OPINION

OF

ATTORNEY GENERAL STANBERY,

UNDER THE

RECONSTRUCTION LAWS,

DEFINING

THE POWERS OF THE MILITARY COMMANDERS, AND FURNISHING A GENERAL SUMMARY OF THE DUTIES OF THE BOARD IN THE MATTER OF REGISTRATION, AND IN THE MATTER OF SUPERINTENDING THE ELECTIONS, AND AS TO THE QUALIFICATIONS AND DISQUALIFICATIONS OF PERSONS APPLYING FOR REGISTRATION.

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ATTORNEY GENERAL'S OFFICE,
June 12, 1867.

The PRESIDENT.

SIR: On the 24th ultimo, I had the honor to transmit for your consideration my opinion upon some of the questions arising under the reconstruction acts therein referred to. I now proceed to give my opinion on the remaining questions, upon which the military commanders require instructions.

First, as to the powers and duties of these commanders.

The original act recites in its preamble that "no legal State governments or adequate protection for life or property exist" in those ten States, and that "it is necessary that peace and good order should be enforced" in those States "until loyal and republican State governments can be legally established."

The first and second sections divide these States into five military districts, subject to the military authority of the United States as thereinafter prescribed, and make it the duty of the President to assign from the officers of the army, a general officer to the command of each district, and to furnish him with a military force to perform his duties and enforce his authority within his district.

The third section declares "That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, and to this end, he may allow local civil tribunals to take jurisdiction of and try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose; and all interference under color of State authority with the exercise of military authority under this act shall be null and void."

The fourth section provides "That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted; and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions: *Provided*, That no sentence of death under the provisions of this act shall be carried into effect without the approval of the President."

The fifth section declares the qualification of voters in all elections, as well to frame the new Constitution for each State as in the elections to be held under the provisional government until the new State Constitution is ratified by Congress, and also fixes the qualifications of the delegates to frame the new Constitution.

The sixth section provides "That until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control or supersede the same; and in all elections to any office under such provisional governments, all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the fifth section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment."

The duties devolved upon the commanding general by the supplementary act relate altogether to the registration of voters and the elections to be held under the provisions of that act. And as to these duties they are plainly enough expressed in the act, and it is not understood that any question not heretofore considered in the opinion referred to, has arisen or is likely to arise in respect to them. My attention, therefore, is directed to the powers and duties of the military commanders under the original act.

We see clearly enough that this act contemplates two distinct governments in each of these ten States, the one military, the other civil. The civil government is recognized as existing at the date of the act. The military government is created by the act. Both are provisional, and both are to continue until the new State constitution is framed and the State is admitted to representation in Congress. When that event takes place, both these provisional governments are to cease. In contemplation of this act, this military authority and this civil authority are to be carried on together. The people in these States are made subject to both, and must obey both, in their respective jurisdictions.

There is, then, an imperative necessity to define as clearly as possible the line which separates the two jurisdictions, and the exact scope of the authority of each.

Now as to the civil authority, recognized by the act as the provisional civil government, it covered every department of civil jurisdiction in each of these States. It had all the characteristics and powers of a State government, legislative, judicial, and executive, and was in the full and lawful exercise of all these powers, except only that it was not entitled to representation as a State of the Union. This existing government is not set aside; it is recognized more than once by the act. It is not in any one of its departments, or as to any one of its functions, repealed or modified by this act, save only in the qualifications of voters, the qualifications of persons eligible to office, the manner of holding elections, and the mode of framing the constitution of the State. The act does not in any other respect change the provisional government, nor does the act authorize the military authority to change it. The power of further changing it is reserved, not granted, and it is reserved to Congress, not delegated to the military commander.

Congress was not satisfied with the organic law, or constitution, under which this civil government was established. *That* constitution was to be changed in only one particular to make it acceptable to Congress, and that was in the matter of the elective franchise. The purpose, the sole object of this act is to effect that change, and to effect it by the agency of the people of the State, or such of them as are made voters, by means of elections provided for in the act, and in the meantime to preserve order and to punish offenders, if found necessary, by military commissions.

