

# **Beuding Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper<sup>†</sup>**

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“The moral arc of the universe is long, but it bends toward justice.”<sup>a</sup>

## **INTRODUCTION**

On February 19, 1999, President William Jefferson Clinton granted the first posthumous Presidential pardon in our nation’s history. The recipient was Lt. Henry Ossian Flipper, the first African-American graduate of West Point and the first African-American commissioned officer in the regular United States Army. Lt. Flipper was dismissed from the Army in 1881 after a court-martial, for conduct unbecoming an officer and a gentleman. His court-martial and dismissal have long been seen as a grave miscarriage of justice.

In seeking a posthumous pardon for Lt. Flipper, we faced considerable barriers. It has long been the policy of the Pardon Attorney of the U.S. Department of Justice not to accept or process posthumous pardon applications. The government’s position is rooted in cases decided during the early days of our country. The Pardon Attorney asserts that these cases and authorities dictate that posthumous pardons cannot and should not be granted by the President.

The brief we submitted to the President in support of our pardon petition attacked those legal and policy barriers, and also set forth the factual and legal case for the pardon.<sup>b</sup> In researching the brief, we examined evidence that is over 100 years old, including Lt. Flipper’s court-martial, and other records. Our research took us to England; we also examined our own constitutional authorities, and conducted research in various States.

## **THE FACTUAL CASE FOR LT. FLIPPER’S POSTHUMOUS PARDON**

The facts favoring a posthumous pardon for Lt. Flipper are compelling and are set forth in the Statement of Facts portion of the brief. Lt. Flipper was an American patriot and hero, who met with a miscarriage of justice because of his race. Restoring his good name and remedying the injustice he suffered was an important step forward for our nation, especially in light of the significance of Lt. Flipper’s contributions to his country.

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\* The authors are attorneys at the law firm of Arnold & Porter, Washington, D.C., who represented the family of Lt. Flipper in seeking a posthumous pardon.

a. Theodore Parker, Abolitionist.

b. The brief is reprinted following this Introduction.

### *Lt. Flipper at West Point and as a Soldier*

As a soldier, Lt. Flipper was a trailblazer who, despite the overwhelming resistance he faced, cleared the path for others who, until then, had been barred from fully serving in the military. Born a slave in Thomasville, Georgia in 1856, he was the fifth African American to enter West Point, but the first to graduate. He endured unremitting racial ostracism from his fellow cadets during his West Point years.

He went on to become the first African-American officer to command units of the famed "Buffalo Soldiers," who served in the 9th and 10th Cavalry. He was tested in battle. As an Army engineer, he constructed "Flipper's Ditch," a system that drained the malaria-filled swamps around Ft. Sill, Oklahoma, and saved many lives. It is still in use today—over 100 years after its construction. No other engineer the Army had assigned to this task had been able to accomplish it. In 1975, the U.S. Department of the Interior designated Flipper's Ditch a National Historic Landmark.

### *The Court Martial Trial*

In 1881, Lt. Flipper was tried at Ft. Davis, Texas, on charges of embezzlement and conduct unbecoming an officer and a gentleman. The charges arose from monies found to be missing in connection with his duties as Acting Commissary of Subsistence at that post. After a 30-day trial, Lt. Flipper was found not guilty of embezzlement, but guilty of conduct unbecoming an officer—the mandatory penalty for which was dismissal from the Army. There was no judicial review provided for at that time, and the conviction was affirmed by President Chester A. Arthur, whereupon, the commissioned officer corps of the Army returned to its prior status of being all white.

### *Lt. Flipper's Post-Army Life*

After his dismissal from the Army, Lt. Flipper continued his life in a truly heroic manner. Since the quality of the life one has lived post-conviction is the factual touchstone for granting a pardon, Lt. Flipper unquestionably met the standard. Indeed, his accomplishments and contributions to his country undoubtedly far exceed those of others who seek presidential pardons.

Lt. Flipper established his own business as a civil and mining engineer. As a result of his formidable skills, he was called back into service by the U.S. government. He served as a Special Agent of the U.S. Department of Justice, assigned to the U.S. Attorney for the Court of Land Claims. He later served as a staff member of the Senate Foreign Relations Committee and as a Special Assistant to the Secretary of the Interior. He used his skills as an engineer, a scholar and translator in these various positions. His work was widely praised by the high government officials under whom he worked. He also was employed by a number of private companies.

### THE FIGHT TO CLEAR LT. FLIPPER'S NAME

Despite his contributions, Lt. Flipper was unsuccessful in his fight to clear his name. He attempted to do so through legislative means, as well as by attempting to see the President. He died in Atlanta, Georgia, at age eighty-four.

Others continued where Lt. Flipper's efforts had ended. In the 1970s, Lt. Flipper's niece, Irsle Flipper King, along with a Georgia schoolteacher, Ray O. MacColl, presented the Army with a petition seeking a pardon for Lt. Flipper, as well as a posthumous honorable discharge. After reviewing the matter, the Army Board for Correction of Military Appeals ("ABCMR"), in 1977, granted a posthumous honorable discharge to Lt. Flipper, finding that his treatment was "unduly harsh" and "unjust."<sup>c</sup> The ABCMR stated that it lacked the power to grant him a pardon, however, because the Constitution grants the pardon power exclusively to the President.

### *Posthumous Honors*

After the ABCMR's action, a procession of additional posthumous honors were bestowed upon Lt. Flipper by the State of Georgia, West Point, the Army, and the United States. In 1977, the Governor of Georgia proclaimed "Henry O. Flipper Day." That same year, West Point dedicated a bust and a portion of its Library in Lt. Flipper's honor, and also established an award in his name to be given annually to a cadet who has overcome adversity. In 1978, the Army reburied Lt. Flipper in his hometown of Thomasville, Georgia, with full military honors. In 1989, Georgia placed an historical marker at his gravesite. As a result of legislation introduced in the Congress, the U.S. Postal facility in Thomasville, Georgia was named after Lt. Flipper in December 1998.

However, the final step in clearing his name—obtaining a presidential pardon—remained to be accomplished.

### THE LEGAL CASE FOR THE PARDON

In the Argument portion of the brief, we set forth the legal support favoring a posthumous pardon for Lt. Flipper. Therein, we also rebut the Pardon Attorney's long-standing legal and policy arguments against granting posthumous pardons.

In Part I, we argue that presidential pardons are granted to remove stigma, to signal forgiveness, and to correct injustices. Part II discusses why the Pardon Attorney's position that posthumous pardon requests cannot be granted is flawed. Part III reviews the authorities that show the President has the power to grant posthumous pardons. Part IV discusses the special responsibility that the President has as Commander in Chief to ensure the integrity of the military justice system. Part V establishes that the President's pardon power is coextensive with that of the British Crown, which has granted posthumous pardons. In Part VI, we argue that

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c. Department of the Army, Army Board for Correction of Military Records ("ABCMR") Proceedings, Nov. 17, 1976, at 7.

the president's pardon power is similar to that of state governors, who have granted posthumous pardons. Part VII rebuts the Pardon Attorney's concern that granting Lt. Flipper a posthumous pardon would cause the "floodgates" to open to additional requests. Finally, Part VIII discusses why granting the pardon would promote the public welfare, which is the modern legal standard for whether a pardon should be granted.

### THE POSTHUMOUS PARDON IS GRANTED

In granting Lt. Flipper a posthumous pardon on February 19, 1999, President Clinton remedied a grave injustice that had stood for far too long. Three generations of Lt. Flipper's relatives from around the country attended the White House ceremony at which the pardon was granted. By virtue of his accomplishments, Lt. Flipper has been, and will continue to be written about and studied. As the President stated, "This good man has now completely recovered his good name." That is as it should be—and nearly sixty years after his death, Lt. Flipper continues in his role as a trailblazer.

## Executive Grant of Clemency

TO ALL WHOM THESE PRESENTS SHALL COME, GREETING:

*WHEREAS* Lieutenant Henry Ossian Flipper, 10<sup>th</sup> Cavalry, United States Army, was convicted on December 8, 1881, of Conduct Unbecoming an Officer by General Court-Martial convened at Fort Davis, Texas, and sentenced to be dismissed from the Army effective June 30, 1882; and

*WHEREAS* on November 17, 1976, the Army Board for Correction of Military Records concluded that Lieutenant Flipper's overall military service was honorable and that his military records should be changed to reflect that he served honorably; and

*WHEREAS* on February 8, 1977, Lieutenant Flipper's dismissal was changed to an honorable discharge; and

*WHEREAS* the Department of Defense and the Department of Justice have recommended executive clemency for Lieutenant Flipper:

*NOW, THEREFORE, BE IT KNOWN*, that I, William J. Clinton, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant a full and unconditional pardon to Lieutenant Henry Ossian Flipper for the above-described offense against the United States.

*IN TESTIMONY WHEREOF*, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the City of Washington this  
nineteenth day of February  
in the year of our Lord nineteen  
hundred and ninety-nine and of the  
Independence of the United States  
the two hundred and twenty-third.



*William J. Clinton*

TO THE PRESIDENT OF THE UNITED STATES

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PETITION FOR PARDON FOR  
SECOND LIEUTENANT HENRY OSSIAN FLIPPER  
10<sup>TH</sup> CAVALRY, UNITED STATES ARMY

The First African-American Graduate  
of the United States Military Academy, 1877

Convicted December 8, 1881,  
"Of Conduct Unbecoming An Officer"  
by General Court-Martial at Fort Davis, Texas  
and Sentenced to be  
Dismissed from the Army June 30, 1882

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**BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR  
PARDON\***

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\* This brief is published almost entirely in its original form save a few, minor editorial changes implemented solely for formatting purposes. Additional citations to the sources cited herein as exhibits are provided in the Appendix following the Brief.

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STATEMENT OF FACTSA. Lt. Flipper's Court-Martial and Its Review

Lt. Henry Ossian Flipper, born a slave in Thomasville, Georgia, was the first African-American to graduate from the United States Military Academy at West Point, in 1877, and was the first African-American commissioned officer in the regular United States Army. After four years' service with various segregated units including the 10<sup>th</sup> Cavalry, in 1881 he became Acting Commissary of Subsistence at Fort Davis, Texas. He had received no training for this position. In this capacity, Lt. Flipper received payments from soldiers buying goods from the Army at this remote frontier post. In July of that year, he discovered that some \$2,378 in U.S. Government funds entrusted to his care was missing. Fearful that the loss would be used as a pretext to end his Army career, and unable to seek out any fellow officer for advice due to the extreme isolation imposed on him throughout his Army career as a result of his race, he kept silent about the loss. He planned to replace the money with, *inter alia*, \$2,500 he expected at any moment from the publishers of a book he had written about his experiences at the Military Academy, A Colored Cadet at West Point.<sup>1</sup> In the meantime, he submitted inaccurate statements concerning the status of the funds to his commanding officer, Col. William Shafter, to prevent discovery.<sup>2</sup>

His book receipts did not arrive before the shortfall was discovered. Col. Shafter arrested Lt. Flipper and jailed him in the guardhouse, in violation of regulations barring such imprisonment of officers. The War Department, upon learning of this blatant mistreatment of Lt. Flipper, telegraphed General C.C. Augur, Commander of the Army Department of Texas:

Papers relative to Lieut. Flipper's arrest and confinement received. Both the Secretary of War and the General of the Army require that this officer must have the same treatment as though he were white.

This telegram demonstrates that the highest levels of the Army felt that Col. Shafter's treatment of Lt. Flipper reflected racial prejudice. However, the telegram was not admitted at the trial.

Lt. Flipper's good character in the local community was so strong that more than a dozen of his friends and acquaintances took up a collection and, within 48 hours, made good the entire loss. Nevertheless, Col. Shafter drew up charges accusing Lt. Flipper of violations of military discipline, in particular, of violating the 60<sup>th</sup> and 61<sup>st</sup> Articles of War. He alleged that Lt. Flipper had embezzled the missing commissary funds and had engaged in conduct unbecoming an officer by failing to report to his superiors that the funds were missing.

Lt. Flipper pled not guilty to all charges. The thirty days of testimony and argument at his trial included the testimony of many witnesses attesting to

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1. This book is still in print; see reprint edition by Ayer Co., Salem, New Hampshire (1991).

2. Trial transcript at 506 (copy available on request). The facts surrounding the conviction are discussed in detail in Lt. Flipper's Pardon Petition at pages 6-13.

Lt. Flipper's good character and frugal habits, including Army officers.<sup>3</sup> The court-martial found Lt. Flipper not guilty of the lead charge of embezzlement. However, he was found guilty of conduct unbecoming an officer, based upon his inaccurate financial reporting to Col. Shafter.<sup>4</sup> Thus, Lt. Flipper's only crime was his attempt to postpone discovery of the deficiency in the funds, for the sole purpose of giving himself more time to correct the deficiency in the accounts prior to discovery—a deficiency which was not his fault and which he swiftly made up, in any event.

Pursuant to the procedures in place at that time, there was no judicial review of the court-martial finding. The only available review was through the military chain of command, with President Chester A. Arthur, in his capacity as Commander in Chief of the Army, as the final reviewing authority.

On intermediate review of the court-martial's finding, the Judge Advocate General of the Army, Gen. Swaim, found that Lt. Flipper's conduct did not warrant the mandatory discharge that conviction for conduct unbecoming an officer entailed, and recommended that the President mitigate the conviction. Gen. Swaim, therefore, wrote a lengthy and detailed letter to the Secretary of War recommending this leniency.<sup>5</sup> However, it does not appear that this letter was made part of the official record of the case. In fact, there is no evidence that President Arthur ever saw or knew of Gen. Swaim's recommendation for leniency. The President confirmed Lt. Flipper's conviction with only a one-sentence order that includes no statement that he had given any personal consideration to the record of the case or to the Judge Advocate's recommendation of leniency.<sup>6</sup>

#### B. Lt. Flipper's Subsequent Distinguished Record

After his conviction, Lt. Flipper subsequently led an extraordinarily successful life both in private industry and in government, primarily in Arizona, New Mexico, and Washington, D.C. He served the United States with great distinction for 12 years, first as a Special Agent for the Department of Justice attached to the Court of Private Land Claims, then as a member of the staff of the Senate Foreign Relations Committee, and lastly as a Special Assistant to the Secretary of the Interior.<sup>7</sup>

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3. Trial transcript at 464, 470, 477-478, 488, 491. Key testimony is reproduced in the Pardon Petition at 59-61.

