



The Senate of
The State of Texas

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JUL 14 2009

OPINION COMMITTEE

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State Affairs

July 14, 2009

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

FILE # ML-46114-09
ID. # 46114

Re: Request for opinion on the governor's authority to grant a
pardon to a deceased person and other related matters.

Dear General Abbott:

In September 1986, Timothy Brian Cole was convicted and sentenced to 25 years in prison for a rape he did not commit. He professed his innocence until he died in prison of an asthma attack in 1999. In May 2008, DNA evidence revealed that Tim Cole was innocent and that a man named Jerry Johnson (who confessed to the crime as early as 1995) was the true rapist.

On April 7, 2009, Presiding Judge Charles Baird of the 299th District Court exonerated Tim Cole in a "court of inquiry." No. D1-DC 08-100-051. Judge Baird wrote in his opinion:

Was Tim Cole innocent of the charges against him? Yes. The evidence is crystal clear that he died in prison an innocent man, and the Court finds to a 100% moral, legal, and factual certainty that he did not commit the crime for which he was convicted.

On May 27, 2009, Governor Perry signed HB 1736, which in part authorized compensation for family members of persons who were posthumously pardoned. Section 2 of the legislation amended Section 103.001 of the Civil Practice and Remedies Code by adding Subsection (c) to read as follows:

(c) If a deceased person would be entitled to compensation under Subsection (a)(2) if living, *including a person who received a posthumous pardon*, the person's heirs, legal representatives, and estate are entitled to lump-sum compensation under Section 103.052. (italics added)

While Governor Perry may have signed legislation that, at a minimum, implies a posthumous pardon is possible, he insists he cannot grant one without a constitutional amendment.

As such, attempts were made during the 81st legislative session and special session to

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explicitly give the governor constitutional authority to grant posthumous pardons so that he would pardon Tim Cole. During the regular session, HJR 98, which, among other things, would have authorized a constitutional amendment to explicitly give the governor the power to grant posthumous pardons, failed to pass. During the special session, Sen. Rodney Ellis and Rep. Marc Veasey introduced legislation (SJR 1 and HJR 1, respectively) to amend the constitution to explicitly give the governor the power to grant posthumous pardons. The governor refused to add those bills to "the call" and they were never referred to committee as a result.

In the wake of HJR 98, SJR 1, and HJR 1 not passing, there is now disagreement among policymakers, the legal community, and the governor's office as to whether or not a constitutional amendment is really needed in order for the Board of Pardons and Parole to recommend, and the governor to grant, a posthumous pardon.

Texas Legislative Council Memorandum on Posthumous Pardons

In an attempt to settle this dispute, Sen. Ellis asked the Texas Legislative Council (TLC) to issue a legal memorandum on the question: "May the governor grant a legally effective posthumous pardon under current Texas law?" Legislative Council's short answer: Possibly. (The memorandum is attached.)

The memo notes that, "The law is unclear on the question of posthumous pardons because the Texas Constitution and Code of Criminal Procedure are silent concerning whether the governor may grant a pardon to a deceased person, and because no Texas court has squarely answered this question." Gabe Brake, Texas Legislative Council, *Subject: Posthumous Pardons*, 1 (July 6, 2009), hereafter referred to as "TLC memo."

1965 Attorney General's Opinion and the Acceptance Doctrine

According to the TLC memo, an early interpretation of the pardon power in this state by Texas courts is at odds with the interpretation of that same power in other states and under federal law. This is despite the fact that the pardon power in Texas, in other states, and under federal law is essentially derived from the same source: English common law.

The early Texas doctrine, the "acceptance doctrine," says that a pardon must be accepted by the person for it to be considered complete. This is the doctrine that formed the basis of the 1965 Attorney General's Opinion No. C-471, which the governor's office claims is preventing him from issuing a posthumous pardon to Tim Cole and why a constitutional amendment is needed to explicitly give him the authority to grant posthumous pardons. This doctrine was first articulated in Texas case law in 1885, and the bulk of the Texas cases directly treating this issue were all decided before World War II. See *Hunnicuttt v. State*, 18 Tex. App. 498 (1885). But see *Ex parte Lefors*, 303 S.W.2d 394 (Tex. Crim. App. 1957) (cited in the TLC memo, p. 2).