We are, therefore, not at a loss to know what powers were possessed by the existing civil authority. The only question is upon the powers conferred on the military authority. Whatever power is not given to the military, remains with the civil government.

We see, first of all, that each of these States is "made subject to the military authority of the United States"—not to the military authority altogether, but with this express limitation, "as hereinafter prescribed."

We must, then, examine what is thereinafter provided, to find the extent and nature of the power granted.

This, then, is what is granted to the mililtary commander: the power or duty "to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals," and he may do this by the agency of the criminal courts of the State, or, if necessary, he may have resort to military tribunals.

This comprises all the powers given to the military commander.

Here is a general clause making it the duty of the military commander to give protection to all persons in their rights of person and property. Considered by itself, and without reference to the context and to other provisions of the act, it is liable, from its generality, to be misunderstood.

What sort of protection is here meant? What violations of the rights of persons, or of property, are here intended? In what manner is this protection to be given? These questions arise at once.

It appears that some of the military commanders have understood this grant of power as all-comprehensive, conferring on them the power to remove the executive and judicial officers of the State, and to appoint other officers in their places, to suspend the legislative power of the State, to take under their control, by officers appointed by themselves, the collection and disbursement of the revenues of the State, to prohibit the execution of the laws of the State by the agency of its appointed officers and agents, to change the existing laws in matters affecting purely civil and private rights, to suspend or enjoin the execution of the judgments and decrees of the established State courts, to interfere in the ordinary administration of justice in the State courts, by prescribing new qualifications for jurors, and to change, upon the ground of expediency, the existing relations of the parties to contracts, giving protection to one party by violating the rights of the other party.

I feel confident that these military officers, in all they have done,

have supposed that they had full warrant for their action. Their education and training have not been of the kind to fit them for the delicate and difficult task of giving construction to such a statute as that now under consideration. They require instruction, and nearly all of them have asked for instruction, to solve their own doubts, and to furnish to them a safe ground for the performance of their duties.

There can be no doubt as to the rule of construction according to which we must interpret this grant of power. It is a grant of power to military authority, over civil rights and citizens, in time of peace. It is a new jurisdiction, never granted before, by which, in certain particulars and for certain purposes, the established principle that the military shall be subordinate to the civil authority, is reversed. The rule of construction to be applied to such a grant of power is thus stated in *Dwarris on Statutes*, page 652: "A statute creating a new jurisdiction ought to be construed strictly."

Guided by this rule, and in the light of other rules of construction familiar to every lawyer, especially of those which teach us that, in giving construction to single clauses, we must look to the context and to the whole law, that general clauses are to be controlled by particular clauses, and that such construction is to be put on a special clause as to make it harmonize with the other parts of the statute, so as to avoid repugnancy. I proceed to the construction of this part of the act.

To consider, then, in the first place, the terms of the grant. It is of a power to protect all persons in their rights of person and property. It is not a power to create new rights, but only to protect those which exist and are established by the laws under which these people live. It is a power to preserve, not to abrogate; to sustain the existing frame of social order and civil rule, and not a power to introduce military rule in its place. In effect, it is a police power, and the protection, here intended, is protection of persons and property against violence, unlawful force, and criminal infraction. It is given to meet the contingency recited in the preamble, of a want of "adequate protection for life and property;" and the necessity also recited, "that peace and good order should be enforced."

This construction is made more apparent when we look at the immediate context, and see in what mode, and by what agency, this protection is to be secured. This duty, or power, of protection is to be performed by the suppression of insurrection, disorder, and violence, and by the punishment, either by the agency of the State courts, or by military commissioners, when necessary, of all disturbers of the public peace and criminals; and it is declared that all interference, under color of State authority, with the exercise of this military authority, shall be null and void.

The next succeeding clause provides for a speedy trial of the offender, forbids the infliction of cruel and unusual punishment, and requires that sentences of these military courts, which involve the liberty or life of the accused, shall have the approval of the commanding general, and, as to a sentence of death, the approval of the President, before execution.

