An officer of the Navy who has been dismissed by sentence of court-martial, and subsequently pardoned for the offense for which dismissed, is ineligible for reappointment to the Navy or to membership in the Fleet Naval Reserve.

An enlisted man who in time of peace has incurred the penalties for desertion prescribed by Revised Statutes, sections 1996 and 1998, as amended, and who has received an unconditional pardon for such offense, is eligible for reentry into the naval service.

A person "who has deserted in time of war from the naval or military service of the United States," and who has been pardoned for the offense, is ineligible for reenlistment in the naval service, in view of the provisions of sections 1420 and 1624 of the Revised Statutes, as amended by the act of August 22, 1912 (37 Stat. 356).

DEPARTMENT OF JUSTICE,
February 15, 1918.

SIR: I have the honor to reply to your letter of November 24, 1917, in which you request my opinion on three questions which have arisen in the administration of your Department touching the eligibility for reentry into the naval service, after pardon by the President, of former officers and enlisted men who have incurred statutory disabilities resulting from dismissal under sentence of court-martial or from desertion. The questions are as follows:

"(a) Is an officer of the Navy who has been dismissed by sentence of court-martial and subsequently pardoned for the offense for which dismissed eligible for reappointment to the Navy or to membership in the Fleet Naval Reserve, in view of section 1441 of the Revised Statutes, section 21 of the act of February 16, 1914 (38 Stat. 283, 290), and the provisions of the act of August 29, 1916 (39 Stat. 589)?

"(b) Is an enlisted man who has incurred the penalties prescribed by Revised Statutes, section 1996, and Revised Statutes, section 1998, as amended August 22, 1912 (37 Stat. 356), and who has been pardoned, eligible to hold an office of trust or profit in the Navy, or to serve as an enlisted man in the Navy?

"(c) Is a person who has deserted in time of war from the naval or military service of the United States eligible, after pardon, for reenlistment in the naval service, in view of the provisions of sections 1420 and 1624 of the Revised Statutes?"
Naval Service—Desertion—Pardon.

Statutes, as amended by the act of August 22, 1912 (37 Stat. 356)?

I.

IS AN OFFICER OF THE NAVY WHO HAS BEEN DISMISSED BY SENTENCE OF COURT-MARTIAL, AND SUBSEQUENTLY PARDONED FOR THE OFFENSE FOR WHICH DISMISSED, ELIGIBLE FOR REAPPOINTMENT TO THE NAVY OR TO MEMBERSHIP IN THE FLEET NAVAL RESERVE?

The statutes involved in the consideration of this question are as follows:

"Revised Statutes, section 1441.—No officer of the Navy who has been dismissed by the sentence of a court-martial, or suffered to resign in order to escape such dismissal, shall ever again become an officer of the Navy.

"Act of February 16, 1914, section 21 (38 Stat. 283, 290).—That the President may also commission or warrant as of the highest rank formerly held by him, or the present equivalent of such former rank in case the nomenclature or some of the specific duties of the same may have been changed, any person who having been formerly a commissioned or warrant officer of the United States Navy shall have been honorably discharged from the service.

"Act of August 29, 1916 (39 Stat. 556, 589).—All former officers of the United States naval service, including midshipmen, who have left that service under honorable conditions, and those citizens of the United States who have been, or may be entitled to be, honorably discharged from the naval service after not less than one four-year term of enlistment or after a term of enlistment during minority, and who shall have enrolled in the Naval Reserve Force shall be eligible for membership in the Fleet Naval Reserve."

In substance, your inquiry is whether an unconditional pardon removes the disability imposed by Revised Statutes, section 1441.

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.
By express provision of the Constitution, Article II, section 2, the President has plenary power, except in cases of impeachment, to pardon all Federal offenses; and a pardon, of course, relieves the offender of all disabilities imposed by way of punishment. *Ex parte Garland*, 4 Wall. 333, 380.

On the other hand, under its powers "to raise and support armies," "to provide and maintain a navy," and "to make rules for the government and regulation of the land and naval forces" (Constitution, Art. I, sec. 8), Congress may prescribe the qualifications of officers of the Army and Navy. (13 Op. 516, 524; 14 Op. 164, 172; 18 Op. 18, 23; 26 Op. 502, 503.)

If in the exercise of these powers Congress thinks proper to accept the fact of dismissal or enforced resignation of a naval officer as evidence of unfitness, of lack of qualification, in my opinion it may do so without having its action in that regard overridden by the pardoning power of the President. 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. (See 27 Op. 178, 183; 22 Op. 36; article by Prof. Williston, Harv. L. Rev., vol. 28, p. 647.)

What, then, is the nature of the disability imposed by Revised Statutes, section 1441? Is it a punishment or does the section merely prescribe qualifications for office in the Navy?

