

September 11, 2013

Ronald L. Rodgers, Pardon Attorney  
Office of the Pardon Attorney  
4<sup>th</sup> Floor, 500 First Street, N.W.  
U.S. Department of Justice  
Washington, D.C. 20530-0001

Dear Mr. Rodgers,

Enclosed you will find a formal application for the posthumous pardon of the great American short-story writer, O. Henry (**William Sydney Porter**). O. Henry's well-known reputation is such that President Obama recently quoted him, at an annual public event held at the White House,<sup>1</sup> and the *U.S. Postal Service* has issued a stamp commemorating the 150<sup>th</sup> Anniversary of his birth.<sup>2</sup> As the enclosed application also notes, the very courtroom where O. Henry was once convicted is now named in his honor.

In your letter of September 20, 2012, you note that, in 1985, the Office of the Pardon Attorney "declined a previous request" for posthumous pardon and that you are "not inclined" to take a "contrary position." You explain this disinclination as the by-product of a "well settled policy" of the Justice Department not to accept applications for posthumous pardon because "the time and efforts of clemency officials are better dedicated to the clemency requests of living persons." A casual review of the acting pardon attorney's 1985 decision suggests, however, that you would be well justified (if not outright prudent) in developing such an inclination or – at a minimum – substantively revisiting his position.

**First**, the 1985 letter was not written in response to a formal application. It was made in response to a two-page personal letter that the Treasurer of the *O. Henry Festival* wrote to Senator Jesse Helms.<sup>3</sup> Senator Helms then wrote the attorney general asking that a posthumous pardon be considered.<sup>4</sup> No application was filed. No substantive arguments were made on O. Henry's behalf. No data or evidence was presented to the attorney general, the acting pardon attorney or the Department of Justice. Substantively, the acting pardon attorney's letter to Helms<sup>5</sup> merely disagreed with the notion that there was "much to gain and nothing to lose" by pardoning O. Henry<sup>6</sup> and that such a pardon might be "important."<sup>7</sup>

**Second**, the acting pardon attorney did *not*, as you seem to suggest, reject the request for posthumous pardon of O. Henry because of the "well settled policy" which you assert. Indeed,

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<sup>1</sup> "Obama Quotes Fugitive, Felon While Pardoning Turkey." *PardonPower Blog*, December 5, 2011. <http://www.pardonpower.com/2011/12/obama-quotes-fugitive-felon-while.html>

<sup>2</sup> "Celebrating Master Storyteller O. Henry's 150th Birthday Anniversary." U.S. Postal Service, Release 12-100, September 11, 2012. Posted at [http://about.usps.com/news/national-releases/2012/pr12\\_100.htm](http://about.usps.com/news/national-releases/2012/pr12_100.htm).

<sup>3</sup> Letter from Seth Macon, Treasurer, *O. Henry Festival*, to Senator Jesse Helms, dated December 10, 1984.

<sup>4</sup> Letter from Senator Jesse Helms to U.S. Attorney General Edwin Meese dated March 1, 1985.

<sup>5</sup> Letter from Donald C. Stevenson, acting pardon attorney, to Senator Jesse Helms, dated March 20, 1985.

<sup>6</sup> Macon's letter to Helms, page 2.

<sup>7</sup> Helms' letter to Meese.

there is not a trace of the “well settled policy” you assert in the acting pardon attorney’s 1985 letter. Instead, the request was unequivocally rejected because of:

... [a] long-established practice of the Department of Justice not to consider petitions for the granting of posthumous pardons. The basis of this practice is in large part<sup>8</sup> the legal principle that a pardon, like a deed, must be accepted by the person to whom it is directed. Acceptance, of course, is impossible when the recipient is deceased ... While I sympathize with the desire of the members of the festival committee to obtain a posthumous pardon of O. Henry, I hope they will understand the limitations upon the President in matters of this kind.

I cannot attest to the authenticity and / or authoritative nature of “long standing” and “well settled” policies asserted by persons in your position, but I do have the strong sense that the “limitations” upon the President referenced by the acting pardon attorney in 1985 have been squarely, publicly, and fantastically rejected for about a decade and half. I base this sense on the assumption that **Henry O. Flipper** (who died in 1940) did not “accept” the pardon granted to him in 1999, by President Clinton.

Posthumous presidential pardons have not been granted frequently, but it is also my recollection that George W. Bush granted one to **Charlie Winters**, in 2008. Winters died around 1984. I believe it is also correct to say that you were serving as U. S. Pardon Attorney when Winters’ posthumous pardon was granted. I do not recall hearing of any protest on the part of the attorney general, anyone in the Office of the Pardon Attorney, or anyone in the Department of Justice, asserting that Mr. Bush had somehow exceeded “limitations” placed on him by “legal principle” because Mr. Wilson could not “accept” the pardon.