All these special provisions have reference to the preservation of order, and protection against violence and crime. They touch no other department or function of the civil administration, save only its criminal jurisdiction, and even as to that the clear meaning of this act is, that it is not to be interfered with by the military authority, unless when a necessity for such interference may happen to arise.

I see no authority, nor any shadow of authority, for interference with any other courts or any other jurisdiction, than criminal courts in the exercise of criminal jurisdiction. The existing civil authority in all its other departments, legislative, executive, and judicial, is left untouched. There is no provision, even under the plea of necessity, to establish, by military authority, courts or tribunals for the trial of civil cases, or for the protection of such civil rights of person or property as come within the cognizance of civil courts as contradistinguished from criminal courts. In point of fact there was no foundation for such a grant of power, for the Civil Rights act, and the Freedman's Bureau act, neither of which is superseded by this act, made ample provision for the protection of all merely civil rights where the laws or courts of these States might fail to give full, impartial protection.

I find no authority anywhere in this act for the removal by the military commander, of the proper officers of a State, either executive or judicial, or the appointment of persons to their places. Nothing short of an express grant of power, would justify the removal or the appointment of such an officer. There is no such grant expressed or even implied. On the contrary the act clearly enough forbids it. The regular State officials, duly elected and qualified, are entitled to hold their offices. They, too, have rights which the military commander is bound to protect, not authorized to destroy.

We find in the concluding clause of the sixth section of the act that these officials are recognized, and express provision is made to perpetuate them. It is enacted that "in all elections to any office under such provisional governments, all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the fifth section of this act; and no person shall be eligible to any office under such provisional governments, who would be disqualified from holding office under the provisions of this act."

This provision not only recognizes all the officers of the provisional governments, but, in case of vacancies, very clearly points out how they are to be filled; and that happens to be in the usual way, by the people, and not by any other agency or any other power, either State or federal, civil or military.

I find it impossible under the provisions of this act to comprehend such an official as a governor of one of these States appointed to office by one of these military commanders. Certainly he is not the governor recognized by the laws of the State, elected by the people of the State, and clothed as such with the chief executive power. Nor is he appointed as a military governor for a State which has no lawful governor, under the pressure of an existing necessity, to exercise powers at large. The intention, no doubt, was to appoint him

to fill a vacancy occasioned by a military order, and to put him in the place of the removed governor, to execute the functions of the office as provided by law. The law takes no cognizance of such an official, and he is clothed with no authority or color of authority.

What is true as to the governor is equally true as to all the other legislative, executive, and judicial officers of the State. If the military commander can oust one from his office, he can oust them all. If he can fill one vacancy he can fill all vacancies, and thus usurp all civil jurisdiction into his own hands, or the hands of those who hold their appointments from him and subject to his power of removal, and thus frustrate the very right secured to the people by this act. Certainly this act is rigorous enough in the power which it gives. With all its severity, the right of electing their own officers is still left with the people, and it must be preserved.

I must not be understood as fixing limits to the power of the military commander in case of an actual insurrection or riot. It may happen that an insurrection in one of these States may be so general and formidable as to require the temporary suspension of all civil government, and the establishment of martial law in its place. And the same thing may be true as to local disorder or riot in reference to the civil government of the city or place where it breaks out. Whatever power is necessary to meet such emergencies, the military commander may properly exercise. I confine myself to the proper authority of the military commander where peace and order prevail. When peace and order do prevail, it is not allowable to displace the civil officers and appoint others in their places under any idea that the military commander can better perform his duties and carry out the general purposes of the act by the agency of civil officers of his own choice rather than by the lawful incumbents. The act gives him no right to resort to such agency, but does give him the right to have "a sufficient military force" to enable him "to perform his duties and enforce his authority within the district to which he is assigned."

In the suppression of insurrection and riot, the military commander is wholly independent of the civil authority. So, too, in the trial and punishment of criminals and offenders, he may supersede the civil jurisdiction. His power is to be exercised in these special emergencies, and the means are put into his hands by which it is to be exercised, that is to say, "a sufficient military force to enable such officer to perform his duties and enforce his authority," and military tribunals of his own appointment to try and punish offenders. These are strictly military powers, to be executed by military authority, not by the civil authority or by civil officers appointed by him to perform ordinary civil duties.