Section 1441 is derived from section 11 of an act approved July 16, 1862 (12 Stat. 583), entitled "An act to establish and equalize the grade of line officers of the United States Navy." That act provided generally for a division of line officers of the Navy into certain specified grades, fixed the number of officers to be allowed in each grade, divided the vessels of the Navy into certain classes and provided how they were to be commanded, established examining boards to determine the qualifications of officers for promotion, provided how promotions were to be made to the grade of rear admiral, contained pro-
visions relative to the retirement of officers, the advance-
ment of officers and enlisted men for distinguished con-
duct in battle, established the relative rank between officers
of the Army and Navy, provided for promotions on the
retired list, fixed the pay of officers on the active and re-
tired lists, authorized the detail of an officer as an assistant
to the Bureau of Medicine and Surgery, fixed the relative
rank between officers of the active and retired lists in
the Navy, and contained other miscellaneous provisions
relating to organization, allowances, etc., of the Navy.
Section 11 of the act related principally to the appoint-
ment and qualification of students at the Naval Academy;
it contained the following proviso, the latter half of which
was afterwards incorporated in the Revised Statutes with-
out substantial change as section 1441:

“Midshipmen deficient at any examination shall not be
continued at the academy, or in the service, unless upon
recommendation of the academic board; nor shall any
officer of the Navy who has been dismissed by sentence of
a court-martial, or suffered to resign to escape one, ever
again become an officer of the Navy.”

As pointed out by the Judge Advocate General of the
Navy in his memorandum of November 24, 1917, accom-
panying your letter, the whole content of the original
section and of the act of which it formed a part discloses
its nonpenal character. The act related to the Navy gen-
erally and did not provide for the punishment of individ-
ual offenders. On the other hand, an act of clearly
penal character was approved by the President on the
following day, July 17, 1862 (12 Stat. 600), entitled “An
act for the better government of the Navy of the United
States,” which established certain “articles for the gov-
ernment of the Navy,” made general provisions for the
punishment of all offenses of whatever character by per-
sons belonging to the Navy, whether at sea or on shore,
including provisions for the constitution and procedure
of courts-martial, the punishments which they might im-
pose, and specifying also the minor punishments au-
thorized to be inflicted by commanding officers without
trial. Had Congress considered the provision now embodied in Revised Statutes, section 1441, as a part of the penal laws relating to the Navy and not as a measure affecting the qualifications of officers, it would logically have included it in the statute of July 17, 1862, rather than in the act of the day before relating to the organization of the Navy.

I conclude, therefore, that section 1441 should be viewed as a part of the law prescribing the qualifications of officers in the Navy generally, and not as a part of the law for the punishment of individual offenders.

Of course, where a statute although purporting to prescribe qualifications for office has no real relation to that end but is obviously intended to inflict punishment for a past act or to add to the punishment of an offender who has been pardoned, the disguise may be penetrated. Cummings v. Missouri, 4 Wall. 277, 319; Ex parte Garland, 4 Wall. 333, 380. But there is nothing of that sort here.

A distinction has been drawn, also, between deprivation of a common right, between “exclusion from any of the professions or any of the ordinary avocations of life,” and exclusion from holding public office. In Ex parte Garland, the Supreme Court, while stating that “exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment” (p. 377), was careful to add (p. 378):

“The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution.”

The broad language in some of the cases to the effect that a pardon “obliterates in legal contemplation the offense itself” (16 Wall. 151), was not essential to the decisions actually rendered. (See Ex parte Garland, 4 Wall. 333, 380; Carlisle v. United States, 16 Wall. 147, 153; Osborn v. United States, 91 U. S. 474, 477; Knote v. United States, 95 U. S. 149, 153.) It must, moreover, be regarded as limited by the opinion in the recent case of Carlesi v.
Naval Service—Desertion—Pardon.

New York, 233 U. S. 51. There it was held that the taking into consideration by a State court of the fact that a person convicted had previously committed a similar crime against the United States does not deprive the convicted person of any Federal rights under a pardon by the President of the first offense. While the decision is confined to the effect of the pardon upon the power of the States, the court observes:

"* * * we must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States * * * to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted.

"Indeed, we must not be understood as intimating that it would be beyond the legislative competency to provide that the fact of the commission of an offense after a pardon of a prior offense, should be considered as adding an increased element of aggravation to that which would otherwise result alone from the commission of the prior offense" (p. 59).

For the reasons stated, I am of opinion that section 1441 of the Revised Statutes is properly to be regarded as a rule relating to qualification for office in the Navy, that it does not impose a penalty as such on individual offenders, and that the incidental disabilities which they may suffer by reason of the statute are not removed by a pardon.

Nor do the acts of February 16, 1914 (38 Stat. 283, 290), and of August 29, 1916 (39 Stat. 589), show any purpose on the part of Congress to change the requirement of section 1441; on the contrary they confirm it, since each of these later acts by its terms applies only to officers who have been "honorably discharged from the service," or who have "left that service under honorable conditions."

