Pardoning Power.

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.
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.
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
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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."
HON. JAMES SPEED

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...
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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-
TO THE ACTING SECRETARY OF STATE. 237

Deposit of Ships' Papers with American Consuls.

The President.

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

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.

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.

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