The Pardon Power

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THE PARDON POWER

A discussion of the origin, control and legal effect of the pardon, which in our system of government holds a well defined place in the executive branch, is, of course, particularly of interest to those engaged in the enforcement of the criminal and penal laws against the execution of which it relieves.

Lord Coke says of the pardon that it is "a work of mercy whereby the king, either before or after attainder, conviction or sentence, forgiveth any offense, punishment or execution."¹ Chief Justice Marshall defines it as "An act of grace proceeding from the power entrusted 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."²

The pardoning power may be traced to the earliest writers as the prerogative of the sovereign authority, and while it is said by some theorists of the law that "pardons should be excluded in a perfect legislation where punishments are mild, but certain," yet the power has existed from time immemorial, and is regarded as an act of grace and mercy; and "a pardon, where properly granted, is also an act of justice supported by a wise public policy."

Writing on Pardons, Blackstone says of the King: "To him the people look as the fountain of bounty and grace and these acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince." Hence, forgiveness is the principle by which public policy justifies the delegation of this power and it should be based upon such considerations of mercy and justice as the circumstances of each case permit, and always "repentance should precede pardon."

The Constitution of the United States provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."³ The power is unlimited, except in impeachment, and extends to every known offense, and may be exercised at any time after the commission of the offense, either before or during

¹ Inst. 233.
² United States v. Wilson, 7 Peters 150; George v. Lillard, 106 Ky. 820.
³ Art. 2, Sec. 2.
trial, or after conviction or judgment. It is not subject to legisla-
tive control. Congress can neither limit the effect of his pardon,
nor exclude from its exercise any class of offenders. This pre-
rogative of mercy reposed in the executive can not be fettered
by any legislative restrictions.4

The power has long been exercised by the king of that na-
tion, whose jurisprudence and judicial institutions have fur-
nished the basis of our own principles respecting the operation
and effect of a pardon, and form the foundation for the main
body of our laws.

The limitation in cases of impeachment found in the Fed-
eral Constitution and also in each of the four constitutions of
our own state originated in the Statute 12 and 13 William III, C.
2, which states “that no pardon under the great seal should
be pleaded in bar of an impeachment by the House of Com-
mons.” This act was the result of a controversy which ter-
minated in a dissolution of Parliament and arose out of the im-
peachment of the Earl of Danby in 1678, who presented the
king’s pardon as a plea in bar to the proceedings in the House
of Commons. But with this limitation, it is given as an unques-
tioned prerogative of the crown to pardon all offenses, which
include treasons, felonies and misdemeanors. This doctrine laid
down by the English authorities, as a royal prerogative, limited
only in impeachment by the act of William III, is contained in
Federal Constitution and has received the same construction.

Our State Constitutions have limited the pardoning power
to a further extent. The first Constitution of Kentucky adopted
April 19, 1792, by Article 2, Sec. 10, referring to the powers of
the governor, provided “he shall have power to remit fines and
forfeitures, and grant reprieves and pardons, except in cases
of impeachment; in cases of treason, he shall have power to
grant reprieves until the end of the next session of the General
Assembly in whom the power of pardoning shall be vested.” By
Articles 3, Sec. 2, of our second Constitution, adopted August 7,
1799, we find the exact language of the first Constitution. In
our third Constitution, adopted June 11, 1850, by Article 3, Sec.
10, the same language formed the basis of the pardon power,
with the addition of these significant words, “but he shall have

4Ex Parte Garland, 4 Wallace 333.
no power to remit the fees of the clerk, sheriff or Commonwealth's Attorney in penal or criminal cases."

Our present Constitution, adopted September 28, 1891, by section 77, provides: "He shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons, except in cases of impeachment, and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection. In cases of treason he shall have power to grant reprieves until the end of the next session of the General Assembly, in which the power of pardoning shall be vested; but he shall have no power to remit the fees of the clerk, sheriff or Commonwealth's attorney in penal or criminal cases."