4. The charge for which Lt. Flipper was convicted consisted of five specifications, all of which related to his attempt to wait until he had the funds on hand for which he was responsible. The first specification was for making a false statement to Colonel Shafter on August 10, 1881, in connection with transmittal of the funds and representing orally that the funds were in transit to the Chief Commissary of Subsistence. Specifications two through four concerned the weekly statements he completed on July 9, 16, and 23, 1881, that showed the funds in transit to the Chief Commissary of Subsistence. Specification five involved him displaying a check by which he attempted to convince Colonel Shafter that the funds were not deficient.

5. Attached as Exhibit 1.

6. President Arthur's order is attached as Exhibit 2.

7. When not in federal service, Lt. Flipper was a civil engineer, surveyor, and expert in mining and land laws, practicing in the Southwest, Mexico, and South America. He was the first African-American to gain distinction in these professions in the United States. See Henry O. Flipper, Negro

The U.S. Attorney for the Court of Private Land Claims defended Lt. Flipper's integrity against a challenge by disappointed litigants before the Supreme Court of the United States in 1898. In a brief to the Court, the U.S. Attorney wrote that "no successful attack can be made upon his honesty, his integrity, and his reliability" and that "[f]ive judges, composing the Court of Private Land Claims, who have observed him carefully and closely since his original employment, will unite in commending his work and the integrity of it and the man."<sup>8</sup> Six years later, the Attorney General reported to Congress that Lt. Flipper had served the United States with "fidelity, integrity, and inagnificent ability."<sup>9</sup> On several occasions, Senator, and later Secretary of the Interior, Albert Fall also attested to Lt. Flipper's excellent service in the Senate and the Interior Department.<sup>10</sup>

On at least four occasions, Lt. Flipper petitioned Congress to pass a private bill exonerating him and restoring his rank, but, given the times, was unable to muster sufficient political support to obtain passage. None of the bills ever reached the floor of either House. On at least one occasion, he met with the President of the United States at the White House, in the hopes of securing relief. However, Lt. Flipper died in Atlanta in 1940 at the age of 84 with his conviction intact.

### C. Posthumous Proceedings in the Army

In 1976, the Army Board for Correction of Military Records conducted posthumous proceedings in the case of Lt. Flipper. After an exhaustive review of the record of Lt. Flipper's conviction and post-conviction career, the Board concluded that Lt. Flipper's conviction and punishment were "unduly harsh, and therefore unjust." Proceedings of the Army Board for Correction of Military Records in the Case of Henry O. Flipper (Deceased), November 17, 1976, ("ABCMR") at 7.<sup>11</sup> The Board found that Lt. Flipper should not have been dismissed from service, but ruled that it did not have the authority to overturn the conviction. Id. at 6. Donald G. Brotzman, Assistant Secretary of the Army for Manpower and Reserve Affairs, expressly "approved" the findings and conclusions of the Board in a memorandum to the Adjutant General, dated December 13, 1976. The Adjutant General, Brig. Gen. Robert S. Young, agreed, and on February 8, 1977, the Army corrected Lt. Flipper's military records to show that he received an honorable discharge on June 30, 1882.

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Frontiersman: The Western Memoirs of Henry O. Flipper, reproduced in the Pardon Petition Appendix at Tab A, page vii.

8. See Brief of the United States in Opposition to Motion to File Additional Evidence in Faxon v. United States, No. 119, Oct. Term 1897 at 9; Pardon Petition at 49-51 and Pardon Petition Appendix Tab B1.

9. See Annual Report of the Attorney General, 1904, at 99; Pardon Petition at 51-52 and Pardon Petition Appendix at Tab B2.

10. See Letter from Senator Albert B. Fall to Senator James W. Wadsworth, dated Sept. 9, 1922; Letter from Senator Albert B. Fall to Senator Harry S. New, dated Sept. 9, 1918; Pardon Petition at 52-58 and Pardon Petition Appendix at Tabs C2 and C4.

11. A complete copy of these proceedings is included as Exhibit 3 and in the Pardon Petition Appendix at Tabs E1, E2 and E3.

The Army also took other steps to recognize Lt. Flipper's remarkable accomplishments. In 1977, the Army established the annual Henry O. Flipper Award for outstanding cadets at West Point, which has been given every year thereafter. West Point also dedicated a portion of its library in Lt. Flipper's honor. In 1978, the Army reburied Lt. Flipper with full military honors.

#### D. Other Posthumous Honors

Lt. Flipper has received other posthumous honors as well. The Department of the Interior granted National Historic Landmark status to a drainage channel engineered by Lt. Flipper at Ft. Sill, Oklahoma, known as "Flipper's Ditch." This channel, which is still in use today, drained malaria-infested swamps around the fort and has saved many lives.

The state of Georgia has also honored Lt. Flipper. In 1977, the Governor and the legislature proclaimed "Henry O. Flipper Day." In 1989, the state placed a special commemorative marker at his gravesite in Thomasville, Georgia, in ceremonies attended by several high state officials.<sup>12</sup>

#### E. The Instant Pardon Petition

We recognize and deeply appreciate that the Army has done everything within its power to remedy the injustice done to Lt. Flipper. However, the Army was not the final reviewing authority that decided that Lt. Flipper should stand convicted of conduct unbecoming an officer. It was President Arthur, acting as Commander in Chief, who ultimately rendered that final decision. The actions of the Army in honoring Lt. Flipper, while gratifying, are not the actions of the President, and are not understood by the public or by the military as constituting the full measure of recognition and forgiveness that our government ought to bestow on Lt. Flipper. They are not sufficient to undo the injustice in this case. Accordingly, Lt. Flipper has now petitioned the President for the grant of a pardon.

Herein we demonstrate that the President—who serves as Commander in Chief of the Army—clearly has the authority to grant posthumous relief to Lt. Flipper by granting him a pardon. Part I of this submission discusses the fact that Presidential pardons are granted to remove stigma, to signal forgiveness, and to correct injustices. Part II demonstrates why the precedent traditionally relied upon by the Office of the Pardon Attorney does not support the proposition that Lt. Flipper may not be granted a posthumous pardon. In fact, as is shown in Part III, the President has the power to grant Lt. Flipper a posthumous pardon. Part IV explains that the President's power as Commander in Chief of the Army enhances his power to pardon Lt. Flipper, in order to remedy an unjust conviction and remove its stain from the military justice system. Part V examines the fact that the President's

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12. The Citizens Stamp Advisory Committee of the U.S. Postal Service is considering an application for a stamp honoring Lt. Flipper. The request, which has been pending since 1985, has garnered the support of broadcasting entrepreneur Ted Turner, former Arizona governor Rose P. Mofford, and many others. We understand that the request is still "under consideration" at this time.

pardon power has been derived from and is coextensive with that of the British Crown, which has granted posthumous pardons. Part VI shows how state governors, whose pardon powers may also be traced back to the British Crown, have found no impediment to granting posthumous pardons. Part VII examines the state and British experiences and demonstrates why granting Lt. Flipper a pardon will not result in any subsequent administrative burden to the Office of the Pardon Attorney. Part VIII establishes that granting Lt. Flipper a posthumous pardon will promote the public welfare, which is the standard for determining whether a pardon should be granted.

### ARGUMENT

#### 1. PRESIDENTIAL PARDONS ARE GRANTED TO REMOVE STIGMA, TO SIGNAL FORGIVENESS, AND TO CORRECT INJUSTICES

The “pardon clause,” U.S. Const. art. II, § 2, cl. 1, authorizes the President “to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” The Supreme Court has stated that “[t]he plain purpose of the broad power conferred by § 2, cl. 1, was to allow plenary authority in the President to ‘forgive’ the convicted person in part or entirely . . . .” Schick v. Reed, 419 U.S. 256, 266 (1974). According to the Department of Justice Manual, “[a] pardon is a symbol of forgiveness of an offender and generally restores basic civil rights. It is useful in removing stigma incident to conviction and facilitates restoration of professional and other licenses lost by reason of conviction.” Department of Justice Manual § 1-2.108 at 1-60 (1990-1 Supp.).<sup>13</sup> It would be appropriate, therefore, to pardon Lt. Flipper to signal forgiveness.

Presidents have often used the pardon power to heal divisions in our society. As early as 1795, President Washington issued a broad pardon to help resolve the Whiskey Rebellion. See Proclamation Granting Pardon to the Western Insurgents, July 10, 1795.<sup>14</sup> President Adams issued a pardon to the Pennsylvania Insurgents on May 21, 1800, expressly noting that they “have returned to a proper sense of their duty, whereby it is become unnecessary for the public good” to continue prosecuting the insurgents. See Proclamation Granting Pardon to the Pennsylvania Insurgents, May 21, 1800.<sup>15</sup> Some of the most troubling divisions in our society today are racial divisions, which have been caused, in part, by institutionalized discrimination and racial injustice. The conviction of Lt. Flipper resulted from such discrimination. By pardoning Lt. Flipper, the President will help to heal these racial divisions.

Presidents have also issued pardons to demonstrate the gratitude of the nation for those who have provided special services to our country. For example, President Madison issued a pardon to the Baratarian Pirates of Louisiana who fought in the defense of New Orleans in 1815, because “the offenders have manifested a sincere

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13. Attached as Exhibit 4.

14. See Official Opinions of the Attorneys-General of the United States, Vol. 20, at 339-340, attached as Exhibit 5.

15. Id. at 343.

penitence" and, by serving the United States against the British, "have exhibited in the defense of New Orleans unequivocal traits of courage and fidelity." Thus, President Madison proclaimed, they should be treated "as objects of a generous forgiveness." See A Proclamation, Feb. 6, 1815.<sup>16</sup> This pardon is notable for the fact that the hope of its receipt induced many pirates, then in federal custody, to risk their lives in the Battle of New Orleans. It would be unfortunate if President Madison's forgiveness had been available only to pirates who survived the battle, but not to those who suffered the supreme sacrifice in the service of their country. If these pirates could be forgiven their many serious offenses in light of their subsequent service to the United States in a single battle, so should Lt. Flipper be forgiven the sole offense of which he was convicted, in light of the fact that he served the United States thereafter with great distinction over the course of many years.

Moreover, it is appropriate to use the presidential pardon to correct injustices within our criminal justice system. See Ex parte Grossman, 267 U.S. 87, 120 (1925) ("Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law."). It would be difficult to argue with the proposition that an injustice was committed in Lt. Flipper's case, or that his court-martial has been seen as unjust throughout our nation's history. Indeed, the highest legal officer responsible for prosecuting Lt. Flipper in the 1800's, the Judge Advocate General, recommended leniency for him. Subsequently, the ABCMR in the 1970's ruled that Lt. Flipper's conviction was "unjust." And, at this very moment, the United States Army supports Lt. Flipper's petition for pardon, reiterating the earlier finding by the ABCMR in the 1970's.<sup>17</sup> Thus, for more than a century, government officials, as well as the public at-large, have been aware that Lt. Flipper's court-martial was a miscarriage of justice. Such circumstances are precisely those in which our Constitutional scheme contemplates that the President will utilize his pardon power. See Ex parte Grossman, 267 U.S. at 120.

The fact that Lt. Flipper is not alive to benefit from the restoration of his rights does not mean that a Presidential pardon is without value, because the stigma of his conviction endures. For example, the city of El Paso has contemplated creating a "Walk of History," which would feature larger than life bronze statues of twelve individuals who helped shape that community. See Thaddeus Herrick, Where Have All the Heroes Gone?, *Houston Chron.*, May 24, 1998 at 1, 1998 WL 3579068.<sup>18</sup> The leader of the group appointed by the El Paso City Council to select these "Twelve Travelers" stated that Lt. Flipper should not be included in this memorial, inter alia, because he had been "dealt a dishonorable discharge." Id. at 4. This is but one example of how Lt. Flipper's reputation continues to be unjustifiably diminished. Various organizations, historians, former West Point graduates, and members of the military all recognize the stigma that continues to be associated with Lt. Flipper as a result of his conviction, despite his outstanding service to this

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16. Id. at 343-344; 11 Stat. 763-764.

17. See Letter from Jayson L. Spiegel, Acting Assistant Secretary of the Army for Manpower and Reserve Affairs, to the Acting Pardon Attorney, dated May 5, 1998, attached as Exhibit 6.

18. Attached as Exhibit 7.

country.<sup>19</sup> Pardoning Lt. Flipper would show that the President recognizes that the treatment Lt. Flipper received was unjust and would finally remove the stigma of this unjust conviction.

## II. THE AUTHORITIES RELIED UPON BY THE PARDON ATTORNEY ARE INAPPOSITE TO LT. FLIPPER'S PARDON PETITION

The Office of the Pardon Attorney at the U.S. Department of Justice relies upon four cases and one opinion issued by the Office of the Attorney General as support for the proposition that the President cannot grant posthumous pardon requests. These authorities are Burdick v. United States, 236 U.S. 79 (1915); United States v. Wilson, 32 U.S. 150, 7 Pet. 150 (1833); Sierra v. United States, 9 Ct. Cl. 224, 1800 WL 773 (1873); Meldrim v. United States, 7 Ct. Cl. 595, 1800 WL 1602 (1871); and Caldwell's Case, 11 Op. Att'y Gen. 35, 1864 WL 1458 (1864). However, none of these authorities presents a situation wherein the President intended to grant a pardon to a person known to be deceased. For this, and for other reasons, these authorities—all but one of which are more than a century old—are easily distinguishable from the instant matter. Moreover, to the extent these cases stand for the proposition that a pardon, like a deed, must be “accepted” before it becomes effective, these authorities are no longer good law.

