The Secretary of the Navy.

While it may be that no one of these provisions relates to the railroads, telephones and telegraphs, they embrace all of the older establishments of the Government, and amply demonstrate the general purpose of Congress that the purchase of Government supplies shall be based on competitive bidding.

I am of opinion, therefore, that the proposed plan of the Industrial Board of the Department of Commerce, viewed in any aspect, is unauthorized by law.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF COMMERCE.

NAVAL OFFICERS—PROMOTION—CONSTRUCTIVE PARDON.

The promotion of an officer of the Navy while under charges awaiting trial by general court-martial does not operate as a constructive pardon of the offenses charged against him.

Where an ensign in the Navy, while under charges general in their nature and not peculiar to his office of ensign, was commissioned a lieutenant, and was thereafter found guilty of such charges by a general court-martial and sentenced to be dismissed from the service, the Secretary of the Navy was authorized by the law in mitigating his sentence with reference to the grade in which he was permanently serving.

DEPARTMENT OF JUSTICE,  
April 4, 1919.

Sir: I have the honor to acknowledge the receipt of your letter of March 13 requesting my opinion on the following questions of law arising in the administration of your Department:

"(a) Does the promotion of an officer of the Navy while under charges awaiting trial by general court-martial operate as a constructive pardon of the offenses charged against him?

"(b) If so, is it necessary for such officer, when later brought to trial by general court-martial for such offenses, to bring the fact of such promotion to the attention of the court-martial, by special plea or otherwise, in order to have the proceedings of the court-martial set aside by the reviewing authority, or is it sufficient if the fact of
such promotion is placed in the records of the case, after trial but before final action is taken by the reviewing authority?

From the accompanying letter of the Judge Advocate General it appears that the specific case before you out of which the above questions arise is as follows:

Prior to September 21, 1918, Horace Roy Whittaker was an ensign in the United States Navy. On that date charges were preferred against him of "Absence from station and duty without leave" and "Conduct to the prejudice of good order and discipline." On October 25, while these charges were pending, he was commissioned temporarily a lieutenant (junior grade) from September 21, the commission stating that it was issued in accordance with the provisions of the act of May 22, 1917, 40 Stat. 84, as amended by the act of July 1, 1918, 40 Stat. 714. On October 30 he was placed on trial on the aforesaid charges before a general court-martial, found guilty by his own plea, and sentenced to be dismissed from the service. On January 3 following, the Judge Advocate General reviewed the proceedings of the court-martial and recommended that they be set aside for the reason that by the well-settled rule of the Navy Department the commission operated as a constructive pardon of the charges pending before the court-martial. This recommendation was, however, disapproved by you, the sentence of the court-martial approved, but mitigated to the loss of 10 numbers in the grade in which Whittaker was permanently serving.

After a careful investigation, no authority has been found for the possibility or validity of an implied pardon except the opinions of Attorney General Cushing in 6 Op. 123, and 8 Op. 237, and the opinion of Attorney General Legare in 4 Op. 8. The former rest entirely on the authority of the latter, without reasoning. The latter with a like lack of reasoning relies entirely on Sir Walter Raleigh's Case, 2 Rolle's Reps. 50. In that report of the case it is said that the Chief Justice, while holding that there could be no implied pardon of treason (the case before him), remarked that perhaps it might be different
The Secretary of the Navy.

in felony. In the report of the same case in 2 Howells State Trials, 1, 34, no such remark is given, the Chief Justice merely stating:

"* * * for by words of a special nature, in case of treason, you must be pardoned and not implicitly. There was no word tending to pardon in all your commission; and therefore you must say something else to the purpose."

A pardon by implication is not noticed in such authoritative English treatises as Hawkins (Pleas of the Crown, vol. 2, p. 542 et seq.), Blackstone (vol. 4, pp. 400, 401), Chitty (Criminal Law, vol. 1, p. 770 et seq.), Halsbury (Laws of England, vol. 6, p. 404). These writers are in accord in mentioning only absolute or full, and conditional, pardons. The American writers add partial pardons—in the nature of commutation of sentence—but none mentions an implied pardon except American and English Encyclopedia. (See e.g. Bishop, Criminal Law, vol. 1, sec. 914; Wharton, Criminal Procedure, 10th edition, vol. 2, secs. 1458-1474; Cyc., vol. 29, p. 1560.) In American and English Encyclopedia (vol. 24, p. 552), where implied pardons are mentioned, no authorities are cited but the opinions of Attorney General Cushing, supra, and of implied pardons it is said:

"* * * these, however, have been of very rare occurrence and are somewhat anomalous in their character."