In this, as in most states, executive clemency in cases of treason is limited to a reprieve until the end of the next General Assembly in which the pardon power is vested. By section 66 the sole power of impeachment is vested in the house of representatives and a judgment shall not extend further than removal from office and disqualification to hold office. By section 240 of the Constitution the governor shall not, within five years, pardon any person who shall have participated in a duel. With these limitations, the pardon power of the executive is unlimited and exclusively his prerogative. It may be exercised as to all other offenses in an unlimited manner, before or after conviction. The power is by the organic law vested in the governor, and there can be no legislative or judicial restriction in its exercise. It is a prerogative completely and exclusively in his province.

It is not my purpose to extend this article beyond the questions of the effect of a pardon, the right of revocation and the power of the courts to set aside for fraud and misrepresentation.

The effect of a pardon is well stated by Justice Fields of the United States Supreme Court, viz.: "It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It af-

*Commonwealth v. Duval, 2 Duval (Ky.) 264.*
fords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it.'

The general acceptance of these principles is too well settled for further comment, except to observe that in our own state a pardon after judgment relieves the convict of the punishment, but does not invalidate the judgment of conviction; and such a judgment may be used as a basis for the increased penalty of a second offense under our habitual criminal act.

Where it is undertaken to impeach the credibility of a witness by showing he has been convicted of a felony, it seems that it is not competent to show he has been pardoned.

It is well settled that the court will not take judicial notice of the existence of a pardon, and to be available it must be brought to the attention of the court to stay proceedings or execution of the judgment, but no formal plea is necessary.

An unconditional pardon cannot be revoked by the executive granting it. The authorities, without any conflict, deny to the executive any such power. As said in the case of Knapp v. Thomas, infra, "It would not only be contrary to principle that the governor should be vested with such authority, but the power itself would be of the most dangerous and pernicious character. Great evils would inevitably flow, in ways that may be readily suggested, from the exercise of any such power; and hence, wisely, no such power exists." The written instrument having been executed and delivered cannot be revoked by the governor after the fraud is discovered. The law is settled that when a pardon is complete, there is no power to revoke it, any more than there is power to revoke any other completed act. And it is doubtful, except statute authorize it, if summary arrest may follow the violation of a conditional pardon; but the accused

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6 Knotz v. United States, 95 U. S. 442.
9 Powers v. Commonwealth, 110 Ky. 400, 20 R. C. L. 580, Sec. 70; United States v. Wilson, 7 Peters 158.
10 Knapp v. Thomas, 39 Ohio St. 379 (1883); Rathburn v. Baumel, 191 N. W. 297, 30 A. R. L. 219 (Iowa, 1922); State v. Nichols, 26 Arkansas 74; Ex Parte Reno, 66, Mo. 266; Ex Parte Redwine, 91 Tex. C. R. 83; 236 S. W. 96 (1922); Ex Parte Ray, 193 Pac. 635 (1920).
will be entitled to a trial in a court of competent jurisdiction to
determine the breach of the condition.\textsuperscript{11}

That a pardon may be set aside by the courts for fraud and
misrepresentation is sustained by the great weight of authority.
At the common law any suppression of truth or suggestion of
falsehood in procuring a pardon will vitiate it, for the king
was misinformed; or when it may reasonably be presumed the
king is deceived, the pardon is void.\textsuperscript{12} The same thing is said,
in general terms, with respect to charters, patents, grants and
judgments, that anything obtained by fraud is void, and that
"covin doth suffocate the right."\textsuperscript{13}

Chitty in his work on Criminal Law,\textsuperscript{14} says: "It is also a
general rule that whenever it may reasonably be inferred that
the king, when he granted the pardon, was not fully apprised of
the heinousness of the offense or how far the defendant stood
committed on the record, the pardon is altogether void."

Wharton, in his work on Criminal Procedure,\textsuperscript{15} says: "A
pardon fraudulently procured will, it has been held, be treated
by the courts as void. And this fraud may be by suppression
of the truth as well as by direct affirmation of falsehood. Yet
this test should be cautiously applied by the courts, for there are
few applications for pardon in which some suppression or falsi-
fication may not be detected. It is natural that it should be so,
when we view the condition of persons languishing in prison, or
under sentence of death; and if departure from rigid accuracy
in appealing for pardon be a reason for canceling a pardon,
there would be scarcely a single pardon that would stand. The
proper course is to permit fraud to be set up to vacate a pardon
only when it reaches the extent in which it would be admissible
to vacate a judgment."