### A. The Pardon Attorney's Supreme Court Jurisprudence

The Pardon Attorney's concern that a pardon may not be issued posthumously appears to stem from the fact that if a grantee is no longer alive, she cannot accept her pardon. The notion that a pardon must be accepted by the grantee in order to be effected emerged from a statement by the Supreme Court in the early case of United States v. Wilson, 32 U.S. 150 (1833):

A pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.

Id. at 161.

In Wilson, the defendant had pled not guilty to a number of indictments dealing with obstructing the mail, robbing the mail, and putting the life of a mail carrier in jeopardy. He subsequently went to trial on one of the indictments, was convicted of the robbery and endangerment charges therein, and was sentenced to death. Thereafter, Mr. Wilson withdrew his not guilty pleas to the remaining indictments pending against him, and entered guilty pleas as to them. President Jackson subsequently pardoned Mr. Wilson only for “the crime for which he has been sentenced to suffer death.” Id. at 153. The terms of the pardon specifically stated

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19. See, e.g., Letter from Franklin J. Henderson, Colonel and Immediate Past National President, Ninth & Tenth (Horse) Cavalry Association, dated June 19, 1998; Letter from James M. McPherson, George Henry Davis Professor of History, Princeton University to President Clinton, dated June 5, 1998, attached as Exhibits 8 and 9.

that it did not apply to any other judgment that might be had or obtained against him in any other case or cases then pending before the court. *Id.* Thereafter, the trial court was interested in inquiring as to the effect of the pardon because it had been granted as to an offense which, by the terms of the various indictments, was alleged to be related to the ones for which Mr. Wilson was about to be sentenced. However, Mr. Wilson explicitly declined to avail himself of any advantage or protection the pardon might have given him before the court, and refused to invoke the pardon in any way. The Supreme Court, therefore, held that a pardon that was not "brought judicially before the court, by plea, motion or otherwise, ought not to be noticed by the judges, or in any manner to affect the judgment at law." *Id.* at 163.

Relying on *Wilson*, the Supreme Court held in another early case that a person may refuse a full and unconditional pardon that was given to him for the express purpose of removing his Fifth Amendment right against self-incrimination and compelling his testimony before a grand jury. *Burdick v. United States*, 236 U.S. 79 (1915). Mr. Burdick was the city editor of the *New York Tribune*, and was called to testify before a Federal grand jury about his knowledge of various custom frauds being investigated. *Id.* Mr. Burdick refused to testify on the ground that he might incriminate himself and was found in contempt. *Id.* Therefore, President Woodrow Wilson, *sua sponte*, issued Mr. Burdick a full and unconditional pardon, in an effort to compel his testimony.<sup>20</sup> The Court emphasized that Mr. Burdick was free to refuse the President's pardon and decline to testify before the grand jury because, *inter alia*, given the fact that he had never been charged with or convicted of a crime, Mr. Burdick may have deemed that accepting the pardon would involve "consequences of even greater disgrace than those from which it purports to relieve." *Id.* at 90.

*Burdick* and *Wilson* are easily distinguishable from the instant matter. Allowing the pardon to be refused in *Burdick* is premised upon protecting the "right of the individual against the exercise of executive power not solicited by him nor accepted by him." 236 U.S. at 91 (emphasis added). This is also the rationale in the *Wilson* decision, wherein Mr. Wilson deliberately chose to not assert the pardon as a defense at his sentencing, or bring it before the court in any way. The circumstances in those cases are very different from the instant matter. Unlike Messrs. Burdick and Wilson, Lt. Flipper actively and repeatedly solicited assistance to clear his name and remove the stigma of his unjust conviction. Toward that end, he solicited Congress several times during his life to have his conviction set aside. *See* Letter from Senator Albert B. Fall to Senator James W. Wadsworth of September 9, 1922 (discussing one such bill); Letter from Senator Albert B. Fall to Senator Harry S.

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20. The pardon in *Burdick* stated, in pertinent part:

Whereas, the United States attorney for the southern district of New York desires to use the said George Burdick as a witness before the said grand jury . . . and, Whereas, it is believed that the said George Burdick will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself; Now, therefore, be it known, that I, Woodrow Wilson, President of the United States of America . . . hereby grant unto the said George Burdick a full and unconditional pardon . . . .

236 U.S. at 85-86.



New of September 9, 1918 (same).<sup>21</sup> Lt. Flipper's western memoirs also describe his "bitter disappointment" over the fact that proposed legislation to clear his name was never reported out of committee and never reached a vote. See Henry O. Flipper, Negro Frontiersman: The Western Memoirs of Henry O. Flipper at 37-39 (1963).<sup>22</sup>

Lt. Flipper even sought the President's aid in removing the stigma from his name. He paid a friend who was the Registrar of the Treasury to set up a meeting with President McKinley to talk about his court-martial, but like his other efforts, this failed. Id. at 38. Lt. Flipper's "friend" took his money, and Lt. Flipper ended up in a receiving line at the White House with fifteen or twenty others. As Lt. Flipper describes the incident: "[t]he whole thing did not last two minutes and no one spoke a word except the President." Id. In his memoirs, Lt. Flipper wrote about his failed attempts to clear his name:

I have worked hard at all times to have my Army record cleared but I have never had any illusions and have none now. It is uphill work.

Id. at 39. Given his efforts in this regard, it is abundantly clear that Lt. Flipper has constructively solicited a pardon, and that were he alive today, he would both solicit and accept a Presidential pardon. His descendants formally do so today on his behalf.<sup>23</sup>

Burdick is also distinguishable in several other significant respects. First, it should be noted that the issue in Burdick would not arise today. At the time Burdick was decided, the immunity given to witnesses in federal cases was transactional immunity. See Brown v. Walker, 161 U.S. 591 (1896) (upholding 27 Stat. 443 adopted in 1893 by Congress and providing transactional immunity). However, in 1970, Congress amended the federal statute to provide for use immunity. See 18 U.S.C. § 6002 et seq. (1994); see also Kastigar v. United States, 406 U.S. 441 (1972) (upholding the grant of use immunity provided under 18 U.S.C. § 6002). Therefore, in modern times, there would be no need for a President to attempt to force a pardon upon a person who had not been convicted of a crime, merely to procure his testimony before a federal grand jury.

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21. Copies of these letters are attached as Exhibits 10 and 11 and were also included as character references in Lt. Flipper's Petition for Pardon at 54 and in the Appendix to that Petition at Tabs C2 and C4.

22. Attached as Exhibit 12. The full text of these memoirs is included in the Appendix to Lt. Flipper's Petition for Pardon at Tab A.

23. Even if one were to take the words of Wilson literally and approach a pardon as if it were a deed, there would be no impediment to issuing a pardon to Lt. Flipper. A deed traditionally is a conveyance of realty. See Black's Law Dictionary 414 (6th ed. 1990). Since Lt. Flipper has died, his heirs, who have made this pardon application on his behalf, can accept any property posthumously bequeathed to him. Lt. Flipper's estate would be administered in Georgia. Under Georgia Law, an estate may be reopened after it is settled for the purpose of administering additional property. See Ga. Code Ann. § 53-7-50(d) (1997). If a person dies intestate, his heirs may petition the court for an order that no administration is necessary if the heirs agree to a division of the property. See Ga. Code Ann. §§ 53-2-40 through 53-2-42 (1997). Therefore, even if a pardon were really a deed, one may be granted to a Georgia decedent. Lt. Flipper's heirs would be happy to reopen his estate or to go to court to obtain the order that no administration was necessary, if that is what now is required to clear his name.

Moreover, before he was ever tried or convicted of anything, Mr. Burdick was offered a pardon that he did not request. He rejected the pardon, at least in part, because he believed that it might not provide sufficient immunity. *Id.* at 87. This situation is not applicable to Lt. Flipper. Lt. Flipper already has been tried and convicted. Thus, his case raises none of the same concerns about self-incrimination or the sufficiency of the immunity given by the pardon.

Finally, the Court also allowed Mr. Burdick to reject the pardon because, given the circumstances, he might have viewed accepting it as a badge of dishonor or an admission of wrongdoing. The Court recognized that Mr. Burdick might feel that others in his community would question why the President would issue a pardon to a person who had not been charged with or convicted of a crime. By contrast, Lt. Flipper already has been convicted. Thus, unlike Mr. Burdick, a pardon for Lt. Flipper will serve to alleviate the disgrace of his conviction, rather than to bring further disrepute upon him.

#### B. The Pardon Attorney's Court of Federal Claims Cases

The Office of the Pardon Attorney also points to two cases brought shortly after the Civil War in the Court of Federal Claims, in which the administrators of decedents' estates were attempting to collect money judgments against the United States. Neither case deals with the President's ability to grant intentionally a posthumous pardon.

In Meldrim v. United States, 7 Ct. Cl. 595 (1871), the plaintiff, Margaret Doyle, administratrix of her husband's estate, sued under a federal statute to recover for thirty-one bales of cotton that she claimed had been captured in 1865 by the government. The statute under which the case was brought, the Act of March 12<sup>th</sup>, 1863, required that, in order to recover, the administratrix had to prove, inter alia, that her deceased husband never gave any aid or comfort to the rebellion. *Id.* at 596. There was little or no evidence of Mr. Doyle's loyalty to the Union. Mr. Doyle could have established his loyalty during his lifetime either by taking an oath of loyalty to the United States or by obtaining a special pardon. He had applied to the President for a special pardon, which subsequently was granted. However, Mr. Doyle died nine days after its issuance without having accepted it. *Id.* Mr. Doyle had not taken the oath of amnesty before his death, pursuant to which he also could have proven his loyalty. The court held that had Mr. Doyle either accepted his pardon or taken the oath of amnesty before his death, Mrs. Doyle could have recovered for the cotton. *Id.* at 597. However, because he did neither, there was a failure of proof as to his loyalty. Therefore, recovery was barred under the applicable statute.

The Court discussed the limited role that pardons and amnesty play in this particular type of post-Civil War case involving claims against the government:

The most, in this class of cases, that is claimed for pardon or amnesty, whether granted directly by the warrant of the President or proclaimed in his proclamations, is, that it purges the offender of the crime that previously stood in the way of his prosecuting a suit in this court, and thereby restores to him all the rights and privileges which he would have enjoyed if he had never offended against the Constitution and laws of the United States. In other words, pardon or amnesty . . . comes in the place of proof of loyalty, and thereby answers the

requirements of the statute. But it does not supercede or set the statute aside. It remains in full force, and we are bound to give it effect.

*Id.* The court went on to state that, under such circumstances, plaintiff-administratrix could not cure the situation by claiming that her deceased husband's loyalty could be proven by way of the President's subsequent Proclamation of December 1868, which was issued after he died. That Proclamation granted general amnesty and unconditional pardons to all who were involved in the rebellion. The court said that it could not allow plaintiff-administratrix to utilize that Proclamation to bring her lawsuit, because doing so would violate both well-established principles of the capacity of personal representatives to bring suit, as well as the provisions of the statute under which the case was brought:

In this view of the case it seems to follow, logically, that we cannot by any sort of legal imputation hold that the President's proclamation of the 25<sup>th</sup> December, 1868, granting amnesty and pardon unconditionally to all, can in any way affect the legal status of Doyle while he lived. To hold otherwise would be to revive the right of action in the personal representative, lost by the default and neglect of her intestate; and, at the same time, wholly to disregard the plain provisions of the third section of the Act March 12<sup>th</sup>, 1863 [which provided that claimants prove that they never gave aid or comfort to the rebellion].

*Id.* at 597-98 (emphasis added).

Likewise, two years later, the Court of Federal Claims denied relief, for failure to meet the statute of limitations, to another administratrix in Florida. She claimed that her deceased husband was owed more than \$3,700 by the government. *Sierra v. United States*, 9 Ct. Cl. 224 (1873).

In *Sierra*, the husband of the claimant-administratrix had been the collector of customs at the port of Pensacola, Florida. When the Civil War began in 1861, he ceased to act on behalf of United States, and gave aid and comfort to the rebellion. In May, 1865, the President issued a Proclamation granting amnesty and pardon to all who had participated in the rebellion, on the sole condition that they take and keep an oath to faithfully support, protect, and defend the Constitution of the United States and the union of the States, and to uphold the laws and cease to be a rebel against the United States. Although the Proclamation was in effect for two years before he died, Mr. Sierra never sought to take the oath and thereby avail himself of the amnesty the Proclamation provided. Because he did not do so, the suit brought by his administratrix was barred. In so ruling, the court stated:

From the date of that proclamation to the day of his death, nearly two years afterward, the door of amnesty stood wide open to Joseph Sierra, and he would not avail himself of the opportunity to remove the only barrier to his recourse here. Had he sought the benefit of that proffered amnesty, he might at any time thereafter have filed his petition here . . . .

*Id.* at 232.

Plaintiff-administratrix also attempted to claim that, having failed to fulfill the conditions of the May 1865 Proclamation available to him during his life, her deceased husband nevertheless could avail himself of a subsequent Proclamation, issued in December 1868, one year after his death. That Proclamation offered general amnesty, and administratrix claimed that it cleansed her deceased husband of his treason. Citing *Meldrim, supra*, the court ruled that the Proclamation of 1868 was inoperative as to one who had died before its issue. *Id.* at 233.

Meldrim and Sierra significantly differ from the instant matter. Messrs. Doyle and Sierra actually had the opportunity to obtain pardons, or in the alternative, to otherwise demonstrate their loyalty to the United States during their lifetimes, and thereby meet the requirements of the statute under which their lawsuits were filed. As the Sierra court noted, “the . . . disqualification to sue here was the result of his [Mr. Sierra’s] own omission” in not availing himself of the President’s pardon. Id. The same can be said of Mr. Doyle regarding his failure to take a readily available oath of loyalty to the United States. By contrast, despite his repeated efforts to clear his name, Lt. Flipper never had a pardon extended to him.