Evolution of Pardon Case Law and the Public Welfare Test

In the early days of the United States, the Supreme Court followed one interpretation of English common law at the time and also construed a pardon issued by the president to require delivery and acceptance. As stated before the court in the 1833 case, *States v. Wilson*, "It is a grant to him; it is his property; and he may accept it or not, as he pleases." *States v. Wilson*, 32 U.S. 150, 156 (1833).

By the early twentieth century, however, the acceptance doctrine was seemingly discarded in favor of a new doctrine or legal test, the "Public Welfare Test," which was articulated by the U.S. Supreme Court in 1927 and reaffirmed by the Court in 1974. See *Biddle v. Perovich*, 274 U.S. 480 (1927); *Schick v. Reed*, 419 U.S. at 261 (1974). As the TLC memo notes, "Under the view articulated in *Perovich*, public welfare interests inform the executive whether to grant a pardon, and a pardon may operate at law regardless of whether the person being pardoned formally accepts the pardon." *TLC memo*, 4. In 1974, the Supreme Court found that "the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself" and, "The requirement of consent was a legal fiction at best." *Schick*, 419 U.S. at 261, 267.

While federal pardon law evolved beyond the acceptance doctrine, Texas judicial decisions "continued to refer to the acceptance doctrine as a limitation on the pardon power past the time federal and English jurisprudence seemed to have changed course." *TLC memo*, 3. While Texas judicial decisions may not have evolved, "because the Texas Constitution is silent on the matter of posthumous pardons, if a Texas court applied the public welfare test in hearing a challenge to a posthumous pardon, issued under current law, on grounds that the pardon could not be accepted, the court could determine that the pardon is effective." *TLC memo*, 4.

Posthumous Pardons Have Been Issued Under State, Federal, and English Law

The president, governors of numerous states, and the Queen of England have all issued posthumous pardons, beginning as early as 1966 (one year after Attorney General Opinion No. C-471 was issued). In the British case, *Regina v. Timothy John Evans*, Evans was wrongfully convicted of murder and executed in 1950. In the mid-1960s, the British government determined Evans was innocent of the crime and on Oct. 18, 1966, Queen Elizabeth II issued a posthumous "free pardon" to Evans, exonerating him of guilt and declaring his innocence. See Darryl W. Jackson, et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 *Ind. L.J.* 1251, 1273-74 (1999).

In the United States, posthumous pardons have been granted in nine states on at least 10 separate occasions since 1977, including: Arizona, California, Georgia, Maryland, Massachusetts, Nebraska, Nevada, Oklahoma, and Pennsylvania. Three of those states - Massachusetts, Pennsylvania, and Oklahoma - have "constitutional pardon power provisions that are substantially similar" to those in Texas. Jackson, *supra* at 1277-86; *TLC memo*, 4.

At the federal level, Presidents Clinton and George W. Bush have granted posthumous pardons. In February 1999, President Clinton issued a posthumous pardon to Lt. Henry Ossian Flipper, the first African-American graduate of West Point and first African-American commissioned officer in the regular US Army. Jackson, *supra* at 1259. In 2008, President Bush granted a posthumous pardon to Charlie Winters, who was convicted of violating the Neutrality Act of 1939 by smuggling arms to Israel. Eric Lichtblau, *Jailed for Aiding Israel, but Pardoned by Bush*, *N.Y. Times*, December 23, 2008.

