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PRISONERS IN THE PENITENTIARY BY SENTENCE OF COURTS-MARTIAL.

LETTER

FROM

THE ATTORNEY GENERAL,

ON

The legality of the confinement of prisoners in the penitentiary of the District of Columbia, by sentence of courts-martial, &c.

JUNE 12, 1862.—Referred to the Committee on the Judiciary, and ordered to be printed.

ATTORNEY GENERAL'S OFFICE, *May* 8, 1862.

SIR: That courts-martial, in cases within their lawful jurisdiction, may condemn persons to imprisonment at hard labor in the penitentiary of the District of Columbia, in punishment of crime, is too well settled to be now open to question; and the power of such courts to impose that punishment is derived not from the decisions of the Supreme Court, referred to in your letter of the 2d instant, but from the act of Congress which declares the purposes to which the penitentiary of the District shall be devoted, and the acts which confer the jurisdiction and define the powers of courts-martial.

The first section of the act of March 3, 1829, (4 St. 365,) enacts that the penitentiary of the District of Columbia "shall be exclusively appropriated to the confining such persons as may be convicted of offences which now are or may hereafter be punishable with imprisonment and labor under the laws of the United States or of the District of Columbia." The right of Congress to declare it the receptacle of persons convicted under the laws of the United States will hardly be questioned, in view of the fact that this penitentiary was built and is supported with the money of the United States, and is as much under the control and direction of the national government as is the Capitol or the treasury building.

Nothing in the language of the act of 1829 justifies the inference that Congress meant to prohibit the confinement of offenders con-

victed and sentenced by courts-martial in the penitentiary of the District. True, it is restricted to the confinement of those who may be convicted of offences punishable with imprisonment at hard labor under the laws named. But courts-martial have power in many cases under the laws of the United States to inflict this punishment; in illustration of which I refer you to Dynes *vs.* Hoover, (20 How. 65;) Crowell's case, (Man. Op. of Att'y Gen. Black, September 5, 1857;) and an opinion of my own in Toombs's case, furnished to the Secretary of the Navy on the 8th of November last. As I had occasion in that opinion to examine the question of the power of a court-martial to sentence a marine in the service of the United States to imprisonment at hard labor for a term of years in the penitentiary of the District of Columbia, I take the liberty to enclose you a copy of it herewith. Although in these cases the main question was of the power of courts-martial to punish by imprisonment at hard labor in the penitentiary at all, yet the incidental question of the legality of such punishment by imprisonment in *the penitentiary of the District of Columbia* was also involved; for the legality of that form of punishment under the laws of the United States being established, the right to use the penitentiary of the District, under the terms of the act of 1829, designating the class of persons who might be confined therein, necessarily followed; and, in point of fact, in all the cases I have cited, the persons under sentence were confined in that penitentiary.

It is not necessary in all cases that the sentence of the court-martial imposing the punishment in question should be approved by the President. The articles of war prescribe certain cases, even where the punishment of death is not pronounced, where the sentence must receive the President's approval before it can be executed; but except in these cases I am aware of no rule which requires the special intervention of the President to authorize the admission into the penitentiary of the District of a prisoner lawfully convicted and sentenced thereto by a court-martial, with the approval of the proper authority under the articles of war.

I am, sir, very respectfully, your obedient servant,

EDWARD BATES,
Attorney General.

Hon. C. B. SMITH,
Secretary of the Interior.

ATTORNEY GENERAL'S OFFICE, *November* 8, 1861.

SIR: I have the honor to acknowledge the receipt of your letter of the 4th instant relative to the case of Corporal William Toombs, of the marine corps. It appears that at a marine general court-martial, convened by order of the Navy Department, he was tried under article 12 of section 1 of the act of April 23, 1800, (2 St. 45,) for the better government of the navy, upon the charge of endeavoring to corrupt two privates belonging to a marine guard on board a steamer convey-

ing State prisoners to Fort Lafayette, by offering them a large pecuniary reward if they would assist him in effecting the escape of certain of the prisoners; and that the court found him guilty of the charge and sentenced him to be imprisoned for a term of years at hard labor in the penitentiary of the District of Columbia. Under these circumstances you have done me the honor to submit for my consideration certain papers on the subject, and to request my opinion as to the legality of the sentence.

As you have not deemed it necessary to furnish me with a copy of the record of the proceedings of the court-martial in this case, and as I understand your question to refer to the legality of the sentence in respect to the single objection urged against it in the accompanying papers, I shall proceed to consider that point only, abstaining from any expression of opinion as to the legality of the sentence in any other respect.

