

Clemency in California Capital Cases

Mary-Beth Moylan[†] and Linda E. Carter[‡]

INTRODUCTION

This article is a survey of procedures and reasoning involved in California clemency in the context of the death penalty. Though the article is principally descriptive in nature, our analysis includes some prescriptive recommendations. This article grew from a report that we prepared at the request of the California Commission on the Fair Administration of Justice.¹ We undertook a study of clemency in capital cases throughout the years of California's use of the death penalty.² Our goal was to provide the Commission with as much information as possible about the procedures and reasons for granting or denying clemency in capital cases. In addition to researching documentary materials, we also interviewed many individuals who have been involved in capital clemency proceedings and policy.³

[†] Director, Global Lawyering Skills Program, University of the Pacific, McGeorge School of Law. The authors would like to thank their research assistants for their invaluable work on this study. They are Pacific McGeorge students Leslie Ramos, Lauren Tipton, Andrew McClelland, and Christopher Chaffee.

[‡] Professor of Law and Director, Institute for Development of Legal Infrastructure, University of the Pacific, McGeorge School of Law.

1. The California Commission on the Fair Administration of Justice was created by a State Senate Resolution in 2004 and charged with:

(1) [Studying] and [reviewing] the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons; (2) [Examining] ways of providing safeguards and making improvements in the way the criminal justice system functions; and (3) [Making] any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate. . .

California Commission on the Fair Administration of Justice, *Charge*, available at <http://www.ccfaj.org/charge.html>.

2. This article was prepared as a research project for the California Commission on the Fair Administration of Justice. The opinions, conclusions and recommendations contained in this article are entirely those of the authors and do not necessarily represent or reflect the opinions, conclusions or recommendations of the California Commission on the Fair Administration of Justice.

3. These individuals are listed in Appendix A. We would like to make it clear, however, that all aspects of the report and this article are the views of the authors and not of any person who was interviewed.

We begin the article in Section I with a brief overview of the meaning of clemency, its function, and its historical background. Section II describes the present constitutional provision on clemency and its history as well as the history of executions and commutations in California. In Section III, we outline the highly limited legal constraints on clemency and the almost nonexistent intervention by courts in the clemency process.

In Section IV, we begin describing the clemency process as it exists in California, examining the roles of the Governor, the Legal Affairs Secretary, the Board of Parole Hearings, the attorneys for the petitioner, and the District Attorney's Office involved in each case. This section also includes the role of other sources of information such as the victims' or petitioners' families, the role of a hearing before the Board or the Governor, and the method of delivering a decision. Section V follows with a description of the reasons given for denying clemency in requests since 1992 and, to the extent it was possible to find such information, the reasons for granting or denying clemency prior to 1976.

We then turn to an examination of alternatives to the process in California and various modifications suggested in the academic literature. Section VI provides information about the clemency process in five selected states. Four of those states have a process that is significantly different from California's in one or more respects. Section VII is an overview of critiques of and suggested changes in clemency by the American Bar Association and other commentators. The final section, Section VIII, is a list of recommendations to modify the clemency process in California.

As a prefatory note, there are a number of terms used in this article that may cause some confusion. The terms "clemency" and "commutation" are defined below in the first section. This article also references the "modern era" of the death penalty and "pre-1976" and "post-1976" data. All death penalty statutes in the United States were effectively rendered invalid in 1972 when the United States Supreme Court found the death penalty statutes of Texas and Georgia unconstitutional as applied in the landmark case of *Furman v. Georgia*.⁴ The "modern era" of the death penalty in the United States is viewed as beginning in 1976 when the Court upheld the death penalty itself as constitutional and upheld the facial validity of the revised statutes of Georgia, Florida, and Texas.⁵ After those decisions, states, including California, began to reenact death penalty statutes patterned after those of the states involved in the litigation before the Supreme Court—which differed significantly from those that existed in the pre-1976 era. California passed a new statute in 1977. The California statistics could be viewed as "post-1977," but we will refer to all statistics using the 1976 date as that is consistent with nationally-gathered

4. 408 U.S. 238 (1972).

5. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

statistics.

I. OVERVIEW OF CLEMENCY IN DEATH PENALTY CASES

At the outset of this report, and in order to evaluate the benefits of different models or variations on models of clemency, it is important to keep in mind the functions of clemency. As discussed below, two dominant themes of clemency's role emerge from case law and academic scholarship.⁶ The first is clemency as the final fail-safe for correcting miscarriages of justice that occurred in the judicial process, such as granting clemency to an innocent person. In this instance, the judicial process failed and an injustice will result if the person continues to be punished for an act he or she did not commit. The second theme is clemency as a source of mercy based on facts or circumstances that are outside the parameters of the judicial process, such as granting clemency to a prisoner who is dying of cancer or who performed an act of heroism by saving a guard from a prison riot.

Clemency as practiced in the United States is almost exclusively an *executive* function and not a judicial function. The term "clemency" is a broad one and generally encompasses at least three executive actions: a pardon, a reprieve, and a commutation. Another phrase that is used to comprehensively describe all types of clemency is "pardoning power." A "pardon," however, specifically refers to an action that legally absolves a person of his or her conviction and sentence.⁷ A "reprieve" stays the sentence for a short period of time.⁸ A "commutation" is a reduction of sentence.⁹ In the context of capital cases, most often a grant of clemency comes in the form of a commutation. In rare cases, a death row inmate will be pardoned if evidence of innocence is discovered after all court processes are complete.¹⁰ However, in most cases,

6. There is an ongoing debate in the academic literature about the role of "mercy" in clemency decisions. Some writers are of the view that mercy is inconsistent with retributive justice. Others posit that "justice" includes a concept of mercy. Still others take the position that there can be two processes, one that focuses on justice (retributive justice) and the other on broader concerns, such as mercy. Because it appears to be well-entrenched in California gubernatorial administrations that clemency encompasses a mercy component as well as an injustice component (i.e., unfairness in the legal proceedings), we proceed from the assumption that miscarriages of justice in the sense of unfair proceedings or results and mercy on other grounds are both valid purposes for clemency. See, e.g., Symposium, *Clemency and Mercy: Questions of Mercy*, 4 OHIO ST. J. CRIM. L. 321 (2007); Robert Weisberg, *A Colloquium on the Jurisprudence of Mercy: Capital Punishment and Clemency: Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415 (2004).

7. See Linda E. Carter & Ellen Kreitzberg, UNDERSTANDING CAPITAL PUNISHMENT LAW, 253 (LexisNexis 2004) (citing James R. Acker & Charles S. Lanier, *May God – Or the Governor – Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 204 (2000)).

8. *Id.*

9. *Id.*

10. Death Penalty Information Center, *Innocence: List of Those Freed From Death Row* (Sept. 18, 2008), <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Apr. 4, 2009) (The Death Penalty Information Center, founded in 1990, is a nonprofit organization that

clemency in capital cases is extended where innocence is not proven, but an executive officer or board decides to commute a sentence of death to one of life imprisonment, usually without the possibility of parole.¹¹ Unless otherwise noted, the use of the term “clemency” in this report will be used solely to denote “commutation.”

While clemency is part of the criminal justice process insofar as it is a final step for a defendant in a criminal action, it is at the same time not part of that process insofar as it is a purely executive function. This intersection of judicial and executive power makes clemency unique. It is this unusual placement in our overall criminal justice system that has caused some to view clemency as a fail-safe to correct errors brought about through the criminal justice process, while causing others to criticize reliance on clemency as an adequate fail-safe mechanism to correct miscarriages of justice.¹²

The nature of clemency as a tool of the executive branch has also resulted in very limited judicial review of clemency procedures and decisions. To date, the judicial branch has only rarely involved itself in issues that affect the grant or denial of clemency. The resulting minimal due process limitations on clemency will be discussed in Section III below.

Exercising their broad discretion, the states have created a variety of clemency procedures. While all states with death penalty statutes have a clemency procedure, the authority to whom such requests are made and the process for submitting requests is significantly different from state to state. In fourteen states, the Governor has sole authority to grant clemency.¹³ In three states, a board decides clemency petitions.¹⁴ Eight states require the Governor to have a recommendation from a board or advisory group, and ten states require a recommendation from a board, but make the recommendation non-binding on the Governor.¹⁵ (The states in each category of clemency procedure are listed in Appendix B.) For federal crimes, the United States Constitution grants sole clemency authority to the President.¹⁶

provides extensive information on all aspects of capital punishment.)

11. Carter & Kreitzberg, *supra* note 7, at 253-54.

12. See Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1826 (2002) (citing *Herrera v. Collins*, 506 U.S. 390 (1993), as an example of the Supreme Court erroneously considering clemency a safeguard against injustice). See also Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 47 (1998).

13. Death Penalty Information Center, *Clemency*, available at <http://www.deathpenaltyinfo.org/clemency> (last visited Apr. 6, 2009) [hereinafter “Death Penalty Information Center, *Clemency*”]; Dinsmore, *supra* note 12, at 1838 n.66 (California is listed as one of these fourteen, although it is unique in that a decision to grant clemency to a twice-convicted felon must be approved by four members of the California Supreme Court. New York and New Jersey are also listed among the fourteen states, although they have both recently abolished the death penalty.).

14. Death Penalty Information Center, *Clemency*, *supra* note 13 (These states are Connecticut, Georgia and Idaho.).

15. *Id.*

16. See U.S. CONST. art. II, § 2, cl. 1 (“[The President] shall have Power to grant Reprieves

The clemency power in the United States is rooted in the English pardoning power which allowed Kings and Queens to forgive crimes against the Crown.¹⁷ The English tradition may have been influenced by even earlier societies; reports of grants of clemency for the condemned date back to ancient Rome.¹⁸ In England, factors that formed the basis for a pardon included “benefit of the clergy,”¹⁹ youth, or insanity.²⁰ The tradition of the royal pardon was carried over to the American colonies and royal governors served as surrogates for the King in issuing pardons in early America.²¹ While the framers of the Constitution were wary of executive power, they acknowledged the need for executive pardoning power to counterbalance injustices that may result from the application of the law.²² Article II, Section 2, of the Constitution provides that the President “shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.” Individual states in the early republic created their own systems of clemency and some gave the power to pardon to the legislature, rather than to the governor.²³ All, however, rested clemency with one of these two elected branches and not with the judicial branch.²⁴ One tenet that has held since the English royal pardons is the ability for the pardoner to use his or her discretion in awarding clemency. In our modern day system of clemency, the executive branch has virtually complete discretion to decide whether or not to grant clemency, on what grounds, and by what procedure.²⁵

The scholarly literature debating the purpose and role of clemency largely argues some aspect of “mercy” should inform the clemency inquiry.²⁶ Professor Kathleen M. Ridolfi has articulated two general purposes for

and Pardons for Offenses against the United States, except in Cases of Impeachment.”).

17. See Ridolfi, *supra* note 12, at 49-50; Michael A. G. Korengold, et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 353 (1996).

