maryland and Virginia are subject to, in relation to the same."

The boards of commissioners so alluded to in that second section, are established by the fourth section of that act:— "The magistrates to be appointed for the said District shall, and they are hereby constituted a board of commissioners within their respective counties, and shall possess and exercise the same powers, perform the same duties, receive the same fees and emoluments, as the levy courts or commissioners of the county, for the State of Maryland, possess, perform, and receive; and the clerks and collectors, to be by them appointed, shall be subject to the same laws, perform the same duties, possess the same powers, and receive the same fees and emoluments as the clerks and collectors of the county tax of the State of Maryland, are entitled to receive."

Under these statutes, Daniel Drayton and Edward Sears were severally indicted, in the criminal court for the District of Columbia and county of Washington, in many cases, for transporting various slaves, the property of persons residing in the City of Washington, Georgetown, and the county of Washington, to the number of fifty or sixty slaves or more. The slaves were transported in a vessel which was pursued by some of the inhabitants of the District, overtaken in the Chesapeake Bay, and the vessel, slaves, and the offenders, were brought back to the City of Washington. Upon the convictions on the several indictments, the court pronounced judgments for fines in various sums, under two hundred dollars each and costs; amounting in all the several convictions of the two offenders, to upwards of $18,000.

In each case, the judgment is, that one half of the said fine is to the use of the owner of the slave named in the indictment and judgment, "according to the act of Maryland of 1796, chapter 67," "and that the said offender be committed to the county jail until the fine and costs are paid."

Upon writs of error into the circuit court of the United States, for the District of Columbia and county of Washington, the judgments of the criminal court of the United States for the said district and county were affirmed.

Pardoning power of the President.

Although the judgments are in the name of the United States, yet, by the law constituting and defining the offence, and by the judgments of the court, one half of the respective fines belongs to the respective owners of the slaves unlawfully and clandestinely transported from the District of Columbia by the offenders, Drayton and Sears; and, by law, the other half of the fines belongs to the board of commissioners of the county of Washington, in the District of Columbia, for the use of the county. The costs are adjudged, and belong to the United States.

These are the cases referred to in your letter of the 17th of this month, in which application is again made to you for pardons; and upon which you require my advice and opinion on the constitutional power of the President of the United States to grant a pardon, which shall release these convicts from their liability to pay these *fines*.

The Constitution of the United States declares that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

But use is the law and rule of speech. There is no natural connection between words and the things or ideas they are intended to signify. Language is a system of articulate sounds, whose signification is established by common usage among those who speak the same language. Before men can converse intelligibly one with another, the sign, and the thing signified by articulate sounds, must be agreed and mutually known and understood. Names, words and terms mark and signify particular ideas, only by established practice and general usage of those, who speak the language of each particular nation or province.

To understand the things, subjects, or cases, to which reprieves and pardons are properly to be applied, their utility, effects and consequences, as intended by the Constitution of the United States, we must look to the common law, as we do for the meaning of the other terms and phrases of law employed in that Constitution; such, for example, as grand jury, trial by jury, felony, *ex post facto* law, bill of attainder, &c.

The power of pardoning is not an absolute unlimited power of dispensing with the operation of laws which vest an interest

or right in a private citizen, or which are designed to secure to him the enjoyment of his property, or give him damages against a wrong-doer.

To convert the power of mercy and grace by pardon, into a power releasing and acquitting or abrogating private vested rights, would be a distortion of the power from its true meaning, spirit, and purpose.

The British Constitution has vested the power of granting pardons, except in cases of impeachment, in the Crown, as a branch of the royal prerogative, as completely and as amply, as that power is vested in the President of the United States, by our Constitution. Accordingly, we find in Coke's Reports, (part 12, case of *non obstante*, or dispensing power, p. 18, 19,) "No act of Parliament can bind the king from any prerogative which is sole and inseparable to his person, but that he may dispense with it by *non obstante*. * * * * And so the royal power to pardon treasons, murders, &c., is a prerogative incident solely and inseparably to the person of the king: and an act of Parliament to make the pardon of the king void, and to disable him to whom the pardon is made, to take or plead it, shall not bind the king but that he may dispense with it: and this is well proved," &c.

To understand the meaning of a pardon, and the extent to which the power of pardoning may be rightfully exercised by the President of the United States, we must look to the books of authority respecting the prerogative power of pardoning rightfully belonging to the King of Great Britain, to the common law of the people of England, whose principles of jurisprudence the people of the United States brought with them as colonists and established here, in so far as they were of a general nature, not local to that kingdom and not repugnant to the American institutions.

In commenting upon the power of granting pardons, given in general terms to the President of the United States, the Supreme Court, in an opinion delivered by Chief Justice Marshal, (United States vs. Wilson, 7 Peters, 160,) say: "As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we

adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

This power of granting pardons does not confer an unlimited power, whereby, in extending mercy to offenders against the laws, to break the laws in relation to private rights and interests, and to cause loss and damage to unoffending citizens. It is not an unlimited, absolute, despotic power resting in the mere will and opinion of the Executive. It has limits within which it is as free from the control of the Congress of the United States, as the prerogative of the crown of Great Britain is, in that respect, free from the control of the British Parliament: Out of its legitimate sphere a pardon is void.

A pardon is a deed. To the efficacy of this deed (as in all other deeds) it is essential that there be a grantor, capable of granting, a grantee, a thing to be granted, the right of the grantor to the thing to be granted, and a willingness of the grantee to accept the grant, for a pardon may be granted upon a condition, and the person, pardoned upon a condition, may be unwilling to abide the condition.

A pardon operates by way of release and acquittance: And the grantor of a pardon, cannot release, acquit, and abrogate a private right and interest vested in a third person.

The king cannot, by his deed of pardon, release and acquit that which is not his, but is belonging to another as of his particular and private right. Accordingly, Coke tells us, in his third Institute, (of Pardons, ch. 105, p. 236,) "by the ancient and constant rule of law, the king cannot make a pardon to the injury and loss of others; that which belongs to another the king cannot give away by his act of grace, (*Non potuerit rex gratiam facere cum injuria et damno aliorum, quod autem alienum est dare non potest per suam gratiam.*")

Again, (3 Inst. p. 238,) "after an action popular brought *tam pro domino rege quam pro se ipso*, according to any statute, the king cannot discharge but his own part, and cannot discharge the informer's part, because by the bringing of the action, he hath an interest therein, but before action brought, the king may discharge the whole, because the informer cannot bring an action

or information originally for his part only, but must pursue the statute; and if the action be given to the party grieved, the king cannot discharge the same."

Again, (of Pardons, 3 Inst. ch. 105, p. 238,) "if one be bound in a recognizance, &c., to the king to keep the peace towards another by name, and generally all other lieges of the king; in this case before the peace be broken, the king cannot pardon or release the recognizance, although it be made *only* to him, because it is for the benefit and safety of his subjects."

Again, (3 Inst. p. 236,) "in an appeal of murder, robbing, &c. the king cannot pardon the defendant, for the appeal is the suit of the party, to have revenge by death; and whether the defendant be attainted by judgment, &c. or by outlawry, the pardon of the king shall not discharge defendant."

In Hawkins' Pleas of the Crown, (vol. 2 of Pardon, chap. 37, sect. 33, 34, p. 553,) we are told "the king may prevent any popular action on a penal statute by a pardon of the offence before any suit commenced by an informer."

"I take it to be a settled rule that the king cannot, by any dispensation, release, pardon, or grant whatsoever, bar any right, whether of entry or action, or any legal interest, benefit or advantage whatever, vested in the subject before such pardon; and upon this ground it seems clear that the king can in no way bar any action on a statute by the party grieved, not even a popular action commenced before his pardon and release; and that he cannot discharge a recognizance for the peace before it is forfeited."

The same doctrine is held in 11 Coke, 65 b. 66 a, (Fosters' Case,) in which is cited Stretton *qui tam* vs. Taylor, Trinity term, 31 Elizabeth.

In the case of Jones vs. Shores' Exor's, (1 Wheat. 471.) The Supreme Court of the United States says: "By the common law a party entitled to a share of a thing forfeited, acquires, by the seizure, an inchoate right, which is consummated by a decree of condemnation, and when so consummated it relates back to the time of the seizure. This principle is familiarly applied to many cases of forfeitures to the crown; even in respect to private persons entitled to forfeitures, the interest which is acquired by seizure, has been deemed a sufficient title to sustain

an action of detinue for the property." Again, (p. 474,) "The same reasoning which has been used in respect to forfeitures *in rem*, applies to personal penalties; and it is unnecessary to repeat it. The court are clearly of opinion that the right of the collector to forfeitures *in rem* attaches on seizure, and to personal penalties on suit brought, and in such case, it is consummated by judgment; and it is wholly immaterial whether the collector died before or after judgment." Therefore the court awarded to the executors of John Shore the share of the penalty, upon a seizure by said John Shore, whilst collector, who died pending the proceedings upon which judgment of forfeiture to the United States was pronounced, which penalty, the law required to be distributed, the one moiety to the United States, and the other to the several revenue officers of the district.

