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THE WHITE HOUSE

WASHINGTON

May 22, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHILIP BUCHEN

FROM: JAMES E. CONNOR *JEC*

SUBJECT: Posthumous Pardons

The President reviewed your memorandum of May 18 on the above subject and has approved your recommendation that he decline to have the Department of Justice consider further the request for pardon made by Otto Kerner prior to his death.

Please follow-up with the appropriate action.

cc: Dick Cheney

THE PRESIDENT HAS SEEN....

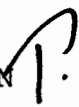
G. F.

THE WHITE HOUSE

WASHINGTON

May 18, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: PHILIP BUCHEN 

SUBJECT: Posthumous Pardons

BACKGROUND

At the time of the terminal illness of Otto Kerner of Illinois, he, his family and friends sought to make it possible for you to consider granting him a pardon from the Federal tax fraud crime of which he had earlier been convicted.

Under current rules governing petitions for pardons, it is provided that no petition for pardon in cases involving violation of income tax laws should be filed until the expiration of five years from the release of the petitioner from imprisonment. Under the circumstances of the Kerner case, the petitioner sought from the Deputy Attorney General a waiver of this waiting period based on the medical evidence that the petitioner would not survive the five year period and would probably die within a matter of months. This waiver was granted and the Department of Justice started to process the petition for a pardon, without regard to the waiting period, so as to determine whether or not the petition on its merit warranted favorable action by you. This process was just barely begun when Otto Kerner died.

Now, the surviving family of Otto Kerner and his friends are urging that the Department of Justice proceed to treat the initially filed request for a pardon as one which could lead to a posthumous pardon by you. Under these circumstances, I asked the Department of Justice to advise me on whether a posthumous pardon could be validly granted by you.



MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The President's power to  
issue a posthumous pardon

This is in response to your request for our advice on the above question. The Constitution, Article II, Section 2, vests in the President "Power to grant Reprieves and Pardons for Offenses against the United States." The authorities dealing with the question whether this power extends to the issuance of posthumous pardons are few and not of recent date.

At its December 1871 term, the Court of Claims held in Meldrim v. United States, 7 Ct. Cl. 595, that where an individual guilty of giving aid or comfort to the rebellion of the Southern States died without pardon and before the President's General Amnesty Proclamation of December 25, 1868 (15 Stat. 711), the proclamation did not obliterate the offense, and his administratrix therefore could not maintain an action for the proceeds of his captured property in the Treasury. It further appeared that the President had issued a special pardon but the intestate died shortly after its issuance and never accepted it. In a subsequent case, Sierra v. United States, 9 Ct. Cl. 224 (Dec. T., 1873), the court held on the authority of its decision in the Meldrim case that the Amnesty Proclamation of 1868 was "inoperative as to one who had died before its issue." See also Scott's Case, 8 Ct. Cl. 457 (Dec. T., 1873).

At an earlier date, in 1864, the President had before him the question whether he could remit a fine after the death of a man convicted of aiding and rescuing a deserter, the court having imposed a sentence of a \$500 fine. Attorney General Bates advised the President that he had this power. 11 Ops. A.G. 35. He said that "it might be doubtful on technical principles whether the President could grant a deed of pardon to a man after his death, since as Chief Justice Marshall says, in United States vs. Wilson, (7 Pet., 161,) 'a pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance', and, of course, there can be no delivery to and acceptance by a dead man" (p. 36). However, he continued (pp. 36-37):

\*\*\* a distinction exists between the act of a pardon by which a man is relieved of corporal punishment for guilt and the act for remission of a fine which operates on his estate only. The technical reason which may (I do not say will) prevent a pardon from operating in favor of a dead man, does not apply to the remission of a fine, for that may be accepted by the heirs to the estate whose interests are affected by it. The distinction between pardon of corporal punishment and remission of a pecuniary fine is recognized by the act of February 20, 1863, chap. 46, which gives the President the full discretionary power to remit the one without disturbing the other.\*

In my opinion you have the power to remit the fine imposed on the late John Caldwell, notwithstanding his death, by an instrument reciting the circumstances of the case.\*\*

