

Opinion No. 15-1667

November 2, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Hon. B. S. Rodey, Albuquerque, New Mexico.

Governor has power to pardon for a misdemeanor.

OPINION

{*240} I have just received your letter of yesterday asking whether I have ever had occasion to consider the question of the constitutional or inherent power of the governor of New Mexico to pardon a person convicted of a misdemeanor who is confined in the county jail, and you call my attention to Section 6 of Article V of the constitution, and to Sections 5086 and 5087 of the Codification of 1915.

The constitutional provision to which you refer is as follows:

"Subject to such regulations as may be prescribed by law, the governor shall have power to grant reprieves and pardons, after conviction, for all offenses except treason and in cases of impeachment."

Of the two sections of the statutes to which you refer, the second one, Section 5087, is the only one which would seem to have application to the question which you ask. That attempts to restrict the pardoning power of the governor so that no pardon could be granted before the expiration of the time for which the convict was sentenced unless it were first recommended by the board of penitentiary commissioners. At that time, by the organic act, the governor was authorized to "grant pardons for offenses against the laws of said Territory," without any limitation whatever, and I have never had any doubt that the attempt of the legislature, by the passage of the act which now re-appears as Section 5087, to make a recommendation of a board essential to the exercise of the pardoning power, was invalid as beyond the power of the legislature. My recollection is that the several governors since that time have not felt bound by that legislative restriction, but have granted pardons without any reference to action by the board of penitentiary commissioners. There can be no doubt of the correctness of this position and it is fully sustained by authority, the {*241} leading case perhaps being that of *Ex parte Garland*, 4 Wall., 333, 380. The court said that the power conferred was unlimited with the exception of cases of impeachment, and extended to every offense known to the law and might be exercised at any time after the commission of the offense, either before legal proceedings were taken or during their pendency, or after conviction and judgment, and that it was not subject to legislative control.

The only language in the constitution which would furnish ground for argument that this condition has been changed is to be found in the first words of the section already

quoted, "subject to such regulations as may be prescribed by law." By Section 4 of Article XXII of the Constitution it is provided that all laws of the Territory of New Mexico in force at the time of its admission into the Union as a state, not inconsistent with the constitution, shall remain in force as the laws of the state, and it might be argued that the law set out in Section 5087 is not inconsistent with the constitution and is an exercise of the authority to prescribe regulations under which the governor has the power to grant pardons. There is some conflict of authority, I believe, as to whether such legislation would prevent the governor from granting a pardon without compliance with its restrictions, but you will notice that that section relates only to the pardon or commutation of sentences of convicts confined in the penitentiary, and, therefore, to answer your question as to the constitutional power of the governor to pardon a person convicted of a misdemeanor it is not necessary to consider the legislation at all. If we concede that the legislature has authority, under the constitution, to limit the exercise of the pardoning power by the governor, no such limitation has been enacted concerning misdemeanors, and there can be no doubt that the governor has unlimited power to pardon for a misdemeanor.