18. See Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 569 (2000) (describing the history of clemency; giving example of clemency granted in ancient Rome if the condemned man happened to cross the path of vestal virgins).

19. See Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 586-87 n.97 (1991) (describing the “benefit of the clergy” as originally exempting “clerics and their associates”).

20. See Ridolfi, *supra* note 12, at 48 n.23 (describing the use of clemency in England for situations that would be covered today by defenses: “self-defense, lack of intent, insanity, and age”).

21. *Id.* at 50.

22. *Id.* at 50-51.

23. Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 248-49 (2002).

24. *Id.* at 249.

25. See Linda E. Carter, *Lessons From Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT’L L. 259, 266-67 (2005) (noting that, in most states, “the only oversight of clemency rest[s] with voters who elect the Governors”).

26. AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* (2005).

clemency: “(1) to dispense mercy when the system is too harsh in an individual case and, (2) to ensure justice when the system proves itself incapable of reaching a just result.”²⁷ Professor Linda Ross Meyer looks at the historic bases for clemency and divides pardons into five categories based on: (1) equity, (2) peace, (3) allegiance/remorse, (4) compassion, and (5) extrinsic-good.²⁸ She argues that without taking the risk of pardoning people along all five of these bases, we will be subject to a merciless state.²⁹ Other scholars see no place for mercy in a system of retributive justice and urge that mercy, as distinct from equitable discretion, is improperly applied in a justice system.³⁰

The United States Supreme Court has recognized the significance of clemency. In the context of a case that was raising a claim of actual innocence, Justice Rehnquist commented on the role of clemency as a safeguard against errors in the judicial process.³¹ He wrote that, “Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”³² Calling the power to pardon “an act of grace,” he further wrote, “Executive clemency has provided the ‘fail-safe’ in our criminal justice system. . . . It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”³³ And, more recently, the United States Supreme Court has again reaffirmed clemency proceedings as “a matter of grace” outside of the judicial process and open to executive discretion.³⁴

The broader purpose of clemency as an act of mercy is rooted in history and requires contemplation of factors beyond what is considered in the judicial process. As Judge Janice Rogers Brown of the U.S. Court of Appeals for the District of Columbia Circuit, and formerly a justice of the California Supreme Court, wrote in 1992 after the execution of Robert Alton Harris in California, “Mercy cannot be quantified or institutionalized. It is properly left to the conscience of the executive entitled to consider pleas and should not be bound by court decisions meant to do justice.”³⁵ At the time that she wrote the article from which the quoted passage is taken, Judge Brown was the Legal Affairs Secretary to California Governor Pete Wilson and, thus, had a significant role in the clemency process for Harris, whose case had just come before the

27. Ridolfi, *supra* note 12, at 78.

28. Linda Ross Meyer, *The Merciful State*, in FORGIVENESS, MERCY AND CLEMENCY 64, 66 (Austin Sarat & Nasser Hussain, eds., 2007). In this essay, Professor Meyer draws on the pardons made by Abraham Lincoln in a series of letters to demonstrate that the first four types of pardons are deeply rooted in American history. *Id.*

29. *Id.* at 64-6.

30. Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

31. *Herrera v. Collins*, 506 U.S. 390 (1993).

32. *Id.* at 411-412.

33. *Id.* at 415.

34. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 285 (1998).

35. Janice Rogers Brown, *The Robert Alton Harris Execution: The Quality of Mercy*, 40 UCLA L. REV. 327, 328 (1992).

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Governor.

It is with this backdrop in mind that we examine the historic use of the clemency process in California capital cases and try to find its place in our current criminal justice system.

II. HISTORY OF CAPITAL CLEMENCY IN CALIFORNIA

A. *California Constitutional Clemency Provisions*

The original California Constitution of 1849 gave the Governor:

the power to grant reprieves and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.³⁶

That provision, at the time Article V, Section 13, also required the Governor to communicate each pardon or reprieve (but not commutation) to the Legislature at the beginning of every session.³⁷ In 1879, the clemency provision of the California Constitution moved to its own Article, namely Article VII, Section 1, which stated:

The governor shall have the power to grant reprieves, pardons, and commutations of sentence, after conviction, for all offenses except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying pardons. Upon conviction for treason, the governor shall have power to suspend the execution of the sentence until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, direct the execution of the sentence, or grant a further reprieve. The governor shall communicate to the Legislature, at the beginning of every session, every case of reprieve or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence, its date, the date of the pardon or reprieve, and the reasons for granting the same. Neither the governor nor the legislature shall have power to grant pardons, or commutations of sentence, in any case where the convict has been twice convicted of felony, unless upon the written recommendation of a majority of the judges of the supreme court.³⁸

36. CAL. CONST. art. V, §13 (1849).

37. *Id.*

38. CAL. CONST. art. VII, § 1 (1879) (Interestingly, the 1879 Constitution moved the pardoning power to its own section outside of the Article delineating executive power, and while it added commutations to the list of powers the Governor could exercise, it failed to include commutations in the list of acts that the Governor was required to report to the Legislature. That omission was remedied in a 1941 statutory enactment, Cal. Penal Code § 4807, and commutations

Two important changes were made in the 1879 Amendments. First, the provision broadened the Governor's reporting requirements to mandate that he or she include the reasons for granting clemency.³⁹ Second, a new limitation on the power to grant a pardon or commutation was imposed in the form of securing the assent of a majority of the justices of the California Supreme Court.⁴⁰ This latter requirement is unique to the process of clemency in California.

In 1966, the California Revision Commission moved the clemency provision from Article VII back into the Article that addresses the executive power, Article V.⁴¹ Current Article V, Section 8(a), is not substantially different from the 1879 version. The newer version omits the specific procedures to be followed by the Governor in the event that he wants to grant a reprieve or pardon to a person convicted of treason. More significantly for the purposes of this report, the newer version corrected what was probably an oversight in the 1879 version by mandating that the Governor report commutations as well as reprieves and pardons to the Legislature. The current provision states:

SEC. 8(a) Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.⁴²

The constitutional section appears to make the discretion of the Governor subject only to legislation relating to the "application procedures." We assume for the purposes of this report and for our later recommendations that the term "application procedures" would be narrowly defined by the courts and would permit regulation only of the procedures relating to the submission of a petition and not to more substantive clemency procedures, such as the requirement of a hearing or the consideration of certain criteria.⁴³

were also added to the list of acts that should be communicated at the beginning of each legislative session in the 1966 Revision of the California Constitution. Unfortunately, the duplication of this requirement in the present Constitution and section 4807 has never been cleaned up, and so the Constitution and the statute both mandate the same reporting with slightly different language.)

39. CAL. CONST. art. VII, §1 (1879).

40. *Id.*

41. CAL. CONST. art. V, § 8 (1966).

42. *Id.*

43. As discussed above, several cases have rejected substantive and procedural challenges to clemency procedures. *See, e.g.,* *Faulder v. Texas Bd. Of Pardons & Paroles*, 178 F.3d 343 (5th Cir. 1999), *cert. denied*, 540 U.S. 1172 (2004); *Provenzano v. State* 736 So. 2d 1150 (Fla. 1999), *cert. denied*, 537 U.S. 1050 (1999); and *Alley v. Key*, 431 F. Supp. 2d 790 (W.D. Tenn, 2006), *cert. denied*, 548 U.S. 920 (2006).

B. History of Executions and Commutations in California

The Criminal Practices Act of 1851 legalized executions statewide.⁴⁴ In 1872, the Penal Code required that all executions be committed “within the walls or yard of a jail, or some convenient private place in the county.”⁴⁵ Because county authorities performed the executions and the information was not recorded, it is impossible to know with complete accuracy how many were executed in total during the first forty years of California statehood.⁴⁶ Despite this lack of official data, the ESPY Database estimates that a total of 709 executions took place within the state between 1778 and 1967.⁴⁷

In 1891, the California legislature passed a provision requiring that all executions be performed by the state prisons.⁴⁸ After 1893, all executions were performed at either Folsom or San Quentin Prisons; the first state-conducted execution was held March 3, 1893, at San Quentin, and the first execution held at Folsom occurred on December 13, 1895.⁴⁹ From 1893 until 1938, a total of 310 prisoners were executed. Out of the 310 people executed, one was convicted of assault while serving a life sentence, three were convicted of kidnapping, and the rest were convicted of murder.⁵⁰ During the same time period from 1893 to 1938, fifty-five death sentences were commuted.

The following chart lists the executions and commutations by gubernatorial administration from 1893 to the present:

Year	Governor ⁵¹	Executions	Commutations
1893-1894	Henry Markham	3	0
1895	Markham/Budd	9	0
1896-1898	James Budd	20	0
1899-1902	Henry Gage	13	1
1903-1906	George Pardee	27	3

44. Criminal Practices Act of 1851, Cal. Stats. 1851, ch. 29, § 480 (1851).

45. *Id.*

46. GERALD F. UELMEN, CALIFORNIA DEATH PENALTY LAWS AND THE CALIFORNIA SUPREME COURT: A TEN YEAR PERSPECTIVE, 6 (1986).

47. M. WATT ESPY & JOHN ORTIZ SMYKLA, EXECUTIONS IN THE U.S. 1608-2002: THE ESPY FILE (Inter-University Consortium for Political and Social Research 2004), available at <http://www.deathpenaltyinfo.org/ESPYstate.pdf>. (“The ‘Espy File’ is a database of executions in the United States and the earlier colonies from 1608 to 2002. This list of 15,269 executions was compiled by M. Watt Espy and John Ortiz Smykla, and was made available through the Inter-University Consortium for Political and Social Research.”) [hereinafter “ESPY File”].

48. Amendment to An Act to Establish a Penal Code, Cal. Stats. 1891, ch. 191, § 9, 274 (1891).

49. California Department of Corrections and Rehabilitation, *History of Capital Punishment in California*, http://www.cdcr.ca.gov/Reports_Research/historyCapital.html (last visited 3/4/08).

50. ESPY File, *supra* note 47.

51. The years 1895, 1917, 1934, and 1953 are listed separately because two Governors overlapped in those years and we do not have data that indicates in which administration the executions for that year occurred. We are also missing some data from 1910 due to missing legislative reports.