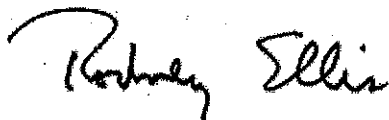
Questions for the Attorney General

In light of the dispute over the power of the governor to grant posthumous pardons, I am requesting an Attorney General opinion on the following questions:

1. May the governor grant a legally effective posthumous pardon under current Texas law, or under Texas law as of September 1, 2009 when HB 1736 goes into effect?
2. Prior to the issuance of this new opinion from the Attorney General, was the July 28, 1965 Attorney General's Opinion No. C-471 legally binding on the governor on this issue or could he have legally issued a posthumous pardon upon the recommendation of the Board of Pardons and Parole?
3. Who has standing, on what grounds, to challenge the governor's pardon (posthumous and otherwise)? What is the process for challenging a pardon, and if a challenge to a pardon is successful, is there an appeals process?
4. Under current Texas law, is the Board of Pardons and Parole constitutionally authorized to recommend a posthumous pardon?

Following this letter you will find the Texas Legislative Council memorandum. I appreciate your prompt consideration of this important request.

Sincerely,

A handwritten signature in black ink that reads "Rodney Ellis". The signature is written in a cursive, flowing style.

Senator Rodney Ellis



TEXAS LEGISLATIVE COUNCIL

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DAVID DEWHURST
Lieutenant Governor
Joint Chair

JOE STRAUS
Speaker of the House
Joint Chair

MEMORANDUM

TO: The Honorable Rodney Ellis
State Senator

FROM: Gabe Brake *MCB*

DATE: July 6, 2009

SUBJECT: Posthumous Pardons

QUESTION PRESENTED

May the governor grant a legally effective posthumous pardon under current Texas law?

BRIEF ANSWER

Possibly. The law is unclear on the question of posthumous pardons because the Texas Constitution and the Code of Criminal Procedure are silent concerning whether the governor may grant a pardon to a deceased person, and because no Texas court has squarely answered this question. A 1965 attorney general opinion states that the governor may not grant a pardon to a deceased person because prior Texas case law requires a pardon to be accepted before it is considered complete and for that reason prohibits the issuance of a posthumous pardon. If a posthumous pardon issued by the governor were challenged on grounds that a deceased person cannot accept a pardon, a Texas court following this line of reasoning could find that the governor may not grant an effective posthumous pardon.

In contrast, if a Texas court hearing a challenge to a posthumous pardon adopted the "public welfare test" articulated by the United States Supreme Court in 1927 and reaffirmed by that court in 1974, the court could find that the governor may issue a posthumous pardon.

Also, without specific regard to Texas law, it may be noteworthy that the President of the United States and the governors of several states, acting under pardon powers similar to the power granted the governor by the Texas Constitution, have issued posthumous pardons.

DISCUSSION

I. The Pardon Power and Posthumous Pardons in Texas

Section 11(b), Article IV, Texas Constitution, provides that "[i]n all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons" Chapter 48, Code of Criminal Procedure, mirrors Section 11(b), Article IV, Texas Constitution, and further provides a limited number of procedural requirements with which the governor must comply when granting a pardon or undertaking certain other official actions. *See, e.g.*, Articles 48.02 and 48.03, Code of Criminal Procedure. Both Section 11(b), Article IV, Texas Constitution, and Chapter 48, Code of Criminal Procedure, are silent concerning whether a class or classes of individuals exist to whom the governor may not grant a pardon. Accordingly, neither the Texas Constitution nor the Code of Criminal Procedure specifically allows the governor to, or prohibits the governor from, granting a pardon to a deceased person.