In Van Ness vs. Buel, (4 Wheat. 74,) the Supreme Court of the United States said; "This case differs from that of Jones vs. Shore's Exor's, in two circumstances; first, that this is a case of a seizure of goods for an asserted forfeiture; and, secondly, that before the proceedings *in rem* were consummated by a sentence, the collector who made the seizure was removed from office. In our judgment, neither of these facts affords any ground to except this case from the principles which were established in Jones vs. Shore's Exor's. It was there expressly held that the collector acquired an inchoate right by the seizure, which by the subsequent decree of condemnation, gives him an absolute vested title to his share of the forfeiture." Therefore, the judgment which gave to Buel, the removed collector, his share of the forfeiture, was affirmed.

In the case of the United States vs. Lancaster, (4 Washington's Cir. C. Reports, p. 66,) the President of the United States had granted a pardon to Lancaster of all the interest of the United States, in a bond of $4,002, dated February, 1809, given to respond for the value of the Brig Eliza seized by the collector of the District of Delaware, which vessel was ultimately condemned for violation of the embargo law passed in the year 1808, Mr. Justice Washington who tried the case in the circuit court, said— "The question then is whether the pardon of the President remitting the interest of the United States in and to the penalty and forfeiture of the bond on which the action is founded, can affect the moiety of the penalty claimed by the officers of the customs?

violation to the parties aggrieved, and the other half to the use of the county. The judgments are so given and recorded. According to the uniform and unbroken current of opinions pronounced by the sages of the common law of England, the prerogative power of pardon, vested in the crown of Great Britain, and exercised from time immemorial, does not comprehend such cases as those of Drayton and Sears.

I have given you a citation of the decisions in the courts of the United States, bearing upon the power of granting pardons, as vested by the Constitution of the United States in the President.

I cannot advise that this power is of greater scope and extent than that vested in the King of Great Britain, as a branch of the royal prerogative, and as understood and exercised in that country from time immemorial.

I cannot advise that your power of pardon, as President of the United States, extends to any portion of the several fines, imposed by the judgments against Drayton and Sears. The imprisonment is to compel payment of the fines, and not to be released by the power of granting pardons, any more than the fines themselves.

If the power of granting pardons had been, in practice, applied to the release of the portion of fines, penalties, and forfeitures, which, by the laws of the United States, are directed to be distributed to individuals, the question of such a power would have been brought before the judiciary, and into the Supreme Court of the United States for final adjudication: the individuals, deprived of their interests by such pardons, would not have suffered their losses to go by default, without seeking the opinion of the judiciary. In the long series of sixty years and more, during which the Federal Constitution has been in operation, that no such question has been brought into the Supreme Court of the United States, leads rationally to the conclusion that no one of your predecessors in office (twelve in number) during the whole operations of the Constitution and laws of the United States, has exercised the power of pardon, by way of remitting or releasing a private right or interest in a fine, penalty, or forfeiture, accrued under the laws of the United States, and consummated by judgment or condemnation. The

non-user of such a power in any instance, during such a great length of time, and under such multiplied prosecutions, lays the foundation for rational belief that your predecessors in office have construed the Constitution as not conferring such a power; as limiting and confining the prerogative power of pardon by the principles of the common law; and as not conferring on the President of the United States a more extensive power than the prerogative of granting pardons, vested in the king, by the British Constitution.

Having given my advice and opinion on the question as propounded to me, with the reasons and authorities on which my opinion has been formed, it remains for you, in your highest trust, and better judgment, to decide for yourself this very important question of constitutional law.

I have the honor to be, very respectfully,

J. J. CRITTENDEN.

To the PRESIDENT.

TRANSPORTATION OF FOREIGN MAILS.

The act of March 3, 1845, providing for the transportation of the mail between the United States and foreign countries, is not repealed by the act of 19th of June, 1846.

ATTORNEY GENERAL'S OFFICE,
April 30, 1852.

SIR: In answer to your letter of 27th of this month, my opinion upon the question therein stated is, that the act of Congress of 3d March, 1845, (5 Stat. at Large, 748, ch. 69,) to provide for the transportation of the mail between the United States and foreign countries, which authorizes the Postmaster General of the United States, under the restrictions and provisions of the then existing laws, and upon the terms, conditions, and restrictions in that act, "to contract for the transportation of the United States mail between any of the ports of the United States, and a port or ports of any foreign power, whenever, in his opinion, the public interest will be thereby promoted," is not repealed by any thing contained in the act approved 19th June, 1846, entitled "An act making

law here presented; but the conclusion itself is independent of the particular facts, and rests on a logical analysis of the true legal intendment of the act of Congress.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

PARDONING POWER OF THE PRESIDENT.

The President of the United States has the constitutional power to pardon as well before trial and conviction as afterwards; but it is a power only to be exercised with reserve, and for exceptional considerations.

ATTORNEY GENERAL'S OFFICE,
April 15, 1853.

SIR: I have examined the papers in the case of John Sandford, and respectfully submit the following statement of facts and suggestions on the subject.

At the last January term of the District Court of the United States for the District of New Jersey, Sandford was indicted for the act of purloining a letter, and money contained therein, from the post office at Paterson; and the indictment stands for trial at the approaching April term of the same District Court.

It appears, from the representation made in behalf of Sandford, that he was a youth employed, at the time of the offence, as a clerk in the post office at Paterson, and left there by the deputy postmaster to perform his duties; and that, in committing the theft, Sandford yielded, perhaps, to the persuasion of another and older person, as much as to the temptation of opportunity; in consideration of which extenuating circumstances, and of the respectability of his connexions, he was recommended to the leniency of the Court by the grand jury who found the bill of indictment, and his pardon is now solicited by persons of great worth and credit, including the Governor of the State.

The application, therefore, is for a pardon before trial and conviction. The President of the United States has, undoubtedly, the power to grant a pardon as well before conviction as

afterwards, because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law. But there must be satisfactory evidence of some kind as to the guilt of the party. And it has been held unwise and inexpedient, as a general rule, to interpose the pardoning power in anticipation of trial and condemnation, although particular circumstances may exist to justify such an exceptional act on the part of the President. (Mr. Wirt's opinion, March 30th, 1820; Mr. Berrien's opinion, October 12th, 1829; Mr. Taney's opinion, December 28th, 1831.)

In addition to the obvious considerations of public policy and official duty, which seem to dictate reserve in the granting of pardons previous to trial and conviction, is the special fact here, that this application is *ex parte:* whereas it has been usual for the President, before acting on questions of this class, to inquire into the merits of the given case, by means of a report from the proper District Judge or otherwise.

I do not see, on the present occasion, any sufficient reason for departing from the established course in such matters. As the District Judge can have no official knowledge of the case, I recommend that the District Attorney be required to communicate any facts, which, in his opinion, may contribute to inform the conscience of the President in the premises.

I have the honor to be, very respectfully,

C. CUSHING.

The PRESIDENT.

THE ATTORNEY GENERAL AND LOCAL OFFICERS OF THE GOVERNMENT.

It is not the duty of the Attorney General to give advice to local officers of the Government in the Department of the Secretary of the Treasury.

ATTORNEY GENERAL'S OFFICE,
April 20, 1853.

SIR: I have received your communication of the 5th inst., referring to my consideration the letter of James Murray, a Supervising Inspector of Steam Vessels.

That letter propounds a series of nine questions of doubt,

on report to and decision by the Minister of the Interior. (Ubi supra, p. 122.)

There is an old statute of the State of New York which empowers the Justices of the Supreme Court of that State to order the destruction of such papers on file in the clerk's office of the same "as they shall judge to have become useless." (Act of April 4, 1807, ch. 133, s. 4.)

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

EFFECT OF PARDONS.

The constitutional power of the President to pardon extends to all the elements of the subject-matter, including as well pecuniary penalties as other methods of punishment of any federal offence, except in the case of impeachment, and it cannot be controlled or curtailed by act of Congress.

But when a pecuniary penalty, accruing to the United States, has been actually paid into the Treasury, although it may be remitted of right by the President, still, by reason of constitutional prohibition, which is coequal in force with the constitutional power to pardon, the amount of the penalty cannot be drawn from the Treasury without appropriation by act of Congress.

ATTORNEY GENERAL'S OFFICE,
January 1, 1857.

SIR: By your letter of the 8th of October last, and the papers accompanying the same, it appears that, on the 16th day of June, 1856, the President, in the exercise of pardoning power, remitted conditionally or in part a forfeiture to the United States, incurred by one Gourd, a Creole Indian, by judgment of the District Court of the western district of Arkansas; that at that time the proceeds of the forfeiture had been deposited by the marshal in one of the public depositaries to the credit of the United States, but had not yet been brought into the treasury by a covering warrant: whereupon you submit the question whether this sum of money can be refunded to the marshal, and through him to the party entitled, in execution of the remission granted by the President.

8 Op. 281

If this money had actually passed into the treasury by a covering warrant or otherwise, it could not, in my opinion, be refunded without authority of Congress.

It is true, that the pardoning power is completely vested in the President, and does not require in its exercise any aid from Congress, nor can it be curtailed by Congress. If, therefore, the impediment in the case supposed were a mere enactment of ordinary legislation, it could not operate to obstruct the clemency of the President. But the obstacle, in the case supposed, is a provision of the Constitution itself, and of equal efficiency to restrict the pardoning power with the provision by which the latter is granted, to wit, the condition, that "no money shall be drawn from the treasury but in consequence of appropriations made by law." (Art. i, s. 9.)