A review of the early decisions in the United States strongly
confirms this power in the courts. In the case of \textit{Dominick v. Bowdoin},\textsuperscript{16} decided in 1871, in a habeas corpus proceeding, the
defendant, as sheriff, held the petitioner under a bench warrant,
and the prisoner answered by producing a pardon from the gov-

\textsuperscript{11} \textit{Alvarey} v. \textit{State}, 50 Florida 287.
\textsuperscript{12} 2 Hawkins P. C. 382; 4 Blackstone 400.
\textsuperscript{13} \textit{Knapp v. Thomas}, 39 Ohio St. 388.
\textsuperscript{14} Vol. I, page 771.
\textsuperscript{15} Vol. II, page 1469.
\textsuperscript{16} 44 Ga. 357.
ernor, and the issue of fraud was raised. The court said:
"When, by suggestion of fraud in its procurement, the ques-
tion of its validity is put in issue, or where the identity of the
person pardoned, or the fact of its acceptance or delivery, are
brought before the court, in such cases, if, upon habeas corpus,
it is the duty of the court to hear the testimony and pass upon
the merits of the particular case, or, if pleaded upon the trial,
then to hear evidence, and let the jury pass upon the case under
the proof. For, while we hold the constitutional power exists in
the executive to grant pardons, we also hold that fraud in their
procurement will render them void. . . . We need not mul-
tiply cases, as enough has been quoted to show the fact that
fraud will render the pardon void. We find no settled rule of
practice or law laid down, nor do we intend to lay down more
than the recognition of the general rule stated. As to what
would or would not amount to fraud, or sufficient fraud to render
it void, we deduce from the general rule of decisions, that mis-
representation of the facts material in the case upon which the
governor acted, and which ought to have prevented the clemency
of the governor, if known, or any concealment of the material
facts of the case, or suggestion of false views to the Governor
to procure the pardon, ought to be adjudged in the particular
case by the court or jury, as the issue may be joined."

The case of State v. McIntire,17 decided in 1853, arose on a
conditional pardon relieving the imprisonment on express con-
dition that all fines and costs incident to the judgment be first
paid by the defendant. As a matter of fact, no fine was imposed
by the judgment, and the pardon upon its face showed the gov-
ernor was misinformed because there was a condition precedent
which was impossible of performance, and the condition itself
was contradicted by the record, as the governor evidently sup-
posed the defendant had been both fined and imprisoned, and in-
tended to remit the imprisonment provided the fine be paid, but
it will be observed that such use was made of the pardon as to
escape both. The court said: "If the condition precedent be im-
possible, no interest shall grow thereupon" as a common rule of
law, and further: "That the law, which declares a pardon ob-
tained under such circumstances to be void, is one of the many

17 46 N. C. 1.
instances showing the truth of the maxim 'the common law is the perfection of reason.'"

In *State v. Leake*,\textsuperscript{18} decided in 1854, the governor remitted the sum of $1,500.00 to the sureties on a recognizance providing for the appearance of one charged with an offense, and in an action for a recovery on the recognizance, the sureties pleaded the governor's remission thereof, and to this the state replied that the remission was obtained by fraud in that the defendant had indemnified them for the whole sum with an agreement that he would flee the country and never appear for trial, which facts were concealed from the governor. Under these circumstances the court held the pardon to be void, and the court said: "It is well settled in the British courts that fraud vitiates a pardon or remission, and so it is in the American. But how this fraud must appear is, perhaps, not so clearly determined. It is insisted that it cannot be pleaded, and established by extrinsic evidence; that is, evidence not furnished by the record of the suit in which the pardon or remission is granted. This point we shall not examine in deciding the case before us. The authorities and text books all concur in this: That whenever it may reasonably be inferred from the contents of the pardon or remission itself, considered in connection with the record of the cause in which it was granted, that the executive was deceived or imposed upon by false statements, or an omission to state relevant facts, on the part of those procuring the pardon or remission, the one or the other, as the case may be, is void. Coke, in his 3rd Institutes,\textsuperscript{19} says: "And that party which informeth not the king truly, is not worthy of his grace and forgiveness, and therefore either suppressio veri or expressio falsi doth avoid the pardon."