The deed concept of a pardon as expressed by Chief Justice Marshall was approved in Burdick v. United States, 236 U.S. 79, and on that basis it was held that the President "cannot force a pardon upon a man." However, in Biddle v. Perovich, 274 U.S. 480, the Supreme Court held that the reasoning of the Burdick case was not to be extended to the commutation of a death sentence to life imprisonment. Without overruling Burdick, the Court did say (p. 486) that "A pardon in our days is not a private act of grace from an individual happening to possess power." However, it would seem that as the law now stands a pardon, except in the situation involved in Perovich, must be considered as in the nature of a deed so that to be effective it has to be accepted. Moreover, the law is well-settled that in the absence of statute a deed to a deceased party is ineffectual to pass title to real property. Davenport v. Lamb, 13 Wall. 418; Note, 148 A.L.R. 252.

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\*See, 18 U.S.C. 3570, providing that when an individual is sentenced to two kinds of punishment "the one Pecuniary and the other corporal, the President's remission in whole or in part of either kind shall not impair the legal validity of the other kind or of any portion of either kind, not remitted."

\*\*This opinion has never been subsequently cited.

The Pardon Attorney advises us that with the exception of the fine case above (11 Ops. A.G. 35), he has found no record of the President issuing a posthumous pardon. He further states that it has always been the view of his office that it would not be practical to issue pardons to deceased persons although personally he "would not object in hardship cases such as cases of widows of Government employees who are deprived of annuities to follow the precedent established in the Caldwell case /11 Ops. A.G. 35, supra/ \* \* \* where an estate is involved rather than a person. I would counsel against, however, the practice of recommending pardons for deceased persons for the mere purpose of clearing the name, etc. There is no doubt that many widows and survivors would want that done."

Unless the deed theory of a pardon is to be rejected, which I do not believe is warranted under existing decisions, it is my opinion that the President does not possess the power to issue a posthumous pardon; he does have the power, as established by the opinion of Attorney General Bates, to remit a fine posthumously. Unless there is occasion to do so, I feel that we should leave open the question whether Attorney General Bates' reasoning as to remission of a fine may be extended to affording relief, by way of a posthumous pardon, with respect to a Government annuity, as suggested by the Pardon Attorney.

/s/ J. Lee Rankin  
J. Lee Rankin  
Assistant Attorney General  
Office of Legal Counsel

THE WHITE HOUSE

WASHINGTON

May 22, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHILIP BUCHEN  
FROM: JAMES E. CONNOR *JEC*  
SUBJECT: Posthumous Pardons

The President reviewed your memorandum of May 18 on the above subject and has approved your recommendation that he decline to have the Department of Justice consider further the request for pardon made by Otto Kerner prior to his death.

Please follow-up with the appropriate action.

cc: Dick Cheney



THE WHITE HOUSE  
WASHINGTON  
May 18, 1976

*up*  
*5/21/76*  
*approved*  
*5/22/76*

MEMORANDUM FOR: THE PRESIDENT  
FROM: PHILIP BUCHEN *P.*  
SUBJECT: Posthumous Pardons

BACKGROUND

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Now, the surviving family of Otto Kerner and his friends are urging that the Department of Justice proceed to treat the initially filed request for a pardon as one which could lead to a posthumous pardon by you. Under these circumstances, I asked the Department of Justice to advise me on whether a posthumous pardon could be validly granted by you.

The Department of Justice files show that the same issue was raised in 1956 by the then Attorney General. The opinion at that time by the Office of Legal Counsel was that the President does not possess the power to issue a posthumous pardon. (A copy of this opinion is attached at Tab A.)

I am further advised by the Department of Justice that there has been no instance either before or after this opinion which indicates that the President of the U. S. has issued a posthumous pardon, except for one instance where the pardon was issued to a grantee under the mistaken impression that he was still alive when in fact he had died just before the date of the pardon.

#### DISCUSSION

If you were to take the innovative step of issuing a pardon for a deceased person merely for its symbolic effect, I do not see that anyone would have standing to challenge this action on your part. However, such a step on your part would undoubtedly provoke considerable public discussion and would undoubtedly lead to other requests from families of persons formerly convicted of Federal crimes who have since died. This possibility would make it almost mandatory that some criteria be developed for judging when to grant and when to decline requests for pardons in favor of deceased persons, and the Department of Justice would have to be instructed to set up a machinery for handling such requests.