There are some cases in the statute-book of the refunding of penalties by express act of legislation, which have become historical by reason of the political interest of the matter or the importance of the party. I allude to the act refunding to the heirs of Matthew Lyon the fine imposed on him under the sedition law, so called, (viii Stat. at Large, p. 802;) to acts for the relief of heirs of Thomas Cooper, (i Stat. at Large, p. 799), and of Charles Holt (viii Stat. at Large, p. 931), in the like circumstances; and that to refund the fine paid by Andrew Jackson, at New Orleans, (v Stat at Large, p. 651.) But these were not in fact or in form acts to consummate a pardon granted by the Executive.

Other cases of legislation of the same nature have occurred in matters of a purely private character. The private acts to this effect are quite numerous. (Ex. gratia, viii Stat. at Large, p. 78, 122, 133, 300, 372, 631, 646, 841, 880, 937.) None of these acts seem to have been passed in order to give effect to an exercise of the pardoning power of the President. On the contrary, in most of them it distinctly appears that they belong to the class of cases, in which, by the general statute, or by acts supplementary thereto, the Secretary of the Treasury has power to remit, upon certificate of cause by the proper court (i Stat. at Large, p. 505; ii Ibid, p. 7. See also ii Ibid, pp. 549 and 532.) Moreover, in many of the cases cited it appears

that the matter had proceeded to a point, either judicially or administratively, beyond the jurisdiction of the Secretary of the Treasury. But, in others of these cases, this does not appear, but the contrary is implied, so as to indicate that the Secretary had refused to remit, for want, in his opinion, of sufficient cause, and that Congress had interposed to overrule him, or that he had declined to act from scruples touching his power, the extent of which had not then been so thoroughly explored as it has at the present time. (See Opinions, vol. vi., p. 393 and 498.)

So that, on the whole, these acts do not serve to throw light on the precise question of the power of the President in the premises.

I feel content to say, however, that, in my opinion, where the forfeiture has actually gone into the treasury, there is no power to refund, either under the statute authority of the Secretary to remit, or the constitutional authority of the President to pardon.

But suppose, although the forfeiture be consummated so far as the guilty party is concerned, and the money value of such forfeiture has passed into the hands of some officer of government, may the money then be refunded by executive warrant in execution of a pardon? I think it may, in certain circumstances.

In the first place, it must be a forfeiture accruing to the United States. (See Opinions, vol. vi., p. 488.)

Secondly, the payment must not in form be such as to constitute a complete severance from intermediate official custody, and absolute entry into the Treasury of the United States.

There is but one exception to the President's power to pardon, which is the case of impeachment. There is no other exception. In all other respects the power is perfect, and co-extensive with the subject-matter. The President may grant an absolute pardon, or a conditional one. (Ex parte Wells, xviii Howard, p. 307.) He may pardon before trial and conviction. (See Opinions, vol. vi., p. 20.) His power extends to all penalties and forfeitures, as well as other punishment. (Ibid p. 393.) He may do this by order of *nolle prosequi* pending a prosecu-

tion. (Opinions, ed. 1851, pp. 798, 807.) He may do it by warrant of remission in all cases, even those to which the statute authority of the Secretary of the Treasury extends. (Opinions, vol. vi., p. 488.) And he may do it by the common form of a general warrant of pardon. And in my judgment he may do it for and at any time, either anterior to prosecution, or pending the same, or subsequently to the execution in part or in whole of sentence—subject in the latter case only to the limits of legal, moral, or physical possibility.

Whatever of controversy there may have been or still be, on the latter point, will be found to resolve itself into a question of the *form* of the pardon, or of its legal *consequences* and effect.

Thus, while it is admitted that a general pardon under the great seal restores the competency of the party as a witness, yet it has been doubted whether that effect follows a special remission merely of the residue of a sentence. (Perkins *v.* Stevens, xxiv Pickering, p. 277.) On the other hand, it has been held, that a proviso, affixed to a general pardon, that it shall not relieve the party from such a disability, is null for repugnancy. (The People *v.* Pease, iii Johns. Cases, p. 333.) These, it is manifest, are questions of form.

As to the matter of incidental disabilities of conviction for crime, it has seemed to me that a pardon by the proper pardoning power of one jurisdiction does not affect disabilities imposed by another jurisdiction. (Opinions, vol. vii., p. 760.) That is a question of substance, not of form.

As to the general question of consequences, it is clear enough that if a party has gone through the whole or a part of the *physical* incidents of prosecution and sentence, what is thus done, cannot be undone. Stripes, confinement, maiming, death, when inflicted, have become irremissible. There, the pardoning power encounters physical impeachment. So it may encounter legal impediment, as when a penalty, accruing to private persons, has become vested in them of right; and in all cases of rights, acquired by others in virtue of the judgment and sentence. (Hawkins, P. C., ch. 37, § 34, 54.) Thus, if, by the law of the country, conviction of felony have the effect of dissolv-

ing marriage, and the innocent party contract new bonds of matrimony, these are not affected by the subsequent pardon of the felon. (In re Denning, x Johns., p. 232.) So it is in the case of lawful disposition made of the convict's property during the time of his civil incapacity. (The King *v.* Turril, iii Mad. R., p. 52.)

Misapprehension has arisen as to the import of some old cases in England, to the effect that the king's pardon cannot divest any interest, which, by the conviction, has vested either in private persons or in the king himself. (Viner's Abr. Prerog. S. a; Bacons' Abridg. Pard., Bouvier's ed., vol. vii., p. 418.) But, on examination, the decision in those cases appears to involve only a condition of form, namely, that, in order to divest interests thus vested in the state, the pardon must contain words of restitution. That the king might, by the use of apt words, restore penalties acquired to him, and lands or powers forfeited, was never denied: although it has been held that restitution of blood requires an act of Parliament. (Hale's H. P. C., p. 358; Tombes *v.* Ethrington, Levinz, p. 120; The King *v.* Amery, ii D. & E., p. 515, 569.)

I conclude, therefore, that in this case no question remains, except whether, by intendment of law, this money was actually in the Treasury. If it was, a law will be requisite to draw it out, in execution of the pardon—if not, it may be refunded by you for that purpose. In the judgment of the Treasurer, it would seem, as that is reported by the Solicitor, the money is still subject to your order, and not yet technically in the Treasury. I am not sufficiently well informed on that point to undertake to anticipate your decision therein, presuming that it must have come up in practice, and been determined during your administration of the Department.

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

THE WHITE HOUSE

WASHINGTON

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Scalia's office - Copies of opinions (a.g.)

(1) 20 Op. A.G. 668 (1893)

(2) 41 Op. A.G. 251 (1955)

(3) 19 Op. A.G. 106 (1888)

(4) 41 Op. A.G. 251 (1955) 254-258

(5) 22 Op. A.G. 36 (1898) 39.

(6) 11 Op. A.G. 227 (1865) 228, 229

(7) 6 Op. A.G. 20 (1853) 21 232-233

(8) 1 Op. A.G. 359 (1820)

(9) 8 Op. A.G. 281 (1857)

(10) 5 Op. A.G. 532 (1852)

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(11) 4 Op a. g. 317 (1844)

in the statute now and thus mustered out of service is entitled to receive "three months' pay proper."

I am, sir, very respectfully,
Your obedient servant,
JAMES SPEED.

Hon. EDWIN M. STANTON,
Secretary of War.

PARDONING POWER.

Commentary on the constitutional power of the President "to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

ATTORNEY GENERAL'S OFFICE,
May 8, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of April 21, 1865.

By the Constitution of the United States, (2d Art., § 2, cl. 1,) the President is vested with the "power to grant reprieves and pardons for offences against the United States, except in case of impeachment."

By the 13th section of the act of Congress, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17, 1862, "the President is authorized, at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion, in any State or part thereof, pardon and amnesty, with such exceptions, and at such time, and on such conditions, as he may deem expedient for the public welfare."

The right and power of the President to pardon and to issue any proclamation of amnesty are derived from the clauses in the Constitution and the act of Congress as quoted above.

By the Constitution and the act of Congress, the power to pardon in individual cases and the power of extending by proclamation amnesty to classes of individuals are

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solely in the hands of the President. It is, therefore, needless to discuss the question whether the act of Congress was necessary in order to enable the President lawfully to issue a proclamation of pardon and amnesty. The power of exercising and extending mercy resides in some department of every well ordered government. When order and peace reign, its exercise is frequent and its influence valuable.

Its influence is of value inestimable at the termination of an insurrection so wide-spread as the one which in our country is just being suppressed. Its appropriate office is to soothe and heal, not to keep alive or to initiate the rebellious and malignant passions that induced, precipitated, and sustained the insurrection. This power to soothe and heal is appropriately vested in the executive department of the Government, whose duty it is to recognize and declare the existence of an insurrection, to suppress it by force, and to proclaim its suppression. In order, then, that this benign power of the Government should accomplish the objects for which it was given, the extent and limits of the power should be clearly understood. Therefore, before proceeding to answer the questions propounded in your letter, it would seem to be eminently proper to state some of the obvious principles upon which the power to grant pardons and amnesty rests, and deduce from those principles the limitation of that power.

The words amnesty and pardon have a usual and well understood meaning. Neither is defined in any act of Congress. The latter is not used in the Constitution. A pardon is a remission of guilt. An amnesty is an act of oblivion or forgetfulness. They are acts of sovereign mercy and grace flowing from the appropriate organ of the Government.

