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PRESIDENTIAL PARDONS

Reinvigorate the power

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Pardons are granted only at the end of a president's term, so goes the conventional wisdom. In reality, most presidents have hit the ground running where pardoning is concerned. The best of them have made strategic use of this most personal power from the very beginning to advance their policy goals.

For example, in his first year in office, Abraham Lincoln issued 80 grants of pardon to ordinary citizens, in addition to his more famous grants to soldiers. By his second term he had pardoned 365 civilians. Lincoln encouraged a high degree of public participation in his clemency decision-making process, even disclosing the reasons for each grant. A pardon scholar notes that Lincoln "thrived on the hope that each request he granted further educated a portion of the public to the necessity of a clemency power in the justice system."

Other exemplary occupants of the Oval Office were similarly forgiving early on. In their first year, Theodore Roosevelt issued 128 grants, Franklin Roosevelt 167 and Truman 107. Kennedy made up for a relatively slow start by pardoning 472 people and commuting 100 prison sentences in his 34 months in office.

These presidents were able to begin pardoning right away because they inherited an administrative system that ensured a steady stream of favorable recommendations from their attorneys general. Pardoning was considered a part of the routine housekeeping business of the presidency, and hundreds of grants were made every year, without fanfare, to ordinary people convicted of garden-variety crimes.

This low-key system worked well for more than a century, and generally kept the president out of trouble. But it broke down in the Clinton administration with disastrous results, and no effort was made by President Bush to repair the damage.

The disappointing trickle of grants at the end of Bush's term, like the torrent of irregular grants at the end of Clinton's, was the product of a chronically dysfunctional pardon advisory system in the Justice Department, a system now dominated by prosecutors that produces few favorable recommendations. Clinton dealt with the problem by staffing pardons in the White House. Bush didn't deal with it at all. The difference in the end games for the two presidents is attributable to their very different personal inclinations to dispense forgiveness. But neither president was well-served by a Justice Department whose pardon office has become a place where petitions for presidential mercy go to die.

Critical to interests of justice

It is unfortunate that the pardon power has become essentially unusable, for it has never

been more critical to the fair and efficient operation of the criminal justice system. Harsh no-parole sentences mean that many people remain in prison long after any just purpose is served by their continued incarceration, and all leave prison permanently burdened with disabling collateral consequences that almost guarantee their return to crime. Pardon, once the justice system's fail-safe, has not served that function for many years.

If President Obama wants to use his pardon power as an instrument of government, he will need a reliable and independent system for administering it. To those who argue that the Justice Department has a built-in conflict that disqualifies it as gatekeeper in pardon matters, we say prosecution of a crime is in no way inconsistent with its eventual forgiveness. Until recently, attorneys general evidently agreed, for they participated enthusiastically in crafting and implementing the president's pardon policy. The attorney general brings to his advisory responsibilities the advantages of institutional knowledge coupled with political insight, and is in the best position to advise how pardons can advance the president's criminal justice agenda.

During the campaign, Obama expressed concern about the number of African-American men in prison, and declared his intention to eliminate the disparity in sentences for crack and powder cocaine. This policy goal, recommended for many years by the U.S. Sentencing Commission but stubbornly resisted by Congress, could be advanced by a few judicious grants of clemency to crack defendants who have served many years in prison and have been recommended for release by the prosecutor or the sentencing judge.

We have served three presidents as pardon attorney, and have strong opinions about the importance of presidential leadership in pardon matters. President Obama should decide what role pardon will play in his administration, and direct the attorney general to see that this policy is implemented. He should also appoint a pardon attorney whose judgment and independence he can count on. President Carter was the last president to appoint his own pardon attorney, and in our experience a personal relationship between the president and his pardon attorney is essential for the pardon program to command the respect and resources it needs within the Justice Department.

In a perfectly just system of laws there is no need for pardon. Ours falls far short of that. Justice Anthony M. Kennedy has observed that "a people confident in its laws and institutions should not be ashamed of mercy." We hope that Obama is of like mind, and that he will take steps to reinvigorate the pardon power by shoring up the system for administering it.

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