

In Defense of Lame-Duck Pardons

By Margaret Colgate Love
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As [President Bush](#)'s term nears its end, rumors abound that he will grant a lot of final pardons. Hundreds of clemency applications have been filed with the [Justice Department](#) in the past year, a reflection of the popular belief that pardoning is an end-of-term phenomenon in which all presidents indulge. Media reports have identified prominent individuals who are seeking Bush's mercy, and there is speculation about a blanket amnesty for those engaged in counterterrorism efforts.

Yet presidential pardons have rarely been concentrated in the weeks between Election Day and the inauguration of a new president. There was no precedent for the torrent of irregular grants issued by [Bill Clinton](#) on his last day in office, many of which were the product of special pleading by Clinton friends and family.

Historically, pardoning has occurred regularly over the course of a president's term, more frequently in the middle than at either end. The attorney general, custodian of the president's pardon power since before the Civil War, is responsible for ensuring that the process is accessible and disciplined, and that grants are defensible on their merits. The president rarely acts except pursuant to a Justice Department recommendation, which helps ensure that pardons are consistent with his criminal justice agenda.

Bush has kept a low profile in exercising his pardon power. Though a record number of people have applied for pardons and sentence commutations during his presidency, he has issued fewer grants than any other president in the past 100 years -- except for his father.

Bush's 157 pardons say little about his criminal justice philosophy. Most have gone to people convicted long ago of minor offenses, who spent little or no time in prison, and who are unknown outside of their communities. Five of his six sentence commutations went to small-time drug offenders who had spent years in prison and were close to their release dates.

Meanwhile, Bush has denied almost 8,000 clemency requests, many of which were indistinguishable from the ones he granted. Only his decision to spare [Scooter Libby](#) a prison term attracted much attention.

So if Bush's record suggests that he is unlikely to make a lot of interesting last-minute grants, why should we hope that he does?

The pardon power is more functionally relevant to the federal justice system today than it has been since the 19th century. That is, more people want and need what only the pardon power can deliver.

History teaches that the demand for clemency increases when the system lacks other mechanisms for delivering individualized justice, for recognizing changed circumstances, or for correcting errors and inequities. The Sentencing Reform Act of 1984 made the pardon power virtually the only mechanism by which lengthy mandatory prison sentences can be reconsidered once they have become final. Supreme Court Justice [Anthony Kennedy](#), the author of opinions upholding harsh sentencing laws, urged in a 2003 speech to the [American Bar Association](#) that the pardon process be "reinvigorated" in response to "unwise and unjust" federal sentencing laws; "a people confident in its laws and institutions should not be ashamed of mercy," he said.

Pardon is the only way to overcome the legal and social consequences of conviction, since a federal conviction cannot be expunged. In some states, federal offenders cannot exercise basic civil rights, including the right to vote, unless they have been pardoned. The fact that so many people with criminal records are African American only aggravates the "internal exile" phenomenon.

A series of final pardons could highlight flaws in the justice system that would be instructive to the next administration. The Framers considered the pardon power an integral part of our system of checks and balances, not a perk of office. Judicious grants of clemency can signal to Congress where rigid laws should be amended and give policy guidance to executive officials. The president's intervention in a case through his pardon power benefits an individual but also signals how he wants laws enforced and reassures the public that the legal system is capable of just and moral application.

It is ironic that a president who has stretched his other constitutional powers to the breaking point has been so reticent and unimaginative in using the one power that is indisputably his alone. A course change would be fitting from someone who has spoken of the power of forgiveness in his own life and of America as "the land of second chance." He need not risk reenacting the drama of the final Clinton grants; surely there are many worthy cases in the Justice Department's pardon pipeline.

Despite its virtues, pardon has not played a meaningful role in the justice system for years. Meanwhile, punishments have become too harsh and the stigma of conviction too permanent. Pardons can show that the system works and that redemption is always possible. Americans want their leaders to be merciful as well as just, compassionate as well as resolute. President Bush still has time to burnish his legacy if he recognizes and responds to this reality.

The writer was the U.S. pardon attorney from 1990 to 1997. She currently represents applicants for executive clemency.

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