

FEBRUARY 26, 1953.

RE: A-4302773 IB

MR. A. C. DEVANEY, *Assistant Commissioner,*
Inspections and Examinations Division,
Immigration and Naturalization Service,
United States Department of Justice,
Washington 25, D. C.

FORMAL OPINION—1953. No. 5.

DEAR SIR:

By your inquiry of January 19, 1953, you raised four questions relating to the effect of an order expunging record of conviction secured under the provisions of R. S. 2:192-15 (now N. J. S. 2A:164-28). We believe that the issues raised can be resolved by the single question, "Is such an order expunging record of conviction secured in accordance with the cited statutes equivalent to a pardon granted by the Governor and would an individual who had secured such an expunging order be exempt from additional punishment available to habitual offenders?"

It is our opinion and we advise you that such an order expunging record of conviction does not have the attributes of a full pardon granted either by the former Court of Pardons under the Constitution of 1844 or by the Governor under the Constitution of 1947.

It becomes necessary to make reference to the provisions of our former Constitution because it appears that the order in question was secured in the appropriate court of Middlesex County on January 2, 1948. The present Constitution of this State became effective January 1, 1948. Since the proceedings were instituted under the former Constitution, it might be urged that the individual involved had available to him the safeguards of the former Constitution. Even if this be the case, we will demonstrate that the result obtained from a review of the law is the same under either Constitution.

By the Constitution of 1844, Art. V, Par. 10, it was provided as follows:

"The governor, or person administering the government, the chancellor, and the six judges of the Court of Errors and Appeals, or a major part of them, of whom the governor, or person administering the government, shall be one, may remit fines and forfeitures, and grant pardons, after conviction, in all cases except impeachment."

This provision of our former Constitution received judicial interpretation in an advisory opinion of Chancellor Walker in a matter entitled *In re N. J. Court of Pardons*, 97 N. J. Eq. 555 (Chancery Court, 1925). Therein it was stated that the former Court of Pardons could not grant a pardon by a majority vote of the members of the court unless the Governor or person administering the government, concurred. It was further said:

"Our Court of Pardons represents, not the parliament but the king and his privy counsel, *Cook vs. Freeholders* * * *, 26 N. J. L. 340. Ergo, it is a kingly, and not a parliamentary power—that is, one vested in the executive and not in the legislature."

Elsewhere in the opinion, Chancellor Walker said (page 558) :

"In this state and country, the pardoning power is, and always has been, a prerogative of the executive department. In this state it is expressly bestowed in Art. V of the Constitution relating to the executive department. And Art. III, Par. 1, declares that no person or persons belonging to or constituting that department shall exercise any of the powers belonging to either of the others. * * * And it also provides that no person or persons belonging to or constituting either of the other departments shall exercise any of the powers properly belonging to it."

Further discussion in the decision leads to the inescapable conclusion that the pardoning power in New Jersey under the former Constitution reposes solely in the executive and could not be fettered by any legislative restrictions and it was said that the Legislature shall define the crimes and fix the degree and method of punishment but it is within the executive authority to relieve from the punishment.

If the order expunging record of conviction is controlled by the 1947 Constitution, which was in effect at the time that the order was entered, then the result is the same for in Art. V, Par. 1, 1947 Constitution, this is found :

"The governor may grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures."

In *State vs. Mangino*, 17 N. J. Super. 587 (App. Div., 1952), wherein this portion of the Constitution received judicial attention, the court said :

"The exercise of executive clemency is exclusively the governor's province."

Thus, we observe that whatever the effect of an order expunging record of conviction may be, it has not the effect of an executive pardon nor does it partake of the attributes or consequences of such a pardon. So, it can be said that the statute is not supplemental to or in addition to the pardoning power of the governor as herein discussed.

Your remaining inquiry deals with any exemptions that might be granted the holder of such an order with respect to additional penalties that may be imposed under our Habitual Offender Law (N. J. S. 2A:85-8, et seq.).

We do not believe that a discussion of this phase of the matter is necessary to a disposition of the prime question. Suffice it to say, that in this jurisdiction additional punishments are imposed upon persons holding former convictions for crimes denominated as high misdemeanors. An examination of the expungement statute reveals that it does not apply to a series of crimes specifically enumerated therein, the bulk of which are high misdemeanors. In these specific instances no escape would be permitted the holder of such an order of expungement from the operation of our Habitual Offender Law. We make no further reference thereto for the reasons stated.

Accordingly, we hold the view that an order expunging record of conviction has not the force and effect of a full pardon in this jurisdiction.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.