The objection to the sentence of the court-martial in this case is, that the punishment of imprisonment in the penitentiary for a term of years, at hard labor, is contrary to the usages of the service, and is therefore illegal.

The 12th article of the rules for the government of the navy, under which this sentence was pronounced, declares that "spies, and all persons who shall come or be found in the capacity of spies, or who shall bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the navy to betray his trust, shall suffer death, or such other punishment as a court-martial shall adjudge."

In this case the prisoner was convicted of one of the gravest offences enumerated in the calendar of naval crimes, and he has much more reason to congratulate himself that the court did not award to him the extreme penalty of the law than to complain that his punishment is contrary to the usage of the service. Where death is one of the penalties affixed to the commission of a crime, most persons, after conviction, would be glad to accept any lower degree of punishment, but it seems that in this case the prisoner is unwilling to make even the expiation which is commonly required for the lowest grade of felonies. But he is entitled to the benefit of an answer to the objection he has interposed, and I proceed to give it.

The rule which he has invoked for his protection is unquestionably correct, that the words "such other punishment as a court-martial shall adjudge" are to be limited by the custom of the service, and authorize only such punishments as are usual.—(Hickman, Nav. Court-mar., 150; Macomb, C. M., sec. 138; Kennedy, 176; De Hart, 69.) Cruel and unusual punishments are not only forbidden by the law martial but by the Constitution of the United States, and if the punishment in the present case fall within that category the prisoner ought not to invoke the rule in vain.

Is, then, the punishment by imprisonment for a term of years at hard labor in the penitentiary, for the offence of endeavoring to corrupt marine privates, in charge of State prisoners, to betray their trust, against the usage of the service?

It is said by Delafous, (Treat. Nav. Courts-martial, 286,) the words "such other punishment as the nature of the offence shall deserve and the court-martial shall impose, (which in the act of the 22d Geo. II are the equivalent of the words used in the 12th and other articles of our act of 23d April, 1800,) are expressions of great and almost unbounded latitude." It is certainly hard to mark the line where usual and proper punishments end, and unusual and cruel ones begin, and the sentence pronounced under an authority so broad and general ought to be so far out of proportion to the offence committed as to shock the sense of justice, before it is arrested as contrary to usage. If it bear a just relation to the crime, and be not utterly outside of the circle of naval punishments, any interference with it on that ground could hardly be justified. No man can say that imprisonment at hard labor in the penitentiary is punishment too severe for a crime to which the law affixes the penalty of death, as it does in this case; and we are therefore limited to the inquiry whether there are any instances in the history of naval courts-martial of the infliction of this form of punishment. If such precedents can be found the objection urged to the sentence pronounced against Toombs is utterly groundless.

In our own navy it is a punishment that has been repeatedly imposed. In 1854 Dynes and others were tried by a naval court-martial, and sentenced to imprisonment at hard labor in the penitentiary of the District of Columbia. These sentences were approved by the Secretary of the Navy, and carried into execution in the usual way. Dynes brought an action against the marshal of the District for assault and battery and false imprisonment, which reached the Supreme Court of the United States.—(Dynes *vs.* Hoover, 20 Howard, 65.) One of the questions raised was as to the legality of the punishment inflicted on the plaintiff. Judge Wayne, delivering the opinion of the court, said: "If a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, *or shall inflict a punishment forbidden by the law*, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action of a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress."—(Pages 82–3.) And he further said: "In this case all of us think that the court which tried Dynes had jurisdiction over the subject of the charge against him; *that the sentence of the court was not forbidden by law;* and that, having been approved by the Secretary of the Navy, *as a fair deduction from the 17th article of the act of 23d April*, 1800," (which in this respect is similar to the 12th article,) "and that Dynes having been brought to Washington as a prisoner, by direction of the Secretary, that the President of the United States, as constitutional commander-in-chief of the army and navy, &c., violated no law in directing the marshal to receive the prisoner Dynes, &c.. for the purpose of transferring him to the penitentiary of the District of Columbia."

If the punishment by imprisonment at hard labor in the penitentiary were regarded as contrary to the usage of the naval service, it would, for that reason, as we have already seen, be forbidden by law.

But the court, in Dynes *vs.* Hoover, having decided that it is not forbidden by law, it follows that it is not a punishment contrary to the usage of the service. If this decision stood alone, it would be sufficient to vindicate the sentence against Toombs from the objection made to it. But it is further sustained by the case of Charles Crowell, a seaman who was convicted for striking, disobeying, and treating with contempt his superior officers, and sentenced to three years confinement at hard labor in the penitentiary of this District. This sentence being referred to Attorney General Black for his opinion, as to its legality, received his approval, (Man. Op., No. 30, September 5, 1857.) Our naval records furnish other instances of the same sentence pronounced by naval courts-martial against convicted offenders, and although they were not always carried into effect, I am not aware that the failure to do so resulted from any doubt of their legality.