In the case of the *Commonwealth v. Halloway*,\textsuperscript{20} decided in 1863, the governor granted a pardon to a notorious forger, named Crosse, which was based upon communications to the governor and the United States marshall of Pennsylvania from the assistant secretary of war requesting the release of the forger for the purpose of a secret mission in the union cause attended with great peril and in which it was stated that the prisoner

\textsuperscript{18} 5 Indiana 359.
\textsuperscript{19} Page 238.
\textsuperscript{20} 44 Penn. 210.
was to be sent through the lines with his brother and a company of telegraph operators where his *peculiar talents* would enable him to render valuable service to the federal government in the pending crisis, and further requested no publicity as it would defeat the purpose of the mission. The pardon was delivered to the warden, who released the prisoner to the United States marshal, and, unfortunately for the prisoner, he was accompanied to Washington by the marshal, who learned from Secretary Stanton and the assistant secretary that the communications were forgeries, whereupon the marshal, on the order of the governor, returned the prisoner to the warden of the penitentiary. In this case, on habeas corpus, the court held the pardon was void for fraud under the common law. The court recognized that the delivery of the pardon to the warden was a delivery to the prisoner, and expressly decided this case on the question of fraud presented. The court said: "This pardon is void because of the false and forged representations and papers that were used in procuring it from the governor. . . . By the common law all charters and patents may be avoided if based on any false suggestion, whether the suggestions be contained in them or not. . . . Any person may reclaim the rights out of which he has been cheated, until they come into the hands of a third person, who is a bona fide purchaser for value, without notice of the fraud. And so may the Commonwealth. . . . He has no better title to this pardon than a consignee of goods would have after the goods had been stopped in transitu, on the discovery that the sale and delivery had been procured by letters forged by the friends of the consignee."

The only case in which the power of the courts to declare a pardon void for fraud has been denied is *Knapp v. Thomas*, decided in 1883. In this case Governor Charles Foster of Ohio revoked a pardon for fraud and directed the prisoner to be held. On a writ of habeas corpus a divided court based its decision upon the point that the pardon could not be called in question in such a proceeding because it was a collateral attack, and, after arriving at this conclusion, delivered an exhaustive opinion against the power of the courts to set aside pardons for fraud as an interference by the judiciary with the prerogative of a co-ordinate branch of the government. There is no authority for such a position, and it has never been followed,
and, of this opinion, Bishop in his work on Criminal Law,\textsuperscript{21} says: "A pardon obtained by a fraud on the pardoning power is void. In an Ohio habeas corpus case, this proposition was by the majority of a divided court denied, as applied to a pardon fully delivered and accepted, and in a proceeding not for its revocation. A pardon being an act specially in pais, the procuring of it being altogether ex parte, and there being no provision of law for its reversal or for any hearing of persons whose interests may be prejudiced by it, this Ohio doctrine is most unfortunate and is contrary to the ordinary course of our jurisprudence in analogous things."

When a pardon is presented as a bar to the execution of the judgment of a court, it has the power to inquire into the validity of the pardon in the hands of the person who seeks to benefit by it, and it is upon this theory that it has been repeatedly held that the courts have the right to determine if those who seek to avoid the effect of their judgments are lawfully invested with that right, and this is a matter for judicial determination and peculiarly in the province of the court when the title to the pardon is questioned by the Commonwealth.