### C. The Attorney General Opinion Cited by the Pardon Attorney

Finally, the Office of the Pardon Attorney relies upon an Opinion of the Attorney General dating back to 1864. Caldwell’s Case, 11 U.S. Op. Att’y Gen. 35, 1864 WL 1458 (1864). That Attorney General Opinion, however, did not deal with the issue of a posthumous pardon. Rather, the issue presented was whether the President had the power to remit posthumously a fine that had been imposed as part of the punishment for a conviction. Id. In deciding that the posthumous remission was within the President’s power, the Attorney General merely cited Wilson and stated in dicta that it “might be doubtful” if the President could grant a deed of pardon to a man after his death. Id. at 36 (emphasis added). The Attorney General, however, was not addressing—and, indeed, has never squarely addressed—the propriety of a posthumous Presidential pardon.

In fact, the Office of the Legal Counsel stated in 1977 that the question of whether the President may issue a pardon posthumously “has never been resolved judicially.” Presidential Authority — Slovik Case, 2 Op. Off. Legal Counsel 370, 373 (1977). Indeed, the Office of Legal Counsel stated that its own research “indicates that there are conflicting internal departmental memoranda on this question and that none can be said to resolve the question definitively.” Id. at n.7.

## III. THE PRESIDENT HAS THE POWER TO PARDON LT. FLIPPER

### A. The Public Welfare, Rather Than Acceptance of the Pardon, Is the Touchstone of the President’s Power To Issue Pardons

More recent cases than those cited by the Pardon Attorney make it clear that there is no requirement that a pardon must be accepted by the grantee in order to be effectuated. In fact, in a much more recent case discussing the development of the presidential pardon power, the Supreme Court has stated that “the requirement of consent was a legal fiction at best.” Schick v. Reed, 419 U.S. 256, 261 (1974). In addition, the Supreme Court subsequently has made it clear that the “acceptance” requirement of Burdick is not to be extended to all cases relating to the President’s pardon power. Biddle v. Perovich, 274 U.S. 480 (1927).<sup>24</sup>

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24. See also Hempel v. Weedon, 23 F.2d 949, 951 (W.D. Wash. 1928) (“In Burdick v. United States it was held that the acceptance of a pardon was essential to its validity, but it has been held this is not true in all cases.”) (citing Perovich).

In Perovich, the Court allowed President Taft's commutation of a prisoner's sentence from hanging to life imprisonment without the prisoner's consent. The Court elaborated on the general principles relating to pardons, stating that:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done.

Id. at 486 (emphasis added). Thus, the Supreme Court has explicitly held that the public welfare—not the consent of the grantee—is the touchstone for the President's power to issue pardons. The Perovich Court further held that the President did not need Perovich's consent to commute his sentence because there was a "common understanding" that imprisonment for life is a lesser penalty than death. 274 U.S. at 487.

The "public welfare" test also has been recognized in a more recent Opinion of the Attorney General. See Pardoning Power of the President, 41 Op. Att'y Gen. 251, 258-59 (1955). That Opinion discusses the propriety of conditionally commuting a death sentence, and cites Perovich for the proposition that "the public welfare, not his [the prisoner's] consent, determines what shall be done."

Although there is no way now to lessen the actual punishment that Lt. Flipper received, public welfare concerns nevertheless dictate that he should be pardoned, since doing so would remove the stigma of a long-standing unjust conviction from Lt. Flipper's reputation, as well as from the military justice system.

Moreover, it is of no consequence that Lt. Flipper is not alive to accept his pardon. If acceptance was not needed in Perovich to commute the sentence of an individual who did not want the commutation, there should be no acceptance requirement here—especially when it is so clear that Lt. Flipper desired a pardon. In addition, by contrast to the earlier case of Burdick v. United States, *supra*, Mr. Perovich already had been convicted and sentenced. Thus, the Court ruled that he had no right to determine how he would be punished. He could not insist upon execution. See Perovich, 274 U.S. at 487. The Court, therefore, held that Perovich's consent was not needed to commute his sentence. 274 U.S. 480. Like Mr. Perovich, Lt. Flipper need not consent to or accept his pardon in order for it to be effective. He already has been convicted.

In sum, the decision to pardon Lt. Flipper should be based on what the President deems will best serve the public welfare. The public welfare clearly will be well served by granting a pardon to remove the stigma of a conviction that even government officials have acknowledged was unjust for more than a century.

## B. No Limitation on Granting Posthumous Pardons Appears in the Constitution

The Supreme Court has held "that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself." Schick, 419 U.S. at 267. There are only three limitations on the use of the Presidential pardon power specified in the Constitution. First, offenses leading to impeachment are explicitly excluded. Second, the act being pardoned must be an

offense against the United States. "This clause precludes the President from pardoning offenses against the individual states and from intervening in civil suits. The former limitation is based upon the American federal system; the latter upon accepted historical limitation." William F. Duker, The President's Power to Pardon: A Constitutional History, 18 Wm. & Mary L. Rev. 475, 525-26 (1977). And there is a further requirement that the act being pardoned must already have occurred. This prevents the President from granting a pardon in advance of the act, and perhaps thereby encouraging an unlawful action. Therefore, the President retains a great deal of discretion in the exercise of his pardon power. "Alone among the powers enumerated in the Constitution, the power to pardon proceeds unfettered." Duker, *supra*, at 535.

Chief Justice Taft reasoned that the possibility that the pardoning power could be perverted so as to destroy the deterrent effect of judicial punishment is not a sufficient basis for limiting the President's discretion to grant clemency. 'Our Constitution,' wrote Taft for a unanimous Court, 'confers [full] discretion [to pardon] on the highest officer in the nation in confidence that he will not abuse it.'

Daniel T. Kobil, The Quality of Mercy Strained: Wrestling the Pardoning Power from the King, 69 Tex. L. Rev. 569, 597 (1991) (footnotes omitted).

The presidential pardon power, therefore, is very broad. See Ex parte Garland, 71 U.S. 333, 380 (1866) ("The [pardon] power thus conferred is unlimited, with the exception [for impeachment] stated."). The President is answerable only politically should he abuse this power. The instant pardon petition does not fall into one of the areas in which the granting of pardons is proscribed by the Constitution, and thus, it may be granted.

The Pardon Attorney may be concerned because a posthumous Presidential pardon has never before been intentionally granted. 2 Op. Off. Legal Counsel at 372. Assuming, arguendo, that this is correct, it is not dispositive. In the United States, it was once argued that a conditional Presidential pardon was unconstitutional. However, the President's power to grant such a pardon was upheld by the Supreme Court, despite protests from the dissent that such a pardon had never before been granted by the President. See Ex parte Wells, 59 U.S. 307 (1855). The fact that it had not been done before did not matter; what mattered was that the Constitution did not prohibit it. "The very essence of the pardoning power is to treat each case individually." Schick, 419 U.S. at 265. Accordingly, because there is no constitutional limitation on issuing posthumous pardons, Lt. Flipper's petition should be considered on its merits.

#### IV. AS COMMANDER IN CHIEF, THE PRESIDENT HAS A SPECIAL RESPONSIBILITY TO GRANT THE INSTANT PARDON TO ENSURE THE INTEGRITY OF THE MILITARY JUSTICE SYSTEM

The Commander in Chief clause, U.S. Const. art. II, § 2, cl. 1, provides further constitutional impetus for the President to grant the posthumous pardon requested here. That clause states that "The President shall be Commander in Chief of the Army."

Pursuant to this clause, the President has a special responsibility to ensure the good order and discipline of the United States Armed Forces. A fair and impartial

military justice system is essential to that purpose. The ability of the military justice system to contribute to the good order and discipline of the Armed Forces is threatened when an unjust conviction goes uncorrected, because soldiers of all colors, as well as the public at-large, will lose confidence in that system if they perceive it to be tainted by bias or favoritism.

As the Supreme Court has said, “[t]he President’s duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military, including courts-martial.” Loving v. United States, 517 U.S. 748, 772 (1996).

The Court added:

“The military constitutes a specialized community governed by a separate discipline from that of the civilian,” Orloff v. Willoughby, 345 U.S. 83, 94 (1953), and the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special discipline.

Loving, 517 U.S. at 773.

Loving did not address the President’s power to issue pardons; rather, it dealt with the President’s power to prescribe certain aggravating circumstances upon which courts-martial may impose the death penalty. However, the case is important here because it recognizes that the President is required by the Commander in Chief Clause to exercise “continuing” supervision over military justice in order to preserve the “special discipline” of the military community. Loving indicates that implicit in this power should be the power to pronounce, at any time, official forgiveness of military offenses if, in the President’s judgment, forgiveness is appropriate to preserve the special discipline governing the military.

The offense for which Lt. Flipper seeks pardon—conduct unbecoming an officer—is defined in the Articles of War. It is purely a military offense and has no civilian counterpart. The military justice procedures in effect in the 19<sup>th</sup> century—unlike civilian, or even modern military proceedings—did not permit judicial review of Lt. Flipper’s conviction. Proceedings in his case were confined entirely to the Army and its civilian Executive Branch supervisors, beginning with the court-martial itself, up through review by President Arthur acting in his capacity as Commander in Chief. Under such circumstances, the President has a special responsibility in his role as Commander in Chief to utilize his pardon power to remove from the record of the military justice system the stain of this unjust conviction.

## V. THE PRESIDENT’S PARDON POWER IS COEXTENSIVE WITH THAT OF THE BRITISH CROWN, WHICH HAS GRANTED POSTHUMOUS PARDONS

### A. The President’s Pardon Power is Coextensive with the British Crown

According to the Office of Legal Counsel of the United States Department of Justice, “[t]he pardon clause of the Constitution was derived from the pardon power held by the King of England at the adoption of the Constitution.” See Effects of a Presidential Pardon, 19 Op. Off. Legal Counsel \_\_\_, 1995 WL 861618 (June 19,

1995). The Justice Department's position is based upon Supreme Court precedent. See, e.g., Schick, 419 U.S. at 262-63:

In short, by 1787 [the year of adoption of the Constitution], the English prerogative to pardon was unfettered except for a few specifically enumerated limitations. The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice.

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Hamilton's Federalist No. 69 summarized the proposed section 2 powers, including the power to pardon, as "resembl(ing) equally that of the King of Great Britain and the Governor of New-York." (emphasis added).

The court added that "the draftsmen [of the Constitution] were well acquainted with the English Crown authority to alter and reduce punishments as it existed in 1787," Id. at 260, and that "the draftsmen of Art II, section 2, spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed.'" Id. at 263.

In the words of Chief Justice John Marshall, "we adopt [British Crown] principles respecting the operation and effect of a pardon." Wilson, 32 U.S. at 160. See also Ex parte Grossman, 267 U.S. at 108-09 ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."). Speaking specifically to the pardoning power, Chief Justice Taft observed that "the power of the king under the British Constitution, [] plainly was the prototype of this clause." Id. at 118. "Hence, when the words 'to grant pardons' were used in the Constitution, they connoted the authority as exercised by the English crown or by its representatives in the colonies." Duker, supra, at 508.

#### B. Posthumous Pardons Granted by the British Crown

There is no doubt that in 1787 the British Crown had the power to issue pardons, and there is no suggestion that at any time since then there has been an expansion of the Crown's pardon power. See Schick v. Reed, 419 U.S. at 262 ("In short, by 1787 the English prerogative to pardon was unfettered except for a few specially enumerated limitations."). The power given to the President in the U.S. Constitution to issue pardons can be directly traced to the pardon power vested in the British Crown, which has, in fact, issued posthumous pardons.

In the British case of Regina v. Timothy John Evans, defendant Evans was convicted of murder and executed in 1950. However, in the mid-1960s, the Secretary of State for the Home Department (the official vested with the de facto power to grant Crown pardons under British constitutional practice) determined that Evans had been innocent of the crime. Accordingly, on October 18, 1966, pursuant to the Home Secretary's advice, Queen Elizabeth II issued a posthumous "free pardon" to Evans, exonerating him of guilt and declaring his innocence. See 734 Parl. Deb., H.C. (5th Ser.) at 38-40 (1966).<sup>25</sup>

In the British case of Regina v. Derek Bentley, defendant Bentley was convicted of murder and executed in 1953. In 1992, in response to efforts by Bentley's sister

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25. Attached as Exhibit 13.



to obtain a posthumous pardon, the Home Secretary refused, stating that, on review of the trial record, he did not believe a pardon was appropriate. However, on July 7, 1993, the Queen's Bench Division of the High Court, in a unanimous three-justice decision, recommended that the Home Secretary reverse the decision and issue a conditional posthumous pardon, finding that Bentley should not have been executed. See Regina v. Secretary of State for the Home Dep't, ex parte Bentley, [1994] QB 349, [1993] 4 All ER 442 DC.<sup>26</sup> In this case, the court noted that:

There has been only one posthumous free pardon in modern times. That was granted to Timothy Evans in 1966. A free pardon was granted in that case because . . . the Home Secretary of the day considered the conviction itself to be wrong.

Id. at 448. The court rejected Bentley's request for an unconditional "free" pardon,<sup>27</sup> but the court noted that the Home Secretary had failed to consider the possibility of granting a conditional pardon reducing Bentley's sentence to life imprisonment. In ruling that the Home Secretary could indeed grant such a posthumous conditional pardon, the court held that:

there is no objection to the grant of a posthumous conditional pardon . . . The grant of such a pardon is a recognition by the state that a mistake was made and that a reprieve should have been granted.