Although no Texas court has directly addressed the question of posthumous pardons, a 1965 attorney general opinion states that the governor may not issue a posthumous pardon because a deceased person cannot effectively, by agent or otherwise, accept the pardon. Op. Tex. Att'y Gen. No. C-471 (1965). In support of this contention, the opinion cites *Hunnicut v. State*, 18 Tex. App. 498 (1885), for the proposition that a pardon operates as a deed operates and requires both delivery by the grantor and acceptance by the grantee to become effective. This analogy of pardon to deed, commonly known as the "acceptance doctrine," predates the constitution and laws of this state because the analogy is arguably drawn from the common law tradition of England. *See Hunnicutt v. State*, 18 Tex. App. 498 (1885); *Ex parte Powell*, 73 Ala. 517 (1883); *United States v. Wilson*, 32 U.S. 150 (1833); *but see Biddle v. Perovich*, 274 U.S. 480, 486 (1927); *Rose v. Haskins*, 388 F.2d 91, 100 n.8 (6th Cir. 1968) (Celebrezze, J., dissenting); W. HUMBERT, THE PARDONING POWER OF THE PRESIDENT (Washington: 1941), 73 n.78. Since *Hunnicut*, Texas judicial opinions, citing both federal and English cases, have applied the acceptance doctrine in discussions of the governor's constitutional power to grant pardons in this state. *See, e.g., Ex parte Lefors*, 303 S.W.2d 394, 397 (Tex. Crim. App. 1957); *Rosson v. Stehr*, 23 Tex. App. 287, 289 (1887); *Ex parte Giles*, 502 S.W.2d 774, 791 (Douglas, J., dissenting) (Tex. Crim. App. 1973); *Whan v. State*, 485 S.W.2d 275, 279 (Onion, P.J., dissenting) (Tex. Crim. App. 1972); *Ex parte Muncy*, 163 S.W. 29, 56-57 (Davidson, J., dissenting) (Tex. Crim. App. 1913).

II. The Acceptance Doctrine

Hunnicut v. State, the basis of the acceptance doctrine in this state, determines that the governor's pardon power "is of the same general nature as that conferred upon the President of the United States by the Federal Constitution" *Hunnicut* at 517. In adopting the acceptance doctrine into Texas law, *Hunnicut* defers to an Alabama case, stating that the "correct rule is that as laid down in *Ex parte Powell*." *Id.* at 520. The state supreme court in that case states that federal and state law on the subject of pardons is the same law that evolved at

common law in England and is governed by the same rules as those that govern the common law. *Ex parte Powell*, 73 Ala. 517 (1883). The Alabama court then construed both English common law and United States Supreme Court precedent to require that a pardon be delivered and accepted before it is considered complete. *Id.*

The United States Supreme Court, at least initially, construed a pardon issued by the president pursuant to the United States Constitution to require delivery and acceptance. *United States v. Wilson*, 32 U.S. 150 (1833). In comparing the pardon to a deed in early English and federal jurisprudence, the court emphasized that the issuance of a pardon is an "act of grace," implying a private act made by the executive for the benefit of the pardoned person. *See id.* at 160-161. A pardon was considered property, transferred from the executive to the person pardoned in a private transaction dependent, like all private transactions, on mutual consent. As stated before the court: "It is a grant to him; it is his property; and he may accept it or not, as he pleases." *Id.* at 156.

Additionally, in 1915, the United States Supreme Court articulated that the acceptance doctrine is necessary to preserve a person's fifth amendment right against self-incrimination. *See Burdick v. United States*, 236 U.S. 79 (1915) (reversing judgment of contempt for newspaper reporter who refused to disclose identities of sources, claiming fifth amendment protections, after receiving an unsolicited pardon for any criminal consequences of disclosing those sources). Historically, a pardon had been used in England when the crown intended a pardon to confer amnesty for a particular offense in order to compel certain actions by the recipient. *See Schick v. Reed*, 419 U.S. 256, 261-63 (1974). The supreme court, seeing this tactic in the context of compelling testimony as an abuse of executive power, held that under the United States Constitution the executive branch may not, by pardon, strip away constitutional protections against a person's will. *See Burdick*, 236 U.S. at 93-94.

It is not clear whether Texas adopted the acceptance doctrine because of the perceived nature of a pardon as property, because the acceptance doctrine protected against executive abuse of the pardon power, or because Texas courts were following certain federal and English jurisprudence. Regardless, Texas judicial opinions continued to refer to the acceptance doctrine as a limitation on the pardon power past the time federal and English jurisprudence seemed to have changed course. *See Biddle v. Perovich*, 274 U.S. 480 (1927); *Ex parte Lefors*, 303 S.W.2d 394, 397 (Tex. Crim. App. 1957); *Ex parte Giles*, 502 S.W.2d 774, 791 (Douglas, J., dissenting) (Tex. Crim. App. 1973). *See also Schick*, 419 U.S. at 261 (declaring that in certain cases, the acceptance doctrine was "a legal fiction at best").