In the latest case on this subject, Rathburn v. Baumel,\textsuperscript{22} the majority opinion says: "Are the courts impotent to protect their judgments from annulment by fraud perpetrated upon the pardoning power? This is no interference by the judicial department with the constitutional prerogatives of a co-ordinate branch of the government. The court is not asked to investigate or pass upon the motives of the governor in granting the pardon. No such question is in the case. It is the acts of the appellee, who is claiming a benefit under the written instrument, that are the subject of the inquiry. Here we have a situation where a man duly convicted of crime seeks the annulment of the judgment against him. He has possession of a written instrument which, if valid, annuls the judgment. It is contended that the instrument was procured by his own fraud, and is therefore invalid. A court of equity has the power to investigate his title to such written instrument and to inquire whether or not the same is valid. This is not an interference with the prerogatives of the executive. It is merely an inquiry into the rights of the

\textsuperscript{21} 8th Ed., Sec. 905.
\textsuperscript{22} 191 N. W. 297, 30 A. L. R. 216 (1922).
party holding such instrument to claim anything thereunder. The governor may issue pardons without let or hindrance on the part of the judiciary. No inquiry is made in regard to his acts. But the party seeking to benefit by an official act of the governor can certainly have his own acts investigated for fraud.

A pardon must be evidenced by a written instrument. It is not sufficient to vacate and supersede the judgment of a court, for the executive to orally say to the convict, 'Go, and sin no more.' A pardon is a deed to the validity of which delivery and acceptance are essential. Can this written instrument, this deed, be subject to impeachment for fraud in its procurement? By it, the solemn judgment of a court was, in effect, vacated and set aside. The party obtained such written instrument by his own fraudulent act, both as to its execution and delivery. The people of the state have a direct and vital concern in this matter. It is a basic and fundamental principle of our law that fraud in its procurement vitiates any written instrument in the hands of him who is guilty of the fraud. There is no good reason why the same rules do not apply to a written instrument obtained by fraud upon the governor as to one obtained by fraud upon a private citizen. If the instrument was obtained by fraud upon the governor it is invalid and void, and no rights can be enforced under it.2

In a recent case in one of our circuit courts, a defendant was convicted of a violation of the prohibition law and by the judgment a fine and imprisonment for sixty days was imposed; he executed bond for an appeal, but failed to perfect the appeal, when a warrant was issued. When arrested he presented and offered to file a pardon remitting the imprisonment, which recited that executive clemency had been extended on account of pulmonary tuberculosis. The governor in this case, when the alleged fraud was discovered, entered an order of revocation on the executive journal which stated clearly his position, but it was never contended that the revocation itself was effective to revoke the pardon. In response to the motion to file the pardon, the Commonwealth filed a pleading in the criminal proceeding

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2 This doctrine is also recognized in the following cases: Territory v. Richardson, 9 Okla. 579 (1900); Ex Parte Rice, 72 Texas C. R. 597 (1913); Ex Parte Ray (Okla.) 193 Pacific 638 (1920); Rossen v. State, 23 Texas C. A. 237 (1887); Ex Parte Redwine (Texas) 236 S. W. 96 (1921); Ex Parte Reno, 66 Mo. 266; 27 American Reports 337.
attacking the pardon for fraud in its procurement, chiefly on the
ground that the defendant did not have pulmonary or any other
form of tuberculosis. On a writ of prohibition directed against
the circuit judge the Court of Appeals held the court had juris-
diction to hear and determine the matter. Upon the hearing
by the court a judgment was entered refusing to file the pardon
because of fraud in its procurement, and from this judgment an
appeal was prosecuted, but before the case was reached, the de-
fendant had served the sixty days, and the case was dismissed
as a moot question.

The principle that the decisions settle is that a man can
not profit by his own wrong and the courts will protect their
judgments against fraud. This is not an interference with the
pardoning power of a co-ordinate branch of the government.
They do not investigate the executive acts. They cannot. It is
pertinent, perhaps, to state that in most of the cases the execu-
tive has initiated the inquiry, and it is certainly true, and none
will deny, that the executive may, when all the facts are revealed,
before or after a judgment of avoidance, renew his pardon. It
seems axiomatic that if the judgment does not seek to prevent a
renewal of the pardon, or the further exercise of the executive
prerogative in the particular case, certainly there is no inter-
fERENCE between the co-ordinate branches of the government. It
limits the executive in no way. The courts do not review the
executive acts; they review the conduct of the man who seeks to
nullify the execution of the judgment of the court by his own
fraud and misrepresentation. A contributor to the April, 1923,
Michigan Law Review, opposes the majority opinion in the
Rathburn v. Baumel case and the great weight of authority, and
expresses a preference for the conclusions reached by a like-
wise divided opinion in the Knapp v. Thomas case, on the ground
that it is an interference with the executive, and concludes with
the following citation from the latter case, that “it is far better
that he should escape punishment than that a plain principle
of law should be set at naught,” and further the criticism is
made that “it limits the executive’s power to pardon in such
cases as where in the court’s view the petitioner and his advo-

Hudspeth v. Tracy, 203 Ky. 277.
Hudspeth v. Commonwealth, 204 Ky. 606.
cates have related to the governor 'the truth, the whole truth and nothing but the truth.'"