No decision has been found either in the Federal or the State courts recognizing or even mentioning an implied pardon. On the other hand, the uniform tenor of the decisions is inconsistent with their legal possibility. The Constitution of the United States confers upon the President "power to grant pardons for offenses against the United States," thus assimilating a pardon to an express grant by deed, and the general constitutional provision is of this character. This was but an adoption of the English rule that a pardon was a grant under the great seal. Even an instrument in effect granting a pardon under the sign manual of the King was not sufficient. (Bullock v. Dodds, 2 B. & Ald. 258, 277; Gough v. Davies, 2 Kay & Johns. 623, 627.) Accordingly all the courts in this coun-
try, construing the constitutional provision, hold that a pardon is an express act of the Executive or legislature evidenced by something in the nature of a formal grant. In United States v. Wilson (7 Pet. 150, 160, 161), the court said:

"A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended * * *

This definition is approved by the court in Burdick v. United States (236 U. S. 79, 89, 90), where an acceptance of a pardon was held essential. Clearly this definition refers to an express act of the Executive, having his mind directed to a certain offense and consciously willing an exemption from the consequences of it. In Ex parte Wells (18 How. 307, 310), the court said:

"Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special, or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course."

In Commonwealth v. Halloway (44 Pa. St. 210), as preliminary to a holding that a pardon must be delivered, the court pointed out its distinction from a commission to office such as is claimed by the Attorneys General, supra, to work a pardon. A commission is but the seal of approval upon former considered, effectual, legal acts, and therefore needs no delivery for its operation. A pardon is an act of grace having no legal antecedents to the formal grant, and needing therefore assent by the grantee to make it complete. This view is accepted by Judge (afterwards Justice) Blatchford in Matter of de Puy, 3 Ben. 307, 319-322, and he calls attention to the fact that Marshall, Chief Justice, delivered the opinion of the court in Marbury v. Madison (1 Cranch 137), as well as in United States v. Wilson (7 Pet. 150), thereby recognizing and as-
serting the fundamental distinction between a commission and a pardon, viz, that the former is unilateral, requiring only the completed action of the appointing power, while the latter is bilateral, a meeting of the minds of the parties concerned being essential. This view of the nature of a pardon—clearly excluding an implied pardon—is evidently the basis of the decision of the court in Burdick v. United States, supra.

That a pardon is an express act based upon an intent directed to the particular offense and the reasons excusing it with a will to wipe out the punishment therefor, is also shown by the decisions that a pardon granted through fraud or misapprehension, the executive not being apprised of the true situation, is void;¹ that a pardon not clearly directed to the specific offense which it is claimed to cover is not effective as to that offense;² that a pardon varying only in a slight degree in its recitals from the truth, or expressed in clear but inartificial terms, is good.³ It is safe to say that these cases would all have been differently treated both by counsel and by the court had anyone suspected that a right to a pardon could accrue from mere implication out of general circumstances beyond the record.

If a pardon by implication were held to be within the pardoning power as known to the common law and adopted in the several constitutions, the result would be that, in every case where it was pleaded or set up, an issue of fact would be necessary and a consequent inquiry into the actions of the Executive or the legislature, the inferences of fact to be drawn therefrom, whether the subject acted in reliance on them and to what extent, with many other matters of a similar nature, all unfitting, even dangerous considerations in the determination of the im-

¹State v. Leak, 5 Ind. 350; State v. McIntire, 1 Jones Law (N. C.) 1; Commonwealth v. Halloway, supra.
²Stetler's Case, 1 Phila. 305, 306; Ex parte Higgins, 14 Mo. App. 501; State v. Foley, 15 Nov. 64, 70-72; Hawkins v. State, 1 Porter (Ala.) 475; State v. McCarty, 1 Bay (S. C.) 334; Ex parte Weimer, 8 Ills. 321.
important question of public law, viz, whether an amnesty has been duly granted for an offense against the laws of the State. Nor would the offender have anything definite to show as his title to his freedom from punishment, open to all the world—a matter of considerable though lesser importance.

I have therefore reached the conclusion that a pardon by implication or construction is a thing not known to or recognized by the law, and I answer your first question in the negative. This makes an answer to your second question unnecessary.

