

February 14, 2013

The President of the United States
In c/o **Caroline K. Cheng**
Deputy Assistant, Principal Deputy Counsel to the President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Senator Dick Durbin
In c/o **Mara Silver**
711 Hart Building
Washington, DC 20510

Dear Mr. President,

As I recently read the *Review* issued by the Office of the Inspector General *re* the clemency application of Clarence Aaron (December 2012), I was struck by the conclusion that the current U.S. Pardon Attorney's actions:

... fell substantially short of the high standards to be expected of Department of Justice employees ...

This language struck a chord with me because, on September 11 of last year - the day that the U.S. Postal service released a commemorative stamp in O. Henry's honor - Scott Henson and I over-nighted an application for a posthumous pardon to the Office of the Pardon Attorney (Department of Justice – hereafter DOJ). The idea of doing so had been in our minds since you quoted O. Henry (born William Sydney Porter) at the 2011 version of the annual pardoning of Thanksgiving turkeys. But the application we filed can hardly be dismissed as a matter of personal or passing whim. *Several* generations of Americans have sought clemency for this great American.

In addition to filing a formal application for the pardon, we also sent you a summary of the substantive arguments. We did so, primarily, because, as students and followers of matters related to federal executive clemency, we are well aware of dysfunction in the Office of the Pardon Attorney.

About 5-6 working days after our filing, we received a response from the current U.S. Pardon Attorney, Ronald Rodgers (enclosed). While it can be fairly said that we were disappointed with the outcome of his decision, it is also accurate to say that we were somewhat surprised by the manner in which it was communicated. Consequently, I do not wish to complain about the outcome so much as I wish to

- 1) Share my view of the *quality* of the decision as explained in the response letter
- 2) Express my distress at the manner in which the Pardon Attorney responded to our

- 3) Comment on the poor reflection I believe his response casts on the Office of the Pardon Attorney and the DOJ.

I. The Pardon Attorney writes: *The well-settled policy of the Justice Department not to accept for processing applications for posthumous pardon is grounded in the belief that the time and efforts of clemency officials are better dedicated to the clemency requests of living persons, who can actually benefit from the President's mercy.*

- Knowing the cases of Samuel Mudd, Robert E. Lee, Marcus Garvey, Ellis H. Parker and Jack Johnson, I am well aware of the DOJ's traditional position on posthumous clemency. But, I am also aware of the fact that **1)** the pardon power is a presidential power, one that is *not* constitutionally restricted to the benefit of living persons **2)** recent presidents have granted posthumous pardons and **3)** the DOJ's own web page says that it only has a "general policy" against the consideration of posthumous pardons – *contra* an absolute rule (See <http://www.justice.gov/pardon/policies.htm>).
- Notably, the DOJ's web page also says that its "general policy" is, at least in part, based on the concern that claims of "manifest injustice" are likely to require the need for the "historical record" to be "scoured objectively and comprehensively to investigate such claims" (see <http://www.justice.gov/pardon/policies.htm>).
- As our application clearly makes *no such claims*, we simply asked the Pardon Attorney to **1)** consider the numerous substantive arguments therein and **2)** to consider making an exception to the general rule. However, it is my very strong sense that the application was *not* given careful, fair consideration.
- Finally, as an aside, the Pardon Attorney references a community college professor's personal blog which, in the Pardon Attorney's words, has shown "support" for the DOJ's "general policy" and "has criticized" posthumous pardons. Although the blog is referenced *nowhere* in our application, we searched it and found that its Editor was actually far out front in supporting Charlie Winters' posthumous pardon (only the second such pardon granted in the history of the United States - See *I See Dead People*. PARDONPOWER BLOG, November 22, 2008, <http://www.Pardonpower.com/2008/11/i-see-dead-people-pardoned.html>). It appears the Pardon Attorney reads blogs with the same degree of clumsy selectivity that he reads clemency applications (see commentary below).

II. The Pardon Attorney writes: *Although you have indicated that your request for pardon is not based upon a claim that Porter's conviction was unjust, the application as a whole – and particularly the description of the offense contained therein – indicates that some writers have expressed the belief that there are strong reasons to doubt Porter's guilt.*

- It would be a very peculiar thing to file a clemency application on behalf of an individual widely believed to have been innocent and completely ignore that fact. To be quite blunt, the implication that the possibility of innocence should in no way be referenced in a pardon application is irritatingly obtuse.