In sum, as the current U.S. pardon attorney, you should be very much inclined to consider a “contrary position” to that of the acting pardon attorney almost three decades ago. His position was neither substantive (in response to a formal request) nor correct (in terms of the views of presidents, attorneys general, the OPA and the DOJ since at least 1999).

In 2012, when an application for O. Henry’s posthumous pardon was presented to your office, you seemed somewhat distracted by the fact that it was supported by Scott Henson who, apparently, once “opined” doubt as to O. Henry’s guilt in a blog post. Neither the blog, nor the particular post, were referenced anywhere in the application, or in supporting materials. But, for what it is worth, Mr. Henson plays no role in the enclosed application.

Your response to the same application also suggested I had “previously expressed” my “support” for the “well-settled” policy (above) in a blog post (again, nowhere referenced in the application or accompanying materials). Assuming a sincere interest in fairly, accurately understanding / representing my view, I have attached a post (“I See Dead People,” at the same blog). It should easily clarify for you that I felt the case of Charlie Winters (unlike the case of **Jack Johnson**) deserved more than your casual attention, as does the case of O. Henry (see Section VIII, Answer 20, “Reasons for Pardon”).

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<sup>8</sup> No other “part” is mentioned in the acting pardon attorney’s letter to Senator Helms.

Your response to the 2012 application appeared unable to see past the mere “indication” that “some writers” have “expressed belief” that there were reasons to doubt Porter’s guilt. Frankly, I am mystified as to what adjustment could be made to adequately address the dysfunction driving this inability. I can only say that the enclosed application (like the previous one) is very clearly based on the ground of rehabilitation and well-deserved forgiveness. This basis is affirmed repeatedly and - contrary to your characterizations - unequivocally. Indeed, in the single instance where such doubts are mentioned in the discussion of “Reasons for Pardon” (Section IV), I very clearly assert agreement with the view of Courtney that belief in Porter’s innocence – however sincerely held – is best understood as profound evidence of the degree of his rehabilitation (evidence that should not be ignored) and his well established reputation as a law-abiding citizen.

Finally, your response to the 2012 application suggested that, in order to “process” a request such as this, it would be necessary for “clemency authorities” to “review the historical record” to “attempt to find and piece together concrete evidence of the nature and extent of Porter’s post-conviction rehabilitation.” You added that Porter’s writings “in and of themselves do not establish rehabilitation” and that the application provided only “limited additional information about his post-prison life.”

I respectfully disagree.

O. Henry was / is famous and many authors have gone through his life with a fine-toothed comb. Few “historical records” of persons are so exhaustive, accessible and authoritative. There should be no problem whatsoever obtaining (much less piecing together) the needed information quickly, and with precious little effort.

The 2012 application, of course, nowhere foolishly suggested Porter’s writings “in and of themselves ... establish rehabilitation.” On the other hand, it *did* say quite a bit (as does the enclosed petition) about Porter’s “post-conviction rehabilitation” – contrary to your assertion. Among other things, the application discussed:

- Porter’s well-known penitent disposition in prison
- His excellent prison record
- The amount of responsibility Porter was given in prison
- The incredible degree of freedom he was also given in prison
- His early release from prison (for good time)
- The obvious shame of conviction that he carried throughout life (hidden even from his own daughter)
- The fact that his conviction was his first and last
- And, again, the fact that his reputation as a law-abiding citizen was such that many simply could not accept that he was ever guilty to begin with

The application also offers far more than any of that. My exhaustive examination of the *Annual Report* of the attorney general (1902-1909), carefully explained to you that several of the items listed above are noted as sole justifications for the granting of pardons and commutations of sentence to contemporaries of Porter who committed similar offenses. The data thus very clearly

demonstrate that Porter would have been an excellent candidate for clemency, in his day, had he but applied. And, as the application explains, he remains an excellent candidate for clemency.

I recognize that Porter's offense was committed a long time ago. I realize that your Office – reasonably enough - has no desire to be caught in the snare of the outcome of an embarrassing decision. I also realize you are perhaps short on time, energy and resources, and that there are many thousands of living clemency applicants looking to you for a decision.

But, the fact of the matter remains that it is your job to merely make recommendations to the President of the United States. Ultimately, it is the President's power to grant pardons. And I believe serious, fair review of the enclosed materials should be more than sufficient to provide you justification for favorable recommendation on O. Henry's behalf. President Obama did not quote a scoundrel. The *U.S. Postal Service* did not commemorate an un-rehabilitated, notorious, repeat offender.

