Exact Idea - 1

OGC Has Reviewed

13 July 1954

MEMORANDUM FOR: General Counsel

SUBJECT : Relationship of Ex Parte Grossman to the Issue of Whether the President May Pardon a Contempt Committed Before the Bar of the Congress By a Member of the Executive Department

1. You asked that I examine the case of ex parte Grossman (267 U.S. 87; 87 S.C. 122 (1925)) with a view to determining what bearing it had on the issue stated above. The request was made in the context of a statement on page 21 of Senate Document 99 (83rd Congress, 2nd Session), "Congressional Power of Investigation", to the effect that it was "doubtful" whether the President could pardon a contempt committed by a member of the Executive Department before the bar of the House, for which the Grossman case was cited as an authority.

2. The salient facts of the Grossman case are these. In 1920 Phillip Grossman, a resident of Chicago, Illinois, was enjoined by an order of the District Court of the United States for the Northern District of Illinois for selling alcoholic beverages at his place of business in violation of Section 22 of the National Prohibition Act (41 Stat 305, 314 (1919) since repealed). However, he continued to sell alcoholic beverages. In January 1921, pursuant to information filed against him charging this violation of the restraining order, Grossman was haled before the same court, tried and found guilty of contempt. He was sentenced to imprisonment in The Chicago House of Correction and to the payment of a fine and court costs. In December 1923, the President pardoned Grossman on the condition that the fine be paid. Grossman paid the fine and was released. In May 1924, however, the District Court recommitted Grossman to The Chicago House of Correction to serve the sentence notwithstanding the Presidential pardon. Grossman brought a writ of habeas corpus contesting his detention on the grounds of the pardon. The writ was denied him by the District Court (1 F. 2nd 941 (1924)); and he appealed directly to the Supreme Court of the United States.

3. The issue presented, in the language of the Court, was "that of the power of the President to grant a pardon" for contempt of a federal court. In the exhaustive opinion which reviewed both the English and American authorities on the subject of executive pardon, it was held that the Presidential pardoning power did extend to cases of contempt of federal courts.

4. In seeking to have the writ denied, the United States argued, inter alia, that contempt of a federal court was not within the definition of the word "offenses" as used in Article 2, Section 2, clause 1 of the Constitution which empowered the President to grant pardons. In disposing of this argument, the court, on page 118, stated as follows:

> "Moreover, criminal contempts of a Federal court have been pardoned for eighty-five years. In that time the power has been exercised twenty-seven times. In 1830, Attorney General Berrien, in an opinion on a state of fact which did not involve the pardon of a contempt, expressed merely in passing the view that the pardoning power did not include impeachments or contempts, using Rawle's general words from his work on the Constitution. Examination shows that the author's exception of contempts had reference only to contempts of a House of Congress." (Emphasis Supplied)

Evidently this is the language referred to on page 21 of the Senate Document.

5. The Attorney General's opinion referred to appears in 2 Opinions of the Attorney General 229, 230 (March 17, 1830) and has to do with the propriety of a Presidential pardon from the seizure of certain property of one Adams for nonpayment of some sort of penalty, the type of which is not clear from the opinion. In paragraph 2, Attorney General Berrien stated:

> " . . . the (Presidential) pardoning power is considered to be coextensive with the power to punish, except only in cases of impeachment and procedings for contempt. In all other cases . . . the power is general and unqualified . . ." (Emphasis Supplied)

Apparently it is the underlined language to which Chief Justice Taft, in the Grossman case, had reference.

6. I have been unable to locate the text or reference which led to the court's conclusion that the word "contempt", as appearing in Attorney General Berrien's opinion, comprehended only contempt before the bar of either House of the Congress. No explanation is furnished in the opinion itself. However, I deem it significant that this exception in favor of contempt, however meant by Berrien, was not picked up in some subsequent opinions of the Attorney General having to do with the Presidential pardoning power and has not since reappeared. Thus, in 3 Opinions of the Attorney General 418, 418-419 (February 16, 1839) Attorney General Brundy stated:

> "The power given (the President) by the Constitution is plenery cases of impeachment only excepted." (Emphasis Supplied)

In 20 Opinions of the Attorney General 330, 331, Attorney General Taft, in speaking of the pardoning power stated:

> "The power thus conferred is unlimited, with the exception stated, i.e., cases of impeachment. It extends to every opinion known to the law . . ." (Emphasis Supplied)

7. As noted by the Court in the Grossman case, Attorney General Berrien's statement did not involve the pardon for a contempt and was obiter to the issue before him. Likewise, the Court's reference to Berrien's opinion was obiter in that the issue of a contempt before either House of the Congress was not before it. Neither the arguments pro and con, the issues nor the decision in the Grossman case involved the power of the President to pardon for contempt of the Congress.

8. On the basis of the foregoing, I cannot agree that the Grossman case is any sort of authority for the proposition that:

> "it is doubtful . . . that the President could take definitive action (as regards a pardon) with respect to a person held under an order of the House."

In concluding, I note that I fail to perceive why the House of Representatives should be singled out and no mention made of the Senate, or of the Congress as a whole. Attorney General Berrien's troublesome opinion dealt with "a House of Congress", not with the House of Representatives.

9. What research I have done on the larger problem, that of the power of the President to pardon a contempt citation by either House of Congress not made pursuant to Title 2, U.S.C. 192, 193 and 194 (the statutory contempt provision of the Code) convinces me that this matter has not been determined. I shall continue to research this question, but for the nonce submit my thoughts as regards the bearing of the Grossman case on it.

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