Id. at 455. On July 29, 1993, in response to the High Court ruling, the Home Secretary approved and the Queen granted "Our Pardon in respect of the said sentence [of death]."<sup>28</sup>

In 1996, the definitive treatise on English law, Halsbury's Laws of England, stated it plainly: "A pardon may be granted posthumously." Halsbury's, 4th ed. Reissue 1996, Vol. 8(2), ¶ 823, at 482 (citing ex parte Bentley, supra).<sup>29</sup>

The British legal officials who advised the Home Secretary in 1966 to pardon Evans posthumously would not have recommended that course of action had they not first assured themselves that the Crown had the power to issue such pardons. Moreover, had there been any serious doubt concerning the Crown's ability to grant posthumous pardons, the discussion of the Evans pardon in the House of Commons most certainly would have reflected it. But that discussion, as reported, reveals that no member of Parliament had such a concern.<sup>30</sup> Likewise, it is inconceivable that the Queen's Bench Division, in its unanimous decision in ex parte Bentley, would have omitted any discussion of whether it was lawful to issue posthumous pardons

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26. Attached as Exhibit 14.

27. The Crown's policy in issuing "free" pardons had been to grant such pardons, whether posthumous or not, only in cases where the convicted person was found to have been "morally and technically innocent" of the crime. The British court in the Bentley case accepted the Home Secretary's finding that Bentley failed this standard. Id. at 454. This unwillingness to grant an unconditional pardon without finding that the grantee was innocent is not relevant to the scope of the pardon power, but is a distinction in policy. In contrast to the Crown's policy, the U.S. Department of Justice Manual says that "in all clemency cases, the guilt of the petitioner is assumed, and the question of guilt or innocence is not relitigated in clemency proceedings." Department of Justice Manual § 1-2.108 at 1-57 (1990-1 Supp.), attached as Exhibit 4.

28. A copy of this posthumous pardon is attached as Exhibit 15.

29. Attached as Exhibit 16.

30. Attached as Exhibit 13.

had there been any question concerning the issue.<sup>31</sup> The decision reflects no such discussion. The legality of issuance of a posthumous pardon was clear to all justices of the court.

Accordingly, the Pardon Attorney should follow Supreme Court precedent and Department of Justice policy (as announced by the Office of Legal Counsel in 1995), and adopt the principles of the British Crown relating to the pardon power. The Crown clearly has concluded that it has the power to issue posthumous pardons. The Pardon Attorney ought to adhere to this practice and acknowledge that the President also may issue posthumous pardons.

## VI. THE PRESIDENT'S PARDON POWER IS SIMILAR TO THAT OF STATE GOVERNORS WHO HAVE GRANTED POSTHUMOUS PARDONS

### A. The Original Source of the Governors' Pardon Powers is the Same as that of the President's

Like the President's pardon power, the power vested in the governors of states that had been British colonies reaches back to the Crown's pardon power. The English royal model influenced the colonies during the pre-Revolutionary period.

When America was colonized, the king in most instances delegated the pardoning power to his counterpart and direct representative in the New World, the royal governor. The colonial charters of Virginia, Massachusetts Bay, Maryland, Maine, the Carolinas, New Jersey, Pennsylvania, and Georgia committed the clemency power to the executive.

Kobil, *supra*, at 589; see also Duker, *supra*, at 475 (1977) (tracing the history of the pardon power and coming to the same conclusions). This model was carried forward as the states passed their own constitutions, although several states attempted to restrict this executive power:

During the pre-Independence period there were three models for the institution of clemency: (a) vesting the power in the governor; (b) vesting the power in the governor acting only with the consent of the Executive Council; (c) vesting the power in the legislature. During the period 1790-1860 there was a revival in public trust of the executive, and twenty-one states adopted model (a), while four preferred model (b). Since 1890, in keeping with the increasing professionalization of the pardoning power, the majority of state constitutions have provided for some sort of autonomous board of pardons having either formal decision-making power or at least an advisory role in this respect.

Leslie Sebba, The Pardoning Power—A World Survey, 68 J. Crim. L. & Criminology 83, 112 (1977). Although the pardon power in some state constitutions is more restrictive than the President's,<sup>32</sup> the pardon power in the federal Constitution exerted an influence on the states:

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31. Attached as Exhibit 14.

32. For example, some states include additional offenses beyond impeachment in their constitutional prohibition on pardons. Other states require the governor to act in conjunction with the state legislature or an advisory board in issuing pardons. See Section V.B., *infra*.

The development of state constitutions and, presumably, the influence of the newly adopted federal constitution led to the abolition of the legislative council and an increase in the governor's clemency powers in a number of states. The idea that the executive branch was the proper repository of the clemency power rapidly gained popularity, and most of the new states admitted to the Union allocated the power to the governor alone.

Kobil, *supra*, at 605 (footnotes omitted). The fact that some of these states have issued pardons posthumously bolsters the conclusion that this is an appropriate use of the pardon power that resides today with the President.

#### B. Posthumous Pardons Granted by State Governors

Nine states have granted posthumous pardons on at least ten separate occasions since 1977. Although the constitutional language of the pardon clauses from these states varies, the pardon power in these state constitutions is at least as expansive as the broad authority given to the President in article II, § 2, cl. 1. Therefore, the experience of these states is compelling.

The manner in which the pardon power is exercised in these nine states can be grouped into four categories. In Maryland, California, and Arizona, the governor has the exclusive authority to bestow pardons. In Massachusetts, Pennsylvania, and Oklahoma, the recommendation of an advisory board is required for the governor to issue a pardon. In Nebraska and Nevada, the pardon power is vested in a decision-making body that includes the chief executive of the state. Finally in Georgia, the State Board of Pardon and Paroles has the authority to issue pardons. Regardless of these formulations, none of these states saw any impediment to the granting of posthumous pardons.

##### 1. Governor as Exclusive Grantor

###### a. Maryland

Of the states that have conferred posthumous pardons, the State of Maryland vests authority in the governor, by way of its constitution, in language very similar to that of the federal Constitution. It gives the governor of Maryland discretion to grant pardons, except in cases of impeachment.<sup>33</sup> Unlike the President, however, Maryland's governor has significant procedural mechanisms imposed upon him. The governor must give public notice of pardon applications that are under his

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33. See Md. Const. art. II, § 20, which states:

He shall have power to grant reprieves and pardons, except in cases of impeachment, and in cases, in which he is prohibited by other Articles of this Constitution; and to remit fines and forfeitures for offences against the State; but shall not remit the principal or interest of any debt due the State, except, in cases of fines and forfeitures; and before granting a nolle prosequi, or pardon, he shall give notice, in one or more newspapers, of the application made for it, and of the day on, or after which, his decision will be given; and in every case, in which he exercises this power, he shall report to either Branch of the Legislature, whenever required, the petitions, recommendations and reasons, which influenced his decision.

consideration and notify the state legislature regarding the petitions, recommendations and reasons that informed his decision. This notice requirement does not, however, serve as a restriction on the governor's authority, but merely as an avenue of accountability.

Maryland Governor William Donald Schaefer posthumously pardoned Jerome S. Cardin in 1994. Cardin was convicted in 1986 of stealing \$385,000 from Old Court Savings and Loan, of which he was a co-owner.<sup>34</sup> He was sentenced to a 15-year prison term, but was released due to failing health after serving a little more than a year in prison. Prior to his conviction, he had been a prominent civic activist and philanthropist, founding both the Retinitis Pigmentosa Foundation and the Basic Cancer Research Foundation in Baltimore. The governor's office cited Cardin's lifetime of philanthropic service, time served in prison, and payment of \$10 million in restitution as grounds for the posthumous pardon.<sup>35</sup> According to the pardon certificate, Governor Schaefer granted a full posthumous pardon, "absolving him [Cardin] from the guilt of his criminal offenses and exempting him from any pains and penalties imposed upon him therefore by law."<sup>36</sup>

b. California

The California constitution also vests the pardon power exclusively in its governor.<sup>37</sup> The governor may grant pardons to offenders after they have been sentenced, except in cases of impeachment and subject to application procedures provided by statute.<sup>38</sup> Akin to Maryland's arrangement, the governor of California is required to give notice to the state legislature, including reasons for bestowing the pardon.

On April 15, 1996, Governor Pete Wilson posthumously pardoned Jack Ryan, who had served almost 25 years in prison after being wrongly convicted for murder by a corrupt district attorney. Originally, a jury acquitted Ryan, but a year later, a

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34. See Cardin v. State, 533 A.2d 928 (Md. Ct. Spec. App. 1987), appeal denied, 538 A.2d 777 (Md. 1988); see also John W. Frece, Schaefer Grants Cardin Pardon in S & L Scandal, Baltimore Sun, Sept. 10, 1994, at A1, attached as Exhibit 17.

35. See id. See generally Alec Matthew Klein, S & L Meltdown, Baltimore Sun, May 7, 1995, at E1; Thomas W. Waldron, Commuted Term was Typical of Schaefer, As Governor, He Relied on Instincts, Advice of Longtime Friend, Baltimore Sun, Oct. 4, 1997, at B1, attached as Exhibits 18 and 19.

36. Pardon Proclamation (for Jerome S. Cardin), Md. Exec. Dep't (Sept. 2, 1994), attached as Exhibit 20.

37. See Cal. Const. art. V, § 8(a), which states:

Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.

38. The only other constitutional limitation on the California governor is that he may not pardon an individual who has been twice convicted of a felony except on the recommendation of at least four judges of the state Supreme Court.

bootlegger was elected district attorney. Unable to gain a confession to two highly publicized murders by other means, the district attorney secretly paid a woman \$100 to swear in a complaint that Ryan had raped her daughter.<sup>39</sup> After Ryan's arrest, two other women made similar accusations. After two months in jail, Ryan confessed to two of the rapes, and following a night of interrogation, confessed to the murders as well. He was sentenced to life in prison on September of 1928. Ryan served nearly 25 years in prison before being paroled in 1953.<sup>40</sup> He did not leave behind any surviving relatives who petitioned on his behalf. Instead, a district attorney's investigator spent more than ten years working to clear Ryan's name after one of Ryan's accusers confessed to committing perjury to help convict him.<sup>41</sup> In fact, the California Supreme Court and the state Board of Prison recently reviewed the evidence and concluded that Ryan had been framed.<sup>42</sup>

Governor Wilson's pardon noted that because Ryan was dead, it was impossible to comply with California's practice of requiring the individual seeking clemency to submit her own petition.<sup>43</sup> Nonetheless, the governor issued the pardon which states:

Unfortunately, we cannot do justice for Jack Ryan, the man. But we can do justice for Jack Ryan, the memory. And by doing so, we breathe vitality into our system of justice. . . . Therefore, so that justice is maintained, I grant Jack Ryan posthumously a pardon based on innocence (emphasis added).<sup>44</sup>

c. Arizona

The governor of Arizona, like those of Maryland and California, is vested with the exclusive authority to bestow pardons. The pardons may be bestowed for any post-conviction offenses except treason and cases of impeachment. The exercise is also subject to statutory restrictions enacted by the state legislature.<sup>45</sup>

39. See Dave Leshner, Dead Man's Name Finally to be Cleared: Crime: Investigator Shows Murder Confession 68 Years Ago Was Coerced, L.A. Times, Apr. 15, 1996, at 1, attached as Exhibit 21.

40. See *id.*

41. See generally Stephen Green, Pardon Still Awaited in 1920s Crime Convictions, Sacramento Bee, July 10, 1995, at A1; Stephen Green, Terrible Legal Wrong Finally Righted, Sacramento Bee, Apr. 16, 1996, at A1; Bleys W. Rose, Pardon Sought in 1925 Humboldt Murder Case, Press Democrat (Santa Rosa, Cal.), July 13, 1995, at A1, attached as Exhibits 22, 23, and 24.

42. See Stephen Green, Dead Man is Cleared by Wilson, Fresno Bee, Apr. 16, 1996, at B3, attached as Exhibit 25.

43. The governor noted in the pardon, however, that Mr. Ryan, before his death, had sought a pardon. See In the Matter of the Clemency Request for Jack Ryan, Executive Dept., State of California (Apr. 15, 1996), attached as Exhibit 26. As discussed *supra*, Lt. Flipper worked during his lifetime to clear his name.

44. *Id.*; see also Wilson Grants Posthumous Pardon to Convicted Killer, L.A. Daily News, Apr. 16, 1996, at N9, attached as Exhibit 27.

45. See Ariz. Const. art. V, § 5, which states:

The Governor shall have power to grant reprieves, commutation, and pardons, after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as may be provided by law.

On November 6, 1990, Governor Rose Mofford of Arizona conferred full and unconditional pardons posthumously to Joseph L. Chacon, Alex S. Contreras, James Ellis, and Curtis Springfield. The four men were prison inmates who were killed while serving as inmate labor on a firefighting detail.<sup>46</sup> The seven-member Board of Pardons unanimously recommended the pardons to the governor in recognition of the inmates' sacrifice to fight fire.<sup>47</sup> Governor Mofford's press secretary was quoted by one news article as stating: "[i]t's largely a symbolic measure to clear the names of the individuals who acted above and beyond the call of duty."<sup>48</sup>

Thereafter, in the case of Chacon v. United States, 48 F.3d 508 (Fed. Cir. 1995), the next of kin of one of the decedents filed a claim against the U.S. government under the Public Safety Officers' Benefits Act. The claim was denied by the Department of Justice. The denial was later upheld by the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit. Id. at 511. The courts hearing this case found that the inmates were not entitled to benefits because they failed to meet the definition of a public safety officer in the Act. However, at no point did either the Court of Federal Claims or the Federal Circuit suggest that their pardons had not been effective because they were granted posthumously and, therefore, had not been accepted. Id. at 513; Chacon v. United States, 32 Fed. Cl. 684 (Fed. Cl. 1995).