If these emergencies do not happen, if civil order is preserved, and criminals are duly prosecuted by the regular criminal courts, the military power though present must remain passive. Its proper function is to preserve the peace, to act promptly when the peace is broken, and restore order. When that is done and the civil authority may again safely resume its functions, the military power becomes again passive, but on guard and watchful.

This, in my judgment, is the whole scope of the military power conferred by this act, and in arriving at this construction of the act, I have not found it necessary to resort to the strict construction which is allowable.

What has been said indicates my opinion as to any supposed power of the military commander to change or modify the laws in force. The military commander is made a conservator of the peace, not a legislator. His duties are military duties, executive duties, not legislative duties. He has no authority to enact or declare a new code of laws for the people within his district under any idea that he can make a better code than the people have made for themselves. The public policy is not committed to his discretion. The Congress, which passed this act undertook in certain grave particulars to change these laws, and these changes being made, the Congress saw no further necessity of change, but were content to leave all the other laws in full force, but subject to this emphatic declaration, that as to these laws and such future changes as might be expedient, the question of expediency and the power to alter, amend or abolish, was reserved for "the paramount authority of the United States at any time to abolish, modify, control, or supersede the same." Where, then, does a military commander find *his* authority "to abolish, modify, control, or supersede" any one of these laws?

The enumeration of the extraordinary powers exercised by the military commanders in some of the districts would extend this opinion to an unreasonable length. A few instances must suffice.

In one of these districts the governor of a State has been deposed under a threat of military force, and another person, called a governor, has been appointed by the military commander to fill his place. Thus presenting the strange spectacle of an official entrusted with the chief power to execute the laws of the State whose authority is not recognized by the laws he is called upon to execute.

In the same district the judge of one of the criminal courts of the State has been summarily dealt with. The act of Congress does give authority to the military commander, in cases of necessity, to transfer the jurisdiction of a criminal court to a military tribunal. That being the specific authority over the criminal courts given by the act, no other authority over them can be lawfully exercised by the military commander. But in this instance the judge has, by military order, been ejected from his office, and a private citizen has been appointed judge in his place, by military authority, and is now in the exercise of criminal jurisdiction "over all crimes, misdemeanors, and offences," committed within the territorial jurisdiction of the court. This military appointee is certainly not authorized to try any one for any offence as a member of a military tribunal, and he has just as little authority to try and punish any offender as a judge of a criminal court of the State.

It happens that this private citizen, thus placed on the bench, is to sit as the sole judge in a criminal court whose jurisdiction extends to cases involving the life of the accused. If he has any judicial power in any case, he has the same power to take cognizance of cap-

ital cases, and to sentence the accused to death, and order his execution. A strange spectacle! where the judge and the criminal may very well "change places;" for if the criminal has unlawfully taken life, so too does the judge. This is the inevitable result, for the only tribunal, the only judges, if they can be called judges, which a military commander can constitute and appoint under this act, to inflict the death penalty, is a military court composed of a board, and called in the act a "military commission."

I see no relief for the condemned against the sentence of this agent of the military commander. It is not the sort of court whose sentence of death must be first approved by the commander and finally by the President; for that is allowed only where the sentence is pronounced by a "military commission." Nor is it a sentence pronounced by the rightful court of the State, but by a court, and by a judge, not clothed with authority under the laws of the State, but constituted by the military authority. As the representative of this military authority, this act forbids interference "under color of State authority" with the exercise of his functions.

In another one of these districts a military order commands the governor of the State to forbid the reassembling of the legislature, and thus suspends the proper legislative power of the State. In the same district an order has been issued "to relieve the treasurer of the State from the duties, bonds, books, papers, &c., appertaining to his office," and to put an "assistant quartermaster of United States volunteers" in place of the removed treasurer; the duties of which quartermaster-treasurer are thus summed up: He is to make to the headquarters of the district "the same reports and returns required from the treasurer, and a monthly statement of receipts and expenditures; he will pay all warrants for salaries which may be, or become, due, and legitimate expenditures for the support of the penitentiary, State asylum, and the support of the provisional State government; but no scrip or warrants for outstanding debts of other kind than those specified will be paid without special authority from these headquarters. He will deposit funds in the same manner as though they were those of the United States."