I therefore answer your first question in the negative.

II.

IS AN ENLISTED MAN WHO HAS INCURRED THE PENALTIES PRESCRIBED BY REVISED STATUTES, SECTION 1996, AND REVISED STATUTES, SECTION 1998, AS AMENDED AUGUST 12, 1912 (37
The statutes referred to in this question are as follows:

Section 1998, R. S.—"Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six."

Section 1996, R. S.—"All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof."

Act of 22 August, 1912 (37 Stat. 356).—"That section nineteen hundred and ninety-eight of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows: 'Sec. 1998. That every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six of the Revised Statutes of the United States: Provided, That the provisions of this section and of section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace: And provided further, That the loss of rights of citizenship heretofore imposed by law upon deserters from the
military or naval service may be mitigated by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests."

The essential words of the foregoing statutes, so far as concerns the disabilities which they impose, are that deserters—

"shall be liable to all the penalties and forfeitures of section 1996;"

which are as follows:

"Such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof."

Here, as contradistinguished from the situation presented under section 1441, supra, the disabilities are not merely incidental to rules prescribing the qualifications for service in the Navy, but in effect and by express avowal are penalties for the punishment of offenses. As such, of course, they would be wiped out by an unconditional pardon.

The fact that by the act of August 22, 1912, Congress expressly recognized the right of the President to remit such penalties “where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interest” can not affect the power of the President, which exists independently of legislative recognition, to remit such penalties by pardon, whether the offense were committed in time of peace or in time of war.

I therefore answer your second question by stating as my opinion that in so far as ineligibility to reenter the naval service depends upon the provisions of Revised Statutes, sections 1996 and 1998, as amended, the disability is effectually removed by an unconditional pardon.

III.

IS A PERSON "WHO HAS DESERTED IN TIME OF WAR FROM THE NAVAL OR MILITARY SERVICE OF THE UNITED STATES" ELIGIBLE, AFTER PARDON, FOR REENLISTMENT IN THE NAVAL SERVICE, IN VIEW OF THE PROVISIONS OF SECTIONS 1420 AND 1624
OF THE REVISED STATUTES, AS AMENDED BY THE ACT OF
AUGUST 22, 1912 (37 STAT. 356) ?

The statutes involved in the consideration of this question are as follows:

Section 1420, R. S., as amended by act of 22 August, 1912 (37 Stat. 356).—"No minor under the age of fourteen years, no insane or intoxicated person, and no person who has deserted in time of war from the naval or military service of the United States, shall be enlisted in the naval service."

Section 1624, R. S., Article 19, as amended by act of 22 August, 1912 (37 Stat. 356).—"Any officer who knowingly enlists into the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fourteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fourteen years, shall be punished as a court-martial may direct."

For present purposes these two provisions come to the same thing, i. e., both are directed to the end of preventing the enlistment in the naval service of any person who has deserted from the naval or military service in time of war.

The question here is whether a pardon removes this disqualification.

These statutes relate to the general organization and efficiency of the Navy. They affect only incidentally particular classes of individuals and are obviously not intended as punishment for offenses. They place deserters in the same category with minors, insane persons, and intoxicated persons as not qualified for the naval service.

In an opinion by Attorney General Bonaparte dated June 16, 1908 (26 Op. 617), it was held that a full and unconditional pardon of a deserter from the Navy so far removes all the disabilities incident to his offense that it is in legal contemplation obliterated, so that he can no longer be regarded as a deserter or denied reenlistment under Revised Statutes, section 1420. For the reasons heretofore stated in answer to your first question, supra, I am unable to concur in this view.
Redemption of War-Savings Certificates.

In an earlier opinion (22 Op. 36) Attorney General Griggs, construing a statutory requirement 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" (28 Stat. 216), held that a candidate for enlistment whose previous service had not been honest and faithful could be rejected notwithstanding the President's pardon of the offense.

The reasoning there was that--

"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" (p. 39).

Neither does a pardon destroy the fact of desertion. This reasoning finds support in the opinion of the Supreme Court in Carlesi v. New York, supra.

These two opinions of my predecessors are apparently irreconcilable in principle. A later opinion by Attorney General Bonaparte (27 Op. 178, 182-183), holding that a pardon could not convert a dismissal under sentence of court-martial into an honorable discharge, which was a prerequisite to the grant of a pension, seems to return to the reasoning of the earlier opinion of Attorney General Griggs.

For the reasons stated I am of opinion that a pardon does not remove the disqualification attached to the fact of desertion by Revised Statutes, sections 1420 and 1624, and therefore answer your third question in the negative.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE NAVY.

REDEMPTION OF WAR-SAVINGS CERTIFICATES AND STAMPS.

The Attorney General declines compliance with the request of the Postmaster General for an opinion as to the validity of articles 9 and 10 of the Treasury Regulations, relating to the redemption of War Savings certificates and stamps of deceased owners, be-