There can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is a confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow.

Pardoning Power.

A pardon may be absolute and complete, or it may be conditional or partial. The whole penalty denounced by the law against an offender may be forgiven, or so much of it only as may seem expedient. The power to pardon is not exhausted by its partial use. A part of the penalty may be forgiven now, and at a future time another part, and so on till the whole is forgiven. This power may be so used as to place the offender upon trial and probation as to his good faith and purposes.

A pardon may be upon conditions, and those conditions may be precedent or subsequent. The conditions, however, appended to a pardon cannot be immoral, illegal, or inconsistent with the pardon.

If a condition precedent annexed to a pardon be immoral so that the person in whose favor it is issued should never speak the truth; or illegal, so that he should commit murder; or inconsistent with the pardon, so that he should never eat or sleep, the pardon would never attach or be of avail. On the other hand, if those conditions were subsequent, that is, if it were declared that the pardon should be void if the party ever spoke the truth, or if he did not commit murder, or if he should eat or sleep, the pardon would attach and be valid, and the condition void and of no effect. If a condition subsequent is broken, the offender could be tried and punished for the original offence. The breach of the condition would make the pardon void. Any conditions, precedent or subsequent, may, therefore, be appended that are not immoral, illegal, or inconsistent with the pardon. This great and sovereign power of mercy can never be used as a cover for immoral or illegal conduct.

As a pardon presupposes that an offence has been committed, and ever acts upon the past, the power to grant it never can be exerted as an immunity or license for future misdoing.

A pardon procured by fraud or for a fraudulent purpose, upon the suppression of the truth, or the suggestion of falsehood, is void. It is a deed of mercy given without

other fee or reward than the good faith, truth, and repentance of the culprit. On the other hand, as an act of grace freely given, when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentant offender.

A promise to pardon is not a pardon, and may at any time be withdrawn. But a pardon may be offered, and the offer kept open and thus be continuing, so that the person to whom it is offered may accept it at a future day. After the pardon has been accepted, it becomes a valid act, and the person receiving it is entitled to all its benefits.

The principles hereinbefore stated forbid, however, that an offer of pardon be construed as a license or indulgence to commit continuing or future offences, or as giving immunity from the consequences of such offences. After the offender shall have received notice of the offer, or after a reasonable time shall have elapsed within which he must be presumed to have received notice of the offer, he cannot continue his ill-doing, and then accept and rely upon the offer of pardon as an indemnity against what he did before, and also what he did after notice. Such a construction of the pardoning power would virtually convert it into a power to license crime.

The high and necessary power of extending pardon and amnesty can never be rightfully exercised so as to enable the President to say to offenders against the law, "I now offer you a free pardon for the past; or at any future day when you shall, from baffled hopes, or after being foiled in dangerous and bloody enterprises, think proper to accept, I will give you a pardon for the then past."

When men have offended against the law, their appeal is for mercy, not for justice. In this country, and under this Government, violators of the law have offended against a law of their own making; out of their own mouths they are condemned—convicted by their own judgments—and, under a law of their own making, they cannot appear before the seat of mercy, and arrogantly claim the fulfillment of a promise of pardon they have refused and defied.

Pardoning Power.

The excellence of mercy and charity in a national trouble like ours, ought not to be undervalued. Such feelings should be fondly cherished and studiously cultivated. When brought into action, they should be generously but wisely indulged. Like all the great, necessary, and useful powers in nature or in government, harm may come of their improvident use, and perils which seem passed may be renewed, and other and new dangers be precipitated. By a too extended, thoughtless, or unwise kindness, the man or the government may warm into life an adder that will requite that kindness by a fatal sting from a poisonous fang.

Keeping in view these obvious and fundamental principles that fix and limit the powers of pardon and amnesty under the Constitution and the law, I will proceed to consider the questions propounded by you on the proclamations dated respectively on the 8th day of December, 1863, and on the 26th day of March, 1864, commonly called the amnesty proclamations.

You ask my opinion, first, as to the proper construction and effect of those proclamations upon the citizens and residents of rebel States, who have taken the oath of amnesty prescribed therein.

These two proclamations must be read together, and regarded as one instrument. That must at least be so from the date of the last proclamation, March 26, 1864.

No doubt many persons did, betwixt the 8th of December, 1863, and the 26th of March, 1864, take the oath, who could not have done so had the original proclamation contained the exceptions set forth in the second. What the rights are of those who took the oath in that intermediate space of time, and who could not have taken it after the 26th of March, 1864, is purely a judicial question. The facts in such cases are accomplished, and the rights arising out of those facts have attached and become vested. If not improper, it would be at least idle in me to express an opinion on those cases. The judicial department of the Government must determine the law in those cases when they are properly presented before the courts. For

all practical purposes, so far as the executive department of the Government is concerned, both proclamations may, therefore, be regarded as of the date the 26th of March, 1864. From that point of view their proper operation and effect are now to be considered.

It is plainly stated on the face of the second proclamation, that its objects "were to suppress the insurrection, and to restore the authority of the United States, and with reference to these objects alone." In the midst of a gigantic effort on the part of traitors to dismember our country and overthrow our Government, the President, in the legitimate exercise of his great powers, invoked the healing influences of charity and forgiveness. His great heart but responded to the desire of the American people to win back this misguided people to their allegiance, and to peace and order, by gentleness, rather than to compel obedience by the dread powers of war. It must not be supposed, that in giving expression to, and making a law of, this noble wish of his heart, and the heart of the people whom he represented, it was intended to give license and immunity to crime and treason for the then future. His expressed object was "to suppress the insurrection, and to restore the authority of the United States, and that alone." This object was made still more manifest when he said that the person "shall voluntarily come forward" and take the said oath, with the purpose of restoring peace and establishing the national authority.

The reluctant, unrepentant, defying persons, who in their hearts desired the success of the rebellion and the overthrow of the Government, were not invited to take the oath; and if any such should take it, they would but add perjury, a God-defying sin, to that of treason; and if that fact can be shown to a judicial tribunal, it seems to me that they should take no benefit from the pardon and amnesty. A mind and heart unpurged of treason were not invited by the amnesty proclamation to add thereto the crime of perjury.

It seems to me, then, that all the citizens and residents

of the rebel States, not excepted from the amnesty, who did, after the issuing of the proclamation, or after notice thereof, or within a reasonable time, within which it must be supposed they had notice, refrain from further hostilities and take the oath of amnesty voluntarily, with the purpose of restoring peace and establishing the national authority—being at the time free from arrest, confinement, or duress, and not under bonds—are entitled to all the benefits and rights so freely and benignly given by a magnanimous Government. Where the oath has been taken without the purpose of restoring peace and establishing the national authority, though taken promptly, it seems to me that the amnesty and pardon do not attach. This, however, is a judicial question, which the courts may decide contrary to my opinion. I ought not, perhaps, to express any."

In giving this construction to the amnesty proclamation, I have been constantly impressed by a paragraph in the last annual message of the President of the United States. It reads as follows:

"A year ago, general pardon and amnesty, upon specified terms, were offered to all, except certain designated classes; and it was, at the same time, made known that the exempted classes were still within contemplation of special clemency. During the year many availed themselves of the general provision, and many more would, only that the signs of bad faith in some, led to such precautionary measures, as rendered the practical process less easy and certain. During the same time also, special pardons have been granted to individuals of the excepted classes, and no voluntary application has been denied. Thus, practically, the door has been, for a full year, open to all, except such as were not in condition to make a free choice, that is, such as were in custody or under constraint. It is still open to all. But the time may come, probably will come, when public duty shall demand that it be closed, and that, in lieu, more rigorous measures than heretofore shall be adopted."

Pardoning Power.

A profound respect for the opinions of that great and good man, Abraham Lincoln, late President of the United States, induces me to ponder long and well before I can venture to express an opinion differing even in a shade from his. But all who had the good fortune to know him well must feel and know that from his very nature he was not only tempted but forced to strain his power of mercy. His love for mankind was boundless, his charity was all-embracing, and his benevolence so sensitive that he sometimes was as ready to pardon the unrepentant as the sincerely penitent offender. Clearly and pointedly does the above paragraph show to the world that such was his nature. He says, during the whole year that special pardons have been granted to individuals of the excepted classes, no voluntary application has been denied. The door of mercy to his heart was, we know, ever open, and yet he closes the paragraph with this significant sentence, "But the time may come, probably will come, when public duty shall demand that it be closed; and that in lieu, more rigorous measures than heretofore shall be adopted."

It is probably fair to infer that the late President understood his proclamation of amnesty as giving pardon to all, no matter how long they had refused and whether they had offended after notice of the offer or not. Whether his powers extended so far, is, to say the least, a doubtful question.

I am clear and decided in my conviction that the President has no power to make an open offer of pardon which could be relied upon as a protection for offences committed after notice of the offer. This opinion is induced from principle, and independently of the language of the proclamation. The language of the first proclamation is, however, consonant with this opinion. It is addressed "to all persons who have participated in the existing rebellion," words referring to the past.

