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A leading legal authority on pardons talks about the need for transparency — and how to get to the top of the list

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WASHINGTON — In the wake of President Bush's most recent pardons, *The National Law Journal* spoke with one of the nation's foremost authorities on the pardon process — Margaret Colgate Love of the Law Office of Margaret Love in Washington. Love specializes in executive clemency and restoration of rights, sentencing and corrections policy, and legal and government ethics. She served as U.S. pardon attorney in the Department of Justice between 1990 and 1997. She currently directs the American Bar Association Commission on Effective Criminal Sanctions.

NLJ: What do we know about how the framers envisioned the president's use of the pardon power?

MCL: The most developed explanation comes from Alexander Hamilton in Federalist 74. He spoke of pardon's importance in tempering the severity of the law, and in mitigating unfortunate guilt. Pardon would also allow the president to take quick action to put down rebellions. Pardon in its more political guise has seen service primarily in post-war amnesties, but it has also allowed the president to intervene in the operation of the justice system to cut short or forestall prosecutions that he considers not in the national interest. The Nixon pardon certainly falls into

this category. You could argue that the first President Bush's Iran-Contra pardons fall into this category, as did Bill Clinton's end-of-term grants to officials in his administration prosecuted by statutory independent counsels.

NLJ: Has the pardon process itself changed in modern times?

MCL: In recent years, the process for administering the pardon power has undergone a number of changes that have made it much less able to serve the purposes for which the framers intended it. Starting in the middle of the 19th century, the attorney general was tasked by the president with responsibility for advising him in pardon matters, and this gave the president the dual perspective of the chief law enforcement officer and political counselor. It also gave him considerable protection, both practically in terms of information about a particular case, and politically in terms of institutional support for his actions.

But in the past 30 years, there have been cultural, political and structural changes in the pardon process that have made it less effective in carrying out the president's will, and less protective of his actions. It was structural changes in the pardon program at the end of the Carter administration that brought pardon under the sway of Department prosecutors: The attorney general stopped making pardon recommendations and delegated authority to his second in command, who was responsible for carrying out the law enforcement programs of the Department. Pardon became subsumed to that agenda.

As pardon recommendations became less frequent, and the pardon review process increasingly rigid and inconsistent, the president has been tempted to act on his own, particularly at the end of his term when he is less deterred by the risk of political fallout. As we saw at the end of the Clinton administration, people with influence tried to by-pass the process, and ordinary people left to the mercy of the Justice Department had only a very small chance of success.

NLJ: From the outside, the process seems mysterious and highly subjective. Is there a genuinely objective process and does it need to be more transparent?

MCL: The pardon process has always seemed mysterious — to some extent that is in its nature. After a few controversial grants at the end of the Truman administration, President Eisenhower vowed to pardon in a fishbowl. But that policy didn't last six months. In the past, the overwhelming number of pardons went to ordinary people convicted of garden-variety crimes, with a few special deals salted into long lists of grantees. At the end of the Clinton administration, when the president basically ceased to rely on the Justice Department because it could not produce enough recommendations to satisfy him, even this myth was exploded. President Bush has spent most of his presidency trying to re-establish confidence that he will rely on the Justice Department, but because that process produces so few positive recommendations, his pardoning record has been one of the least impressive in history. And this is at a time when the number of applications received has skyrocketed, revealing a greater need for pardon than perhaps at any time in our history.

In order to hold the pardon process more accountable, I would make the process more transparent, at least after the fact of a grant. In many states the process for making pardon

recommendations is far more open and accountable than the one we now have in the Justice Department, and I think this would both make the process more disciplined and enhance the confidence of the public. One rather radical idea would be to return to the pre-Roosevelt days, when the reasons for the attorney general's recommendations in particular cases were published after the fact of a grant. It tends to enhance public confidence in the exercise of the power when the advice on which the president acts is not secret. I would also make public the advice of the U.S. attorney in a case, whether they opposed or supported.

NLJ: Why isn't there a more even flow of pardons throughout the life of an administration instead of the heavy concentration at the end?

MCL: Until quite recently, pardoning has taken place at an even pace throughout an administration, with most grants concentrated in the middle of a president's term as opposed to either end. The reason pardons were concentrated at the end of the Clinton administration is precisely because he had pardoned so infrequently and irregularly during his first seven-plus years in office, and realized only too late that he would have to pardon a great deal at the end to match Ronald Reagan's grant rate, to which he aspired.