From the opinions and reasoning of the courts we have seen on the contrary that the court's view does not limit the executive power and he may do what he chooses after the truth is revealed and disregard the court's view. There is no conflict. They do not restrict or restrain him.

Will any contend that the courts should stand mute in the face of fraud? In the Pennsylvania case of forgery, should Crosse have been released in the face of such deception? There should be a remedy for the wrong, and on this subject the courts have overwhelmingly determined that the remedy exists. There is a difference of opinion in the courts as to procedure, and it may be said that in this state a pardon may be attacked when presented in court and relied upon to enforce rights under it, which is inferred from the decision in Hudspeth v. Tracy, where the jurisdiction of the court was sustained. The questions of law discussed have been decided on writs of habeas corpus in some states, in others in direct proceedings to avoid the pardon, and in others denied where it was viewed as a collateral attack; but with the exception of the Ohio case (and it was decided mainly on the latter ground), the authorities are practically in accord with the view of the law that fraud in its procurement will vitiate the pardon.

It is equally well settled that the courts cannot investigate the validity of a pardon as affected by the particular motives which actuated the granting power. With the reasons which actuate the executive in granting pardons, the courts have no concern. The Constitution of the state gives to the executive this power and invests in him a wide discretion which may not be substituted by the opinions of the judiciary; his reasons or purposes are not subject to review, and it has never been the policy of the courts to inquire into the reasons or purposes which move the pardoning power. This distinction is clearly defined in the decisions of the courts, and cannot be misunderstood. In the Harvard Law Review26 of June, 1924, is an article dealing with the power to regulate contempts, and on the question of separation of powers, the writer says: "As a principle of statesmanship the practical demands of government preclude its

26 Vol. 37, No. 8.
doctrinaire application. The latitude with which the doctrine must be observed in a work-a-day world was steadily insisted upon by those shrewd men of the world who framed the Constitution and by the statesman who became the great chief justice. A distinguished student of comparative constitutional law, one of Montesquieu’s countrymen, has summed up the significance of his doctrine: ‘The separation of powers is merely a formula, and formulas are not working principles of government. Montesquieu had chiefly aimed to indicate by his formula the aspirations of his times and country. He could not and did not wish to propose a definite and permanent solution of all the questions brought up by the government of men and their long-felt longings for fairness and justice.’ . . . Nor has it been treated by the Supreme Court as a technical legal doctrine. From the beginning that court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction. Duties have been cast on courts as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated factors, instead of insisting on self-defining legislation; even though the ‘distinction between amnesty and pardon is of no practical importance’ the specific power of the President to grant pardons does not invalidate congressional acts of amnesty, nor does the President’s power to pardon offenses preclude Congress from giving the Secretary of the Treasury the authority to remit fines and forfeitures. Even more significant than the decisions themselves are the considerations which induced them, and the insistence on an abstract doctrine of separation of powers which they rejected. . . . The dominant note is respect for the action of that branch of the government upon which is cast the primary responsibility for adjusting public affairs.”

A very interesting exercise of the pardon power recently developed in the United States District Court in Chicago when the President pardoned one Peter Grossman, who had been committed to jail for contempt of court under the federal prohibition act. On a writ of habeas corpus, it was held that the President could not pardon a contempt of the federal court, and the same may be true in a contempt of either house of Congress.
However, this case is now pending in the Supreme Court of the United States, and the decision is awaited with interest.

The foregoing is the result of my examination of the decisions on these points in the trial of the case herein mentioned, and after a limited review of the authorities, this discussion of the subject is respectfully submitted for your information and such consideration as it merits.

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