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APR 1 1971

MEMORANDUM FOR THE HONORABLE JOHN W. DEAN III
Counsel to the President

Re: Restoration of Full Civil Rights to the Late General Robert E. Lee

This is in response to your memorandum of March 29, 1971, in which you ask for a legal opinion concerning the status of the civil rights of Civil War General Robert E. Lee. Specifically, you ask (1) whether the Act of June 8, 1898 (30 Stat. 432, 5 U.S.C. 15, repealed by Pub. L. 89-554, 80 Stat. 738) restored posthumously the civil rights of General Lee, (2) whether a presidential pardon under Article II, section 3 of the Constitution is available in view of the provisions of section 3 of the Fourteenth Amendment, and, assuming it is, whether it can be granted posthumously, and (3) whether previous Congressional attempts to restore the General's civil rights failed for reasons other than political support.

On the basis of the discussion that follows, I have concluded that (1) the Act of June 8, 1898, supra, removing disabilities imposed by section 3 of the Fourteenth Amendment, was meant to apply only to participants in the Civil War who were still living at the time of its passage, (2) the disabilities that attach by virtue of section 3 of the Fourteenth Amendment cannot be removed by the exercise of the President's pardon power under Article II, section 2 of the Constitution. In answer to your inquiry concerning the failure of legislation to restore posthumously General Lee's civil rights, it appears that two bills that would have removed the disabilities imposed by section 3 of the Fourteenth Amendment (S.J. Res. 34, 85th Cong., 1st sess., and H.R. 5089, 88th Cong., 1st sess.) were introduced and referred to the respective

Committees on the Judiciary, but received no further attention. No information is available to us as to why no action was taken on these measures.

I

Congressional debates prior to the presentation of the Fourteenth Amendment to the States seem to make it clear that the disabilities imposed by section 3 were meant to be immune from the pardon and reprieve power of the President. 1/ No commentator on the subject has questioned the view that the disabilities of section 3 can be remedied in other than the manner set out in the last sentence of that section. 2/

Indeed, the author of the most comprehensive book on the subject states that the last and most complete general amnesty granted by President Johnson on December 25, 1868, pursuant to his constitutional pardoning power, 3/ had no effect on the disabilities imposed by section 3 of the Fourteenth Amendment, which had been ratified the previous July. Specifically he states in the case of General Lee as follows:

> "The General [Lee] still remained unpardoned until Johnson's universal amnesty on Christmas Day, 1868, when every person remaining disabled under the laws providing punishment for supporting the rebellion was relieved, except for the disability provided in the third section of the Fourteenth Amendment,

1/ See, e.g., Cong. Globe, 39th Cong., 1st sess., 2914-21. See also note 5 infra, and accompanying text.

2/ Flack, The Adoption of the Fourteenth Amendment, 1965, p. 126.

3/ This amnesty in the form of a proclamation read as follows:

> "Unconditionally and without reservation, to all and to every person, who directly or indirectly, participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States."

which became part of the Constitution on July 26, 1868." [Emphasis added.] (Footnote omitted.) 4/

Thus, when General Lee died on October 12, 1870, his civil rights had been restored to the full extent of the Presidential pardoning power, and, since the Congress had not acted to remove the disabilities of section 3 of the Fourteenth Amendment, he died possessed of them.

The most convincing statement on the scope and purpose of section 3 of the Fourteenth Amendment and its relation to the Presidential pardoning power is found in James C. Blaine's Twenty Years of Congress. Specifically, Mr. Blaine, who was a member of the House of Representatives during the consideration of the Fourteenth Amendment, states as follows:

> In the course of the discussion Mr. Doolittle had moved that in imposing political disabilities, those should be excepted "who have duly received pardon and amnesty under the Constitution and laws." He had just admitted the broadest possible power of a Constitutional amendment duly adopted, and, recognizing that the amendment as it stood would certainly include those who had received pardon from the President, desired to avert that result. His amendment was very briefly debated and on a call of the ayes and noes received only ten votes. The effect of this vote unmistakably settled, in the judgment of the law-making power of the Government, that the operation of the Fourteenth Amendment would not in the least degree be affected by the President's pardon. Before the proposed amendment of Mr. Doolittle, Mr. Saulsbury had tested the sense of the Senate practically on the same point, by moving to make the clause of the amendment read thus: "Congress may by a vote of two-thirds of each House and the President may by the exercise of the pardoning power, remove such disabilities;" but it was rejected by a large majority, and every proposition to permit the pardon of the President to affect the disabilities prescribed by the Fourteenth Amendment in any way whatever was promptly overruled.