If I am right in this construction of the proclamation, and I am satisfied in my own mind that I am, another proclamation should be issued. Persons should not be invited

to take an oath, and to comply with terms, under which they cannot obtain firm, legal rights. It is especially due to those who have heretofore, and would now, avail themselves, in good faith, of the benefits of pardon and amnesty, that another proclamation should be substituted, covering the now past. Persons who have been constantly engaged in rebellion should know distinctly what they are to do, when and how they are to do it, to free themselves from punishment, in whole or in part, or to reinstate themselves as before the rebellion. Such as have been affected merely by their treasonable associations should be absolutely forgiven; appropriate conditions should be appended to the pardons of many. The grace and favor of the Government should now be large and generous, and the operation and effect of its proper mercy should not be left uncertain.

The second question you ask is, as to the rights of the citizens and residents of the rebel States who have not taken, or offered to take, the oath, and comply with the terms of the proclamation.

Here, again, we meet trouble and uncertainty. The expressed objects of the proclamation are, to suppress the insurrection and restore the authority of the United States. Can any one be permitted to take the oath and comply with the terms prescribed in the proclamation in a State or community where the civil and military power of the insurrection has been destroyed and the rebellion suppressed, and the authority of the United States is established without let or hindrance; or does the insurrection continue in legal contemplation, though not in fact, until the executive department of the Government shall, by proclamation, declare that it has been suppressed? and would this proclamation of pardon and amnesty continue and be open after proclamation that the rebellion had been suppressed? It would seem from the proclamation that the amnesty was extended to those who were willing to aid in suppressing as well as restoring, and yet it may, and doubtless will be, contended, and with much force and show of reason, that all who have stood by and clung to the in-

surrection till its organization and power, both civil and military, were gone, have, nevertheless, a right to take all the benefits of the amnesty, because they will lend a reluctant aid in restoring an authority which they hate. Amnesty is proffered for aid in suppressing and restoring; amnesty is demanded for the work of restoration; full reward is required for less than half the service that is needed.

As a measure to aid in the suppression of the rebellion, the late proclamation has done its full and complete office. Now one is desired to aid in restoring order and reorganizing society in the rebellious States. Reconstruction is not needed. That word conveys an erroneous idea. The construction of this Government is as perfect as human wisdom can make it. The trial to which its powers and capacities have been subjected in this effort at revolution and dismemberment proves with what wisdom its foundations have been laid. Ours is a task to preserve principles and powers clearly and well defined, and that have carried us safely through our past troubles. Ours is not a duty to reconstruct or change. Society in the rebel States has not been, and is not now, in a normal condition, nor in harmony with the principles of our Government. That society has rebelled against them and made war upon the principles and powers of our Government. In so doing, it has offended, and stands a convicted culprit. Mercy must be largely extended. Some of the great leaders and defenders only must be made to feel the extreme rigor of the law; not in a spirit of revenge but to put the seal of infamy upon their conduct. But the mercy extended to the great mass of the misguided people can and should be so used as to reorganize society upon a loyal and freedom-loving basis. It is manifestly for their good and the good of mankind that this should be done. The power of pardon and mercy is adequate to this end. Such conditions, precedent and subsequent, can legally and properly be appended, as will root out the spirit of rebellion, and bring society in those States into perfect accord with the wise and thoroughly tried principle of our Gov-

ernment. If this power of pardon is wisely used, peace will be established upon a sure and permanent basis.

On these grounds, in addition to what has before been said, I am of the opinion that another and a new offer of amnesty, adapted to the existing condition of things, should be proclaimed.

I do not conceive that it is in place just now, even if I were prepared to do so, which I am not, because not sufficiently advised of the temper of those in rebellion, for me to say what should be the terms of the suggested proclamation.

I am, sir, very respectfully,
Your obedient servant,
JAMES SPEED.

The PRESIDENT.

DEPOSIT OF SHIPS' PAPERS WITH AMERICAN CONSULS.

The provisions of the act of February 28, 1803, in reference to the deposit of ships' papers with American consuls, apply to American steam ferry-boats running between Detroit and Windsor, Canada West.

ATTORNEY GENERAL'S OFFICE,
May 12, 1865.

SIR: I am in receipt of your letter of 28th ultimo, submitting for my opinion two questions relative to the duty of the masters of certain American steam ferry-boats running between Detroit and Windsor, Canada West, to deposit their vessels' papers with the consul of our Government at the latter port, and to pay the tonnage fees provided by law.

These questions are stated in the despatch of our consul at Windsor to the Secretary of State, dated 20th ultimo.

The act of February 28, 1803, (2 Stats., 203,) provides "that it shall be the duty of every master or commander of a ship or vessel belonging to citizens of the United

COURT MARTIAL—PARDON.

An officer who is authorized to order a general court-martial has no power under the 112th article of war to pardon or mitigate the punishment adjudged by it after confirmation by him of the sentence.

DEPARTMENT OF JUSTICE,
February 27, 1888.

SIR: The papers transmitted with your letter of the 24th of February, 1888, call for an interpretation of the one-hundredth and twelfth article of war (Rev. Stat., sec. 1342), which provides:

"Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial shall be held shall have power to pardon or mitigate any punishment which such court may adjudge."

The question presented is whether an officer authorized to order a general court-martial, *after* the final approval by him of the punishment adjudged by the court, has power to pardon the offender.

The second section of Article II of the Constitution of the United States provides:

"The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

This grant of power to pardon offenses against the United States to the President alone forbids the exercise of it by any one else. The crimes or misdemeanors forbidden by the Articles of War are offenses against the United States. The Constitution, therefore, forbids any one but the President to pardon those who commit such offenses. If the power to pardon provided for in article 112 is an absolute grant of power to pardon an offense against the United States, vested in an officer authorized to order a general court-martial, the enactment as to such power is void. But it is to be presumed Congress passed the law in subservience to and not in violation of the Constitution. If, then, the enactment is

fairly capable of a construction that will render it consistent with the Constitution, that construction should be adopted as expressing the intent of the legislative power. To discover that intent, the context and subject-matter may be resorted to.

Article 109 provides: "All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court."

This establishes that the action is not final until the officer ordering the court shall confirm it. His confirmation is the judgment of the law. That confirmation is an act distinct from the action or judgment of the court, and is the action of the officer ordering the court after *it* shall have exhausted its jurisdiction over the alleged offense. Article 112 clearly recognizes the distinction between the final judgment of the law as pronounced by the officer who ordered the court and that of the court-martial submitted to him for judgment. The verdict of a jury bears a close analogy to the judgment of a court-martial. The sentence pronounced on that verdict by the court bears a like analogy to the confirmation of the officer who ordered the court.

The language of article 112 is:

"Every officer who is authorized to order a *general court-martial* shall have power to pardon or mitigate any punishment adjudged by it."

The pronoun "it" refers to "general court-martial" as its antecedent. It is only the judgment of a court-martial that the officer may pardon or mitigate. The enactment does not give him power to pardon or mitigate the punishment of an offense finally adjudged and confirmed by himself. Had Congress so intended, it had the free use of the whole English language to so say. To express such an intent, it would have added after the word "*it*" the words "*or him*," so that the enactment would have read "any punishment adjudged by *it or him*." A fair interpretation of the act does not require the addition of these words. For a construction of the article which shall give the officer any other power over the punishment, except the power to pardon or mitigate the punishment adjudged and reported to him by the court, adds to the power granted by the statute. Before he shall

have confirmed the action of the court article 112 permits him to mitigate the punishment or remit it; but after the final judgment of confirmation—which is the judgment of the law—shall have conclusively established the offense and the guilt of the offender, the law gives him power neither to mitigate nor remit. It is only the punishment, by the language of the article, and not the offense, that he may mitigate or remit. Until the final judgment the charge against the alleged offender is not conclusively or legally established as an offense, and until so established Congress intended to authorize the officer to suspend further prosecution of the alleged crime. But when the law has finally pronounced its judgment, it could not and did not intend to grant the power to pardon the offense against the United States.

Any other interpretation of the article would be a disregard of the constitutional limitation of the pardoning power, which is vested in the President alone. After the final sentence of the law is pronounced by the superior officer, the charge has passed conclusively into an offense beyond dispute, for, as is ruled in the case of *Ex parte Reed* (100 U. S. R., 13), *Keyes v. United States* (109 U. S. R., 336), and 11 Opin., 19, the judgment of a court-martial is conclusive in its effect as to the truth of the charge, and as a judicial decree is a bar to further proceeding.

It is declared in *Bronson* v. *Schulten* (104 U. S. R., 415): "It is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered; and this is placed upon the ground that the case has passed beyond the control of the court."

The consequences that might follow any other interpretation would be obnoxious to the constitutional principle that forbids any person to be twice put in jeopardy for the same offense; for the power of the officer to pardon is limited by the statute to the pardon of the punishment. After such a pardon the offense would still remain unpardoned against the offender. If the power of the officer to pardon existed at any time after the final judgment, and should be exercised after the offender had paid a large part of the penalty of the law, he might be again prosecuted, convicted, and twice punished for the same offense. Such a consequence was not intended.

The latter part of the opinion of Attorney-General Brewster, rendered February 11, 1884, which seems to be inconsistent herewith, does not appear to have been essential to the determination of the question submitted to him, and therefore may not have been maturely considered, nor intended as an authoritative answer to the question now under consideration.

In reply to your inquiry, therefore, after the final approval by the officer ordering the court-martial, he has no power to pardon the offense or mitigate the punishment under article 112.