1907-1910	James Gillett	13	1
1911-1916	Hiram Johnson	30	9
1917	Johnson/Stephens	2	1
1918-1922	William Stephens	27	13
1923-1926	Friend Richardson	39	1
1927-1930	Clement Young	39	5
1931-1933	James Rolph Jr.	26	6
1934	Rolph/Merriam	9	7
1935-1938	Frank Merriam	53	9
1939-1942	Culbert Olson	29	16
1943-1952	Earl Warren	80	7
1953	Warren/Knight	8	1
1954-1958	Goodwin Knight	38	5
1959-1966	Edmund "Pat" Brown ⁵²	35	20
1967	Ronald Reagan	1	1
1992-1998	Pete Wilson	5	0
1999-2003	Gray Davis	5	0
2003-	Arnold		
Present	Schwarzenegger	3	0

During the early twentieth century, as the above chart reflects, there were marked differences in the use of the capital clemency power from administration to administration. Governor Friend Richardson commuted only one death sentence in his one term as governor from 1923 to 1927.⁵³ In the two administrations before Governor Richardson, Governors Stephens and Johnson commuted sentences at a rate of about one commutation to three executions. In the years following Governor Richardson, governors continued to routinely commute death sentences, although the ratios varied greatly depending on the administration. For example, during his administration from 1939 to 1942, Governor Culbert Olson commuted sixteen death sentences while overseeing only twenty-nine executions.⁵⁴ In contrast, Governor Earl Warren held office for almost ten years, from 1943 to 1953, and commuted

52. It is commonly reported that thirty-six executions and twenty-three commutations occurred during the administration of Governor Pat Brown. The statistics in our chart are based on the ESPY file, the California Department of Corrections website, and the reports to the California Senate. There are probably discrepancies in the counting because it was somewhat common for there to be a two-step process in commuting a death penalty case. We found a number of instances where one Governor commuted from death to life without parole and a subsequent Governor commuted that sentence from life without parole to life with parole. We cannot explain the discrepancy in number of executions.

53. Message of the Governor Regarding Acts of Executive Clemency, Cal. State Assembly Journal 46 (Jan. 9, 1925); Message from the Governor, Cal. State Assembly Journal 43, 46 (Jan. 4, 1927).

54. See chart in text, *supra*.

only six sentences, while overseeing eighty-eight executions.⁵⁵ Despite these differences in volume of commutations, it was the practice of most governors to commute some of the death sentences that were presented to them during their tenure.

Multiple events led to a cessation of executions in California from 1967 until April of 1992. In 1964, the California Supreme Court issued an opinion necessitating new penalty trials for all death row inmates because of an erroneous jury instruction.⁵⁶ This order essentially halted executions in the mid-1960s. Then, in its 1972 decision, *People v. Anderson*, the California Supreme Court overturned California's death penalty law outright, holding that it violated California's constitutional ban on cruel and unusual punishment.⁵⁷

Soon after *Anderson*, the United States Supreme Court handed down its own death penalty decision in *Furman v. Georgia*.⁵⁸ The Court held that the death penalty in Georgia and Texas was unconstitutional as applied. The dominant reasoning in the nine separate opinions in *Furman* was that the administration of the death penalty in those two states was arbitrarily imposed in violation of the Eighth Amendment's Cruel and Unusual Punishment Clause. The decision effectively invalidated the death penalty systems in all state and commuted all outstanding death sentences.⁵⁹ In California, 107 individuals on

55. The Messages of the Governor Concerning Pardons, Commutations and Reprieves from the years 1943 to 1953 indicate that Governor Warren only commuted six death sentences during his near decade in office. In addition to the six sentences commuted by Governor Warren, the Lieutenant Governor during his tenure, Frederick Houser, granted two commutations during Governor Warren's absence from the state. See Message of the Governor Concerning Pardons, Commutation and Reprieves Granted by Earl Warren for Period 1943-1945, Cal. State Assembly Journal 124 (Jan. 11, 1945); Message from the Governor: Acts of Executive Clemency of California Granted for Period 1945-1947, Concerning Pardons, Commutations and Reprieves, Cal. State Assembly Journal 146 (Jan. 8, 1947); Message from the Governor: Acts of Executive Clemency of California Granted for Period January 6, 1947, to March 1, 1948, Concerning Pardons, Commutations and Reprieves, Cal. State Assembly Journal 54 (Mar. 2, 1948); Message from the Governor: Acts of Executive Clemency of California Granted for Period March 1, 1948, to January 3, 1949, Cal. State Assembly Journal (Jan. 17, 1949); Message from Governor, Cal. State Assembly Journal 444 (Mar. 28, 1950); Acts of Executive Clemency of California, Granted for Period March 6, 1950, to January 8, 1951, Cal. State Assembly Journal 918 (Jan. 23, 1951); Acts of Executive Clemency of California, Concerning Pardons and Commutations Granted for Period March 20, 1952, to January 9, 1953, Cal. State Assembly Journal 1148 (Jan. 24, 1953); Acts of Executive Clemency of California, Granted for Period March 20, 1953, to January 4, 1954, Cal. State Assembly Journal 30 (Mar. 1, 1954) (this last Message from the Governor was reported by Governor Warren's successor Goodwin Knight, but it reports on two death sentence commutations that Governor Warren made during his last year in office). For numbers of executions in California from 1943 to 1953, see Cal. Dept. of Corrections and Rehabilitation, Number of Executions 1893 to Present, available at http://www.cdcr.ca.gov/Reports_Research/Number_Executions.html (last visited Apr. 13, 2009).

56. *People v. Morse*, 60 Cal. 2d 631 (1964) (holding that it was an error to instruct a jury that if they did impose a death sentence, the Governor and judge could reduce the sentence).

57. 6 Cal. 3d 628 (1972).

58. 408 U.S. 238 (1972).

59. See *History of Capital Punishment in California*, *supra* note 49. As a result of the 1972

death row had their sentences commuted from death, including both Sirhan Sirhan, who assassinated Robert F. Kennedy, and Charles Manson. Subsequently, however, in 1976, the U. S. Supreme Court clarified the *Furman* decision by holding that, while the death penalty cannot be imposed arbitrarily, the death penalty itself is not unconstitutional.⁶⁰

In the aftermath of the 1976 decision by the U.S. Supreme Court, many states passed new death penalty statutes. The California legislature passed its own such statute in 1977.⁶¹ Although there have been various amendments over the years, most notably in 1978 with the Briggs Initiative,⁶² California has had a death penalty on its books continuously since 1977.

In April 1992, Robert Alton Harris became the first person to be executed in California since 1967. Including Harris, thirteen men have been executed since the death penalty was reinstated. Eleven of those thirteen individuals petitioned for clemency and their petitions are discussed in Section V below. Two other death row inmates have also petitioned for clemency and their petitions were denied, but they have not been executed. These cases, too, are discussed *infra*. There are presently no executions imminent in California and there are no pending clemency petitions.⁶³

III. THE LIMITED ROLE OF THE COURTS IN THE CLEMENCY PROCESS

The courts, largely, take a “hands-off” approach to clemency. In large part, this is due to the status of clemency as an executive function, not a judicial one. Courts have repeatedly found little or no legal authority for judicial intervention.⁶⁴ However, with respect only to capital crimes, the United States Supreme Court afforded a sliver of due process protection in its 1998 *Ohio*

decisions, 107 inmates had their sentences commuted. *Id.*

60. *Gregg v. Georgia*, 428 U.S. 153 (1976); see also G. Pierce & M. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV 1 (2005) (providing a brief overview).

61. 1977 Cal. Stat. 316, § 9.

62. Murder–Penalty Initiative Statute (Prop. 7) (approved Nov. 7, 1978) (codified as amended Cal. Penal Code § 190) (The initiative’s purpose was to increase the penalty for those convicted of first and second degree murder; it increased death eligible crimes and made death penalty mandatory in murders of public officials. Note, Proposition 7 should not be confused with Proposition 6 of the same year, also known as the “Briggs Initiative,” which sought to ban gays and lesbians from public school positions.)

63. Two previously scheduled executions have been halted by federal courts in recent years. The execution of Kevin Cooper, originally scheduled for Feb. 10, 2004, was halted by the Ninth Circuit Court of Appeals in order to allow for additional DNA testing of blood and hair evidence. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004). The execution of Michael Morales, originally scheduled for Feb. 21, 2006, was suspended indefinitely after a District Court order that the execution be carried out by a medical professional. *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006).

64. See *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (no constitutional right to a commutation).

Adult Parole Authority v. Woodard decision.⁶⁵

Woodard had challenged the Ohio clemency procedures as providing inadequate notice of a pre-hearing interview and a clemency hearing before the Ohio Parole Authority,⁶⁶ excluding his counsel from the interview and permitting participation of counsel at the hearing only in the discretion of the chair of the Authority, and precluding the submission of oral or written evidence at the hearing.⁶⁷ The decision contains three opinions: (1) a four-justice plurality that found no due process rights in a clemency proceeding for a condemned inmate; (2) a four-justice concurring opinion that found that a condemned inmate retained an interest in life that was accorded “some minimal procedural safeguards” in clemency; and (3) a one-justice concurring and dissenting opinion that agreed with a minimal level of due process. Eight justices held that Ohio’s procedures were constitutional (the four-justice plurality and the four-justice concurring opinion). The plurality considered the procedures constitutional because, in their view, Woodard had no due process right in the clemency proceedings.⁶⁸ The four-justice concurring opinion that recognized a minimal due process right also found that Ohio’s process was constitutional, noting that Woodard had “notice of the hearing and an opportunity to participate in an interview” in accord with Ohio’s procedures and the due process clause.⁶⁹ The one-justice concurring and dissenting opinion did not express a view on the constitutionality of Ohio’s process and would have remanded the case to the District Court for that determination.

The justices who found a due process life interest in the clemency proceedings provided a few examples of what might violate due process. Their examples suggest that only the most extreme arbitrariness or denial of access would constitute a due process violation. Writing for the four-justice concurring opinion, Justice O’Connor suggested:

Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.⁷⁰

Concurring and dissenting, Justice Stevens agreed that “only the most basic elements of fair procedure are required.” He added:

Nevertheless, there are equally valid reasons for concluding that these

65. 523 U.S. 272 (1998).

66. *Id.* at 289-90 (O’Connor, J., concurring) (Woodard had three days notice that he could have an interview with a member of the Authority and 10 days notice of the actual clemency hearing).

67. *Id.*

68. The plurality did state that Woodard had a “residual life interest, *e.g.*, in not being summarily executed by prison guards,” but they did not find a life interest in the clemency process itself. *Id.* at 281.

69. *Id.* at 290 (O’Connor, J., concurring).

70. *Id.* at 289.

proceedings are not entirely exempt from judicial review. I think, for example, that no one would contend that a governor could ignore the commands of the *Equal Protection Clause* and use race, religion, or political affiliation as a standard for granting or denying clemency.⁷¹

Justice Stevens also suggested that “procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence” would violate due process.⁷²

Although a splintered opinion, the agreement of five justices that a minimal level of due process existed in capital clemency means that *Woodard* opened the door, however slightly, for due process challenges to the clemency process. There are numerous cases raising due process claims both before and after *Woodard*. However, due to the limited nature of the due process right, state and federal courts have routinely rejected due process challenges to clemency procedures.

Only where the State was viewed as interfering with the inmate’s ability to present information to the Governor in clemency have we found courts amenable to due process challenges. In *Young v. Haynes*, 218 F.3d 850 (8th Cir. 2000), an inmate wanted to submit an affidavit from a prosecutor. Learning of this, the prosecuting office, the Circuit Attorney, threatened to fire the prosecutor if she submitted the affidavit. The Eighth Circuit did not mince words noting that the actions might well be a crime of tampering with a witness and held, *inter alia*, that the inmate stated a valid 42 U.S.C §1983 claim and remanded the case to the district court.⁷³ Ultimately, however, the appeal was dismissed as moot after the prosecutor left the Circuit Attorney’s office and obtained new employment, and there was no final determination of a due process violation.