In another of these districts a body of military edicts, issued in general and special orders regularly numbered, and in occasional circulars, have been promulgated, which already begin to assume the dimensions of a code. These military orders modify the existing law in the remedies for the collection of debts, the enforcement of judgments and decrees for the payment of money, staying proceedings instituted, prohibiting, in certain cases, the right to bring suit, enjoining proceedings on execution for the term of twelve months, giving new liens in certain cases, establishing homestead exemptions, declaring what shall be a legal tender, abolishing in certain cases the remedy by foreign attachment, abolishing bail "as heretofore authorized" in cases *ex contractu*, but not in "other cases, known as actions *ex delicto*," and changing, in several particulars, the existing laws as to the punishment of crimes, and directing that the crimes referred to "shall be punished by imprisonment at hard labor for a term not

exceeding ten years nor less than two years, in the discretion of the court having jurisdiction thereof." One of these general orders, being number ten of the series, contains no less than seventeen sections embodying the various changes and modifications which have been recited.

The question at once arises in the mind of every lawyer, what power or discretion belongs to the court having jurisdiction of any of these offences, to sentence a criminal to any other or different punishment than that provided by the law which vests him with jurisdiction. The concluding paragraph of this order, No. 10, is in these words: "Any law or ordinance heretofore in force in North Carolina or South Carolina, inconsistent with the provisions of this general order, are hereby suspended and declared inoperative." Thus announcing, not only a power to suspend the laws, but to declare them generally inoperative, and assuming full powers of legislation by the military authority.

The ground upon which these extraordinary powers are based is thus set forth in military order No. 1, issued in this district: "The civil government now existing in North Carolina and South Carolina, is provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same." Thus far the provisions of the act of Congress are well recited. What follows is in these words: "Local laws and municipal regulations not inconsistent with the Constitution and laws of the United States, or the proclamations of the President, or with such regulations as are or may be prescribed in the orders of the commanding general, are hereby declared to be in force, and in conformity therewith, civil officers are hereby authorized to continue the exercise of their proper functions, and will be respected and obeyed by the inhabitants."

This construction of his powers under the act of Congress places the military commander on the same footing as the Congress of the United States. It assumes that "the paramount authority of the United States at any time to abolish, modify, control, or supersede," is vested in him as fully as it is reserved to Congress. He deems himself a representative of that paramount authority. He puts himself upon an equality with the law-making power of the Union, the only paramount authority in our government, so far, at least, as the enactment of laws is concerned. He places himself on higher ground than the President, who is simply an executive officer. He assumes, directly or indirectly, all the authority of the State, legislative, executive, and judicial, and in effect declares "I am the State."

I regret that I find it necessary to speak so plainly of this assumption of authority. I repeat what I have heretofore said, that I do not doubt that all these orders have been issued under an honest belief that they were necessary or expedient, and fully warranted by the act of Congress. There may be evils and mischiefs in the laws which these people have made for themselves through their own legislative bodies, which require change; but none of these can be so intolerable as the evils and mischiefs which must ensue from the sort

of remedy applied. One can plainly see what will be the inevitable confusion and disorder which such disturbances of the whole civil policy of the State must produce. If these military edicts are allowed to remain even during the brief time in which this provisional military government may be in power, the seeds will be sown for such a future harvest of litigation as has never been inflicted upon any other people.

There is, in my opinion, an executive duty to be performed here, which cannot safely be avoided or delayed. For notwithstanding the paramount authority assumed by these commanders, they are not, even as to their proper executive duties, in any sense, clothed with a paramount authority. They are, at last, subordinate executive officers. They are responsible to the President for the proper execution of their duties, and upon him rests the final responsibility. They are his selected agents. His duty is not all performed by selecting such agents as he deems competent; but the duty remains with him to see to it that they execute their duties faithfully and according to law.