But the chief authority on which the prisoner relies to sustain his objection is a case mentioned by Hickman, 266, where, in 1797, the members of an English naval court-martial requested the opinion of the attorney general, solicitor general, and the counsel for the admiralty, whether, in cases where, by the act 22 Geo. II, c. 33, they have the discretionary power of punishing with death or such other punishment as they shall deem the prisoner to deserve, the court had power to sentence the prisoner to transportation, solitary imprisonment, or hard labor, or to inflict other than the usual corporal punishment or imprisonment for any term not exceeding two years, and they received for answer that the 3d section of the act 22 Geo. II limited the sentence of imprisonment to two years, and as to their discretionary power of inflicting such other punishment except death as the court should deem the prisoner to deserve, the opinion was that the discretion must be limited by the usage of the service with respect to sentences of that kind, and that the court would not pronounce the sentence of transportation, hard labor, or any sort of imprisonment except such as had been usual.

It may be proper to observe here that the limitation of the length of imprisonment contained in the act of 22 Geo. II, and subsequent English statutes, have not been inserted in our laws; the only limitation of that kind being on the punishment of imprisonment inflicted by summary courts-martial under the act of 2d March, 1855, (10 Stat., 627.)

But whether these British law officers meant to pronounce the sentence of imprisonment at hard labor unusual and illegal during the last century or not, it is certain that the records of both naval and military courts-martial in England, since that time, show it to be one of the most frequent and usual methods of punishing offences of a grade similar to that of which the prisoner in this case is convicted.

In the abstract of the proceedings of English naval courts-martial contained in Hickman (p. 210) I find six cases where the sentence pronounced was imprisonment at hard labor, and several where the sentence was solitary confinement. The offences for which these punishments were inflicted were desertion, mutiny, and other offences

placed by the act of 22 Geo. II, c. 33, in the same grade as that in which the offence of Toombs is ranked by the act of Congress of 1800.

Imprisonment, with or without hard labor, is one of the punishments imposed by the British mutiny act; and General Macomb, an American authority of weight, declares the usual inferior punishment of a soldier to be imprisonment, solitary or otherwise, hard labor, and stoppage of pay.—(Courts-mar., sec. 142.)

It thus appears that punishment by imprisonment at hard labor for offences like that of which the prisoner is convicted is sanctioned by usage and authority in England and America, and has become one of the most frequent methods of vindicating the rules of the naval and military service.

I am therefore of opinion that the sentence pronounced by the court-martial against Corporal William Toombs is free from the objection urged against it in the papers you have submitted to me, and that nothing therein contained affords any reason why that sentence should not be confirmed.

I am, sir, very respectfully, your obedient servant,

EDWARD BATES,
Attorney General.

Hon. GIDEON WELLES,
Secretary of the Navy.

ATTORNEY GENERAL'S OFFICE, *May* 9, 1862.

SIR: A letter from the Assistant Secretary of War, Mr. Watson, to the Secretary of the Interior, (referred, with other documents, to this office,) contains an extract from a report from you to the Secretary of War on the subject of the confinement of prisoners in the penitentiary of the District of Columbia by the sentence of courts-martial. After referring to the authority on which such prisoners are committed, you say: "I understand, but have not seen it, that there is a recent opinion in the matter, by the Attorney General, against the power of a court-martial."

As you have evidently been misinformed in regard to the Attorney General's action, and as the subject is one of some importance, and it is therefore desirable that you should be advised of the opinion of the chief law officer of the government, I have taken the liberty to enclose to you herewith:

1st. An opinion of the Attorney General, in response to a letter of the Secretary of the Navy, as to the power of a navy court-martial to sentence a marine to imprisonment at hard labor in the penitentiary for a term of years; and,

2d. An opinion of the Attorney General, in response to a letter of the Secretary of the Interior, on the question of the right to use the penitentiary of this District for the incarceration of prisoners sentenced by courts-martial.

You will see that the Attorney General not only sustains the legality

of that form of punishment, but also the right to use the penitentiary of the District for that purpose.

I am, sir, very respectfully, your obedient servant,

TITIAN J. COFFEY,
Assistant Attorney General.

Major JOHN F. LEE,
Judge Advocate.