III. The Public Welfare Test

A more recent construction of the presidential pardon power, articulated in *Biddle v. Perovich*, begins with the idea that a pardon exercised under the federal constitution is not necessarily dependent on constructions articulated at common law. *Biddle v. Perovich*, 274 U.S. 480 (1927). "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." *Id.* at 486. Dispensing with the comparison of a pardon to a deed, *Perovich* held that the acceptance doctrine should not be

applied in all cases relating to the president's pardon power. Under the view articulated in *Perovich*, public welfare interests inform the executive whether to grant a pardon, and a pardon may operate at law regardless of whether the person being pardoned formally accepts the pardon. "[T]he public welfare, not [the] consent [of the person being pardoned] determines what shall be done." *Id.* at 486.

This line of reasoning, therefore, seems to limit the acceptance doctrine to cases in which a pardon is offered to remove a constitutional privilege, as in *Burdick*. See *Fletcher v. Graham*, 192 S.W.3d 350 (Ky. 2006) (Green, S.J., concurring in part and dissenting in part) (stating that *Perovich* had "either overruled or severely limited" both *Wilson* and *Burdick* with respect to the acceptance doctrine). If not limited by acceptance, the only limits on the pardon power are constitutionally based. *Schick*, 419 U.S. at 266-267 (citing "considerations of public policy and humanitarian impulses" and stating that "the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself"). Accordingly, because the Texas Constitution is silent on the matter of posthumous pardons, if a Texas court applied the public welfare test in hearing a challenge to a posthumous pardon, issued under current law, on grounds that the pardon could not be accepted, the court could determine that the pardon is effective.

IV. Posthumous Pardons Granted By Other Jurisdictions

The question of the issuance of posthumous pardons is not unique to this state. Posthumous pardons have now been issued under English law and federal law. Queen Elizabeth II issued a posthumous pardon in 1966. See Darryl W. Jackson, et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 Ind. L.J. 1251, 1273-74 (1999). In 1999, President Clinton issued the first federal posthumous pardon to the first African American graduate of the United States Military Academy at West Point, Lt. Henry Ossian Flipper. It was well established by that date that Lt. Flipper, likely a victim of racial discrimination during a court-martial, received a dishonorable discharge for a crime he did not commit. Jackson, *supra* at 1259.

The second federal posthumous pardon was issued in 2008 by President Bush to Charlie Winters, a Florida resident convicted of violating the Neutrality Act of 1939 by smuggling arms to Israel. The pardon was issued because many considered Charlie Winters' actions heroic. Eric Lichtblau, *Jailed for Aiding Israel, but Pardoned by Bush*, N.Y. TIMES, December 23, 2008.

Additionally, the governors of several states with constitutional pardon power provisions that are substantially similar to those in this state have granted effective posthumous pardons, including Massachusetts, Pennsylvania, and Oklahoma. Jackson, *supra* at 1281-84. The governors of Maryland, California, Arizona, Nebraska, and Nevada have also granted effective posthumous pardons. Jackson, *supra* at 1277-86.

CONCLUSION

Whether the governor may grant a legally effective posthumous pardon depends on how a Texas court hearing a challenge to the pardon construes the status of the acceptance doctrine. If the court deferred to state precedent discussing the pardon power in contexts other than a posthumous pardon and held acceptance was a requirement of a legally effective pardon, the court could find the pardon to be ineffective. If, on the other hand, the court adopted the public welfare test, as articulated by the United States Supreme Court, the court could determine that the power to grant a posthumous pardon falls within the pardon power of the governor under Section 11(b), Article IV, Texas Constitution.

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