Since *Woodard*, there have been four notable due process challenges to clemency in California. They arose in the cases of Siripongs, Anderson, Allen, and Morales. In none of these cases did the court find a due process violation.

In a §1983 action in 1998, a federal court issued a temporary restraining order that stayed the execution of Jaturun Siripongs.⁷⁴ Siripongs claimed that he had been misled by letters from the Governor’s office and the Board of Prison Terms (BPT) about what the Governor would or would not consider in clemency. Specifically, Siripongs claimed that he understood the letters to preclude consideration of his guilt of the crime, but that Governor Wilson’s

71. *Id.* at 292 (Stephens, J., concurring in part and dissenting in part).

72. *Id.* at 290-91 (stated in context of disagreeing with the logical result of the plurality’s position).

73. *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000), *appeal dismissed as moot*, 266 F.3d 791 (8th Cir. 2001).

74. *See Wilson v. United States District Court for the Northern District of California*, 161 F.3d 1185 (9th Cir. 1998) (panel of Ninth Circuit Court of Appeals denying state’s petition for a writ of mandamus to review the TRO).

denial of clemency was based, in part, on the lack of evidence of innocence.⁷⁵ The Attorney General's Office contested the interpretation that there were any limits placed on issues in clemency, contending that the letters only stated the obvious: that clemency was not a judicial proceeding or a relitigation of guilt or innocence.⁷⁶ Although indicating there were "serious questions" raised in Siripongs' claim, the court denied the preliminary injunction because the execution date was rescheduled and Siripongs would have another chance to file a clemency petition.⁷⁷ Thus, there was no resolution of the due process claim on the merits. Shortly thereafter, there was a change in administrations and Siripongs submitted a new petition for clemency to Governor Davis. That petition was denied, as were all petitions submitted to Governor Davis.

Stephen Wayne Anderson claimed that Governor Davis had a blanket policy not to grant clemency to any convicted murderer and that this policy violated due process and Eighth Amendment rights. The Ninth Circuit rejected the claim on the basis that there was insufficient evidence that Anderson's case would not receive individual consideration by the Governor.⁷⁸ In the course of its decision, the Ninth Circuit panel noted that other courts had not found a general policy to refuse clemency in capital cases to be violative of due process.⁷⁹ The court distinguished *Anderson* from *Siripongs* in that, unlike Siripongs, Anderson had not claimed constitutionally inadequate notice of what would be *considered* in clemency.⁸⁰

In the third case, Clarence Ray Allen sought a stay of execution on Sixth, Eighth, and Fourteenth Amendment grounds. Suffering from many medical problems, Allen claimed that he was unable adequately to prepare his clemency petition because he had not received necessary medical care and was unable to

75. The letter from the Legal Affairs Secretary stated, in pertinent part:

As you know, the clemency process is not a trial or judicial proceeding of any kind. If the Governor believes that an oral presentation would be helpful, we will advise you after he reviews your written submissions. Otherwise, the Governor will make his decision on the basis of the written submissions.

Letter from Daniel M. Kolkey to Linda Schilling, Michael Laurence, and James Tanizaki (Oct. 19, 1998).

The letter from the BPT to Siripongs' attorneys stated, in pertinent part:

In considering relevant material that you may wish to provide, please understand that this review is administrative and does not include re-litigation of the issues decided in the various courts. Rather it is an opportunity for the Governor to consider the totality of the person and circumstances in making a decision based upon his commutation authority.

Letter from Dave McAule, Senior Investigator, BPT, to Michael Laurence (Oct. 21, 1998).

76. See Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction and Request for a Dismissal of Plaintiff's Request for Declaratory and Injunctive Relief, *Siripongs v. Wilson*, No. C-98-4417 (N.D.Cal. Dec. 3, 1998).

77. See *Siripongs v. Davis*, 282 F.3d 755, 758 (9th Cir. 2002) (The court also denied attorney's fees to Siripongs because the TRO was not viewed as "proving an *actual* violation of the plaintiff's rights" as required in order to recover the fees.)

78. *Anderson v. Davis*, 279 F.3d 674 (9th Cir. 2002), *cert. denied*, 534 U.S. 1119 (2002).

79. *Id.* at 676.

80. *Id.*

meet sufficiently with his attorneys due to transfers to various medical facilities. The federal district court denied a stay, citing to the minimal due process standard in clemency that requires only that “the State does not arbitrarily deny the prisoner all access to the clemency process, and the clemency decision is not wholly arbitrary or capricious.”⁸¹

The fourth California case similarly resulted in a rejection of a due process challenge. In 2006, Michael Morales sought an injunction prohibiting the participation of the San Joaquin County District Attorney’s office in clemency proceedings on the basis that an Assistant District Attorney in that office was formerly a criminal defense attorney who had represented Morales. The court noted that there was no allegation that the attorney was providing any confidential or privileged information to the attorneys in the office handling the clemency petition. The court further found that the fact that the attorney presently worked in the District Attorney’s office did not infringe on the minimal procedural safeguards identified in *Woodard*.⁸²

Other challenges around the country have raised a variety of due process claims, none of which were successful. In several cases, petitioners unsuccessfully argued that actual, or appearance of, bias or a conflict of interest on the part of a governor or clemency board rendered the proceedings unfair. In two cases, the Governor had served as that state’s Attorney General during earlier proceedings in the case.⁸³ In another case, petitioner argued that because two of five members of the clemency board in Georgia were under investigation by the state Attorney General’s office, there would be the appearance of bias because those members had an interest in agreeing with the state’s position on clemency to further their own causes.⁸⁴ In another Georgia case, there was a challenge based on alleged bias by the chair of the Board, who had stated three years before petitioner’s case that no one on death row would get clemency while he was chair.⁸⁵ In a third situation, the Governor was running for the U.S. Senate and petitioner claimed that the political pressure involved in an election in which the granting of clemency in death

81. *Allen v. Hickman*, 407 F. Supp. 2d 1098, 1103-04 (N.D.Cal. 2005).

82. *Morales v. Willett*, 417 F. Supp. 2d 1141, 1143 (C.D.Cal. 2006).

83. *Buchanan v. Gilmore*, 139 F.3d 982, 984 (4th Cir. 1998) (reversing stay where, *inter alia*, claim was challenging Virginia Governor for bias where Governor had been the attorney general in prior proceedings involving petitioner’s case; reliance on “rule of necessity” where only Governor can grant or deny clemency); *Bacon v. Lee*, 353 N.C. 696 (2001) (no violation where North Carolina Governor had been Attorney General during death row inmates’ post-conviction proceedings).

84. *Gilreath v. State Bd. of Pardons and Paroles*, 273 F.3d 932 (11th Cir. 2001) (no violation where two of five members of Georgia parole board were under investigation by the state attorney general’s office; no indication that attorney general took any position on clemency and had a role in it); *Parker v. State Bd. of Pardons and Paroles*, 275 F.3d 1032 (11th Cir. 2001), *cert. denied*, 534 U.S. 1072 (2001) (no violation on same claim as *Gilreath* and additional claim that third Board member would be represented by Attorney General’s office in sexual harassment suit).

85. *Parker*, 275 F.3d at 1036 (noting that district court had credited the chair’s testimony that he had an open mind to consider each clemency petition).

penalty cases was a campaign issue would preclude the Governor from giving him a fair consideration in clemency.⁸⁶ None of these courts found that the possible conflicts of interest jeopardized the “minimal” due process right identified in *Woodard*.

Arguments that procedural deficiencies constituted due process violations have also failed. For example, the lack of a public proceeding, the lack of a hearing, the absence of stated reasons for a decision, the absence of records of actions taken, and the failure to provide counsel in a second clemency proceeding have been found not to constitute due process violations.⁸⁷ Similarly, courts have rejected arguments that the refusal to allow petitioners to run DNA tests on evidence or to have other medical tests run on the petitioner violates due process.⁸⁸ Due process challenges, thus, are virtually a non-existent restraint on clemency.

Legal challenges to clemency have even included treaty rights. In one case, for example, the petitioner argued that a provision of the International Covenant on Civil and Political Rights that guarantees the right to seek pardon or commutation if one is sentenced to death was violated by an inadequate clemency process. The Fifth Circuit rejected this argument on the basis that the treaty was unenforceable in a U.S. court.⁸⁹ While not a challenge to a clemency process, it is also worth noting that the concept of clemency in U.S. cases was considered in a decision rendered by the International Court of Justice (ICJ). In a case brought by Mexico against the United States on behalf of all Mexican nationals on death row in the United States, Mexico argued that the provisions of the Vienna Convention on Consular Relations (VCCR) required a judicial hearing to determine the effect on the conviction and sentence of a failure to advise detained foreign nationals of their right to contact their home consulate. The United States argued that clemency afforded the opportunity to have a sufficient review and reconsideration of the effect of the violation. Recognizing the nature of executive clemency as a process without standards or procedures, the ICJ found that the treaty required a judicial hearing in order to give effect to the rights there under.⁹⁰

86. Roll v. Carnahan, 225 F.3d 1016 (8th Cir. 2000).

87. See generally Carter & Kreitzberg, *supra* note 7, at §18.04(B) (discussing cases finding no due process violation in various situations).

88. Noel v. Norris, 336 F.3d 648 (8th Cir. 2003) (refusal to allow a brain-scan procedure); Alley v. Key, 431 F. Supp. 2d 790 (W.D. Tenn.), *cert. denied*, 548 U.S. 920 (2006) (no access to trial evidence for DNA testing); Arthur v. King, No. 07-CV-319, 2007 U.S. Dist. LEXIS 61058 (M.D. Ala. 2007) (no access to evidence for DNA testing), *aff'd* 500 F.3d 1335 (11th Cir. 2007).

89. *LaGrone*, 2003 U.S. App. LEXIS 18150, at *35-6; See also International Covenant on Civil and Political Rights, art. 6, § 4, Dec. 16, 1966, 999 U.N.T.S. 171 (“Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”).

90. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, para. 140-41 (Mar. 31, 2004). See also Carter, *supra* note 25.

IV. PROCEDURES FOR CLEMENCY PETITIONS IN CALIFORNIA

While the application procedures for initiating the clemency process are constitutionally and statutorily codified, and some specific procedures are required for cases involving two-time felons, overall the procedures for executive clemency are not heavily regulated or widely understood. The specific procedures used by the executive in California in reaching his or her decision to grant or deny clemency are not prescribed by the California Constitution, statute or regulation. Therefore, to determine the procedures used in reviewing and deciding clemency petitions in capital cases, we undertook an oral history project. We spoke to at least one Legal Affairs Secretary from every gubernatorial administration from Governor Edmund “Pat” Brown in 1959 to the present administration of Governor Arnold Schwarzenegger. The observations that we discuss in this section result from the interviews we conducted with Legal Affairs Secretaries and two Governors themselves. We also interviewed a senior investigator from the Board of Parole Hearings, two attorneys who have represented petitioners, two attorneys who were the District Attorney at the time of a particular petition, and an attorney with the California Department of Justice who has been involved in capital cases for the last three decades. Everyone with whom we spoke gave us detailed information about the specific clemency procedures used in their respective Administrations. We were fortunate to have been able to tap the recollections of many who held the office of Legal Affairs Secretary or otherwise participated in clemency procedures, and to benefit from their enormous insight into a process that they experienced first hand.