- Second, any capable and fair-minded reader of our application would comprehend that we made *no* such claim (of actual innocence) and we failed to do so with *spectacular* clarity:
 - For example, the third paragraph of our “Reasons for Pardon” (Answer 20 to formal application sent to the DOJ) summarizes the major arguments ahead – that is, the arguments that support the clemency application. Yet the paragraph very clearly says absolutely *nothing* about claims of injustice, or innocence.
 - In the 9 separate sections that follow, delineating numerous separate and distinct reasons for posthumous pardon, only 1 section (“Reasons” – Section IV) says *anything at all* about the fact that some people consider(ed) Porter innocent.
 - And even though this single section (IV) references the belief of some that Porter may have been innocent:
 - We *explicitly* contend that “the admiration and respect Porter accrued by the life that he lived, his considerable talent and accomplishments” were “primarily responsible for the momentum behind the view that he may not have ever been guilty in the first place.”
 - We reference an author (Courtney) that “agrees with our view.” As he put it: “Many who knew him would not admit his guilt because they felt that basically there was no purposeful design of wrong doing. This attitude toward a man who was *without doubt* technically guilty is a tribute of high order” (italics added for emphasis).
 - We then double down on our clearly stated position by saying, “It is important to note that this application is *not* based on the view that Porter was innocent.”
 - The above language also appeared in the cover letter for the application that we sent to the Pardon Attorney (enclosed).
 - Finally, we clearly explain our position a *third* time in Section III of the application by arguing, “the strong belief among many that Porter *was* innocent” was best construed as “additional compelling evidence of the incredible, positive transformation that took place in the life of William Sydney Porter.”
- In sum, no serious, fair review of the application we filed could lead to the conclusion that we argue Porter *was* innocent, the Pardon Attorney’s peculiar interest in “some writers” notwithstanding. I can only conclude that the arguments in this section of the application were not given a serious, fair review.

III. The Pardon Attorney writes: *Although Porter's writing is certainly praiseworthy, his literary works in and of themselves do not establish rehabilitation.*

- It is these remarks that I find most offensive and critically damaging to the notion that the application we filed was given serious, fair consideration.
- Our application carefully explains that:
 - o Although Porter was a fugitive from justice for a period of time - and could have easily remained so - he **turned himself in** ("Account of the Offense"). Turning oneself in is, incidentally, an act commonly considered a "plus" in the clemency applications of fugitives in the 1800s ("Reasons" – Section VI).
 - o In the federal penitentiary at Columbus, Ohio, Sydney Porter was almost immediately given **a position of responsibility and trust** - which he did not violate ("Reasons" – Section III).
 - o While serving his sentence, Porter was also allowed to walk outside the penitentiary freely, alone, day and night. This is hardly the measure of **unsupervised freedom** one would expect to be given a prisoner making little or no significant progress toward rehabilitation ("Reasons" – Section III).
 - o The Ohio penitentiary's chief physician said he had never known a man who was "so **deeply humiliated** by imprisonment" (See "Reasons" – Section III).
 - o The penitentiary's night physician described Porter as "careful and conscientious" in his work and "always **above reproach**" in the matter of character ("Reasons" – Section III).
 - o During his three plus years in prison, Porter received **no demerits** (See "Reasons" – Section III).
 - o Our petition also notes Porter was released from his mandatory 5-year sentence after just over 3 years because of his **excellent prison record** ("Reasons" – III). It would, of course, be obdurate to ignore what all of the above things say about a prisoner's path to rehabilitation.
 - o And, of course, the petition explains - what the world knows - that, after his release from prison, Porter immediately became **gainfully employed** (writing for several publications and presses simultaneously) and that he gained an **excellent reputation** in the community.
 - o What is also well known – and would require precious little research to document – is that Porter's life featured **no further violations** of the law ("Reasons" – IV).
- Please note that *none* of the items listed above say *anything whatsoever* about the quality of Porter's literary works. The mere suggestion that the application's commentary regarding rehabilitation relies solely upon the quality of O. Henry's literary output is both ludicrous and insulting.
- Second, it should be observed that anyone familiar with the explanations for clemency decisions reported in the *Annual Reports* of the Attorney General in the late

1800s / early 1900s knows the bullet points above represent *classic* justifications for grants of clemency (see chart in “Reasons” – Section VII).

- I respect the Pardon Attorney’s right to enthusiastic disinterest in the history, clemency practices and the many particulars of this application. But I really did expect more rigor and professionalism.

III. The Pardon Attorney writes: *It appears that at least a portion of the public accepts the claim that Porter was wrongly convicted and would likely view a posthumous pardon as evidence of his innocence.*

- I believe that, whatever personal interests the Pardon Attorney has in the topic of what some people might think about Sydney Porter, those interests have no (or should not have any) relevance whatsoever to a serious assessment of the substance of our several arguments.
- More disturbingly, I completely mystified as to how the Pardon Attorney’s imagination appears so limited, so uninformed. Throughout history, presidents have granted literally *thousands* of pardons to persons on the grounds of rehabilitation – without any reference whatsoever to guilt or innocence. Is it really possible that, today, the Justice system’s traditional value of rehabilitation is so far off of the radar of the Office of the Pardon Attorney that applications based on rehabilitation are rejected outright, for fear that, someone, somewhere, might misinterpret a presidential pardon for an unqualified declaration of innocence, or a miscarriage of justice?

I find this possibility positively frightening.