In fact, in Chacon, the Department of Justice never disputed that the posthumous pardons were valid, even though a finding that the pardons were invalid would have defeated one of the Chacon plaintiffs' key arguments. Assistant Attorney General Stuart M. Gerson, by his subordinates in the Commercial Litigation Branch, agreed that "Arizona Governor Rose Mofford granted all four decedents 'full and unconditional pardon[s], restoring all [of their] civil rights.'" (brackets in original). See Joint Preliminary Status Report at 5, Chacon v. United States, 32 Fed. Cl. 684 (Fed. Cl. 1995) (No. 92-715C).<sup>49</sup> In both its trial court and appellate briefs, the Department of Justice suggested that the issue of the pardons was extraneous, but never disputed their validity, even though it was in the government's interest to do so.<sup>50</sup>

Moreover, in the administrative proceedings preceding the Chacon suit, the Department of Justice Office of Justice Programs wrote the following:

It was likely fitting and appropriate that the Governor of Arizona posthumously pardoned the decedents, thus recognizing their ultimate sacrifice. No doubt this act of gratitude and thoughtfulness on the part of the Governor on behalf of the

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46. See Chacon v. United States, 48 F.3d 508, 510 (Fed. Cir. 1995). See also Chacon v. United States, 32 Fed. Cl. 684, 686 (1995).

47. See Posthumous Pardons are Urged for 5, Ariz. Daily Star, Oct. 3, 1990, at B2, attached as Exhibit 28.

48. Abraham Kwok, Mofford Expected to Pardon 5 Cons Killed Fighting Forest Fire, Ariz. Republic, Oct. 3, 1990, at B3. See generally E. J. Montini, Inmate Hurt Fighting Fire Merits Pardon, Ariz. Republic, July 4, 1990, at B1; Art Thomason, Firefighting Victims' Lives Recounted; Memorial Funds are Set Up as Families Mourn, Ariz. Republic, June 29, 1990, at C2, attached as Exhibits 29, 30, and 31.

49. Attached as Exhibit 32.

50. Excerpts of the government briefs are attached as Exhibit 33.

people of Arizona was greatly appreciated by the friends and families of the decedents.

See Letter from Elliot A. Brown, Acting Director, Bureau of Justice Assistance, Office of Justice Programs dated Aug. 25, 1992 (emphasis added).<sup>51</sup>

As we demonstrate herein, the pardon power of state governors derives from the same source as the pardon power of the President: the pardon power of the English Crown, which includes the power to grant posthumous pardons. Thus, the power to grant posthumous pardons exercised by Arizona Governor Mofford in Chacon is the same power that the Constitution invests in the President. The Department of Justice concession that the Arizona posthumous pardons were “fitting and appropriate” exercises of the pardon power amounts to an acknowledgement of the President’s ability to exercise the very same power.

There are significant policy reasons to invest the President with the power to grant posthumous pardons. The Arizona posthumous pardons, given in recognition of the prisoners’ supreme sacrifice, harken back to President Madison’s pardon of the Louisiana pirates, who also risked death in the service of their country. Just as there will be times when a governor finds it to be in the interest of a state to grant a posthumous pardon, so too there will be times when a President finds it to be in the interests of our national government to grant a posthumous pardon. Lt. Flipper presents such a case. Indeed, it would be “fitting and appropriate” to grant a posthumous pardon to Lt. Flipper, to recognize his significant and exemplary service to the United States.

## 2. Governor Acting in Conjunction with a Board

Three states that require recommendation by an advisory board as a necessary condition of clemency by their respective governors—Massachusetts, Pennsylvania, and Oklahoma—have granted posthumous pardons. Once recommendations are made, however, each governor retains the ultimate discretion to approve or deny the recommended pardon.

### a. Massachusetts

The Massachusetts constitution authorizes the governor to grant pardons, except in cases of impeachment. It further imposes two qualifications: (1) the exercise must be “by and with the advice of council,” and (2) in cases of felony offenses, the state courts may impose specific terms and conditions on the pardon.<sup>52</sup> The council

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51. Attached at Exhibit 34.

52. See Mass. Const. pt. 2, ch. 2, § 1, art. 8, which states:

The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council, provided, that if the offence is a felony the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted; but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.

is an advisory body comprised of nine individuals, including the lieutenant governor, which may be assembled from time to time at the governor's discretion.<sup>53</sup> Concurrent approval by both the governor and the council is necessary to effectuate a pardon.<sup>54</sup>

In 1977, Governor Michael Dukakis exercised his pardon power by granting posthumous clemency to Nicola Sacco and Bartolomeo Vanzetti. Sacco, a shoemaker, and Vanzetti, a fishmonger, were Italian immigrants who were charged with stealing more than \$15,000 and murdering the paymaster and a guard of a shoe factory in South Braintree, Massachusetts.<sup>55</sup> During their trial in 1921, witnesses provided contradictory testimony, and the judge and jury were accused of bias. The prosecution's case was based largely upon questionable forensic evidence and a paid informant.<sup>56</sup> Furthermore, despite the emergence of new exculpatory evidence, the trial judge had refused to grant a new trial. The conviction of Sacco and Vanzetti prompted widespread public outcry from those who argued that the defendants were the victims of anti-immigrant sentiment. In 1925, a man convicted of another murder confessed to having been a member of the gang that committed the crimes. Nevertheless, the two men were executed two years later, in 1927. Governor Dukakis, in issuing the posthumous pardons, asserted: "the stigma and disgrace should be forever removed from the names of Nicola Sacco and Bartolomeo Vanzetti, from their families and descendants."<sup>57</sup> (emphasis added)

#### b. Pennsylvania

The constitution of Pennsylvania, which is similar to that of Massachusetts, requires concurrent action by the governor and an advisory body, the Board of Pardons.<sup>58</sup> Unanimous approval of the Board is required in cases involving the

53. See *id.*, § 3, art. 1 (amended 1855), which states:

There shall be a council for advising the governor in the executive part of government, to consist of [eight] persons besides the lieutenant governor, whom the governor, for the time being, shall have full power and authority, from time to time, at his discretion, to assemble and call together. And the governor, with the said councillors, or five of them at least, shall and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the commonwealth, according to the laws of the land.

54. See *Ladetto v. Commissioner of Correction*, 369 N.E.2d 967, 967 (1977) citing *In re Opinion of the Justices*, 98 N.E. 101, 102 (1912) ("The granting of a full or a partial pardon is the result of concurrent action by both the Governor and the Council. Neither alone can take effective action. Both must agree before the Constitution is satisfied.")

55. See *Commonwealth v. Sacco*, 151 N.E. 839 (Mass. 1926); *Sacco-Vanzetti Case* (visited June 10, 1998) <<http://encarta.msn.com/index/concisc/0vol08/00eef000.asp>>, attached as Exhibit 35.

56. See Charles L. Lindner, *British Nanny Trial Not the First to Defy Expectations*, L.A. Times, Nov. 16, 1997, at M3, attached as Exhibit 36.

57. Watt Espy, *Leo Frank's Due-Process Pardon Raises Concern for Others' Rights*, Atlanta J. & Const., Mar. 29, 1986, at A11. See generally Lynn Van Matre, *Recordings*, Chicago Trib., May 9, 1996, at 6, attached as Exhibits 37 and 38.

58. See Pa. Const. art. IV, § 9, which states:

(a) In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but



death penalty or life imprisonment, and its function is limited to recommending particular petitions for clemency.<sup>59</sup> The state constitution dictates that the membership of the Board of Pardons includes the lieutenant governor, the state attorney general, and three other members who are appointed by the governor with the consent of the state senate.

In 1979, Pennsylvania governor Milton Shapp granted a posthumous pardon to Jack Kehoe, following a favorable recommendation from the Pennsylvania Board of Pardons. Kehoe was the reputed leader of the Molly Maguires, a secret group of Irish coal miners who battled the coal barons of northeastern Pennsylvania in the 1860s and 1870s.<sup>60</sup> On April 16, 1877, a jury found Kehoe guilty of the 1862 murder of a mine foreman, and he was executed the following year. The Board recommended the pardon because Kehoe's trial was conducted "in an atmosphere of religious, social and ethnic tension" and by a jury that did not include his peers.<sup>61</sup> In support of the petition, the district attorney submitted a letter, dated December 6, 1978, in which he stated the following: "I believe the trial, conviction and execution of John Kehoe represents a true miscarriage of justice. Therefore, I have no objections to granting the prayer of the petitioner that John Kehoe be given a pardon posthumously."<sup>62</sup> (emphasis added)

c. Oklahoma

In Oklahoma as well, the governor and State Pardon and Parole Board must take favorable concurrent action in order to bestow a pardon.<sup>63</sup> The state constitution

no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.

(b) The Board of Pardons shall consist of the Lieutenant Governor who shall be chairman, the Attorney General and three members appointed by the Governor with the consent of a majority of the members elected to the Senate for terms of six years. The three members appointed by the Governor shall be residents of Pennsylvania. One shall be a crime victim; one a corrections expert; and the third a doctor of medicine, psychiatrist or psychologist. The board shall keep records of its actions, which shall at all times be open for public inspection.

59. See 1984-88 Pa. Op. Att'y Gen. No. 18 (April 21, 1987), attached as Exhibit 39.

60. See Mary Klaus, Molly Leader Said Doomed for Aiding Fellow Miners, Harrisburg Patriot & Evening News, Feb. 19, 1987, at B2, attached as Exhibit 40.

61. *Id.*

62. See In re Application of Kehoe, John (PB 6988-M), Pa. Bd. of Pardons, no. B-1370 (Dec. 1978) (recommending posthumous pardon for Kehoe), attached as Exhibit 41.

63. See Okla. Const. art. VI, § 10, which states:

There is hereby created a Pardon and Parole Board to be composed of five members; three to be appointed by the Governor, one by the Chief Justice of the Supreme Court; one by the Presiding Judge of the Criminal Court of Appeals or its successor. An attorney member of the Board shall be prohibited from representing in the courts of this state persons charged with felony offenses. The appointed members shall hold

obligates the five-member Board "to make an impartial investigation and study of applicants for . . . pardons . . . and by a majority vote make its recommendations to the Governor of all deemed worthy of clemency."<sup>64</sup> In addition to the recommendation requirement, the governor's pardon power is subject to the requirement that offenses be post-conviction, and excludes cases of impeachment. Oklahoma Governor Frank Keating circumvented the concurrent action requirement when he awarded an honorary executive pardon to J. B. Stradford in 1996.<sup>65</sup> The posthumous pardon cleared Stradford of any wrongdoing in a 1921 riot that destroyed 35 city blocks and killed an estimated 250 people in Tulsa, Oklahoma.<sup>66</sup> At a ceremony in which officials formally dropped all charges against Stradford, Governor Keating bestowed the pardon to Cornelius Toole, Stradford's great-grandson, a state court judge. According to Stradford's memoirs, racial tensions turned into a riot when a mob gathered at the Tulsa courthouse and spoke of lynching an African-American man who was held there for allegedly assaulting a white woman. Stradford described his role as that of a peacemaker who was trying to stop violence from erupting. Instead, in the aftermath of the riot, a grand jury charged him with inciting it.

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their offices coterminous with that of the Governor and shall be removable for cause only in the manner provided by law for elective officers not liable to impeachment. It shall be the duty of the Board to make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all deemed worthy of clemency. Provided, the Pardon and Parole Board shall have no authority to make recommendations regarding parole for convicts sentenced to death or sentenced to life imprisonment without parole.

The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the said Board, commutations, pardons and paroles for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. Provided, the Governor shall not have the power to grant paroles if a convict has been sentenced to death or sentenced to life imprisonment without parole. The Legislature shall have the authority to prescribe a minimum mandatory period of confinement which must be served by a person prior to being eligible to be considered for parole. The Governor shall have power to grant after conviction, reprieves, or leaves of absence not to exceed sixty (60) days, without the action of said Board.

He shall communicate to the Legislature, at each regular session, each case of reprieve, commutation, parole or pardon, granted, stating the name of the convict, the crime of which he was convicted, the date and place of conviction, and the date of commutation, pardon, parole and reprieve.

64. *Id.*

65. According to telephone interviews with officials at the Pardon and Parole Board and the governor's legal counsel office, there is no evidence that Governor Keating utilized the official pardoning process of recommendation by the Board to grant the pardon.

66. See Oklahoma Officials Clear Black Man in 1921 Riot and Apologize to Family (Tulsa, Oklahoma Atrocity; J. B. Stradford Who Died in 1935 at Age 75 is Vindicated), *Jet*, Nov. 18, 1996, at 8, attached as Exhibit 42.

### 3. Governor as Member of the Decisionmaking Body

In Nebraska and Nevada, the pardon power is not vested exclusively in the governor, but in a decisionmaking body that includes the chief executive of the state.

#### a. Nebraska

Nebraska's constitution creates a triumvirate comprised of the governor, attorney general, and secretary of state. This three-member Board of Pardons is vested with authority to grant pardons for offenses against the state, with the exception of treason and impeachment.<sup>67</sup>

In 1986, the Nebraska Pardons Board unanimously voted to issue a posthumous pardon to William Jackson Marion, hanged on March 25, 1887, for the murder of John Cameron.<sup>68</sup> Secretary of State Allen Beermann, a member of the Board, noted that this was only the second request for a posthumous pardon the board has heard during his 16-year tenure. Marion's grandson, Elbert Marion, requested the pardon, arguing that the coroner had misidentified a skeleton as Cameron, and maintaining that Cameron was seen alive by two of Marion's relatives four years after Marion's execution.<sup>69</sup> The Board justified the unconditional pardon by stating "that the public good would be served by granting such application and that a posthumous pardon should be bestowed by the government through its duly authorized officers, as an act of grace."<sup>70</sup> (emphasis added).

67. See Neb. Const. art. IV, § 13, which states:

The Legislature shall provide by law for the establishment of a Board of Parole and the qualifications of its members. Said board, or a majority thereof, shall have power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment. The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment. The Board of Parole may advise the Governor, Attorney General and Secretary of State on the merits of any application for remission, respite, reprieve, pardon or commutation but such advice shall not be binding on them. The Governor shall have power to suspend the execution of the sentence imposed for treason until the case can be reported to the Legislature at its next session, when the Legislature shall either grant a pardon, or commute the sentence or direct the execution, or grant a further reprieve.