Across political party affiliation and decades, a common theme emerged in our interviews: decisions about clemency in capital cases were universally discussed as time-consuming and difficult decisions that required labor-intensive investigations by the Legal Affairs Secretaries and their staffs. Those with whom we spoke commented on the immense responsibility they felt to uncover every stone and ensure that justice was done in the clemency process. Many described the process as the most difficult and emotionally weighty aspect of the job.

Another common theme was the vital role played by the Board of Parole Hearings (formerly Board of Prison Terms), particularly its investigations unit. The collection of interviews, prisoner background information, hearing transcripts, prison information, psychological reports, and other relevant information collected by that unit forms the basis of the “black book” upon which the Legal Affairs Secretary, and then the Governor, relies in reaching a conclusion about the propriety of granting or denying executive clemency.

Based on our interviews and research, a clear division became apparent between the volume of capital clemency requests and clemency processes used during the mid-1900s and the role of capital clemency in the years following the reinstatement of the death penalty in California in 1977. The procedural

distinctions are highlighted below, and the substantive distinctions for granting or denying clemency then and now are discussed throughout this report.⁹¹

A. Common Procedures in Capital Clemency Petitions

The clemency process in capital cases begins with the setting of an execution date. Once all appeals and writs have been exhausted, the trial court judge is called upon to set a date for execution.⁹² That event triggers the transmittal of a report by the Board of Parole Hearings (BPH).⁹³ One Legal Affairs Secretary told us that the report, the “black book,” usually arrived about 30 days prior to the execution date. The role this report plays varies from administration to administration, and seems to have had a changing emphasis over time. At a bare minimum, the black book has historically included case files from the trial and all appeals, a record of the inmate’s health and mental health during incarceration, and any other prison documentation that may have been accumulated in the years following sentencing and incarceration.

Under current BPH policy, the black book contains substantially more and is compiled by BPH without express direction by the Governor’s Office. Regardless of whether a clemency application is filed, the BPH investigation unit constructs an investigative report in two phases. First, an initial investigation is undertaken after the appeal of the death sentence is affirmed. Investigators use a checklist to ensure that all background information relating to physical and mental health, childhood trauma, events surrounding the crime, evidence submitted and not submitted at trial, juror statements, victim impact statements, and other relevant information is collected close in time to the imposition of the death sentence by the court.⁹⁴

The second phase commences when the judicial process comes to a close. The BPH investigators are in contact with the Governor’s Office and the California Office of the Attorney General regularly. Since the Attorney General’s office usually represents the state in direct appeals of inmate convictions and in the state and federal habeas processes,⁹⁵ it is able to alert the

91. The information contained in the following section was collected from interviews with the people listed in Appendix A. These interviews took place from September 2007 to February 2008. The interviews often covered confidential matters, and as a result, the interview subjects were guaranteed that specific attribution would not be given. Accordingly, the sections that follow are intentionally generalized in some places.

92. CAL. PENAL CODE § 1227 (West 2009). For a good overview of the steps in the clemency process, see Ward A. Campbell, *The District Attorney’s Role in California’s Capital Clemency Process*, Prosecutor’s Brief, Vol. XXVIII, No. 2-3 (CDAA Publication). For an earlier description of the pre-1976 procedures, see Edwin Meese and John S. McInerney, *Executive Clemency*, § 26 (CLE materials).

93. CAL. PENAL CODE § 1227 (West 2009); *See also* CAL. PENAL CODE §5075(a) (West 2000 & Supp. 2008) (creating the BPH and abolishing the BPT as of July 1, 2005).

94. Supplemental Exhibits in Support of Motion for Preliminary Injunction, *Siripongs v. Wilson*, No. C-98-4417, Exhibit 68 (N.D. Cal. Nov. 30, 1998).

95. The Attorney General’s office generally represents the State of California in appeals in

BPH investigators and the Governor's Office when a capital case is coming to the end of its judicial review. Upon this informal notice, the second phase of construction of the investigative report begins. In this phase, conduct and circumstances since incarceration are added. Witnesses are again contacted, and the investigators collect information from victims' families, the inmate's family, correctional staff and others who can provide any information concerning the inmate or contentions he or she may raise in the clemency proceeding. Sometimes this supplemental material is contained in the black book that is initially transmitted to the Governor's office. In other cases, the supplemental investigation is completed after the black book has been sent.

Immediately upon imposing a sentence of death, a trial judge must transmit the sentence and a transcript of the trial to the Governor.⁹⁶ The Governor may then call upon the Attorney General or the Justices of the Supreme Court to give an opinion as to the sentence,⁹⁷ but given that a series of appeals inevitably follow, this power is not used as a practical matter. Often a period of years passes before transmittal while appellate counsel is secured, appeals are taken and judicial process is exhausted. Most Legal Affairs Secretaries reported that they, like the BPH investigators, were alerted to the imminence of an execution order before this official notice by the Attorney General's office, and specifically by attorneys in the Criminal Writs and Appeals section. As discussed below, this advance notice allowed some Legal Affairs Secretaries to take a proactive role in coordinating the clemency process.

While California statute requires the Governor to transmit any request for clemency from a twice-convicted felon to BPH for review and recommendation,⁹⁸ the statutory requirement of a BPH recommendation is not obtained in all cases of twice-convicted felons. As a matter of BPH policy, the BPH conducts an initial investigation for the Governor's Office even before a request is made, but the Governor only receives a confidential recommendation from BPH after a hearing is conducted by that body. It appears, however, that in practice the Governor exercises complete discretion as to which petitions, if any, are set for a public hearing before the BPH for recommendation purposes.⁹⁹ If the Governor chooses not to request a public hearing, then the BPH does not make a recommendation to the Governor. If the Governor does

capital cases. *See* CAL. CONST. art. V, § 13; CAL. GOVT. CODE § 11042 (2007).

96. CAL. PENAL CODE § 1218 (West 2004 & Supp. 2008).

97. CAL. PENAL CODE § 1219 (West 2004).

98. CAL. PENAL CODE § 4813 (West 2000).

99. Given the breadth of authority given to the Governor in the California Constitution, it seems that the California code requirement that the Governor transmit a certain category of clemency petitions to the BPH for a recommendation may be in conflict with the California Constitution. While the Constitution requires the approval of four Supreme Court justices to grant clemency in the case of a twice-convicted felon, it does not appear to place any further unique procedures on the exercise of discretion for inmates in this category. *See* CAL. CONST. art. V, § 8.

determine that the clemency petition should be referred to the BPH for a public hearing and confidential recommendation, the BPH follows a protocol to give notice to all interested parties and to conduct a hearing in a timely manner so that the recommendation of the Board can be transmitted to the Governor with ample time for his consideration.

Twelve Commissioners comprise the BPH and are trained to hear adult matters.¹⁰⁰ They are appointed by the Governor, with the advice and consent of the Senate, for terms of three years and a Commissioner may be reappointed beyond a single term.¹⁰¹ By statute the membership of the Commission is supposed to reflect the diversity of the state of California.¹⁰² Commissioners are full-time salaried employees and may only be removed for cause.¹⁰³

When a case is referred to the BPH by the Governor for a hearing and recommendation, the entire Board considers the application and decides what recommendation will be made.¹⁰⁴ The BPH has the authority to “do any and all things necessary to make a full and complete investigation of and concerning all applications referred to it.”¹⁰⁵ This investigative function of the Board is performed by the BPH investigation unit, and not the Commissioners themselves. The investigative unit also remains in close contact with the Governor’s Office during the clemency process, and the investigators may be asked to conduct further research in response to arguments and issues raised by the inmate in his petition or by the District Attorney in response to the same.

The California Supreme Court, which becomes involved only if the petitioner is a two-time felon, does not accept applications for clemency unless the Board of Parole Hearings has recommended a grant of clemency, or the Governor, acting without a BPH recommendation, has indicated a desire to commute a sentence.¹⁰⁶ Under either circumstance, the petition and file must be transmitted to the California Supreme Court along with “the papers and documents relied upon in support of and in opposition to the application, including prison records and recommendation of the Board of Prison Terms.”¹⁰⁷

The first step for most inmates in the clemency process is the filing of the

100. CAL. PENAL CODE § 5075(b) (West 2000 & Supp. 2008).

101. *Id.*

102. *Id.*

103. CAL. PENAL CODE §§ 5076, 5081 (West 2000 & Supp. 2008).

104. CAL. CODE REGS. tit. 15, § 2818 (2006). Since capital cases are always referred to the Commissioners by the Governor, it appears that the full membership of the Board must convene to hold the public hearing and to vote on a recommendation. Ordinarily, however, when the BPH is acting on its own initiative in non-capital cases, the Commissioners meet in panels of two or more, and any action must be approved by a majority vote of those present. CAL. PENAL CODE § 5076.1 (West 2000 & Supp. 2008). The Board may also delegate deputy commissioners to hear cases and make decisions. CAL. PENAL CODE § 5076.1(b) (West 2000 & Supp. 2008).

105. CAL. PENAL CODE § 4812 (West 2000).

106. CAL. PENAL CODE § 4850 (West 2000).

107. CAL. PENAL CODE §§ 4850 & 4851 (West 2000).

petition with the Governor's Office. Thirteen condemned men have applied for executive clemency in the last fifteen years and none has been granted a commutation. As guaranteed in California, all have been represented by counsel.¹⁰⁸ In each case, after the petition was submitted to the Governor's Office, responses were filed by the District Attorney of the county in which the case was tried. In the event that the Attorney General's Office tried the case, due to a conflict of interest with the County District Attorney's Office, the Attorney General's office was also responsible for preparing and presenting a response to the clemency petition.

In each administration we contacted, the report of the BPH investigative unit along with information provided by the counsel on each side was reviewed first by the Legal Affairs Secretary and then presented to the Governor. Across administrations, Legal Affairs Secretaries viewed their role as one that required a thorough examination of the petition and any supporting or opposing written or oral submissions, and a recommendation to the Governor about the grant or denial of clemency. Ultimately, in all cases since 1992, the Governor made an adverse decision on the petition, and the decision was made known to the inmate and the public through a written statement or decision. Since the Constitution only requires the Governor to report grants of clemency to the Legislature,¹⁰⁹ these decisions of denial are not easy to research or acquire after they are initially released.