I am yours, respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

LAWS OF THE CHOCTAW NATION.

The seventh section of the Choctaw intermarriage act of November 9, 1875, is not inconsistent with the Constitution, laws, or treaties of the United States.

That section is valid and binding on all citizens of the Choctaw Nation, but affects only their rights acquired under said act.

The fact that a white man was divorced from his Indian wife, upon her petition, is evidence that he parted from her without just provocation, and brings the case within the provision of the Choctaw act of October, 1840, declaring that any white man parting from his wife without just provocation shall be deprived of citizenship.

PRESIDENT'S PARDONING POWER—AMNESTY.

The President's constitutional pardoning power covers the case of the offense in Utah of unlawful cohabitation. The pardoning power of the President is absolute, and not a subject of legislative control.

DEPARTMENT OF JUSTICE,
September 20, 1893.

SIR: I return herewith the papers in the case of David A. Sanders, of Utah, applicant for "amnesty" for the offense of unlawful cohabitation, which papers have been referred to me for an opinion as to the power of the President in the premises.

Though the application is for what is called "amnesty," and though the same term is used in the reference to me for an opinion, the applicant intends to ask—indeed his application expressly so states—for the exercise in his favor of the President's constitutional pardoning power, so that I assume the real question to be whether that power includes the applicant's particular case.

In my judgment it does include his case beyond all question. The only suggestion to the contrary is that the Edmunds law, so called, operates as a limitation of the President's pardoning power by confining the "amnesty" therein authorized to offenders who were such before a designated time.

But, in the first place, if any intent of the sort could be imputed to Congress, it must necessarily fail of effect, because the pardoning power granted to the President is absolute, and is not a subject of legislative control. In the second place, no such intent can fairly be ascribed to Congress, which undoubtedly used the word "amnesty" advisedly, and only meant to indicate by the whole "amnesty" clause that if the President, in his discretion, saw fit, by act of executive clemency, to embrace a whole class of offenders instead of dealing with the case of each separately, such a course would not be inconsistent with the purposes and objects Congress had in view.

Respectfully,

RICHARD OLNEY.

The PRESIDENT.

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ages therefor, the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife."

The second objection of the Colombian Government turns upon the use of the word "trifling." To term the injuries "trifling" is to beg the question. If they were "trifling," this Government would not present a claim based upon them. No government entitled to respect regards as "trifling" the wanton arrest and imprisonment of its citizens upon the whim of a foreign functionary. A money indemnification for such an outrage is the usual reparation demanded and received. (2 Phill. Int. Law, 4; Bluntschli Droit Int., art. 380.)

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved:

JOHN W. GRIGGS.

The SECRETARY OF STATE.

ARMY—ENLISTMENT—PARDON.

Congress has no power by legislation to abridge the effect of the President's pardon.

A person convicted of desertion from the military service and afterwards pardoned by the President, under section 1118, R. S., would be restored by reason of the pardon to all the rights and privileges of a citizen which he had anterior to such conviction.

While the President's pardon restores a criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact that his service was not faithful and honest.

A recruiting officer has the right to reject a candidate for enlistment in the Army whose service during his previous term was not honest and faithful, notwithstanding the President's pardon of the offense.

DEPARTMENT OF JUSTICE,
February 9, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of August 26 ultimo, in reference to the

22 Op. 36

case of Daniel T. Thompson. It appears that said Thompson was a private in Company A, Seventh United States Infantry, that he was tried by a court-martial, convicted of desertion, and sentenced to be dishonorably discharged from the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor at such place as the reviewing authority may direct for the period of one year. This sentence was carried into execution, except that after Thompson had served the greater part of the period of imprisonment the remainder was remitted, and he subsequently received a full pardon from the President. Thompson has applied to reenlist in the Army, and you ask my opinion as to whether the effect of the pardon in Thompson's case has been to restore his eligibility for reenlistment. You also call to my attention that part of the act of Congress of August 1, 1894 (28 Stat., 216), which reads as follows:

"No soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful."

There can be no doubt as to the effect of the President's pardon to one who has been charged with, or convicted of, an offense against the laws of the United States.

In *Knote* v. *United States*, 95 U. S., 149, 153, the court declares the effect of a pardon to be as follows:

"It releases the offender from all disabilities imposed by the offense, and restores to him all of his civil rights. In contemplation of law, it so far blots out the offense that afterwards it can not be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position."

The same doctrine is plainly declared by the court in Spencer's Case, 22 Fed. Cas., 921. Judge Deady, delivering the opinion of this case, says:

"And when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense."

These opinions are fully sustained by Blackstone's Commentaries, book 4, ch. 31, 4.

In Ex parte Garland, 4 Wall., 334, the court in its opinion deals very explicitly with the question of the effect of the President's pardon, and after citing the section of the Constitution from which the President derives the authority to grant pardons, says (p. 380):

"The power thus conferred is unlimited with the exceptions stated (except in cases of impeachment). It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions."

The court says further in this opinion:

"Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

Authorities to any number may be quoted to sustain this position, but the principle declared is so well settled that their citation is unnecessary.

The question, then, which remains to be considered is as to whether these principles shall govern the recruiting authorities of the United States Army in cases of application for reenlistment on the part of persons convicted of desertion during a previous term of service and afterwards pardoned by the President.

It can not be questioned that under section 1118 of the Revised Statutes a person convicted of desertion from the military service of the United States and afterwards pardoned by the President would be restored by reason of the pardon to all the rights and privileges of a citizen which he had anterior to such conviction, but Congress, by the act of August 1, 1894, has added a condition which must exist as

to persons applying for reenlistment in the Army. It is not in the nature of an inhibition on account of the commission of a criminal offense which the President would have the right to pardon, but it relates to previous conduct in service and affects the personal rather than the criminal character of the applicant. It is true that a soldier who has been guilty of the crime of desertion has not given honest and faithful service, and yet a failure to perform honest and faithful service on the part of a soldier does not necessarily involve a crime or an offense against the military laws of the country. There are many acts of a soldier which may be regarded under the strict rules of the requirements of the military service as unfaithful or dishonest, but of which a military court-martial would not take cognizance. The President would not be called upon to pardon such acts of a soldier, because they do not reach that grade of offense which would authorize the exercise of executive clemency, though if the soldier, during his previous term of service, has been guilty of such want of honest and faithful service, he is disbarred from reenlistment by the statute referred to.

I have pursued this line of reasoning in order to draw a distinction between a crime or offense to which the Executive clemency might be applied and the want of honest and faithful service on the part of a soldier during his term, and whilst Congress has no power, by legislation, to abridge the effect of the President's pardon, yet Congress has the right to prescribe qualifications and conditions for enlisted men, and to forbid those not possessing such qualifications, and as to whom such conditions do not exist, to enter the military service.

So, whilst the President's pardon restores the criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact, viz, that his service was not honest and faithful.

I therefore, in answer to your question, advise you that in an application for reenlistment the officers recruiting for the military service of the United States can, under the act of Congress, inquire if the applicant has, during his previous term, performed honest and faithful service, and, if he

has not, reject his application; and this authority pertains to the recruiting service and is not affected by the pardon of the President.

Respectfully,

The SECRETARY OF WAR. JOHN W. GRIGGS.

POSTAGE STAMPS—SUPPLIES.

Postage stamps are supplies within the meaning of section 3709, Revised Statutes.

The word "security" as used in the act of 1877 (1 Supp. R. S., 136) is an evidence of public debt, as a bond, or a certificate of deposit, or other subject of investment.

When the word "securities" is used in the property sense, it refers to bonds, mortgages, certificates of deposit, certificates of stock, etc. In this sense postage stamps are not investments or securities.

The definition given to the words "obligation or other security of the United States" in Revised Statutes, section 5413, is not intended to be general, but is limited in its application.

The transfer of a separate statute, or part thereof, from a particular act to a general revision, does not ordinarily alter its significance.

Statutory meaning, so far as it is artificial and not the natural and usual meaning, can be applied only to the exact phrase defined and to the whole of it, not to a selected portion.

Revised Statutes, section 5600, relative to the construction to be placed upon a statute, does not prevent the application of the ordinary principles which permit the courts to resort to the context and the subject-matter of the sections immediately associated with it.

Revised Statutes, section 5413, does not apply to and limit the meaning of the words "other securities of the United States," as used in paragraph 4 of the act of March 3, 1877.

The Postmaster-General should advertise for proposals for the work of engraving and printing United States postage stamps, for which work the Bureau of Engraving and Printing may be permitted to compete.

DEPARTMENT OF JUSTICE,
February 11, 1898.

SIR: You having requested my opinion as to the law governing the engraving and printing of United States postage stamps, and whether it is necessary for you to advertise for proposals for such work or to have it done at the Treasury Department, I have the honor to advise you as follows:

Section 3709, Revised Statutes, directs that all purchases and contracts for supplies in any of the Departments of the

with section 5 of the act of April 16, 1906 (34 Stat. 116), which authorized the Secretary of the Interior "to lease" surplus power "giving preference to municipal purposes." 30 Op. A. G. 197. There, it was held that the Secretary was authorized to lease such power to a private company; but it does not appear, as here, that the Secretary was faced with choosing between conflicting offers made by a preference user and a non-preference user.