It is true that this act of Congress only refers to the President in the matter of selecting and appointing these commanders, and in the matter of their powers and duties under the law, the act speaks in terms directly to them; but this does not relieve them from their responsibility to the President, nor does it relieve him from the constitutional obligation imposed upon him to see that all "the laws be faithfully executed."

It can scarcely be necessary to cite authority for so plain a proposition as this. Nevertheless, as we have a recent decision completely in point, I may as well refer to it.

Upon the motion made by the State of Mississippi before the Supreme Court of the United States at its late term, for leave to file a bill against the President of the United States, to enjoin him against executing the very acts of Congress now under consideration, the opinion of the court upon dismissing that motion, and it seems to have been unanimous, was delivered by the Chief Justice. I make the following quotation from the opinion: "Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among those laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and their duties must necessarily be performed under the supervision of the President as Commander-in-Chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political."

Certain questions have been propounded from one of these military districts touching the construction of the power of the military commander to constitute military tribunals for the trial of offenders, which I will next consider.

Whilst the act does not in terms displace the regular criminal courts of the State, it does give the power to the military commander, when

in his judgment a necessity arises, to take the administration of the criminal law into his own hands, and to try and punish offenders by means of military commissions.

In giving construction to this power, we must not forget the recent and authoritative exposition given by the Supreme Court of the United States as to the power of Congress to provide for military tribunals for the trial of citizens in time of peace, and to the emphatic declaration as to which there was no dissent or difference of opinion among the judges, that such a power is not warranted by the Constitution. A single extract from the opinion of the minority as delivered by the Chief Justice will suffice. "We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety."

Limiting myself here simply to the construction of this act of Congress and to the question in what way it should be executed, I have no hesitation in saying that nothing short of an absolute or controling necessity would give any color of authority for arraigning a citizen before a military commission. A person charged with crime in any of these military districts has rights to be protected, rights the most sacred and inviolable, and among these the right of trial by jury according to laws of the land. When a citizen is arraigned before a military commission on a criminal charge, he is no longer under the protection of law, nor surrounded with those safe-guards which are provided in the Constitution.

This act, passed in a time of peace, when all the courts, State and federal, are in the undisturbed exercise of their jurisdiction, authorizes, at the discretion of a military officer, the seizure, trial, and condemnation of the citizen. The accused may be sentenced to death, and the sentence may be executed, without an indictment, without counsel, without a jury, and without a judge. A sentence which forfeits all the property of the accused, requires no approval. If it affects the liberty of the accused, it requires the approval of the commanding general; and if it affects his life, it requires the approval of the general and of the President. Military and executive authority rule throughout, in the trial, the sentence, and the execution. No *habeas corpus* from any State court can be invoked; for this law declares that "all interference, under color of State authority, with the exercise of military authority under this act, shall be null and void."

I repeat it, that nothing short of an absolute necessity can give any color of authority to a military commander to call into exercise such a power. It is a power, the exercise of which may involve him, and every one concerned, in the gravest responsibilities. The occasion for its exercise should be reported at once to the Executive for such instructions as may be deemed necessary and proper.

Questions have arisen whether, under this power, these military commissioners can take cognizance of offences committed before the passage of the act, and whether they can try and punish for acts not made crimes or offences by federal or State law.

I am clearly of opinion that they have no jurisdiction as to either. They can take cognizance of no offence that has not happened after the law took effect. Inasmuch as the tribunal to punish, and the measure or degree of punishment, are established by this act, we must construe it to be prospective, and not retroactive. Otherwise it would take the character of an *ex post facto* law. Therefore, in the absence of any language which gives the act a retrospect, I do not hesitate to say it cannot apply to past offences.

There is no legislative power given under this military bill to establish a new criminal code. The authority given is to try and punish criminals and offenders, and this proceeds upon the idea that crimes and offences have been committed; but no person can be called a criminal or an offender for doing an act which, when done, was not prohibited by law.

