the contributions are to be determined. Any amendment of the State law advancing the time for payment of benefits, therefore, also must make a corresponding change in the time with respect to which contributions are required. Of course, the States may now amend their statutes; but should they undertake to make the taxes retrospectively applicable to all wages actually paid during the entire year 1936, they would encounter the same constitutional objections which, the Chairman states, deterred them from so doing in the first place.

Respectfully,

HOMER CUMMINGS.

EFFECT OF PARDON ON STATUTE MAKING PERSONS CONVICTED OF FELONIES INELIGIBLE FOR ENLISTMENT IN THE ARMY

Persons convicted of felonies are ineligible for enlistment in the Army, under sec. 1118 R. S., although pardoned by the President or by the governor of a State.

The interpretation of sec. 1118 R. S., assuming that doubt ever existed concerning it, is now controlled by the administrative construction that has prevailed for half a century.

FEBRUARY 23, 1938.

The SECRETARY OF WAR.

My DEAR MR. SECRETARY: Under date of February 4 you requested my opinion as to whether the following statutory provision (U. S. C., title 10, sec. 622; R. S. 1118) applies to one who has been convicted of a felony but is thereafter pardoned by the President or by the governor of a State:

"No insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service."

On June 1, 1897, Attorney General McKenna advised the Secretary of War that it should be presumed that the Congress did not intend this provision to apply to a deserter who had received from the President an unconditional pardon, but this opinion was recalled on June 15, 1897. I men-

1 Opinion Jan. 28, 1938, post, p. 559.
tion it because it is referred to in the memoranda submitted with your letter and appears to have received some publicity at the time it was rendered. The Attorney General relied upon the principle declared by the Supreme Court in *Ex parte Garland*, 4 Wall. 333, 380, that a full pardon "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 offence," and he assumed the Congress must have had this in mind when enacting the statute.

Following the recall of the opinion of June 1, 1897, he advised the Secretary (21 Op. 568) that the question of the deserter's right to reenlist could not properly arise so as to require an opinion in the absence of a pardon actually issued. The records of this Department indicate that an application for a pardon, then pending, was denied.

On August 26, 1897, the Secretary submitted another case, involving an application for reenlistment by a deserter who had received a full pardon from the President. In an opinion of February 9, 1898 (22 Op. 36), Attorney General Griggs, who had succeeded Attorney General McKenna, denied the right of the pardoned deserter to reenlist, but based his holding upon the provision of the act of August 1, 1894 (28 Stat. 216; U. S. C., title 10, sec. 623), that "no soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful." He stated his conclusions as follows:

"* * * 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."

His distinction between the legal and factual aspects of a pardoned offense finds support in *Hart v. United States*, 118
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U. S. 62, 66-67, wherein the Supreme Court concluded that the broad language used in *Ex parte Garland* and other pardon cases did not warrant the inference that the Congress when exercising a constitutional power (providing for disbursement of public moneys) was forbidden to take notice of a fact (that the individual concerned had been a public enemy) involving an offense that had been pardoned. It also accords with the later holding in *Carlesi v. New York*, 233 U. S. 51, 59, that an offense which is in fact a second offense may be dealt with as such and punished accordingly, under proper statutory provision, notwithstanding that the first offense had been pardoned by the President.

In an opinion of June 16, 1908 (26 Op. 617), Attorney General Bonaparte construed a statute (U. S. C., title 34, sec. 163; R. S. 1420) forbidding reenlistment of deserters in the naval service and concluded that the inhibition did not apply to deserters pardoned by the President. He relied, as had Attorney General McKenna, upon the pronouncements in *Ex parte Garland* and other pardon cases. Later, in an opinion of February 17, 1909 (27 Op. 178), he advised the President that a pardon could not convert a dishonorable discharge into an honorable discharge and that the individual concerned could not be held eligible for pension under a statute providing pensions for persons "honorably discharged" from the Army and Navy. In this latter opinion, it will be observed, he applied the same reasoning used by the Supreme Court in *Hart v. United States* and in *Carlesi v. New York*, and by Attorney General Griggs in the opinion of February 9, 1898.

Acting Attorney General Davis in an opinion of February 15, 1918 (31 Op. 225, 233-234), expressly overruled and rejected the conclusion reached in the opinion of June 16, 1908, and held that the statute forbidding enlistment of deserters in the naval service should receive the same construction previously attributed by Attorney General Griggs to the similar statute governing enlistments in the military service. He went into the matter at some length, dealing with several statutory provisions applicable to the Navy. The following excerpt from the opinion is pertinent:
“The answer depends, I think, upon whether section 1441 is properly to be regarded as imposing punishment for an offense or as merely prescribing a qualification for appointees to office in the Navy.

"* * * An unconditional pardon abates whatever punishment flows from the commission of the pardoned offense, but can not in the nature of things eradicate the factum which is made a criterion of fitness."

Attorney General Mitchell applied the rule indicated in the foregoing quotation when advising the Director of the Veterans' Bureau on March 17, 1930 (36 Op. 193, 195), that a presidential pardon removed a disqualification to receive benefits under the World War Veterans' Act (43 Stat. 607, 629; id. 1302, 1312; U. S. C., title 38, sec. 555). He pointed out that the disqualification was imposed in a section entitled “Penalties” and was intended as a punishment for an offense in addition to the fine or imprisonment provided for in the same section.

It is stated in the documents submitted with your letter that the statute regarding which you ask my opinion has been consistently construed by the Judge Advocate General of the Army during half a century as prescribing qualifications for enlisted personnel (not as imposing punishment for offenses), and making ineligible for enlistment any person convicted of a felony regardless of subsequent pardon by the President or by the governor of a State. I have been informed, upon inquiry at your Department, that these opinions of the Judge Advocate General have been followed in the administration of the law without known exception. In the great registration of all male citizens between the ages of eighteen and forty-five for possible military service during the World War under the acts of May 18, 1917, and August 31, 1918 (40 Stat. 76, 955), as I have been further informed by your Department, persons convicted of felonies were placed in the last deferred classification without regard to subsequent pardon, and none in that classification was called for military service.

If it be conceded that the statute relating to enlistments in the military service was open to two possible construc-
tions as an original proposition, it is nevertheless true that one construction (contrary to that set forth in the recalled opinion of June 1, 1897) has prevailed and that the matter is now controlled by the principle so often repeated by the courts and succinctly set forth by Attorney General Taney (2 Op. 558) as follows:

"Whenever an act of Congress has, by actual decision, or by continued usage and practice, received a construction at the proper department, and that construction has been acted on for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it."


For the reasons hereinbefore set forth, it is my opinion that a person who has been convicted of a felony is ineligible for enlistment in the military service, under the statutory provision herein considered, although pardoned by the President or by the governor of a State.

Respectfully,

HOMER CUMMINGS.

TAYLOR GRAZING ACT—AUTHORITY FOR REMOVAL OF FOLIAGE FROM YUCCA PLANTS GROWING ON PUBLIC LANDS

Section 7 of the Taylor Grazing Act, as amended, does not authorize the Secretary of the Interior to grant permission for removal of foliage from yucca plants growing on public lands.
The said section refers to disposals "under applicable public-land laws" and does not alone authorize any disposals.

MARCH 2, 1938.

The Secretary of the Interior.

My Dear Mr. Secretary: Under date of February 21 you requested my opinion as to whether you are authorized by section 7 of the Taylor Grazing Act, as amended (48 Stat. 1269; 49 Stat. 1976; U. S. C., title 43, sec. 315f), to grant permission for the removal of foliage (for use in manufacturing fiber) from yucca plants growing on public lands, including