To apply the above ruling to the facts of the case, it is necessary to go a step further. Whittaker was an ensign when the charges were filed against him—September 21. It is true that his commission, although not issued until October 25, recited that he was temporarily appointed a lieutenant from September 21. Such retroaction, however, while it might affect his rank and pay (United States v. Vinton, 2 Sumner 299), could not affect his actual status before the court-martial (29 Op. 254, 257). When sentence was pronounced, however—October 30—his commission had become effective for all purposes within its legal scope and his office of lieutenant had vested, acceptance, and execution of the oath not being necessary to this result (Marbury v. Madison, 1 Cranch 137).

If his appointment as lieutenant had been permanent, displacing for all purposes his office of ensign, there would be reason to claim that in law either the sentence of the court-martial was void or it was incapable of execution. In 4 Op. 8, Attorney General Legare had a case of this character before him, and while he held that the commission was an implied pardon his opinion really rested on a sounder basis. The officer, while a passed midshipman, had been suspended for two years, and the sentence had been approved and executed. Subsequently he was commissioned a lieutenant. The Attorney General said:

"I do not see how the sentence applies to the present rank of Lieutenant Hooe. The judgment of the court was, that Passed Midshipman Hooe should be suspended from his office of midshipman. But he ceased to be a midship-
man by his appointment to a higher office, and his acceptance of it. If he is a lieutenant at all, it is because the grant of the office took effect immediately, non obstante the suspension; and so it unquestionably did, and, taking effect, it was a resignation or merger of the commission. Then, how could a sentence, of which the only effect was to deprive him for a time of his rank and emoluments as a midshipman, have any effect upon an office which he acquired after the sentence was passed; and, by acquiring which, he ceased ipso jure to hold the office to which alone the sentence related? * * *"

"But, even supposing the sentence of the passed midshipman might, by possibility, be made applicable to the lieutenant; how could it be enforced? * * * The sentence passed upon the offender was suspension from a passed midshipman's rank and pay; it is now become, by the act of Government itself, impossible to enforce that judgment, because the officer is no longer entitled to that rank and pay, but by those conferred by a higher commission. * * *

Assuming these views to be sound, they would be applicable to the present case, provided Whittaker had been permanently appointed a lieutenant. In that case the Ensign Whittaker would have ceased to exist to the same extent in law as though he had died, and the court-martial proceedings would have been void for lack of jurisdiction in personam.

Does the same conclusion follow as to a temporary appointment made under the provisions of the act of May 22, 1917, as amended, supra? It would seem not. Such appointments are referred to throughout the act as "temporary," being carefully distinguished from "permanent" appointments. They are to "continue in force" only until a certain period (sec. 8), and it is expressly provided:

"That the permanent * * * commissions * * * of officers shall not be vacated by reason of their temporary advancement or appointment, nor shall said officers be prejudiced in their relative lineal rank as to promotion * * *"
"That upon the termination of temporary appointments in a higher grade or rank as authorized by this Act the officers so advanced * * * shall revert to the grade, rank, or rating from which temporarily advanced, unless such officers * * * in the meantime, in accordance with law, become entitled to promotion to a higher grade or rank in the permanent Navy * * * in which case they shall revert to said higher grade or rank * * *." (Sec. 7, 40 Stat. 86.)

The situation is similar to the detail of a line officer to the staff, with higher rank and pay. This does not disturb his office in the line, and, on the termination of his staff duties, he reverts automatically to his old office.

The opinion of Attorney General Legare does not, therefore, apply; the difference in the effect of a permanent, as distinguished from a temporary, appointment to a higher office being fundamental. Whittaker was still an ensign when the court-martial acted on his case, and when you revised it, the office being merely in abeyance for a definite time. The offenses charged against him, viz, "absence from station and duty without leave" and "conduct to the prejudice of good order and discipline," were general in their nature and not peculiar to his office of ensign nor rendered meaningless by his temporary promotion. You evidently took this view in mitigating the sentence with reference to "the grade in which he is permanently serving," and, in my opinion, your action was within the law.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE NAVY.

PHILIPPINE GOVERNMENT—ISSUANCE OF CERTIFICATES OF INDEBTEDNESS.

Certificates of Indebtedness in the sum of $10,000,000 par value which the Government of the Philippine Islands proposes to issue to maintain the required parity between the silver and the gold peso and to meet an emergent exchange situation, as provided by an act of Congress of March 2, 1903, and also by an act of the Philippine Legislature of May 6, 1918, will, if and when issued

NOTE.—Opinion of April 11, 1919, relating to reinstatement of former Government employees, p. 440.