But as to the measure of punishment, I regret to be obliged to say that it is left altogether to the military authorities, with only this limitation, that the punishment to be inflicted shall not be cruel or unusual. The military commission may try the accused, fix the measure of punishment, even to the penalty of death, and direct the execution of the sentence. It is only when the sentence affects the "life or liberty" of the person that it need be approved by the commanding general, and only in cases where it affects the life of the accused that it needs also the approval of the President.

As to crimes or offences against the laws of the United States, the military authority can take no cognizance of them, nor in any way interfere with the regular administration of justice by the appropriate federal courts.

In the opinion heretofore given upon other questions arising under these laws, I gave at large for your consideration the grounds upon which my conclusions were arrived at, intending thereafter to state these conclusions in a concise and clear summary. I now proceed to execute that purpose, which is made especially necessary from the confusion and doubts which have arisen upon that opinion in the public mind, caused in part by the errors of the telegraph and the press in its publication, and in part by the inaptitude of the general reader to follow carefully the successive and dependent steps of a protracted legal opinion.

SUMMARY.

WHO ARE ENTITLED TO REGISTRATION.

1. The oath prescribed in the supplemental act defines all the qualifications required, and every person who can take that oath is entitled to have his name entered upon the list of voters.

2. The board of registration have no authority to administer any other oath to the person applying for registration than this prescribed oath; nor to administer any oath to any other person, touching the qualifications of the applicant, or the falsity of the oath so taken by him. The act to guard against falsity in the oath, provides that, if false, the person taking it shall be tried and punished for perjury.

No provision is made for challenging the qualifications of the applicant, or entering upon any trial or investigation of his qualifications, either by witnesses or any other form of proof.

3. *As to citizenship and residence.*

The applicant for registration must be a citizen of the State and of the United States, and must be a resident of a county included in the election district. He may be registered if he has been such citizen for a period less than twelve months at the time he applies for registration, but he cannot vote at any election unless his citizenship has *then* extended to the full term of one year. As to such a person the exact length of his citizenship should be noted opposite his name on the list, so that it may appear on the day of election, upon reference to the list, whether the full term has then been accomplished.

4. An unnaturalized person cannot take this oath, but an alien who has been naturalized can take it, and no other proof of naturalization can be required from him.

5. No one who is not twenty-one years of age at the time of registration can take the oath, for he must swear that he has then attained that age.

6. No one who has been disfranchised for participation in any rebellion against the United States, or for felony committed against the laws of any State or of the United States, can safely take this oath.

The actual participation in a rebellion, or the actual commission of a felony, does not amount to disfranchisement. The sort of disfranchisement here meant, is that which is declared by law passed by competent authority, or which has been fixed upon the criminal by the sentence of the court which tried him for the crime.

No law of the United States has declared the penalty of disfranchisement for participation in rebellion alone. Nor is it known that any such law exists in either of these ten States, except perhaps Virginia, as to which State special instructions will be given.

7. *As to disfranchisement arising from having held office followed by participation in rebellion.*

This is the most important part of the oath, and requires strict attention to arrive at its meaning. I deem it proper to give the exact words. The applicant must swear or affirm as follows:

"That I have never been a member of any State legislature, nor held any executive or judicial office in any State, and afterwards engaged in an insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I have never taken an oath as a member of Congress of the United States, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, and afterwards engaged in insurrection

or rebellion against the United States, or given aid or comfort to the enemies thereof."

Two elements must concur in order to disqualify a person under these clauses: *First*, the office and official oath to support the Constitution of the United States: *Second*, engaging afterwards in rebellion. Both must exist to work disqualification, and must happen in the order of time mentioned.

A person who has held an office and taken the oath to support the Federal Constitution and has not afterwards engaged in rebellion, is not disqualified. So, too, a person who has engaged in rebellion, but has not theretofore held an office and taken that oath, is not disqualified.

8. *Officers of the United States.*

As to these the language is without limitation. The person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States, is subject to disqualification.

9. *Military officers* of any State, prior to the rebellion, are not subject to disqualification.