68. See generally Marion v. State, 29 N.W. 911 (Neb. 1886).

69. See Leslie Boellstorff, Posthumous Pardon Given to William Marion (visited June 10, 1998) <<http://nadp.inetnebr.com/marion.html>>; Gabriella Stern, Board to Rule Today: Grandson Seeks Pardon for Man Hanged in 1887, Omaha World-Herald, Dec. 12, 1986, attached as Exhibits 43 and 44.

70. Pardon Proclamation: In the Matter of a Posthumous Pardon to William Jackson Marion, Neb. Bd. of Pardons (Dec. 12, 1986), attached as Exhibit 45.

b. Nevada

The Nevada constitution vests authority in Board of Pardons and Paroles, consisting of the governor, five justices of the state supreme court, and the state attorney general.<sup>71</sup> Majority approval of the board is necessary to issue a pardon, and the governor alone retains veto power. All offenses, except treason and impeachment, may be pardoned.<sup>72</sup> In 1987, the Nevada State Board of Pardons and Paroles granted posthumous pardons to Morrie Preston and Joseph William Smith, two union leaders who were convicted of murder in 1907. Some describe the two men as victims of a conspiracy by the state's mining barons to discredit the labor movement. At their trial, there was allegedly false, paid testimony from three key prosecution witnesses who were all outlaws with long criminal records.<sup>73</sup> Governor Richard Bryan, chairman of the Pardons Board, stated that the pardon was an acknowledgement on the part of the Board of grave errors in the trial, which occurred in a highly charged and emotional atmosphere.<sup>74</sup> Of the seven members on the Board, only Justice Cliff Young voted against the pardon, insisting that the men were defended ably by their attorneys and ultimately found guilty by a jury of their peers.<sup>75</sup> According to the transcript of the Pardon Board hearing, Smith's survivors did not seek the pardon to overturn the two men's convictions. The Board, in fact, acknowledged that it had no such power to do so, on the grounds that a determination of guilt or innocence would be too difficult given the passage of

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71. See, e.g., Ex parte Melosevich, 133 P. 57, 59 (1913) ("the powers of the board of pardons, composed of the Governor, the Justices of the Supreme Court, and the Attorney General, are derived from the Constitution (Const. art. 5, § 14; Rev. Laws, § 307). . . ."); State v. Echeverria, 248 P.2d 414, 416 (1952) citing State v. Butner, 220 P.2d 631, 634 (1950) ("The power to commute the sentence from death to life imprisonment is vested exclusively in the Board of Pardons and Parole commissioners by the provisions of § 14 of Article V of the state constitution.").

72. See Nev. Const. art. V, § 14, which states:

1. The governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, may, upon such conditions and with such limitations and restrictions as they may think proper, remit fines and forfeitures, commute punishments, except as provided in subsection 2, and grant pardons, after convictions, in all cases, except treason and impeachments, subject to such regulations as may be provided by law relative to the manner of applying for pardons.

2. Except as may be provided by law, a sentence of death or a sentence of life imprisonment without possibility of parole may not be commuted to a sentence which would allow parole.

3. The legislature is authorized to pass laws conferring upon the district courts authority to suspend the execution of sentences, fix the conditions for, and to grant probation, and within the minimum and maximum periods authorized by law, fix the sentence to be served by the person convicted of crime in said courts.

73. See Jack Viets, Nevada May Finally Undo Old Miscarriage of Justice, San Francisco Chron., May 11, 1987, attached as Exhibit 46.

74. See Pardons in 1907 Slaying, Newsday, May 13, 1987, at 15; 2 Unionists Cleared of 1907 Crime, Chicago Trib., May 14, 1987, at 9, citing Sally Zanjani and Guy Roeha, The Ignoble Conspiracy: Radicalism on Trial in Nevada, attached as Exhibits 47 and 48.

75. See Ed Vogel, Pardoned: Radical Union Men Absolved of Guilt in Goldfield Murder, Nev. Appeal, May 13, 1987, at A10, attached as Exhibit 49.

time.<sup>76</sup> Instead, the Board granted the pardon as recognition of sufficient doubt concerning the credibility of the trial and to promote justice and comfort the surviving family.<sup>77</sup>

#### 4. Georgia: Extra-Gubernatorial Decisionmaker

The State of Georgia vests the pardon authority, not in the governor, but in a constituted State Board of Pardons and Paroles.<sup>78</sup> This Board's exercise of authority may be restricted by legislative enactment.<sup>79</sup> Thus, in Georgia, the governor's only

76. Hearing on Posthumous Petition of Morrie Preston and Joseph Smith Before the Nevada Board of Pardons, 124-27 (May 12, 1987) (transcript of the hearing), attached as Exhibit 50.

77. See id., 124, 157-58. See generally State v. Preston, 95 P. 918 (Nev. 1908), reh'g denied, 97 P. 388 (Nev. 1908).

78. See Ga. Const. art. IV, § 2, para. 2(a), which states:

Except as otherwise provided in this Paragraph, the State Board of Pardons and Paroles shall be vested with the power of executive clemency, including the powers to grant reprieves, pardons, and paroles; to commute penalties; to remove disabilities imposed by law; and to remit any part of a sentence for any offense against the state after conviction.

79. See id. para. 2(b), 2(c), which states:

(b) (1) When a sentence of death is commuted to life imprisonment, the board shall not have the authority to grant a pardon to the convicted person until such person has served at least 25 years in the penitentiary; and such person shall not become eligible for parole at any time prior to serving at least 25 years in the penitentiary.

(2) The General Assembly may by general law approved by two-thirds of the members elected to each branch of the General Assembly in a roll-call vote provide for minimum mandatory sentences and for sentences which are required to be served in their entirety for persons convicted of armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery and, when so provided by such Act, the board shall not have the authority to consider such persons for pardon, parole, or commutation during that portion of the sentence.

(3) The General Assembly may by general law approved by two-thirds of the members elected to each branch of the General Assembly in a roll-call vote provide for the imposition of sentences of life without parole for persons convicted of murder and for persons who having been previously convicted of murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery or having been previously convicted under the laws of any other state or of the United States of a crime which if committed in this state would be one of those offenses and who after such previous conviction subsequently commits and is convicted of one of those offenses and, when so provided by such Act, the board shall not have the authority to consider such persons for pardon, parole, or commutation from any portion of such sentence.

(4) Any general law previously enacted by the General Assembly providing for life without parole or for mandatory service of sentences without suspension, probation, or parole is hereby ratified and approved but such provisions shall be subject to amendment or repeal by general law.

(c) Notwithstanding the provisions of subparagraph (b) of this Paragraph, the General Assembly, by law, may prohibit the board from granting and may prescribe the terms and conditions for the board's granting a pardon or parole to:

(1) Any person incarcerated for a second or subsequent time for any offense for which such person could have been sentenced to life imprisonment; and

role in the pardoning process is to make appointments to the five-member Board. This Board, however, has granted posthumous pardons to Leo Frank, Samuel Worcester, and Elihu Butler as acknowledgements of the state's forgiveness.<sup>80</sup>

Leo Frank, a Jewish factory superintendent, was convicted of murdering 13-year-old Mary Phagan in 1913 and sentenced to death. The Georgia governor subsequently commuted the sentence to life imprisonment, but an armed mob chanting anti-Semitic slogans seized Frank from his jail cell on August 16, 1915 and lynched him. No one was prosecuted for Frank's murder. More than seventy years later, a man testified that as a young boy, he saw the janitor of the factory, also the prosecution's chief witness, carry the limp body of the girl into the basement. In 1986, the Georgia Board of Pardons and Paroles granted Frank a posthumous pardon, in recognition of the state's failure to protect and preserve his safety and civil rights.<sup>81</sup>

In 1992, the second and third posthumous pardons were simultaneously granted in Georgia to Samuel Worcester and Elihu Butler, some one hundred and sixty years after these two Christian missionaries were wrongfully imprisoned for protesting the state's seizure of Cherokee territory. From prison, Worcester appealed their convictions to the Supreme Court of the United States. Upon deliberation, Chief Justice Marshall sided with the missionaries, declaring that Georgia had no right to extend state law into tribal land and ordered the missionaries' release.<sup>82</sup> The state refused to comply, however, and President Andrew Jackson refused to enforce the order.<sup>83</sup> After sixteen months of imprisonment, a new governor, Wilson Lumpkin, discharged the men from prison on a compromise offer. Pursuant to the compromise, Worcester withdrew his legal appeals in return for the release of the two men. The pardon document issued by the Board of Pardons and Paroles concludes with the following:

Today, the State Board of Pardons and Paroles acts to remove a stain on the history of criminal justice in Georgia. The U.S. Supreme Court did what it could 160 years ago to reverse the wrong committed against Reverend Worcester and Reverend Butler. Believing justice ought be denied no longer, by this Order the State Board of Pardons and Paroles unconditionally and fully pardons Samuel Austin Worcester and Elihu Butler.<sup>84</sup> (emphasis added.)

In sum, despite the fact that the degree of decision-making authority given to these state chief executives varies, they all have granted posthumous pardons. Governors, lieutenant governors, state supreme court justices, attorneys general, and secretaries of state from nine different states have all granted such pardons when public welfare and the interests of justice so require. The pardon power in

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(2) Any person who has received consecutive life sentences as the result of offenses occurring during the same series of acts.

80. Telephone interview with Walt Davis, Assistant Director of Clemency at the Georgia Board of Pardons and Paroles (June 15, 1998).

81. See Pardon of Leo Frank, Ga. Bd. of Pardons and Paroles (1986), attached as Exhibit 51.

82. See Worcester v. Georgia, 31 U.S. 515 (1832).

83. See David Corvette, After 161 Years, Two Who Opposed Cherokee Eviction are Pardoned, Atlanta J. & Const., Nov. 25, 1992, at B4; Tom Watson, 160 Years Later, Georgia Apologizes: For Cherokee, Pardon Helps Heal, USA Today, Nov. 25, 1992, at A2, attached as Exhibits 52 and 53.

84. Attached as Exhibit 54.

some of these states is more restricted than that which the President enjoys. Yet, even with those restrictions, there has been no suggestion in the records of these cases that it was improper to grant posthumous pardons.

#### VII. GRANTING LT. FLIPPER A POSTHUMOUS PARDON WILL CAUSE NO ADDITIONAL ADMINISTRATIVE BURDEN TO THE OFFICE OF THE PARDON ATTORNEY

Neither the English Crown nor the U.S. governors' willingness to grant posthumous pardons has caused undue administrative burdens. There is no evidence that the British Crown's willingness to grant posthumous pardons has resulted in a flood of such requests. Indeed, the Criminal Appeal Act of 1995 created the Criminal Cases Review Commission, which is tasked with reviewing cases arising in England, Wales, and Northern Ireland for suspected injustice. This Commission has the authority to seek out and review cases upon its own initiative. This independent body makes recommendations to the Court of Appeal, which reviews the conviction.<sup>85</sup> The Commission has taken over a role formerly filled by the Home Office. Its recommendations may also be considered by the Queen, who has the authority to grant posthumous pardons. The British system, therefore, has evolved such that requests for pardons are not only initiated by the putative grantee or his representatives, but also by the government itself. Moreover, there is no evidence that since the monarch has granted two posthumous pardons, she has been besieged by a burdensome number of such petitions.

Similarly, the states that have granted posthumous pardons have done so on only one or two occasions, on average. The infrequent grant of posthumous pardons by the states that have issued them is due to the fact that requests for such pardons are extremely rare. There have been no requests for posthumous pardons in Georgia other than those regarding Leo Frank in 1986, and those simultaneously granted to Samuel Worcester and Elihu Butler in 1992.<sup>86</sup> Neither do parole officials in Arizona recall any applications for posthumous pardons having been submitted since those granted in 1990.<sup>87</sup> Nor has there been any such request in Maryland or Pennsylvania since they granted clemency to Jerome Cardin in 1994 and Jack Kehoe in 1979, respectively.<sup>88</sup> Nevada, likewise, has received no requests for posthumous pardons except for Morrie Preston and Joseph Smith in 1987.<sup>89</sup> As Susan J. McCurdy, Executive Secretary of the Nevada Board of Pardons, noted: "[The Board of Pardons] thought it was going to open a floodgate. But no, [Preston and Smith]

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85. *Halsbury's*, 4th ed. Reissue 1996, Vol. 8(2), ¶ 830, at 486; Criminal Appeal Act of 1995, Pt. II, §§ 8-25.

86. See Letter from Walton Davis, Assistant Director of Clemency, Georgia State Board of Pardons and Paroles (July 6, 1998), attached as Exhibit 55.

87. See Letter from Erin Mahoney, Special Hearings Coordinator, Arizona Board of Executive Clemency (July 16, 1998), attached as Exhibit 56.

88. Telephone interviews with Patrieja Cushwa, Parole Commission in Maryland (June 10, 1998) and Jennifer Glass, Assistant to the Secretary of the Pennsylvania Board of Pardons (June 15, 1998).

89. See Letter from Susan J. McCurdy, Executive Secretary, Nevada Board of Pardons (July 10, 1998), attached as Exhibit 57.

were the only ones requested.”<sup>90</sup> Not surprisingly, Nebraska also has received no petitions for posthumous pardons since 1986, when it granted one to William Marion.<sup>91</sup>

The infrequent number of posthumous pardon requests at the state level—where the bulk of the criminal cases in our nation are handled—suggests that petitions to the President for posthumous pardons will be very rare, indeed. The experiences of the British Crown and the states, therefore, belie any concern that granting a Presidential posthumous pardon for the first time in Lt. Flipper’s case would lead to a flood of similar requests.

Even if there were a slight increase in the number of such requests, however, administrative inconvenience is an insufficient justification to warrant imposing a blanket rule prohibiting posthumous pardons. As discussed *supra*, the pardon power exists to promote the public welfare and remove the stigma incident to an unjust conviction. There is no legal bar to granting Lt. Flipper a posthumous pardon. Accordingly, it hardly seems appropriate to refuse to correct the patent miscarriage of justice in his case because the Office of the Pardon Attorney arguably may see a slight increase in pardon petitions.