4/ Dorris, Pardon and Amnesty Under Lincoln and Johnson--The Restoration of the Confederates to Their Rights and Privileges, 1861-1898, 1953, p. 127.

As a result of this decision, Southern men who, under the Fourteenth Amendment, had incurred disabilities by reason of participation in the Rebellion, could not assume office under the National Government until their disabilities should be removed by a vote of two-thirds of the Senate and House of Representatives, even though they had previously been pardoned by the President. The language of the amendment, the very careful form in which the tense was expressed, appeared to leave no other meaning possible, and the intention of legislators was definitively established by the negative votes already referred to. The intention indeed was in no wise to interfere with the pardon of the President, leaving to that its full scope in the remission of penalty which it secured to those engaged in the Rebellion. The pertinent clause of the Fourteenth Amendment was regarded as merely prescribing a qualification for office, and the Constitutional lawyers considered it to be within the scope of the amending power as much as it would be to change the age at which a citizen would be eligible to the Senate or House of Representatives." (Footnote omitted. Italics are of the author.) 5/

This passage makes it clear that the President is without power to remove the disabilities created by section 3 of the Fourteenth Amendment. Thus, in view of the fact that President Johnson pardoned General Lee in December 1868 to the full extent of his power, it is my conclusion that General Lee did not die possessed of any disability from which President Nixon could now pardon him.

II

Before the passage of the Act of June 8, 1898, numerous individuals had the disabilities of section 3 removed by private

5/ Blaine, Twenty Years of Congress, 1884, pp. 211-212. The amendment proposed by Senator Doolittle was debated at p. 2918-2921, Cong. Globe, 39th Cong., 1st sess.

legislative act. 6/ However, several general bills that would have removed all section 3 disabilities were introduced during the early 1890's, but each fell short of the necessary two-thirds vote. 7/

In response to your inquiry, there is no indication in the legislative history or the language of the Act of 1898 that Congress intended a retroactive application of the law to deceased individuals that would have removed the disabilities created during their lives by section 3 of the Fourteenth Amendment. Specifically, the Act provided:

> "The disability imposed by section three of the fourteenth amendment to the Constitution of the United States is hereby removed." 30 Stat. 432.

It is doubtful that this wording was meant to have any posthumous effect, and the legislative history supports this conclusion.

The House Report speaks in broad generalities of the necessity to heal the nation completely by removing once and for all the disabilities attaching to participation in the Civil War. 8/ Although there were allusions to the unfortunate necessity for and the nature of the section 3 disabilities, the language of the Report speaks in terms of ". . . those once engaged in rebellion . . . before they all pass away . . . and while some of them are left, to remove the disability . . . ." 9/

6/ Id. at 212, footnote 1.

7/ See Dorris, supra, 370-382. These pages contain a recitation of the history and reason for failure of each bill.

8/ H.R. Rept. No. 1407, 55th Cong., 2d sess., pp. 4-7.

9/ Id. at 5, 6. "It is to be regretted that it was ever in the mind of any person that such extreme measures were necessary."

For this reason it is difficult to argue that the act was meant to apply nunc pro tunc to those who had died before the passage of the Act. And in any event the President has no power to remove section 3 disabilities.

Because I have concluded that General Lee died with no disability which is subject to the power of the President to pardon, I have not discussed whether the pardon power may be exercised after a person's death. The applicable law is discussed in a previous memorandum of this Office, a copy of which is attached. Although Chief Justice Marshall has characterized the pardon as in the nature of a deed requiring acceptance to be effective, it may be that the President, if he so desired, could exercise the pardon power posthumously. While acceptance would, of course, be a prerequisite to invoking the benefits of a pardon in a court of law, it would not seem necessary to clear the good name of a deceased person. In effect, this would be a ceremonial pardon such as you alluded to in your memorandum, although there would appear to be no occasion for even such a pardon in General Lee's case since he has already been pardoned to the full extent of Article II.

William H. Rehnquist
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Attachment