10. *Municipal officers*, that is to say, officers of incorporated cities, towns, and villages, such as mayors, aldermen, town council, police, and other city or town officers, are not subject to disqualification.

11. Persons who have, prior to the rebellion, been members of the Congress of the United States, or members of a State legislature, are subject to disqualification. But those who have been members of conventions framing or amending the Constitution of a State, prior to the rebellion, are not subject to disqualification.

12. All the executive or judicial officers of any State who took an oath to support the Constitution of the United States, are subject to disqualification, and in these I include county officers, as to whom I made a reservation in the opinion heretofore given. After full consideration I have arrived at the conclusion, that they are subject to disqualification, if they were required to take as a part of their official oath, *the oath to support the Constitution of the United States.*

13. Persons who exercised mere agencies or employments under State authority, are not disqualified ; such as commissioners to lay out roads, commissioners of public works visitors of State institutions, directors of State banks or other State institutions, examiners of banks, notaries public, commissioners to take acknowledgments of deeds and lawyers.

ENGAGING IN REBELLION.

Having specified what offices held by any one prior to the rebellion, come within the meaning of the law, it is necessary next to set forth what subsequent conduct fixes upon such person the offence of engaging in rebellion. I repeat, that two things must exist as to any person, to disqualify him from voting: first, the office held prior to the rebellion, and afterwards, participation in the rebellion.

14. An act to fix upon a person the offence of engaging in rebellion under this law, must be an overt and voluntary act, done with

the intent of aiding or furthering the common unlawful purpose. A person forced into the rebel service by conscription, or under a paramount authority which he could not safely disobey, and who would not have entered such service if left to the free exercise of his own will, cannot be held to be disqualified from voting.

15. Mere acts of charity, where the intent is to relieve the wants of the object of such charity, and not done in aid of the cause in which he may have been engaged, do not disqualify. But organized contributions of food and clothing for the general relief of persons engaged in the rebellion, and not of a merely sanitary character, but contributed to enable them to perform their unlawful object, may be classed with acts which do disqualify.

Forced contributions to the rebel cause, in the form of taxes or military assessments, which a person may be compelled to pay or contribute, do not disqualify. But voluntary contributions to the rebel cause, even such indirect contributions as arise from the voluntary loan of money, to rebel authorities, or purchase of bonds or securities created to afford the means of carrying on the rebellion, will work disqualification.

16. All those who, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, where the duties of the office necessarily had relation to the support of the rebellion, such as members of the rebel conventions, congresses, and legislatures, diplomatic agents of the rebel confederacy, and other officials whose offices were created for the purpose of more effectually carrying on hostilities, or whose duties appertained to the support of the rebel cause, must be held to be disqualified.

But officers who, during the rebellion, discharged official duties not incident to war, but only such duties as belong even to a state of peace, and were necessary to the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion or as disqualified. Disloyal sentiments, opinions, or sympathies would not disqualify, but where a person has by speech or by writing, incited others to engage in rebellion, he must come under the disqualification.

17. *The duties of the board appointed to superintend the elections.*

This board, having the custody of the list of registered voters in the district for which it is constituted, must see that the name of the person offering to vote is found upon the registration list, and if such proves to be the fact, it is the duty of the board to receive his vote. They cannot receive the vote of any person whose name is not upon the list, though he may be ready to take the registration oath, and although he may satisfy them that he was unable to have his name registered at the proper time, in consequence of absence, sickness, or other cause.

The board cannot enter into any enquiry as to the qualifications of any person whose name is not on the list, or as to the qualifications of any person whose name is on the list.

18. *The mode of voting* is provided in the act to be *by ballot.* The board will keep a record and poll-book of the election, showing the

votes, list of voters, and the persons elected by a plurality of the votes cast at the election, and make returns of these to the commanding general of the district.

19. The board appointed for registration and for superintending the elections, must take the oath prescribed by the act of Congress, approved July 2, 1862, entitled, "An act to prescribe an oath of office."

I have the honor to be, with great respect,

HENRY STANBERY,
Attorney General.