For the reasons stated above, it is my opinion that section 5 of the Flood Control Act of 1944 does not authorize the Secretary of the Interior, under the circumstances here presented, to enter into the proposed contract with the Georgia Power Company. The documents submitted for my consideration will be returned separately.

Sincerely,

HERBERT BROWNELL, JR.

PARDONING POWER OF THE PRESIDENT

The constitutional pardoning power of the President (Art. II, section 2, clause 1) authorizes the President, in commuting a death sentence, to attach as a condition that the prisoner shall not thereafter be eligible for parole or to receive the benefits of related provisions of law applicable to military offenders. The President's action cannot, of course, bind his successors.

The condition may also be attached without obtaining the prisoner's consent thereto.

AUGUST 11, 1955.

The PRESIDENT.

MY DEAR MR. PRESIDENT: In connection with the case of John F. Vigneault you have asked my opinion as to whether you may lawfully attach to a commutation of his death sentence to imprisonment for life or for a definite term of years, should you decide to grant such commutation, a condition that he shall not be eligible thereafter for parole or to receive the benefits of related provisions of law. It is my opinion that you may do so. However, as you know, your action in this regard could not, of course, bind any of your successors.

It appears that Vigneault, while a member of the United States Army, was convicted by a general court-martial of the offenses of murder and of robbery in violation of articles 118 (4) and 122, respectively, of the Uniform Code of Military

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Justice (50 U. S. C. 712 (4), 716). His conviction was affirmed by the United States Court of Military Appeals (*United States* v. *Vigneault*, 3 USCMA 247), and a death sentence has been approved, as required by article 71 (a) (50 U. S. C. 658 (a)).

Your authority to act in the premises is derived from Article II, section 2, clause 1 of the Constitution, providing that the President "shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." That power extends to military offenders (19 Op. 106; see also 4 Op. 432, 11 Op. 19, 22 Op. 36, 27 Op. 178, Winthrop's Military Law and Precedents (2d ed.), pp. 466–468), and it includes the authority to commute a death sentence to a penalty less than death, including imprisonment for life. (*Biddle* v. *Perovich*, 274 U. S. 480; see also *In Re Ross*, 140 U. S. 453; *Ex Parte Wells*, 18 How. 307). Moreover, it is settled that both a pardon and a commutation of a sentence may be granted on condition. *Ex Parte Grossman*, 267 U. S. 87, 120; *Semmes* v. *United States*, 91 U. S. 21, 27; *United States* v. *Klein*, 13 Wall. 128, 142; *Ex Parte Wells*, *supra*; *United States* v. *Wilson*, 7 Pet. 150, 160.[1] And, the condition imposed may be of any nature, so long as it is not one that is illegal, immoral, or impossible of performance. *Lupo* v. *Zerbst*, *supra*; *Kavalin* v. *White*, 44 F. 2d 49 (C. A. 10th, 1930); 11 Op. A. G. 227, 229. Conditions that have been sustained include the following: that a life sentence shall begin to run at the date of commutation of a death sentence (*Bishop v. United States*, *supra*); that the prisoner, an alien, shall be deported from the United States and not return (*Vitale* v. *Hunter*, *supra*; *Kavalin* v. *White*, *supra*); that the prisoner shall remain law-abiding (*Lupo* v. *Zerbst*, *supra*; *United States ex rel. Brazier* v. *Commr. of Immigration*, *supra*; *Ex Parte Weathers*, *supra*), and abstain from the use of intoxicating liquor (*Ex Parte Weathers*, *supra*).

The Federal courts, so far as I know, have not passed on

[1] To the same effect, see *Bishop* v. *United States*, 223 F. 2d 582 (C. A. D. C., 1955); *Vitale* v. *Hunter*, 206 F. 2d 826 (C. A. 10th, 1953); *Lupo* v. *Zerbst*, 92 F. 2d 362 (C. A. 5th, 1937), certiorari denied, 303 U. S. 646; *United States ex rel. Brazier* v. *Commr. of Immigration*, 5 F. 2d 162 (C. A. 2d, 1924); *Ex Parte Weathers*, 33 F. 2d 294 (D. C. S. D. Fla., 1929); *Chapman* v. *Scott*, 10 F. 2d 156 (D. C. Conn., 1925), affirmed, 10 F. 2d 690 (C. A. 2d, 1926), certiorari denied, 270 U. S. 657; and see Humbert, *The Pardoning Power of the President*, pp. 22, 27, 47–48.

the lawfulness of a condition that a prisoner shall not be eligible to receive the benefit of the parole systems authorized by Congress. A Federal prisoner serving a sentence in a civilian penal institution may be released on parole after serving one-third of his term or after serving fifteen years of a life sentence or of a sentence of over forty-five years. 18 U. S. C. 4202. This applies to a military offender committed to such an institution. *Jones* v. *Looney*, 107 F. Supp. 624 (D. C. E. D. Mich., 1952); *McKnight* v. *Hunter*, 98 F. Supp. 605 (D. C. Kans., 1951); *Fitch* v. *Hiatt*, 48 F. Supp. 388 (D. C. M. D. Pa., 1942); 50 U. S. C. 639; Department of the Army Regulation 600–360, 12.[2] With respect to prisoners confined in institutions under the control of the Army, Congress has authorized the Secretary of the Army to establish a parole system. 10 U. S. C. 1457b. That system provides for eligibility to parole after service of one-third of the term of confinement or ten years of a life sentence or of a sentence of more than thirty years. Department of Defense Instruction No. 1325.4, § III, P, 2 (January 14, 1955).[3]

State courts that have considered the legality of a condition precluding parole have sustained it. Thus, the Supreme Court of California has held that the constitution of that State authorizes the Governor to commute a death sentence to life imprisonment upon condition that the prisoner shall not be eligible to parole, despite the fact that the California code permits parole after seven years' confinement under a life sentence. *Green* v. *Gordon*, 39 Calif. 2d 230 (1952), certiorari denied, 344 U. S. 886; *In re Collie*, 38 Calif. 2d 396 (1952), certiorari denied, 345 U. S. 1000. In the first cited case, the court stated (p. 232):

"We recently held that a commutation of a sentence is in the nature of a favor which, under article VII, section 1, of the Constitution,[4] may be withheld entirely or granted upon

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[2] See also *Johnson* v. *Hiatt*, 71 F. Supp. 865 (D. C. M. D. Pa., 1947), affirmed 163 F. 2d 1018 (C. A. 3d, 1947); *Innes* v. *Hiatt*, 57 F. Supp. 17 (D. C. Pa., 1944); and Wiener, *The Uniform Code of Military Justice*, pp. 142–145.

[3] The Department of the Army advises that this instruction supersedes the criteria for determining parole eligibility set forth in AR 600–360, and that pending the publication of a change in that regulation the commandants of disciplinary barracks were directed on May 2, 1955, to employ the standards established by the instruction.

[4] The Governor "shall have the power to grant reprieves, pardons, and commutations of sentence * * * for all offenses * * * upon such conditions, and with such restrictions, as he may think proper * * *."

such reasonable conditions, restrictions and limitation as the governor may think proper, that the general statutory regulations relating to parole (Pen. Code § 3040 *et seq.*) did not amount to an attempt to interfere with the governor's power, and that the withholding of parole upon the commutation of a death sentence to life imprisonment was not unreasonable." (*In re Collie*, 38 Calif. 2d 396, 398–399 [240 P. 2d 275].)

It is also of significance that at least one President appears to have assumed that the imposition of the parole condition was within his constitutional authority. In 1915 President Wilson commuted the death sentence of James Waupoose to life imprisonment upon condition that he waive all rights and benefits to which he might be entitled under the parole law; and in the same year the President commuted the sentence of Jeff Sharum from imprisonment for a term of three years and six months to a term of two years and six months on condition that he was not to have the benefit of the parole law save on the basis of his original term. Annual Report of the Attorney General, 1916, pp. 338, 343. An examination of the files of these two cases does not disclose that any special study was made of the legal aspects of the question.

Nor do I believe that the parole laws and regulations can be regarded as a limitation upon the President's pardoning power vested in him by the Constitution. The books are replete with statements that Congress can neither control nor regulate the action of the President in this regard. See *Ex Parte Grossman*, 267 U. S. 87, 120; *The Laura*, 114 U. S. 411, 414; *Ex Parte Garland*, 4 Wall. 333, 380; *Thompson* v. *Duehay*, 217 Fed. 484, 487 (D. C. W. D. Wash., 1914), affirmed, 223 Fed. 305 (C. A. 9th, 1915); 22 Op. A. G. 36, 20 Op. 668, 19 Op. 106, 8 Op. 281, 6 Op. 393, 4 Op. 432. In *Ex Parte Grossman*, *supra*, Chief Justice Taft, speaking for the Court, stated that "The Executive can reprieve or pardon all offenses * * * conditionally or absolutely, and this without modification or regulation by Congress;" and in *Ex Parte Garland*, *supra*, it was said that "This power of the President is not subject to legislative control. * * *. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[5] In *The Laura*, *supra*, the Court

[5] In *Ex Parte Garland*, it was held that the President having granted Garland a full pardon for all offenses committed by him in connection with his participation in the Rebellion, it was not within the constitutional power of Congress to inflict punishment upon him beyond the reach of the pardon.

stated that the President's "constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment."