#### VIII. GRANTING LT. FLIPPER A POSTHUMOUS PARDON WILL PROMOTE THE PUBLIC WELFARE

The “public welfare” test is unquestionably met by Lt. Henry Ossian Flipper. Lt. Flipper was an American hero. He overcame tremendous adversity all of his life. To the day he died, he wanted nothing more than to devote his talents and efforts to his country. And he did so in a manner that should be admired—indeed, celebrated by all Americans. He was a soldier, an author, a translator, and a civil engineer. He was also a civil servant, upon whom the United States government heavily relied throughout the course of his life in matters of great importance.

Born a slave in Georgia, he overcame great odds to win an appointment to West Point. Once there, he survived significant racial hazing, thereby earning the begrudging respect of his fellow cadets. He became the first African-American graduate of West Point. He graduated well ahead of many others in his class who were far better prepared for the exacting studies and rigors of that institution—and who did not have to endure the unremitting ostracism of their fellow classmates.

Upon graduation from West Point, he became the first African-American commissioned officer in the regular U.S. Army. He took on positions of authority and respect and demonstrated the leadership skills that he would exhibit throughout the course of his life.

Despite the pitfalls and injustices that he encountered, he always put his country first. And his substantial contributions to his country are a matter of record.

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90. Telephone interview with Susan J. McCurdy (June 15, 1998). *See also Hearing on Posthumous Petition of Morrie Preston and Joseph Smith Before the Nevada Board of Pardons* at 139-41, attached as Exhibit 50 (discussing Board members’ concern with the possibility of “opening the floodgates,” and mentioning that “there was no increase in demands for posthumous pardons” in Georgia subsequent to the Leo Frank pardon).

91. *See* Letter from Lisa M. Perry, Administrative Assistant, Nebraska Board of Pardons (July 6, 1998), attached as Exhibit 58.



His skills as a civil engineer were so formidable that work he did in that field for the federal government is still in use to this day, and is designated as a National Historical Landmark. After his service in the Army, his skills as an engineer also were sought by the private sector. Indeed, when the owners of one private concern wanted to overrule the wishes of their project manager and refused to hire Lt. Flipper because of his race, the manager—who was also an engineer, had been a private in the 1st Arkansas Cavalry, and previously had met Lt. Flipper—told the owners that they had the choice of either firing him or hiring Lt. Flipper. Lt. Flipper was hired.<sup>92</sup>

His abilities as a translator were so superlative that the United States Attorney under whom he served stated in briefs to the Supreme Court that:

[Lt. Flipper] has translated almost every law from the original Spanish which is to be found in the various books and briefs filed in these [land claim] cases by the government. The accuracy of these translations, even the coloring of a word, has never been questioned by any Spanish scholar of standing . . . all of his translations, investigations and reports have stood the test of adverse and rigorous investigation.<sup>93</sup>

The high government officials under whom Lt. Flipper served described him and his work as being “honest” and “reliable” and as having integrity.<sup>94</sup> These are traits to which we, as Americans, aspire each day of our lives. Indeed, the 1904 annual report of Attorney General of the United States to the Congress, describes Lt. Flipper’s seven-year tenure as a special agent of the U. S. Department of Justice as follows:

[H]is fidelity, integrity, and magnificent ability were subjected to tests which few men ever encounter in life. How well they were met can be attested by the records of the Court of Private Land Claims and the Supreme Court of the United States. To Mr. Tipton and Mr. Flipper is due the credit of all the expert work upon Spanish and Mexican archives and the translation of the laws and decrees applicable to land grants situate in the ceded territory.<sup>95</sup>

Today, it is time to remove the terrible stigma with which Lt. Flipper unfairly had to live out the remainder of his life after the untimely conclusion of his Army service. That stigma endures to this day, and remains an unjust blot upon his outstanding reputation and character, and that of his descendants. For Lt. Flipper and his descendants, for the good of the military justice system, and for the good of our country, today we must turn a new page and make right that which has been wrong for far too long. Accordingly, the President should grant to Lt. Flipper a full and unconditional pardon for his conviction for conduct unbecoming an officer and a gentleman—and by so doing, facilitate the ability of our nation to celebrate to the fullest extent the magnificent contributions and achievements of a truly great American.

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92. See The Negro Frontiersman, Pardon Petition Appendix at Tab A at 21.

93. See Brief of the United States in Opposition to Motion to File Additional Evidence in Faxon v. United States, No. 119, Oct. Term 1897 at 9; Pardon Petition Appendix Tab B1 at 9.

94. Id. at 7-9.

95. See Annual Report of the Attorney General, 1904, at 99; Pardon Petition Appendix Tab B2 at 99.

As demonstrated by American precedent, as well as the experience of the British Crown and the state governors, there is no proper legal or policy justification for refusing to issue a posthumous Presidential pardon to Lt. Flipper. Accordingly, for the reasons stated herein and in his Application for Pardon and its accompanying Appendix, we respectfully submit that Lt. Flipper's petition for a pardon for the crime of conduct unbecoming an officer should be granted.

We would be pleased to respond to any questions concerning this matter, either by way of a further written submission, or in person.

Respectfully Submitted,

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July 21, 1998

## APPENDIX

## EXHIBITS

1. Letter from General Swaim to the Secretary of War (excerpted from the Army Board of Corrections of Military Records, Case Summary).
2. Letter from President Chester A. Arthur (June 14, 1882) (confirming Lt. Flipper's conviction).
3. Proceedings, *In re* Henry O. Flipper (Deceased) (Army Bd. for Corrections of Military Records Nov. 17, 1976).
4. DEPARTMENT OF JUSTICE MANUAL § 1-2.108 (Supp. 1990-91).
5. Proclamation Granting Pardon to the Western Insurgents, 20 Op. Att'y Gen. 339 (1895); Proclamation Granting Pardon to the Pennsylvania Insurgents, May 21, 1800, 20 Op. Att'y Gen. 343 (1895); A Proclamation, 20 Op. Att'y Gen. 343 (1895).
6. Letter from Jayson L. Spiegel, Acting Assistant Secretary of the Army, Department of the Army, Manpower and Reserve Affairs, to Roger C. Adams, Acting Pardon Attorney, Department of Justice (May 5, 1998).
7. Thaddeus Herrick, *Where Have All the Heroes Gone?*, HOUS. CHRON., May 24, 1998, at 7.
8. Letter from Franklin J. Henderson, Colonel and Immediate Past National President, Ninth & Tenth (Horse) Cavalry Association, to President William Clinton (June 19, 1998).
9. Letter from James M. McPherson, George Henry Davis Professor of History, Princeton University, to President William Clinton (June 5, 1998).
10. Letter from Senator Albert B. Fall to Senator James W. Wadsworth (Sept. 9, 1922).
11. Letter from Senator Albert B. Fall to Senator Harry S. New (Sept. 9, 1918).
12. HENRY O. FLIPPER, NEGRO FRONTIERSMAN: THE WESTERN MEMOIRS OF HENRY O. FLIPPER 37-39 (1963).
13. 734 PARL. DEB., H.C. (5th ser.) 37 (1966).
14. Regina v. Secretary of State for the Home Dep't, *Ex parte* Bentley, 4 All E.R. 442 (Q.B. 1993).

15. Pardon of Derek William Bentley (July 29, 1993) (U.K.).
16. 8(2) HALSBURY'S LAWS OF ENGLAND 482-86 (Lord Hailsham of St. Marylebone ed., 4th ed. reissue 1996).
17. John W. Frece, *Schaefer Grants Cardin Pardon in S&L Scandal*, BALT. SUN, Sept. 10, 1994, at A1.
18. Alec Matthew Klein, *S&L Meltdown*, BALT. SUN, May 7, 1995, at 1E.
19. Thomas W. Waldron, *Commuted Term Was Typical of Schaefer: As Governor, He Relied on Instincts, Advice of a Longtime Friend*, BALT. SUN, Oct. 4, 1997, at 1B.
20. Pardon Proclamation, *In re Jerome S. Cardin* (Md. Exec. Dep't ordered Sept. 2, 1994).
21. Dave Leshner, *Dead Man's Name Finally To Be Cleared; Crime: Investigator Shows Murder Confession 68 Years Ago Was Coerced*, L.A. TIMES, Apr. 15, 1996, at A1.
22. Stephen Green, *Pardon Still Awaited in 1920s Crime Convictions*, SACRAMENTO BEE, July 10, 1995, at A1.
23. Stephen Green, *Terrible Legal Wrong Finally Righted*, SACRAMENTO BEE, Apr. 16, 1996, at A1.
24. Bleys W. Rose, *Pardon Sought in 1925 Humboldt Murder Case*, PRESS DEMOCRAT (Santa Rosa, Cal.), July 13, 1995, at A1.
25. Stephen Green, *Dead Man Is Cleared by Wilson*, FRESNO BEE, July 13, 1995, at B3.
26. *In re Clemency Request for Jack Ryan* (Cal. Executive Dept. filed Apr. 15, 1996).
27. *Wilson Grants Posthumous Pardon to Convicted Killer*, L.A. DAILY NEWS, Apr. 16, 1996, at N9.
28. *Posthumous Pardons Are Urged for 5*, ARIZ. DAILY STAR, Oct. 3, 1990, at 2B.
29. Abraham Kwok, *Mofford Expected To Pardon 5 Cons Killed Fighting Forest Fire*, ARIZ. REPUBLIC (Phoenix), Oct. 3, 1990, at B3.
30. E.J. Montini, *Inmate Hurt Fighting Fire Merits Pardon*, ARIZ. REPUBLIC (Phoenix), July 4, 1990, at B1.

31. Art Thomason, *Firefighting Victims' Lives Recounted: Memorial Funds Are Set Up As Families Mourn*, ARIZ. REPUBLIC (Phoenix), June 29, 1990, at C2.
32. Joint Preliminary Status Report, *Chacon v. United States*, 32 Fed. Cl. 684 (1995) (No. 92-715C).
33. Defendant's Reply Brief at 3-5, *Chacon v. United States* (Fed. Cl. filed June 28, 1993) (No. 92-715C); Brief for Defendant-Appellee at 17-19, *Chacon v. United States* (Fed. Cir. filed July 28, 1994) (No. 94-5093).
34. Letter from Elliot A. Brown, Acting Director, Bureau of Justice Assistance, Office of Justice Programs, to Bill Stephens and Kevin Garrison (Aug. 25, 1992).
35. *Sacco-Venzetti Case* (visited May 5, 1999) <<http://encarta.msn.com/find/concise.asp?z=1&pg=2&ti=00EEF000&o=1>>.
36. Charles L. Lindner, *British Nanny Trial Not the First to Defy Expectations*, L.A. TIMES, Nov. 16, 1997, at M3.
37. Watt Espy, *Leo Frank's Due-Process Pardon Raises Concern for Others' Rights*, ATLANTA J. & CONST., Mar. 29, 1986, at A11.
38. Lynn Van Matre, *Recordings*, CHI. TRIB., May 9, 1996, at 6.
39. 1984-88 Pa. Op. Att'y Gen. 18 (1987) (No. 87-2).
40. Mary Klaus, *'Molly' Leader Said Doomed for Aiding Fellow Miners*, HARRISBURG PATRIOT & EVENING NEWS (Pa.), Feb. 19, 1987, at B2.
41. Posthumous Pardon, *In re John Kehoe* (Pa. Bd. of Pardons issued Jan. 12, 1979) (No. B-1370).
42. *Oklahoma Officials Clear Black Man in 1921 Riot and Apologize to Family*, JET, Nov. 18, 1996, at 8, available in 1996 WL 14671442.
43. Leshe Boellstorff, *Posthumous Pardon Given to William Marion* (visited May 5, 1999) <<http://nadp.metnebr.com/m1marion.html>>.
44. Gabriella Stern, *Board To Rule Today: Grandson Seeks Pardon for Man Hanged in 1887*, OMAHA WORLD-HERALD, Dec. 12, 1986, available in 1996 WL 4258681.
45. Pardon Proclamation, *In re William Jackson Marion* (Neb. Bd. of Pardons issued Dec. 12, 1986).
46. Jack Viets, *Nevada May Finally Undo Old Miscarriage of Justice*, S.F. CHRON., May 11, 1987, at 4.

47. *Pardons in 1907 Slaying*, *NEWSDAY*, May 13, 1987, at 15.
48. *2 Unionists Cleared of 1907 Crime*, *CHI. TRIB.*, May 14, 1987, at 9.
49. Ed Vogel, *Pardoned: Radical Union Men Absolved of Guilt in Goldfield Murder*, *NEV. APPEAL*, May 13, 1987, at A1.
50. Transcript of Hearing on Posthumous Petition, *In re Morrie Preston* (Nev. Bd. of Pardons May 12, 1987).
51. Pardon of Leo Frank (Ga. Bd. of Pardons and Paroles issued Mar. 11, 1986)
52. David Corvette, *After 161 Years, Two Who Opposed Cherokee Eviction Are Pardoned*, *ATLANTA J. & CONST.*, Nov. 25, 1992, at B4.
53. Tom Watson, *160 Years Later, Georgia Apologizes: For Cherokee, Pardon Helps Heal*, *USA TODAY*, Nov. 25, 1992, at 2A.
54. Pardon of Samuel Austin Worcester and Elihu Butler (Ga. Bd. of Pardons and Paroles issued Sept. 15, 1992).
55. Letter from Walton Davis, Assistant Director of Clemency, Georgia State Board of Pardons and Paroles (July 6, 1998).
56. Letter from Erin Mahoney, Special Hearings Coordinator, Arizona Board of Executive Clemency, to Darryl W. Jackson (July 16, 1998).
57. Letter from Susan J. McCurdy, Executive Secretary, Nevada Board of Pardons (July 10, 1998).
58. Letter from Lisa M. Perry, Administrative Assistant, Nebraska Board of Pardons (July 6, 1998).