

**OPINION OF THE ATTORNEY  
GENERAL CONCERNING  
BRITISH RECRUITMENT IN  
THE UNITED STATES**

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Opinion of the attorney general concerning British recruitment in the United States by Caleb Cushing

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**CALEB CUSHING**

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OPINION

OF

THE ATTORNEY GENERAL

*Saleb Gushing*

of

CONCERNING

BRITISH RECRUITMENT

IN THE

UNITED STATES.

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of Boston.

EXECUTIVE MANSION,

Washington, August 6, 1855.

The reports of the district attorneys of the southern district of New York and the eastern district of Pennsylvania, on the subject of the levy of troops in the United States by official or other agents of Great Britain, are returned herewith to the Attorney General, and his opinion is required upon the question, whether or not the acts reported are in violation of the municipal law and of the national sovereignty and neutrality; and especially upon the question, what legal responsibility, if any, those acts devolve on the British minister and British consuls.

FRANKLIN PIERCE.

## OPINION.

ATTORNEY GENERAL'S OFFICE,

August 9, 1855.

SIR: I have the honor to submit herewith the considerations of law applicable to the enlistment of troops within the United States by the British government, in so far as the facts appearing in documents before me concern the personal action either of the British minister or of the British consuls in the United States.

There is no room for doubt as to the law regarding the general question.

In the first place, the act of Congress of April 20th, 1818, contains the following provision:

"SEC. 2. *And be it further enacted*, That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered, into the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years." (iii Stat. at Large, p. 448.)

Of course, as the levy of troops within the United States for foreign service is forbidden by law, no such right has, by your permission, been given to Great Britain. To the contrary of this, the British

government was expressly notified, by letter of Mr. Marcy to Mr. Crampton of April 28th, 1854, that no enlistments in the United States would be permitted either to Great Britain or to Russia. (Ex. Doc., 1st session 33d Congress, vol. xii, No. 103, p. 5.)

In the second place, independently of the municipal relations of the acts in question, they constitute, whether they be the acts of the British government or of its minister and consuls, a violation of the sovereignty and of the neutral rights of the United States.

The rule of public law is unequivocal on this point, and is correctly stated, as follows, by Wolff:

"Since the right of raising soldiers is a right of majesty, which must not be violated by a foreign nation, it is not permitted to raise soldiers on the territory without the consent of its sovereign." (*Jus Gentium*, s. 1174.)

By Vattel: "As war cannot be carried on without soldiers, it is evident that, whoever has the right of making war, has also naturally that of raising troops. The latter, therefore, belongs likewise to the sovereign, and is one of the prerogatives of majesty." (*Vattel, Droit des Gens*, liv. 3, ch. ii, s. 7.)

\* \* \* \* \*

"As the right of levying soldiers belongs solely to the nation or the sovereign, no person must attempt to enlist soldiers in a foreign country without the permission of the sovereign; and, even with that permission, none but volunteers are to be enlisted; for the service of their country is out of the question here, and no sovereign has a right to give or sell his subjects to another.

"Whoever undertakes to enlist soldiers in a foreign country without the sovereign's permission, and, in



general, whoever entices away the subjects of another state, violates one of the most sacred rights of the prince and the nation. This crime is distinguished by the name of kidnapping or man-stealing, and is punished with the utmost severity in every well-regulated state. Foreign recruiters are hanged without mercy, and with great justice. It is not presumed that their sovereign has ordered them to commit a crime; and supposing even that they had received such an order, they ought not to have obeyed it; their sovereign having no right to command what is contrary to the law of nature." \* \* \* "But if it appears that they acted by order, such a proceeding in a foreign sovereign is justly considered as an injury, and as a sufficient cause for declaring war against him, unless he makes suitable reparation." (Ibid. s. 15.)

By Kluber: "A state entirely neutral has the right to exact, even by force, if necessary, that belligerent powers do not use neutral territory for the purposes of war; that they take not therefrom munitions of war, and provisions and other immediate requirements of war, for their armies; *that they do not make there any military preparations, enrolments or collections of troops*; that none of their troops, armed or unarmed, pass through, &c., &c.; that they exercise there no act of hostility against the persons or property of the subjects of the hostile state; that they do not occupy it militarily, or make it the theatre of war." (*Droit des Gens moderne de l'Europe*, s. 285.)

By G. F. de Martens: "Whilst, in case of rupture between two nations, a neutral state preserves the full enjoyment of its territorial rights, it can, in the absence of treaties, prohibit during the war, as in time of peace,

any passage or sojourn of foreign troops, and much more forbid the occupation of its fortresses, *the recruiting*, mustering, and exercising *troops*; and it may use force against those who shall attempt to violate the prohibition." (*Précis du Droit des Gens*, s. 350.)

By Galiani: "All governments are accustomed to forbid, under capital penalty, any foreigner to make military engagements or *recruits within their territory*; in doing which they do no more than to sustain and defend a natural right, and one inherent in every sovereignty. \* \*

"The neutral sovereign, who leaves his subjects at liberty to engage themselves in the service of a foreign belligerent, will not therein be wanting to his neutral duties, provided it has been customary with his nation; if it has been usual in time of peace; if it accords with the physical and political condition of the country; if, in fine, he practices indifference and impartiality, not denying to one belligerent what he concedes to the other. But if a sovereign has not been accustomed to allow his subjects to enlist in the military or naval service of other governments, it may well be doubted whether he may, for the first time, do it on the occurrence of war between two states, each of which is in amity with him. I am not prepared to say that in so doing he gives equality of advantage and facilities to both; there might be inequality in the need of the belligerents; for perhaps *one of them, suffering from deficiency of men, would derive precious and powerful succor from such permission, while to the other it would be useless and superfluous*. In my opinion, therefore, this question comes within the general rule of essential neutral duties: that is, to continue in the anterior condition, it being lawful to persevere in what has been

usual, but unlawful to innovate." (*Dei Doveri de' Principi Neutrali*, p. 325, 327, 329.)

By Hautefeuille: "The duties of belligerents may be summed up in very few words. The belligerent ought to abstain from the employment of all such indirect means to molest his enemy as, in the accomplishment of their object, would first injuriously affect a neutral nation. He ought to respect, in the most complete and absolute manner, the independence and sovereignty of nations at peace; in a word, he ought to treat them in the same manner as if the most profound peace continued to prevail. Those nations, in fact, are at peace with him, fulfilling strictly their duties of neutrality; they have the right to enjoy the advantages of their position, and to be exempt from all the evils of war; the duty of the belligerent is to abstain from the infringement of this right. Thus neutral territory ought to be held sacred and inviolable by nations at war; these last ought not, on any pretext, nor in any manner, to make use of such territory to subserve their purposes of hostilities, directly or indirectly. The passage of armed troops, *the levying of soldiers*, &c., &c., without the consent of the sovereign, would constitute an offence against the sovereignty of the neutral, and a violation of the duty of the belligerent." (*Droits et Devoirs des Nations Neutres*, tom. i, 312, 313.)

"As to the territory of neutral nations, the occurrence of hostilities makes no change nor modification of their rights: they remain inviolable as in time of peace. Their territory ought, then, to be sheltered from all enterprises of the belligerents, of whatever nature they may be. The consequences of war ought never to be felt by them directly; that is to say, no act of hostility should be committed against them, under any pretext.