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.

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

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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. 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).

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, may be withheld entirely or granted upon

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2 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.

3 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. 388, 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. 665, 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

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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."

"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 circumstances, 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