NLJ: How does someone seeking a pardon get to the top of the pile?

MCL: I hope you're asking me how it should be, and not how it actually is. I think a person should write a very good application that presents his case for clemency in its strongest light, muster support for it from the community and from law enforcement officials if he can, and prepare to be patient. Unfortunately, the standards for success are not very clear, and it is not always apparent what lies behind the decision-making of those managing the pardon process.

NLJ: What does the operation of the pardon process today tell us about our criminal justice system?

MCL: I think you are asking two questions: 1) What does the pardon caseload tell us about how the justice system is functioning? 2) How does the system for administration of the power within the DOJ tell us about how the system is functioning? As to the first, I think the tremendous increase in applications for pardon and sentence commutation tells us that the system is not functioning very well. The pardon power should be reserved for exceptional cases, and there should not be many of those in a well-functioning legal system. As to the latter, I think I've already said that the system within the Justice Department is dominated by a prosecutorial perspective, which means that in particular cases it tends to ratify rather than revise the decisions of prosecutors. It is not how the power has operated historically, and it no longer has the corrective function that Hamilton anticipated for it.

NLJ: Where in the criminal justice system do you think there is a need for greater use of the pardon power?

MCL: I believe there are many people currently in prison whose prison sentences are far too long, and who have no other avenue of relief but pardon. There is also need for pardon to relieve the collateral consequences of conviction. Even long after a person has served his sentence, the

burden of a criminal record lingers, excluding people permanently from many opportunities and benefits. We are working on an inventory of federal collateral consequences in an ABA commission I direct, and we have discovered literally hundreds of legal penalties and disabilities that come into play automatically as a result of conviction.

NLJ: Does the "little guy" have an equal chance at a pardon as the "big name" guy?

MCL: Ideally, he should have a better chance, and historically he has. Until the Reagan administration, people who applied for a pardon were likely to get one if they were sincerely remorseful and had led a good life since conviction. Certainly political connections have always been helpful in securing a pardon. But the ordinary run of pardons went to very ordinary people. That is how this president has pardoned to date. None of the people he has pardoned is remarkable in the slightest, and only the grant to Scooter Libby has caused any controversy.

NLJ: Where does President Bush fall on the spectrum of recent presidents in the realm of pardons and commutations?

MCL: To date he has been quite conservative in his pardoning policy, both in numbers and in types of grants. Of modern presidents, only his father issued fewer grants in absolute numbers. I've said elsewhere that it is curious that a president who has stretched his other powers to the limit has been so reticent about using this one that is indisputably his own.

NLJ: You have noted that most of those individuals pardoned by Bush thus far have not been represented by a lawyer. What, if anything, does that indicate?

MCL: Historically, ordinary people have not been represented by counsel in pardon proceedings. It may be against my own interests, but I'd say they really shouldn't need one. However, in recent years the pardon process has become increasingly complex, and more and more information is requested. The application form was seven pages long in 2001, and now it is 21. Moreover, I have found that the slightest misstep can disqualify an applicant — particularly in describing his offense conduct, or in articulating the reasons he is seeking a pardon. So it is important for an applicant to have someone knowledgeable about the pardon process at least to check over what they have done. But it is a process that is hard to penetrate, since none of it is public, and decisions made in the pardon attorney's office are generally not subject to review — at least if they are decisions to deny relief.

NLJ: In what ways could future presidents strengthen the pardon process?

MCL: The indispensable first step is for the president to decide how he wants to use his power. If it were up to me, I would counsel the president to pardon generously and regularly right from the beginning, as a way of demonstrating to the public his goals for the criminal justice system. Then he should set up a pardon review process that is likely to facilitate those goals. That process should be reliable, consistent, and accountable, and should be perceived by the public as fair and accessible to ordinary people. It should be designed not just to do justice in individual cases, but to further the overall goals of the justice system.

For 150 years the pardon advisory responsibility has been delegated to the attorney general, and I would not counsel moving it as long as the attorney general is interested in making the pardon program one of his own personal priorities. But I would make it more independent and respectable within the Justice Department. While I would always seek and value the input of prosecutors, I would not make a favorable pardon recommendation stand or fall on their blessing. I would encourage prosecutors to see pardon as something that can serve the larger interests of law enforcement, and not as a threat to the results of their work in a particular case.