B. Variations in Procedures and Approaches to Capital Clemency Petitions

Since there are no procedures mandated for the decision-making process in executive clemency, each California gubernatorial administration has the flexibility to adopt its own process for review of clemency petitions. Some administrations have chosen to develop internal procedures formally and others have chosen to vary the process from petition to petition. We found that many Legal Affairs Secretaries had been in contact with their predecessors, even across administrations, to obtain a primer in the executive clemency process and to solicit ideas for how to best manage the petitions. All those we interviewed spoke of the importance of flexibility in the process and the unique nature of each petition that they had considered. Repeatedly we heard that no two cases are the same and that the same procedure was not necessarily appropriate for all cases.

108. Cal. Sup. Ct. Internal Operating P. XV(B) (2007) ("At or after the time the court appoints appellate counsel to represent an indigent appellant on direct appeal, the court also shall offer to appoint habeas corpus/executive clemency counsel for each indigent capital appellant. Following that offer, the court shall appoint habeas corpus/executive clemency counsel unless the court finds, after a hearing if necessary (held before a referee appointed by the court), that the appellant rejected the offer with full understanding of the legal consequences of the decision.").

109. CAL. CONST. art. V, § 8.

1. *Role of the Legal Affairs Secretary*

Before September 1967, the Executive Clemency and Extradition Secretary was the administration official responsible for reviewing and advising on capital clemency cases. During the Reagan administration, while Edwin Meese held the position, the title changed to Legal Affairs Secretary. The designation before 1967 was appropriate to the time because with the volume of executive clemency petitions filed, and the number of executions each year in the state, the secretary spent about half his time considering clemency petitions. In the modern era, the clemency petitions are one part of a large portfolio of tasks that the Legal Affairs Secretary must manage. The volume of capital clemency petitions has dramatically decreased from the number considered by Pat Brown's administration (fifty-five) to the number considered by Arnold Schwarzenegger (five) thus far. Even though the number of petitions considered in the modern era is far smaller, the resources devoted to these petitions are significant. The Legal Affairs Secretaries with whom we spoke indicated that when a petition had been filed, they turned their complete attention to the review of the petition and in some cases turned over all other responsibilities to a deputy Legal Affairs Secretary so that they could exclusively focus on the review of the petition, response and supporting materials.

During Pat Brown's administration, Legal Affairs Secretaries were selected because they brought a perspective on the death penalty that was different from that of the Governor. In his book *Public Justice, Private Mercy*,¹¹⁰ and in conversations that we had with two of Governor Pat Brown's clemency secretaries, we learned that Governor Brown sought to have advisers who would challenge his own ideas about the death penalty and its application. Ultimately, he and his advisers came to establish, albeit informally, certain criteria that they would look for in determining whether to grant or deny clemency, but Governor Brown did look to his advisers for sound advice and disagreement at times.

Governors since Brown have not necessarily chosen Legal Affairs Secretaries specifically based on their perspectives on the death penalty. And, of course, governors bring with them different views of the role of clemency in the death penalty context. Almost all Legal Affairs Secretaries with whom we spoke viewed their role as one of advisor. They were expected to fully immerse themselves in the briefs filed by counsel, review the trial, appellate and habeas records in detail, sort through any other submissions or documentation, and make a recommendation to the Governor about whether clemency should be granted or denied. Many also spoke of the role they played in relation to obtaining and reviewing information from the investigative unit at

110. Edmund (Pat) Brown & Dick Adler, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW* (Weidenfeld & Nicolson 1989).

BPH.

When the role of the Legal Affairs Secretary differed across administrations, it appeared that the differences related to how involved each governor wanted to be in the collection and review of information. Some secretaries were expected to preside over all in-person hearings with counsel. Others were expected to attend any such hearings, but not to preside over them. In some administrations, hearings through the BPH were conducted but no meetings with counsel were scheduled. The role of the Legal Affairs Secretary under the latter scenario was limited to a review of the paper record.

Importantly, each Legal Affairs Secretary came to know the types of arguments that would be especially important to the Governor that they served. For example, in one administration, the Legal Affairs Secretary understood that rehabilitation would not be a basis for granting clemency. In other administrations, claims that had been previously litigated by the judicial system were generally not considered to be a strong basis for a claim for clemency.

2. *Briefing Schedule*

We noted minor differences in the scheduling procedures employed by various administrations. While all Legal Affairs Secretaries accepted documents from both the inmate's counsel and the District Attorney's Office from the county in which the inmate was tried, the involvement in setting a schedule and the formality of the schedule varied between administrations. Some administrations set the schedule to mirror a law and motion schedule in a court, requiring first a brief from the inmate's counsel, then an opposition from the District Attorney's Office, followed by a reply from counsel for the inmate. Other administrations required simultaneous briefing due to timing concerns and a desire to separate the process from that of a typical court proceeding.¹¹¹

In the current administration, the Legal Affairs Secretary sends out a briefing schedule for the clemency petition as soon as an execution date is set. This letter with a briefing schedule contemplates the possibility that a hearing might be held at BPH and factors in time for such a hearing, if one is deemed necessary. The parties are expected to follow the schedule in the same manner as counsel would follow a schedule set by a court. In other administrations, the Legal Affairs Secretary did not set out a schedule until a petition was filed. It was left up to the petitioner and his counsel to start the process. The challenge with this latter system is that there is no guarantee that the petition will be presented in a manner that will allow time for full consideration of the issues or the possibility of a hearing. However, because the Governor also has the power to grant a reprieve if more time for consideration is needed, the time pressure

111. It should be noted that the briefs filed on behalf of the inmate and on behalf of the prosecution are not public records. All clemency briefs cited in this article were obtained by request from the respective parties.

presented by an impending execution date is not as severe as it might be.

3. Acceptance of Materials and Commentary Other Than Briefs From Counsel

While most administrations have been willing to accept any documentation that either the inmate or the District Attorney wishes to provide, including written submissions, photos and videotapes, there have been differences in policies regarding the acceptance of outside materials from interested parties.

In some of the early administrations, while no formal mechanism was provided for outside groups and individuals to submit written briefs, governors did consult with people outside of the process. Calls and letters from outside groups and individuals were not uncommon. More recently, the Legal Affairs Secretaries attempted to limit the influence of these types of outside sources. Calls relating to the clemency process, even from close friends or contacts, are routed away from the Governor to the Legal Affairs Secretary. Letters from outside groups or interested individuals are collected and examined, but do not seem to have a formal place in the consideration process.

Increasingly, the materials submitted to a governor's office regarding clemency include more than written submissions. Videotape testimony from the inmate and other interested parties is not uncommon in recent years. Legal Affairs Secretaries indicated that they would accept support or opposition in any medium the parties preferred.

The role of statements from victims' families has also changed over time. In the pre-1976 administrations, the positions of the victims' families were primarily expressed through the written and oral presentations of the District Attorney's Office. In the Reagan administration, statements of victims' families were considered in the course of the process, but the families were not encouraged to come to the hearings. In the Wilson, Davis, and Schwarzenegger administrations, documents submitted by the victims' families and interested parties were and are considered. There has been a movement toward accepting more, rather than less, material in the modern era, and several Legal Affairs Secretaries believed that the emergence of the victims' rights movement starting in the 1970s has had an impact on the breadth of information consulted by fostering participation in the clemency process.

4. Hearings: Standards and Process

Perhaps the most interesting and varied aspect of clemency procedures in the last several decades has been the use of a clemency hearing. Some administrations required hearings for every clemency case, some held hearings in some cases but not others, and some held no hearings at all. Even in cases where hearings were held, the variations in the attendees, the forum, and the presiding official are significant. In our state, governors have used both public

and private hearings. The hearings have been conducted in various instances by the Governor himself, the Legal Affairs Secretary or the BPH. The hearings have been structured to allow for counsel for the inmate and the District Attorney to present what are essentially oral arguments to the Governor in a court-like setting. They have alternatively been structured so that the inmate's counsel and the District Attorney have a private audience with the Governor separate from one another. Hearings have taken place weeks, and sometimes only days, before the execution date. Victims' families have been allowed to attend the hearings at times, though other administrations have limited attendance to counsel only. In sum, there has been no consensus about the necessity, or appropriate form, of hearings in the California clemency process.

During the Pat Brown administration, a hearing was conducted concerning each petition for clemency. Governor Brown presided over a meeting with the counsel for the inmate and the District Attorney, and the media was invited to attend. Victims' families were not invited to the hearings, and counsel was not allowed to put on testimony. Occasionally, Governor Brown would announce his decision about clemency at the hearing, but more often he would conclude the hearing without a decision and provide a written statement of the decision later.

At the outset of Governor Reagan's administration, a decision was made that the public hearings of the Brown administration created too much of a "circus" atmosphere.¹¹² The Governor also felt that his status as a non-lawyer left him ill-equipped to conduct clemency hearings.¹¹³ Consequently, he directed his Legal Affairs Secretary to conduct hearings with the lawyers on both sides. Governor Reagan would later hear a briefing and recommendation concerning the hearing in each case.

There were no capital clemency petitions during the administration of Governor Jerry Brown¹¹⁴ and only one petition during the administration of Governor George Deukmejian. The petition was filed on behalf of Robert Alton Harris. Since the Harris execution was scheduled to be the first since California reinstated capital punishment, there was considerable thought given to the value of a hearing and the need for the public to see the death penalty process at work in the state.¹¹⁵ No conclusion about the appropriate

112. Interview with Edwin Meese.

113. HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT*, 150 (Northeastern University Press 1987).

114. It is unclear if Governor Brown's staff prepared any draft procedures in the event of capital clemency petitions. A Legal Affairs Secretary from Governor Deukmejian's term recalled reviewing draft procedures from Gov. Brown's staff, but Judge J. Anthony Kline, the Legal Affairs Secretary from the second Brown administration with whom we did speak, did not specifically remember these draft procedures. Because there was no need to finalize or activate such procedures during the Brown administration, it is likely that they were only in a very preliminary stage.

115. One Deputy Legal Affairs Secretary and a representative from the Attorney General's office recalled a discussion about possibly holding a public hearing at San Quentin with the

hearing process was ever reached in the Deukmejian administration because Harris withdrew his clemency petition to Governor Deukmejian, and filed a subsequent petition with Governor Wilson after he took office.

The Wilson administration held a private hearing in the case of Robert Alton Harris, but did not institute a practice of holding private hearings with counsel in every case. Governor Wilson made clear that not all petitions for clemency would demand a private hearing. Some of the hearings conducted during the Wilson administration were conducted by Governor Wilson himself, others were conducted by his Legal Affairs Secretaries, and some did not have a hearing at all. Those cases that were found to have more serious claims and bases for clemency were set for private hearing, while those that appeared to be without merit did not warrant the resources that a private hearing demanded.

The Davis administration did not hold private hearings, and instead sent all clemency petitions for a public hearing through the BPT (the predecessor of the BPH). Governor Davis, along with his Legal Affairs Secretary, reviewed the transcript of the BPT hearing, but did not have an opportunity to observe the witnesses and arguments presented. The approach of the Davis administration was considered to be more like an appellate court reviewing the record for error and ensuring that all issues had been fully resolved and given proper weight. Credibility determinations and the compilation of all relevant testimony were left to the Commissioners of the BPT.