Having grossly misrepresented this aspect of our petition, the Pardon Attorney shared what was, quite apparently, his pre-ordained conclusion: *Under these circumstances its processing would indeed require [difficult and time-consuming] scouring the record of the more than 100-year-old-conviction [to] piece together concrete evidence of the nature and extent of Porter’s post-conviction rehabilitation.*

This is complete and utter nonsense. Porter was internationally famous and became even more so after his death. His life was meticulously “scoured” after his death, when most learned - for the very first time - that he had been convicted. With a computer, *Google* and ever-so-little research skill, the Pardon Attorney could tap into this easily located (and prominent) pile of scholarship to find all the “concrete evidence” he desires.

V. The Pardon Attorney writes: *I note that you have been able to provide only limited addition information about his post-prison life.*

- The Pardon Attorney is correct in suggesting that our clemency application did *not* pedantically review the details of Sydney Porter’s life, say, in the manner of several biographies and journal articles that can be easily obtained online or at any respectable library - without anything like time-consuming, laborious scouring.

- What the application does do, however, is consider what kind of a clemency application *could* have been filed when Porter was living. And we attempt to gain *systematic insight* on the matter of how *likely* a pardon would have been, had such an application been filed. So, in addition to failing to comprehend the application's repeated position regarding rehabilitation ("Reasons" – Section IV), we see *no evidence whatsoever* that the Pardon Attorney examined (much less understood) the result of our considerable effort on this front (summarized in "Reasons" – Sections I, II and VI).
- I spent many hours combing through over a thousand clemency warrants and the *Annual Report* of the Attorney General related to the administration of T. Roosevelt. I meticulously summarized the official, public reasons that were offered for the granting of each and every act of clemency in that administration. I then carefully located clemency almost 30 clemency recipients who had committed offenses similar to Porter's. I presented original data on these things, as well as data on particular offenses, sentences, distances between sentencing and clemency, etc. (See Figure 1). Of course, I researched these matters so seriously, because I expected the application to be *treated* in a serious manner.
- And, as a result of this effort, our application carefully explains that:
 - o Sydney Porter had an excellent **reputation** before his conviction ("Reasons" – Section 1).
 - o His offense at the *First National Bank* of Austin, Texas, was his **first offense** ("Reasons" – Section I)
 - o We discuss the **minor nature** of his offense and provide data on pardons in Porter's generation that were given to individuals who committed offenses in a similar category but were *exponentially* more egregious (crimes involving millions and millions of dollars and collapsing banks - See "Reasons" – Section II). The *Annual Report* of the Attorney General, with an interest in basic notions of fairness, often justifies pardons on the basis of disparity in sentencing and the fact that other persons who committed **similar (or more serious) offenses** were pardoned.
 - o The petition also describes what is undisputed: the lax, disorderly, unprofessional working environment at the *First National Bank* in Austin ("Account of the Offense"), which we feel would constitute - in the mind of any reasonable person - legitimate **mitigating circumstances**.
 - o Porter's 5-year prison sentence was a **mandatory minimum sentence** ("Reasons" – Section VI). The *Annual Report* documents that judges and prosecutors frequently complained about mandatory minimums in this time period. But, at the very least, Porter's minimum sentence clearly suggests court officials did *not* consider his offense of the "worst" sort, or among the more egregious.
 - o Finally, we argue a posthumous pardon for Sydney Porter would serve the **public interest** as well as the interests of the presidency and our system of

justice. It would educate and inform citizens as to the importance of mercy and the rehabilitative functions of the law. It would also provide excellent underpinnings to President Obama's public statements about his belief in "the idea of redemption," that people can "change" and deserve a "second chance" ("Reasons" – Sections VIII and IX).

- Anyone familiar with the explanations for clemency decisions reported in the *Annual Reports* of the Attorney General in the late 1800s and early 1900s knows the bullet points above (along with the ones summarized in our discussion of Porter's rehabilitation) represent **classic justifications for grants of clemency**. Consequently, while the typical explanation for clemency in the *Annual Report* might feature 2-3 of these factors, an entry for Sydney Porter could have very easily featured **16 or 17** (also see the chart in "Reasons" – Section VII).
- The Pardon Attorney simply ignored the fact that, even if Sydney Porter had never so much as written a *single line*, he would have still been – and remains – a freakishly *excellent* candidate for federal executive clemency.

Mr. President, I do not feel that anyone who files an application for federal executive clemency today, for *anyone*, or *any* reason, should find their efforts greeted with such a hard-nosed and dismissive attitude, an attitude which seems to begin with the settled assumption that the next clemency application is/should be simply the next addition to a pile of thousands of denials.

I find the language of the Pardon Attorney's letter insulting, inaccurate, and unnecessary.

Mr. President, I, again, respectfully ask that you formally recognize the importance of second chances, mercy and rehabilitation, and that you do so by granting a posthumous pardon to William Sydney Porter – **O. Henry**.

Sincerely,

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- Enclosed:
1. 9/20/2012 Letter from Office of the Pardon Attorney, Rodgers
 2. 9/11/2011 Cover Letter to the Pardon Attorney from Hensen, Ruckman
 3. Application for Pardon on behalf of O. Henry sent to Pardon Attorney
 4. Application Attachment: Answer 6, Account of Offense
 5. Application Attachment: Answer 20: Reasons for Pardon