No, O. Henry's post-conviction life as a loved and admired, productive, accomplished and law-abiding citizen cannot be reduced to the contents of neatly packaged test tube and delivered to your office. The well-settled judgment of history, and accompanying generations, may not be the stuff of "concrete." But justice can also attune itself to what is relentlessly uniform, without contradiction, and, thus, consistent with conclusions that are entirely reasonable, if not painfully obvious.

Please consider 1) making this application an exception to the Department's "general policy" for posthumous pardons for federal convictions and 2) forwarding a favorable recommendation to the President. If you cannot yield to the arguments therein, please consider 3) forwarding a neutral position on the matter to the President.

Sincerely,

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<http://www.pardonpower.com/2008/11/i-see-dead-people-pardoned.html>

## SATURDAY, NOVEMBER 22, 2008

### "I See Dead People ... Pardoned!"



When Bill Clinton pardoned Henry O. Flipper, the first African American graduate of West Point, in 1999, it was more than a little unusual. Flipper had been dead for about 59 years and the pardon disrupted a long-standing tradition of reserving presidential pardons for individuals who were *alive* (ask family members and supporters of short story writer O. Henry, legendary detective Ellis H. Parker, and Dr. Samuel Mudd). **Some may have worried that the Flipper pardon would lead to a surge in similar requests but, apparently, no such thing has happened.** We are aware, however, of a fairly high-profile effort, spearheaded by filmmaker Ken Burns, to have boxing great Jack Johnson pardoned posthumously.

Charles Thompson Winters (pictured on left), who died in 1984, was never as famous as Jack Johnson, and probably never will be. As far as we know, no films are being made about his life. **But, if we are going to pardon dead people, and Jack Johnson's application is considered legitimate by so many, then one has to think the pardon application of Winters (which has its *own* share of great arguments, letters from impressive supporters and evidence of truly notable contribution) is worth several long, *hard* looks.**

In 1947, the United Nations provided for the creation of a Jewish and Arab state, but the Arab League rejected the mandate. As a result, when the British announced a date for withdrawal from the region (May of 1948), five Arab nations were posed to obliterate the new Israeli state. Supporters of Israel all over the world rallied to provide troops and weaponry on Israel's behalf. And a significant amount of this assistance came from individuals in the United States.

At the time, Charles Winters was a businessman flying fruit from Miami to Porto Rico. But Winters had something a former Army flight engineer, Al Schwimmer, wanted, namely, two B-17s (Schwimmer had already purchased two others in California and Oklahoma). Winters was reluctant to get involved but sympathetic to Israel. Eventually, he made the sale and led the flight of three aircraft from Miami to Czechoslovakia. The contribution could not have been greater as the four B-17s were the only heavy bombers in the Israeli Air Force. Their arrival on the scene has been variously described as "a major turning point" in the 1948 War of Independence, "critical" and "incredibly important."

The two "major players" in the aircraft purchase were Al Schwimmer and radio personality, Hank Greenspun, but all three men were convicted for violating the *Neutrality Act*. In January of 1949, Winters (who lacked the resources of other defendants) plead guilty and was sentenced to 18 months in prison. Yet, just two months later, a second pilot plead guilty and got *no* prison time at all. Schwimmer and two others *demand*ed a trial and were found guilty. The result, once again, was a mere *fine*. Greenspun, likewise, plead guilty and was only *fin*ed. As

a result, one letter supporting a pardon notes, "the sentence given to Winters was the most unjust of all of about a dozen persons indicted and tried."

But the story does not end there. Greenspun sought a presidential pardon and was awarded one by John F. Kennedy in 1961. Schwimmer refused to even apply, but was pardoned anyway, by Bill Clinton in 2001. As it turned out, Herman Greenspun's son, Brian, was a classmate of Clinton's at Georgetown University and a frequent visitor to the White House. Now, some say, it's Winters' turn to have his name cleared. And at least 21 members of Congress agree. As Mr. Schwimmer puts it:

He should be remembered as a hero for his contribution to the creation and preservation of the State of Israel rather than forever being marked as an ex-convict ... **Charlie's pardon is important for history, for his legacy,** and for his son.

Another letter of support from a prominent American reads:

... **it would be a fitting tribute to his memory** and a real blessing to his family if this pardon is granted. There are some moral people in this world, many of whom never receive the credit they deserve. Winters was obviously one of those and deserves it.