It is clear, moreover, from the history of the parole statute itself that Congress had no intention of interfering with the President's pardon authority. As enacted in 1910, section 10 provided that nothing in the act "shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case." 36 Stat. 821, 18 U.S.C. (1946 ed.) 723. This provision does not appear in the 1948 revision of title 18 of the U. S. Code, and the Reviser's Note to section 3570 of that title, dealing with Presidential remission of a sentence, states that the word "pardon" was omitted "as unnecessary in view of the pardoning power of the President under Const. Art. 2, § 2, cl. 1. 'This power of the President is not subject to legislative control.' *Ex parte Garland*, 1866, 4 Wall. 380." And, it is also to be noted that State courts have held that the legislature's power to enact parole laws is distinct from the Executive's constitutional pardoning power and that such laws are not intended to interfere with that power. *Green* v. *Gordon*, 39 Calif. 2d 230, *supra; Commonwealth ex rel. Banks* v. *Cain*, 345 Pa. 581 (1942); *State ex rel. Attorney General* v. *Peters*, 43 Ohio St. 629 (1885). In the *Banks* case it was said (pp. 585–586):

"[Parole] is not an act of clemency, but a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls. It does not set aside or affect the sentence; the convict remains in the legal custody of the state and under the control of its agents, subject at any time, for breach of condition to be returned to the penal institution. Neither is a parole a commutation of sentence within the meaning of that term in the constitutional provision. * * * The constitutional power of the Governor to grant pardons and commutations is exclusive, so that the fact that the legislature has, by various statutes, given the power of parole to the criminal courts, to the board of managers [etc.] * * * indicates that parole has never been considered as being within the category of either pardon or commutation. The courts in other states have held that a parole is not a commutation as that term is employed in their respective constitutions." It is my conclusion that the statutes for the parole of Federal prisoners do not limit in any

manner the President's constitutional pardoning power. In cases involving a sentence less than death, I should like to examine at such time as the situation may arise, the question of the propriety of action, where the condition to be imposed will reduce the prisoner's rights under the original sentence.

I have dealt thus far with the question of parole. There are, however, other provisions of law relating to persons sentenced by court-martials which should be considered. Article 71 (a) of the Uniform Code of Military Justice (50 U. S. C. 658 (a)) provides that "No court-martial sentence extending to death * * * shall be executed until approved by the President" and that he "may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence;" Article 74 (a) of the Uniform Code of Military Justice (50 U. S. C. 661) authorizes the Secretary of the Army to "remit or suspend any part or amount of the unexecuted portion of any sentence * * * other than a sentence approved by the President;" and Article 140 of that code (50 U. S. C. 736) provides that the President may delegate any authority vested in him under the code, and that he may provide for the subdelegation of any such authority. On November 4, 1953, acting by virtue of the authority conferred by Article 140, you issued Executive Order 10498, (18 F. R. 7003). By that order there was delegated to the Secretary of the Army, *inter alia*, "The authority vested in the President by Articles 71 (a) and 74 (a) of the Uniform Code of Military Justice to remit or suspend any part or amount of the unexecuted portion of any sentence extending to death which, as approved by the President, has been commuted to a less punishment." Also of significance is 10 U. S. C. 1457 which provides that "Whenever he shall deem such action merited the Secretary of the Army may remit the unexecuted portions of the sentences of offenders sent to the United States Disciplinary Barracks for confinement and detention therein * * *."

The question is thus presented whether by virtue of the above the Secretary of the Army would be entitled, as a matter of law, either to suspend or remit the unexecuted portion of any commuted sentence of Private Vigneault, and thereby effect his release from confinement, despite a condition that he shall not be eligible for parole. In this regard I have had the benefit of the views of the Acting Judge Advo-

cate General of the Army. In his letter of August 2, 1955, he states as follows:

"If it is assumed that the President by prohibiting Private Vigneault's parole intends to prohibit his release by any means, I am of the view that Executive Order 10498 would be impliedly modified by the President's order and that the Secretary of the Army would not be authorized to act under either Article 71 (a) or 74 (a) to effect Private Vigneault's release. I am of the further view that the Secretary of the Army, acting under the provisions of 10 U. S. C. 1457, would have the authority to remit the unexecuted portion of Vigneault's sentence, provided Vigneault is serving his confinement in a United State Disciplinary Barracks, regardless of the conditions which the President might impose if he commutes the sentence. However, if the President in his action should designate a Federal penitentiary as the place of Private Vigneault's confinement, the provisions of 10 U. S. C. 1457 would not be applicable * * *." The Acting Judge Advocate General continues:

"If the term 'parole' is construed more narrowly and is given only its usual military meaning, the proposed action would in no way affect the authority of the Secretary of the Army to remit or suspend Vigneault's sentence, since 'parole' is not encompassed by either of those terms." And he concludes with the suggestion that "in the event the President commutes Private Vigneault's sentence, intending to prohibit his release under any circumstancces, * * * in his action he include not only the term 'parole,' but also the terms 'remission' and 'suspension.'" In my opinion the suggestion of the Acting Judge Advocate General has merit. Since Vigneault was convicted by an Army court-martial, the provisions of law discussed above are, of course, relevant. And whatever doubts might exist as to their applicability should the condition for commutation be confined to parole they would be removed by adding to the condition the terms "remission" and "suspension." Nor do I have any question as to your authority in this regard. As I have pointed out above, your exercise of authority in the premises is based upon your constitutional pardoning power, and in my opinion the statutes discussed can no more be regarded as a limitation upon that power than the parole laws and regulations.

The remaining question is whether a conditional commutation must be accepted by the prisoner. In *Burdick* v. *United States*, 236 U. S. 79, the Supreme Court held that acceptance of a pardon is essential to its validity. Subsequently, in *Biddle* v. *Perovich*, 274 U. S. 480, the Court declined to extend this rule to the commutation of a death sentence to life imprisonment, stating, in an opinion delivered by Justice Holmes (pp. 487–488):

"The opposite answer would permit the President to decide that justice requires the diminution of a term or a fine without consulting the convict, but would deprive him of the power in the most important cases and require him to permit an execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole. We are of opinion that the reasoning of *Burdick* v. *United States*, 236 U. S. 79, is not to be extended to the present case." The Supreme Court of California is perhaps of the view that a conditional commutation has to be accepted. See *Green* v. *Gordon*, 39 Calif. 2d 230, *supra*, at 232. But this view, if such it is, is based on the theory, rejected by the Supreme Court of the United States in the *Perovich* case, *supra*, that a commutation may not be imposed on a prisoner without his consent. It is also true that President Wilson in commuting the death sentence of James Waupoose to life imprisonment (see *supra*), required the prisoner to waive the benefits of the parole laws. But this action was taken prior to the decision in the *Perovich* case, and it may have been taken under the belief that so far as acceptance was concerned a commutation stood on the same footing as a pardon—if the latter required acceptance so did the former. Although no definitive answer is possible, I think that the *Perovich* decision logically compels the conclusion that the President, in commuting a death sentence, can validly attach the condition that the prisoner shall forego parole or suspension or remission of the sentence without obtaining the prisoner's consent to the condition. Should the prisoner withhold his consent, is it to be supposed either that the death sentence must be carried out or the condition withdrawn? Either alternative seems to me to be opposed to the reasoning of the *Perovich* case that in cases like this, "the pub-

lic welfare, not his [the prisoner's] consent, determines what shall be done." 274 U.S. at 486.

Finally, I should point out that should the sentence be commuted to imprisonment for life the prisoner will not be entitled to "good time" benefits accruing to prisoners whose records of conduct show that they have faithfully observed prison rules, 18 U. S. C. 4161, AR 600-340. On the other hand, if the sentence is commuted to a definite term of years, the prisoner will be entitled to be released at the expiration of his term less the time deducted for good conduct. *Ibid.*

Respectfully,

HERBERT BROWNELL, JR.

DISPOSITION OF PUBLIC POWER REVENUE BONDS HELD BY ADMINISTRATOR OF GENERAL SERVICES

Section 203 (a) (3) of the National Industrial Recovery Act (48 Stat. 195) authorizes the Administrator of General Services to dispose of certain public power revenue bonds of State agencies which he holds as successor to the Federal Works Administrator, subject to the qualification that before the bonds are offered for sale the issuing agencies must be accorded an opportunity to redeem them at par and accrued interest, as provided by the Independent Offices Appropriation Act, 1947.

In view of section 3709 of the Revised Statutes, providing for competitive bidding in Government purchases and sales, there is no existing authority, except as to two of the bond issues involved, to negotiate a sale of the bonds to the issuing agencies at less than par and accrued interest.

No opinion is expressed as to the Administrator's authority to proceed without competitive bidding pursuant to section 203 (e) of the Federal Property and Administrative Services Act of 1949 since the authority provided by that section expired on June 30, 1955.

SEPTEMBER 9, 1955.

THE PRESIDENT.

MY DEAR MR. PRESIDENT: I have the honor to reply to your request for my opinion concerning the questions posed in the letter to you from the Administrator of General Services dated March 22, 1955, regarding his authority to dispose of certain public power revenue bonds of State agencies which he holds as successor to the Federal Works Administrator. The present aggregate face value of the bonds is $84,856,000. The Administrator of General Services states that the bonds were originally acquired by the United States in connection

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