Rescuing The Pardon Power

By Margaret Colgate Love

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Bill Clinton's final pardons were like the man himself: flamboyant and complex and scandalous. Like earlier Clinton cliffhangers, they were apparently the product of an all-night war-room exercise personally commanded by the president. Many were never submitted for the Justice Department review but came in over the transom as faits accomplis. Some of the recipients whose cases were handled outside the normal process had made generous campaign contributions to the Democrats or otherwise had connections to Washington insiders.

All of this is, of course, constitutionally permissible, but that doesn't make it the right or responsible thing to do. For all he repeatedly asked us to forgive him, President Clinton seemed uninterested in his own official obligation to forgive. And so perhaps it is no wonder that he saved the granting of pardons until the final hours, as if to confirm his concept of pardon as payback or payoff.

The true scandal lies not so much in the pardon grants themselves as in the departing president's evident disdain for the system and his easy willingness to compromise a public trust.

The good news is that these final Clinton pardons may give a much-needed boost to efforts to change our savage and unyielding laws on sentencing for drug offenses. Each of the 21 relatively inconsequential drug offenders granted early release from prison last Saturday had served at least six years in prison. Each had been a minor player in a large conspiracy, and none was implicated in any violent conduct.

But the 21 drug sentences commuted on Jan. 20 are only the tip of a great iceberg of unfairness. The Justice Department itself acknowledged as much in a 1993 study showing that thousands of low-level nonviolent drug offenders are serving unnecessarily lengthy no-parole prison terms. After this we should no longer be able to turn away from our responsibility to seek out and give relief to similarly situated individuals.

New York Gov. George Pataki, a Republican, has taken the first steps in this area by proposing reform of the harsh Rockefeller drug laws; the changes would apply retroactively to people already in prison. It may be that only the Republicans can "go to China" and declare a truce in the war on drugs.

There is another piece of good news to be found in Clinton's exit lines: The evident cronyism and irregularity of the final pardons will likely provoke an overhaul of the way the pardon power is administered in the White House and the Justice Department. This will be necessary if pardon is once again to carry out the mercy-dispensing and policy-shaping functions the Framers of the Constitution envisioned for it.

First, the president should decide cases on a regular basis when he can be held properly accountable for his actions, not wait until holidays or the end of his term. Until quite recently presidents had been shielded from public criticism by the frequency and generosity with which they acted on pardon applications. Presidential pardons were freely available to ordinary people convicted of garden-variety crimes, who had been punished enough and wished to be forgiven. In the past 20 years, however, pardons have become so infrequent that each new grant is regarded with suspicion and subjected to intense scrutiny, no matter how apparently innocuous.

Moreover, the process ought to be a confidential one. Vetting pardon cases in the press tends to bring their progress to a standstill, as the recent example of the Milken case shows. A host of questions can arise that are easier to answer

after the fact, and unexpected opposition can be mustered. The Framers would not have favored a plebiscite even in this context.

It would also help to strengthen the attorney general's role in pardons. For more than 100 years the president relied exclusively on the attorney general for advice in pardon matters, and this afforded him the combined perspective of law enforcement official and political counselor. The job of the Justice Department's pardon attorney was to reflect this dual perspective, and not simply the views of the prosecutors. More recently, however, the pardon process has been conducted largely through the deputy attorney general, which in practice has given prosecutors a great deal of influence over pardon decisions. This is probably why the Clinton White House chose to seek advice elsewhere this time. Giving the attorney general exclusive responsibility for recommending pardons would be a step back in the right direction, and would help underscore the relative importance of justice and politics in pardon decision-making.

Finally, pardoning provides a splendid bully pulpit, giving the president an opportunity to speak about all sorts of criminal justice issues in the context of a particular situation. In addition to policy issues such as the mandatory deportation of criminal aliens and the mitigating effect of domestic abuse, pardons can speak to the importance of rehabilitation and reconciliation in the criminal justice system, and the public role of redemption and forgiveness.

If President Bush is willing to use the pardon power early and often, he will find it useful in advancing his criminal law agenda. Through courageous and creative use of the power he can signal the need for changes in the law, set an example for discretionary decision-making by his subordinates, and shore up public confidence in the overall morality of the justice system.

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