The current administration has implemented a case-by-case approach to the holding of hearings. There is no set standard for the form or venue of a hearing, and no requirement for any hearing at all if the result is clear to the Governor from the written submissions and the BPH investigative report. In one recent case, that of Kevin Cooper, no hearing was held at all. In another, the Donald Beardslee case, a public hearing before BPH was held. In the hearing, the BPH took testimony from the victim's family, outside groups with an interest in the case, and expert witnesses on both sides of the issue. In that case, the Legal Affairs Secretary and Governor reviewed the entire video of the hearing, which dealt primarily with mental illness and Mr. Beardslee's ability to form the *mens rea* for the crime. The administration determined that more factual findings were needed, and that a BPH hearing with the taking of testimony would aid in that process. In another case, that of Stanley "Tookie" Williams, the Governor personally held a hearing with counsel for Mr. Williams and the District Attorney present and allowed both sides to present oral arguments in a meeting that was not open to the public. Governor Schwarzenegger's first Legal Affairs Secretary indicated that, in his view, a true plea for mercy should be made in private, outside of the public spotlight.

inmate present. Governor Deukmejian's Legal Affairs Secretary and the former Governor himself did not recall planning a hearing at the prison.

5. *Role of the BPH or BPT*

The role of the BPH (BPT prior to 2005) has changed over time based both on regulations of the Board itself and the role that each gubernatorial administration has envisioned for the Board. While in some administrations, the BPH role is focused on its investigative and information-gathering functions, other administrations have called on BPH Commissioners to hold hearings and offer recommendations on the petition itself.

During the administration of Governor Pat Brown, the BPT provided a parole report, but did not compile the trial and appellate records or make a recommendation. It was up to the clemency secretaries and counsel for each side to secure all court records and any other relevant documents.

In the subsequent Reagan administration, there was a very close working relationship with the Director of the investigative unit of the Department of Corrections. The Reagan administration viewed the investigative unit as the institutionalized clemency secretary and relied on the unit to collect and compile as much objective information as it could find.

The Deukmejian administration had many clemency petitions in non-capital cases, but never went all the way through a capital clemency after the withdrawal of the Harris petition. In the course of preparing for the possibility of these petitions, the administration did discuss the role that BPT would play. The thought, although it was never formalized, was that the BPT would serve as the investigative staff and provide the Governor with a packet of its findings for clemency purposes. Its express role, however, was never finalized.

The Davis administration directed the BPT to hold public hearings and offer recommendations in each of the four cases presented. Those recommendations were relied on in each statement denying clemency.

In the Wilson administration, the BPT conducted investigations and provided background information, medical records in prison, prison reports, victims' statements, views of the community and recommendations. Governor Wilson did not, however, have the BPT conduct any public hearings and its use of the BPT was limited to the information gathered by the investigators.

The current administration relies on the BPH to do an investigation of the inmate, and to provide a report within about thirty days of the execution date. Depending on the case, a hearing before BPH may be ordered and recommendations requested. In this administration, as in Wilson's administration, it appears that the role of BPH shifts depending on the perceived need for a complete hearing.

6. *Format and Publication of Decisions*

The only requirement for written clemency decisions is that any grant of

clémency must be filed with the California legislature.¹¹⁶ Every year in the pre-1976 death penalty era, governors submitted their lists of commutations, pardons, and reprieves to the state legislative body. Since no administration in the modern era has granted clemency in a capital case, none has been required to submit a formal written report.

Even though not required, written decisions for denials of clemency are drafted and sent to the inmate's counsel and the District Attorney, as well as released to the press. The content of these written denials and the decision about whether to make a personal statement about the opinions has varied. Some legal affairs secretaries took primary responsibility for drafting denials and the press releases to go with them. Some governors wrote decisions that read like legal opinions while others took a more plain language approach. From our discussions, we learned that even though reasoned decisions are not required, all governors have desired to provide a sound basis for denying clemency and have relied on their staffs to help them craft responsive and well-reasoned decisions.

In the Wilson administration, the decisions issued by the Governor announced a standard and criteria for granting clemency and explained why each case did not meet that standard. Governor Wilson's decisions cited to the *People v. Superior Court*¹¹⁷ standard and the *Herrera v. Collins*¹¹⁸ opinion to explain the purpose of clemency to prevent a miscarriage of justice where ordinary procedures resulted in injustice. *People v. Superior Court* makes clear that the California judiciary will not interfere with the pardon power of the Governor.¹¹⁹ The United States Supreme Court in *Herrera v. Collins* outlined the history of clemency, dating back to England, as a mechanism for avoiding miscarriages of justice.¹²⁰ Governor Wilson's reliance on these legal authorities to frame his clemency decisions suggests that he viewed clemency in the context of other legal proceedings. In contrast, Governor Schwarzenegger, a non-lawyer, has attempted to keep his decisions free of legal standards and language, but instead has tried to explain in a straightforward way the reasons that he did not find clemency to be an appropriate remedy. Another non-lawyer governor, Ronald Reagan, did not issue a written opinion in the one denial of clemency in a capital case during his term. Since there is no recordation requirement for denials of clemency, even though there are written reasons for the denials in almost every

116. CAL. CONST. art. V. § 8.

117. *People v. Superior Court*, 190 Cal. 624, 625 (1923). See Decision Denying Clemency to Keith Daniel Williams, Governor Wilson, Apr. 24, 1996 [hereinafter "Decision K. Williams"].

118. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). See Governor Pete Wilson, *Decision Denying Clemency to Thomas Thompson* (Jul. 31, 1997) [hereinafter "Decision Thompson"]; Governor Pete Wilson, *Decision Denying Clemency to Jaturun Siripongs* (Nov. 13, 1998) [hereinafter "Decision Siripongs-Wilson"].

119. *People v. Superior Court*, 190 Cal. at 625.

120. *Herrera*, 506 U.S. at 412.

administration, finding those written decisions is not an easy task and thus their circulation is severely limited.

V. REASONS FOR DENYING OR GRANTING CLEMENCY PETITIONS

A. *Post-1976 Clemency Petitions*

There have been fourteen petitions for clemency since 1976 on behalf of thirteen individuals. Because Siripongs petitioned before both Governors Wilson and Davis, his petition is counted twice. The petitions per governor are listed below:

<u>Date</u>	<u>Governor</u>	<u>Petitioner</u>
1992	Wilson	Alton Harris
1996	Wilson	William Bonin
1996	Wilson	Keith Daniel Williams
1997	Wilson	Thomas Martin Thompson
1998	Wilson	Jaturun Siripongs
1999	Davis	Jaturun Siripongs
1999	Davis	Manuel Babbitt
2000	Davis	Darrell Keith Rich
2002	Davis	Stephen Wayne Anderson
2005	Schwarzenegger	Kevin Cooper
2005	Schwarzenegger	Donald Beardslee
2005	Schwarzenegger	Stanley "Tookie" Williams
2006	Schwarzenegger	Clarence Ray Allen
2006	Schwarzenegger	Michael Morales

All petitions for commutation were denied, and eleven of the thirteen individuals listed above were executed. Michael Morales remains on death row despite the denial of clemency because his case involved a challenge to lethal injection that was addressed by the United States District Court for the Northern District and the Ninth Circuit.¹²¹ Kevin Cooper also remains on death row due to court challenges and a stay of execution.¹²² The total number

121. *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006) (enjoining lethal injection procedures and requiring the presence of an anesthesiologist at executions) (*aff'd*, *Morales v. Hickman*, 438 F.3d 926, 931 (9th Cir. 2006)); *Morales v. Tilton*, 465 F. Supp. 2d 972, 976 (N.D. Cal. 2006) (enjoining execution due to medical ethics concerns). The U.S. Supreme Court subsequently held that lethal injection does not, necessarily, offend the Eighth Amendment. *See Baze v. Rees*, 553 U.S. ___, 128 S. Ct. 1520 (2008).

122. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004).

of persons executed in California since 1976 is thirteen. Two people were executed without petitioning for clemency: David Mason in 1993 and Robert Lee Massie in 2001.

It is difficult to generalize about reasons for denying clemency, as the context is necessarily different for each individual. For instance, claims of mental illness or organic brain damage were considered insufficient to commute a sentence in five cases.¹²³ In some of those cases, the Governor felt that consideration of the mental illness by the jury or court prior to sentencing was sufficient.¹²⁴ In several cases, the Governor found that, even if there was new evidence of mental deficiencies, the level of mental disorder was insufficient to grant clemency because the crime had been committed with full awareness or intention on the part of the defendant.¹²⁵ For example, in the case of Donald Beardslee, Governor Schwarzenegger was presented with a claim that Beardslee committed his crime while in a dissociative state due to mental illness.¹²⁶ The Governor framed the issue in that case to be whether “that fact sufficiently impeded his comprehension of the heinous nature of his crimes such that it inspires in me mercy compelling enough to set aside the jury’s sentence and commute death to life in prison without parole.”¹²⁷ The Governor concluded that nothing presented indicated that Beardslee did not understand that he was committing murder and that it was wrong to do so and so denied clemency.¹²⁸

Other factors extrinsic to the crime were occasionally raised but were also considered insufficient grounds for clemency. Beardslee, for example, argued that his death sentence was disproportionate to the sentences received by his accomplices.¹²⁹ The Governor rejected this argument on the basis that Beardslee, but not his accomplices, had a prior murder conviction and because the evidence showed that Beardslee had inflicted the fatal wound to both of the

123. See Governor Pete Wilson, *Decision Denying Clemency To Robert Alton Harris* (Apr. 17, 1992) [hereinafter “Decision Harris”]; Decision K. Williams, *supra* note 117; Governor Gray Davis, *Decision Denying Clemency to Manuel Babbitt* (Apr. 30, 1999) [hereinafter “Decision Babbitt”]; Governor Arnold Schwarzenegger, *Decision Denying Clemency to Kevin Cooper* (Jan. 30, 2004) [hereinafter “Decision Cooper”]; Governor Arnold Schwarzenegger, *Decision Denying Clemency to Donald Beardslee* (Jan. 18, 2005) [hereinafter “Decision Beardslee”].

124. See, e.g., Decision K. Williams, *supra* note 117 (claims of mental illness are same arguments that were rejected by courts); Decision Babbitt, *supra* note 123 (jury heard substantial evidence of mental problems); Decision Cooper, *supra* note 123 (trial counsel investigated mental problem claim).

