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.

A. H. GARLAND.