#### RECOMMENDATION

I recommend that you decline to have the Department of Justice consider further the request for pardon made by Otto Kerner prior to his death.

Concurring in this recommendation are: Messrs. Cannon, Friedersdorf, Marsh, Seidman and Hartmann.

Opposing are: ----

Messrs. Lynn and Austin had no comments.

APPROVE RECOMMENDATION \_\_\_\_\_

DISAPPROVE RECOMMENDATION \_\_\_\_\_

Attachments

copy

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The President's power to  
issue a posthumous pardon

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\*Sec. 18 U.S.C. 3570, providing that when an individual is sentenced to two kinds of punishment "the one Pecuniary and the other corporal, the President's remission in whole or in part of either kind shall not impair the legal validity of the other kind or of any portion of either kind, not remitted."

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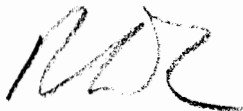
/s/ J. Lee Rankin  
J. Lee Rankin  
Assistant Attorney General  
Office of Legal Counsel

THE WHITE HOUSE  
WASHINGTON

Bob Linder -

The attached is presently being  
staffed. I thought you would be  
interested.

Trudy Fry  
5/19/76

A handwritten signature in dark ink, appearing to read 'Trudy Fry', written in a cursive style.

STAFFING

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: May 19, 1976

Time:

FOR ACTION:

cc (for information):

- ✓ Jim Cannon
- ✓ Max Friedersdorf
- ✓ Jim Lynn
- Jack Marsh
- ✓ Brent Scowcroft
- ✓ Bill Seidman
- ✓ Bob Hartmann
- ✓ Tim Austin

FROM THE STAFF SECRETARY

DUE: Date:

Friday, May 21

Time:

Noon

SUBJECT:

Philip Buchen memo dated 5/18/76 re Posthumous Pardons

ACTION REQUESTED:

- For Necessary Action
- For Your Recommendations
- Prepare Agenda and Brief
- Draft Reply
- For Your Comments
- Draft Remarks

REMARKS:

*Lynn - no comment*  
*Scowcroft - do not want to comment*  
*Hartmann - agree with Buchen*  
*Friedersdorf - concur*  
*Austin - no comment*  
*Cannon - concur*  
*Seidman - concur*  
~~*draft to be sent 5/19/76*~~

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor  
For the President



**MEMORANDUM  
OF CALL**

TO:

YOU WERE CALLED BY—  YOU WERE VISITED BY—

*Ruth Kline*

OF (Organization)

*Seidman*

PLEASE CALL →  PHONE NO. CODE/EXT. \_\_\_\_\_

WILL CALL AGAIN  IS WAITING TO SEE YOU

RETURNED YOUR CALL  WISHES AN APPOINTMENT

MESSAGE

*Burton memo on folder  
"Concur"*

RECEIVED BY

DATE

*5/21*

TIME

*3:25*

MEMORANDUM  
OF CALL

TO: F

YOU WERE CALLED BY—  YOU WERE VISITED BY—

*Jana*

OF (Organization)

PLEASE CALL → PHONE NO. CODE/EXT. \_\_\_\_\_

WILL CALL AGAIN  IS WAITING TO SEE YOU

RETURNED YOUR CALL  WISHES AN APPOINTMENT

MESSAGE

*Tim Austin has  
"no comment" on  
Phil Buckler memo on  
posthumous pardons*

RECEIVED BY

DATE

*5/21*

TIME

*9:40*

STANDARD FORM 63

REVISED AUGUST 1967

GSA FPMR (41 CFR) 101-11.6

GPO : 1969-O-48-16-80341-1 322-380

63-108

**MEMORANDUM  
OF CALL**

TO: \_\_\_\_\_

YOU WERE CALLED BY—

YOU WERE VISITED BY—

OF (Organization) \_\_\_\_\_

*Jam Juna*

PLEASE CALL →

PHONE NO.  
CODE/EXT. \_\_\_\_\_

WILL CALL AGAIN

IS WAITING TO SEE YOU

RETURNED YOUR CALL

WISHES AN APPOINTMENT

MESSAGE

*no comment  
on Pardon  
memo  
for M B*

RECEIVED BY \_\_\_\_\_

DATE

*5/19*

TIME

*6:15*

Date: May 19, 1976

Time:

## FOR ACTION:

Jim Cannon  
 Max Friedersdorf  
 Jim Lynn

Jack Marsh  
 Brent Scowcroft  
 Bill Seidman

cc (for information):

Bob Hartmann  
 Tim Austin

FROM THE STAFF SECRETARY

DUE: Date:

Friday, May 21

Time:

Noon

SUBJECT:

*5/19 - 1105 pm*

Philip Buchen memo dated 5/18/76 re  
 Posthumous Pardons

## ACTION REQUESTED:

 For Necessary Action For Your Recommendations Prepare Agenda and Brief Draft Reply For Your Comments Draft Remarks

## REMARKS:

*Agree with  
 Buchen*

*JMC*

**PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.**

If you have any questions or if you anticipate delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor  
 For the President

NATIONAL SECURITY COUNCIL

19 May 1976

The NSC feels that this does not come under their purview. I am therefore returning to you for further appropriate handling.

Loretta Braxton  
X3723 or 3724

## THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: May 19, 1976

Time:

## FOR ACTION:

cc (for information):

Jim Cannon

Jack Marsh

Max Friedersdorf

Brent Scowcroft

Bob Hartmann

Jim Lynn

Bill Seidman

Tim Austin

FROM THE STAFF SECRETARY

DUE: Date:

Friday, May 21

Time:

Noon

SUBJECT:

Philip Buchen memo dated 5/18/76 re  
Posthumous Pardons

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Jim Connor  
For the President

THE WHITE HOUSE

WASHINGTON

May 18, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: PHILIP BUCHEN 

SUBJECT: Posthumous Pardons

BACKGROUND

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DISCUSSION

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RECOMMENDATION

I recommend that you decline to have the Department of Justice consider further the request for pardon made by Otto Kerner prior to his death.

Concurring in this recommendation are:

Opposing are:

APPROVE RECOMMENDATION \_\_\_\_\_

DISAPPROVE RECOMMENDATION \_\_\_\_\_

Attachments



copy  
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/s/ J. Lee Rankin  
J. Lee Rankin  
Assistant Attorney General  
Office of Legal Counsel

THE WHITE HOUSE

WASHINGTON

May 20, 1976

MEMORANDUM FOR: JIM CONNOR  
FROM: MAX FRIEDERSDORF *M.F.*  
SUBJECT: Phil Buchen memo dated 5/18/76 re  
Posthumous Pardons

The Office of Legislative Affairs concurs with subject memo.

Date: May 19, 1976

Time:

## FOR ACTION:

Jim Cannon

Max Friedersdorf

Jim Lynn

Jack Marsh

Brent Scowcroft

Bill Seidman

cc (for information):

Bob Hartmann

Tim Austin

FROM THE STAFF SECRETARY

DUE: Date:

Friday, May 21

Time:

Noon

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 For Necessary Action For Your Recommendations Prepare Agenda and Brief Draft Reply For Your Comments Draft Remarks

REMARKS:

*Can see  
fws*

**PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.**

If you have any questions or if you anticipate delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor  
For the President

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: May 19, 1976

Time:

FOR ACTION:

cc (for information):

Jim Cannon

Jack Marsh

Max Friedersdorf

Brent Scowcroft

Bob Hartmann

Jim Lynn

Bill Seidman

Tim Austin

FROM THE STAFF SECRETARY

DUE: Date:

Friday, May 21

Time:

Noon

SUBJECT:

Philip Buchen memo dated 5/18/76 re  
Posthumous Pardons

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

REMARKS:

~~\_\_\_\_\_~~ Jim -

I concur in Phil Buchen's  
recommendation and recommend  
that <sup>you</sup> ~~Jim Cannon~~ also concur.

Dick

*5/20/76  
We concur with  
Phil Buchen*

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

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delay in submitting the required material, please  
telephone the Staff Secretary immediately.

Jim Connor  
For the President