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A Place for Pardons

By Margaret Love

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This seems a particularly good time to bring up the subject of presidential pardons, although not with any reference to the president's current situation.

According to recent stories, Bill Clinton has granted fewer pardons than any president in history save his immediate predecessor. Indeed, in terms of percentages, President Clinton is said to have "set a new standard for stinginess," granting only 77, or 2 percent, of the nearly 4,000 petitions for pardon and commutation of sentence submitted during his six years in office.

To be fair, Clinton's record in clemency matters continues a trend begun in the first Reagan administration, when the constitutional pardon power was effectively taken hostage in the war on crime.

Most state governors seem equally uneasy about exercising whatever pardon power they may have under a state constitution, presumably for fear of appearing soft on crime. At this point, executive mercy seems increasingly reserved for holiday seasons, or for the end of an elected official's term, when he can no longer be held accountable by the electorate.

It was not always thus. Throughout our nation's history, and until recently, presidents have exercised their Article II pardon power regularly and liberally, to make what Alexander Hamilton described as "exceptions in favor of unfortunate guilt" and to give relief in appropriate circumstances from the continuing burdens of a criminal conviction. Pardons have been employed frequently by presidents to reward extraordinary service to the government, to accomplish foreign-policy objectives and to quell domestic insurrections.

Well into this century, the pardon power played a fully operational part in the federal criminal justice system, providing almost the only avenue for executive review of sentences or for early release on equitable grounds such as terminal illness.

Pardons also have, from the earliest days of the republic, been used to send signals about the executive's law enforcement priorities and the overall goals of the justice system, and to further a process of national healing. The amnesties granted Vietnam War draft resisters by presidents Ford and Carter are recent notable examples in the latter category. Those two presidents, like their predecessors, also granted pardons to hundreds of individuals convicted of less "political" offenses, in order to

restore civil rights lost as a result of conviction and to extend a measure of national forgiveness.

Since the early 1980s, however, the constitutional pardon power has been gradually allowed to atrophy until it is now almost moribund. This is not just because of executive caution, though the politicization of criminal justice issues has made any exercise of the pardon power suspect and therefore risky. Rather, the power has fallen into disuse in a more intentional fashion, because the guiding spirit of the justice system itself has become harsh and retributive, reflecting our lost faith in the possibility of redemption.

As the president has become increasingly reluctant to exercise his pardon power, the symbolic aspects of clemency have also been devalued, and public confidence in the pardon process has eroded.

The recent election returns seem to confirm that the American public has been receptive to President Clinton's request for forgiveness. It would now seem fitting for him to extend forgiveness to those who seek it from him. Even if he is understandably reluctant -- in light of Congress's general preference for determinate sentences -- to look favorably on requests from inmates seeking early release, surely those same prudential considerations do not apply where those seeking relief have long since served their full sentences and returned to productive lives in the community.

While it has sometimes been said that the president stands to gain nothing from granting pardons, the better view is that the political order respects and will protect the serious and responsible exercise of this most beneficent and personal of the president's constitutional powers.

In any event, the personal and political risk for the president is not really so great. In the first place, he can rely on the Justice Department's investigation and recommendation in considering whether to grant a pardon, as has been the case for more than a century. Moreover, most pardon petitioners are not well-known even in their own communities, having been convicted of relatively minor crimes many years ago, though a few have distinguished themselves by their good works and the example they set for others. All, however, labor under the stigma of a criminal conviction, often attended by legal or employment disabilities, that only the president can relieve.

While some petitioners seek pardon for a specific reason, most simply desire forgiveness from their country and a chance to get on with their lives as ordinary citizens. In this sense, pardons can play an important part in recognizing rehabilitation and reintegrating offenders into society, as well as correcting injustices. They represent the most powerful and direct means of communicating "good news" about the criminal justice system.

President Clinton, rather than consigning justice-based pardons to the dustbin of history, could make a gift to the country by evaluating their role in the modern criminal justice system and considering how pardon policy and practice might be better adapted to serve whatever function may in the future be assigned to what the Supreme Court has described as the "fail safe" in our criminal justice system.

Perhaps the public's affirmation of President Clinton, grounded in its evident desire to accept his apology as sincere, indicates that the time is ripe for just such an effort. Perhaps it tells us, too, that the politics of crime should include a spiritual dimension that would reach out to our better selves.

The writer was pardon attorney in the Justice Department from 1990 to 1997.

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