125. See, e.g., Decision Harris, *supra* note 123 (despite fetal alcohol syndrome evidence, Harris acted with capacity to premeditate and plan); Decision K. Williams, *supra* note 117 (capable of understanding his actions and right and wrong); Decision Babbitt, *supra* note 123 (additional evidence insufficient for clemency);

126. Decision Beardslee, *supra* note 123.

127. Decision Beardslee, *supra* note 123.

128. *Id.*

129. *Id.*

women killed.¹³⁰ Beardslee additionally argued he should be granted clemency based on his exemplary behavior in prison, and this, too, was rejected by the Governor.¹³¹

An unwillingness to consider factors that had been addressed at trial or during judicial appeals was consistent throughout administrations. For example, Governor Wilson wrote in the Thomas Martin Thompson case that a “clemency proceeding is not another judicial proceeding in which to relitigate claims already raised in, and fairly addressed by, the courts.”¹³² He further noted that “clemency is a historic remedy for preventing a miscarriage of justice where the judicial process has been exhausted.”¹³³ In Thompson’s case the Governor found that evidence regarding whether or not the victim had been raped prior to being murdered had already been litigated.¹³⁴

While in every case governors summarized the relevant evidence, in the Stephen Wayne Anderson case, Governor Davis’s decision referred specifically to his own independent review of the facts.¹³⁵ Other governors may well have engaged in similar, independent reviews of the facts, but no other decision spells out that review as clearly as the Anderson case. For instance, Governor Davis wrote that he considered the arguments and trial record on Anderson’s ineffective assistance of counsel claim and that he agreed with the decisions of the courts.¹³⁶ The wording of the decision implies Governor Davis relied primarily on his own review of the evidence without deference to the findings of the trial and appellate courts.

Although sweeping generalizations about reasons for denying clemency are difficult to make, it is worth noting the types of arguments that have been raised in the fourteen petitions to date to show what factors are often considered in clemency. The major factors are described below in two sections: (1) those raised by the petitioners; and (2) information about the nature of the crime, the recommendation of the BPH, views of family members, and views of other interested persons.

1. *Factors Raised by Petitioners*

The first subgroup of factors raised by petitioners relates to the circumstances of the crime and the conduct of the prosecution and defense

130. *Id.*

131. *Id.*

132. Decision Thompson, *supra* note 118.

133. *Id.*

134. Thompson argued that the sexual intercourse with the victim was consensual. He further argued that if there was no rape, the special circumstance of murder in the course of rape was invalid and he should not have been in the category of death-eligible defendants. Without the special circumstance, the maximum penalty would be life imprisonment.

135. Governor Gray Davis, *Decision Denying Clemency to Stephen Wayne Anderson*, (Jan. 26, 2002) [hereinafter “Decision Anderson”].

136. *Id.*

during judicial proceedings: mental disorders and related impairments; abusive or highly disadvantaged childhood; unfair judicial proceedings; disparity with sentences of co-perpetrators; and race or ethnicity. The second subgroup of factors relates to issues that arise post-conviction and sometimes after all judicial proceedings are ended: new evidence and innocence; remorse or redemption; and good adjustment to prison. Three additional factors have been raised that were somewhat unique to that prisoner's situation: debilitated health and old age; intercession by a foreign government; and a possible death penalty moratorium.

a. Mental disorders and related mental impairments.

A number of cases involved arguments that a mental disorder or organic brain damage, including post-traumatic stress disorder and substance abuse impairment, affected the capacity of the individual at the time of the crime.¹³⁷ In their decisions denying clemency, the governors almost uniformly rejected this factor as insufficient for a commutation on the basis that, while the petitioner might have had a mental impairment, he maintained the capacity to act intentionally and to understand what he was doing. For example, in Robert Alton Harris' case, fetal alcohol syndrome and its effects on the brain were raised in his clemency application.¹³⁸ In dismissing this claim, Governor Wilson wrote that Harris acted "with a clear criminal purpose," and that he "was capable of planning to do wrong."¹³⁹ He concluded that Harris was not deprived of "his capacity to understand his act" or "the capacity to resist doing it."¹⁴⁰

A secondary justification rejecting mental disorders as a sufficient basis for clemency was to indicate that the courts had already adjudicated the issue. Manuel Babbitt, for instance, argued in his clemency petition that defense counsel had failed to adequately present evidence in his trial and sentencing of post-traumatic stress disorder (PTSD) stemming from Babbitt's service in

137. See Decision Harris, *supra* note 123 (fetal alcohol syndrome); Decision Cooper, *supra* note 123 (brain damage as a result of childhood automobile accident); Decision Beardslee, *supra* note 123 (organic brain damage compounded by childhood accidents, causing Beardslee to act in a dissociative state while committing the murders); Decision K. Williams, *supra* note 117 (diagnosis of mood disorder resulting in "episodic manic behavior"); Governor Arnold Schwarzenegger, *Decision Denying Clemency to Clarence Allen* (Jan. 13, 2006) [hereinafter "Decision Allen"] (possible mood disorder resulting from undiagnosed brain damage); Decision Babbitt, *supra* note 123 (post-traumatic stress disorder resulting from Babbitt's service in the Vietnam War); Decision Anderson, *supra* note 135 (post-traumatic stress disorder resulting from childhood abuse); Governor Arnold Schwarzenegger, *Decision Denying Clemency to Michael Morales* (Feb. 17, 2006) [hereinafter "Decision Morales"] (diminished mental capacity due to PCP use at the time of the murder).

138. Decision Harris, *supra* note 123.

139. *Id.*

140. *Id.*

Vietnam.¹⁴¹ In his decision denying clemency, Governor Davis emphasized that the federal courts had evaluated the claim and rejected it.¹⁴²

b. Abusive or highly disadvantaged childhood.

Another common factor in the petitions is evidence of severe abuse or neglect in childhood.¹⁴³ Similar to the analysis of mental illness, the governors' response has been to acknowledge, but place little weight on, the abusive circumstances on the grounds that the petitioner was still able to act intentionally and to understand what he was doing. The general view is that a troubled background is a valid ground to raise, but cannot justify an exercise of mercy. Robert Alton Harris' childhood, for example, is described in Governor Wilson's decision as "a living nightmare."¹⁴⁴ He further wrote that Harris "suffered monstrous child abuse that would have a brutalizing effect on him" and that this information was "deserving of the earnest and careful consideration that I have given to it."¹⁴⁵ In the end, though, Governor Wilson reasoned that, "Harris was not deprived of the capacity to premeditate, to plan or to understand the consequences of his actions."¹⁴⁶ Similarly, Governor Davis viewed Manuel Babbitt's difficult childhood as inadequate to deserve clemency for killing an elderly woman. Governor Davis wrote that, "such experiences cannot justify or mitigate the savage beating and killing of defenseless, law-abiding citizens in order to steal their personal property."¹⁴⁷

c. Unfair judicial proceedings.

Some petitioners raised a claim that the judicial proceedings were unfair, either because of ineffective assistance of counsel or misconduct by the prosecutor.¹⁴⁸ In this category of claims, governors were most likely to indicate that the courts had adequately adjudicated the issue and, thus, the Governor should not override the courts' determinations. In the case of Stanley Williams, for example, Governor Schwarzenegger emphasized that the issues

141. See Decision Babbitt, *supra* note 123.

142. *Id.*

143. Decision Harris, *supra* note 123; Decision Siripongs-Wilson, *supra* note 118; Decision Babbitt, *supra* note 123; Decision Anderson, *supra* note 135.

144. Decision Harris, *supra* note 123.

145. *Id.*

146. *Id.*

147. Decision Babbitt, *supra* note 123.

148. Governor Pete Wilson, *Decision Denying Clemency to William Bonin* (Feb. 21, 1996) (claim of unfair trial); Decision Babbitt, *supra* note 123 (claim that trial counsel did not competently present the PTSD defense); Decision Anderson, *supra* note 135 (claim of numerous alleged improprieties committed by trial counsel at guilt and penalty phases,); Governor Arnold Schwarzenegger, *Decision Denying Clemency to Stanley Williams* (Dec. 12, 2005) [hereinafter "Decision S. Williams"] (claim that prosecutor removed people from the jury on basis of race); Decision Morales, *supra* note 137 (claim that key witness gave false testimony and that the prosecutor's charging decision was discriminatory).

raised about the fairness of the trial were litigated in “at least eight substantive judicial opinions.”¹⁴⁹ The decision denying clemency further states that “[t]he possible irregularities in Williams’ trial have been thoroughly and carefully reviewed by the courts, and there is no reason to disturb the judicial decisions that uphold the jury’s findings that he is guilty of these four murders and should pay with his life.”¹⁵⁰

d. Disparity with sentences of co-perpetrators.

In two cases, petitioners argued that a commutation was appropriate on the grounds that co-perpetrators had received lesser sentences.¹⁵¹ In Thomas Martin Thompson’s case, Governor Wilson noted that a co-defendant was convicted of a lesser crime that carried a lesser sentence and that, if there was any disparity, it was that the co-defendant should have been punished more severely.¹⁵² In the Donald Beardslee case, as noted earlier, Governor Schwarzenegger considered Beardslee more culpable than his co-perpetrators.¹⁵³

e. Race or ethnicity.

In two cases, the petitioners raised claims of disparities on the basis of race or ethnicity.¹⁵⁴ Neither was considered of any significance by the Governor under the circumstances of those cases. In fact, in a third case, that of Jaturun Siripongs, Governor Wilson declined Thailand’s request for clemency and simultaneous offer to take custody of Siripongs based partially on the grounds it would be discriminatory to grant clemency on the basis of nationality.¹⁵⁵

f. New evidence and innocence.

In the cases in which the petitioner raised either new evidence that affected his level of culpability¹⁵⁶ or arguments of actual innocence,¹⁵⁷ the governors did not view the claims as factually strong. For example, in the case

149. Decision S. Williams, *supra* note 148.

150. *Id.*

151. Decision Thompson, *supra* note 118; Decision Beardslee, *supra* note 123.

152. Decision Thompson, *supra* note 118.

153. Decision Beardslee, *supra* note 123.

154. Governor Gray Davis, *Decision Denying Clemency to Darrell Rich* (Mar. 10, 2000) [hereinafter “Decision Rich”] (Rich’s Native American ethnicity); Decision Morales, *supra* note 137 (claim that “charging decision was biased by race, gender, and ethnicity”).

155. Decision Siripongs–Wilson, *supra* note 118.

156. Decision Thompson, *supra* note 118 (new evidence that there was no rape and, therefore, no special circumstance).

157. Governor Gray Davis, *Decision Denying Clemency to Jaturun Siripongs* (Feb. 6, 1999) [hereinafter Decision Siripongs–Davis]; Decision S. Williams, *supra* note 148. *See also* Decision Cooper, *supra* note 123 (claim that an incriminating DNA test had been tampered with).

of Stanley Williams, Governor Schwarzenegger reviewed the evidence of guilt, found the evidence “strong and compelling,” and concluded that “there is no reason to second guess the jury’s finding of guilt or raise significant doubts or serious reservations about Williams’ convictions and death sentence.”¹⁵⁸ Similarly, in the case of Jaturun Siripongs, Governor Davis found the evidence supported the finding of guilt, citing the number of courts that had considered the claims.¹⁵⁹

g. Remorse or redemption.

A claim of remorse or redemption was raised in six cases.¹⁶⁰ This factor, even if viewed as sincere, never significantly affected clemency decisions. In some cases, the governors commended the good works of the petitioners while on death row, but remorse or redemptive behavior did not carry much weight in the ultimate clemency determination. For example, Kevin Cooper presented information to Governor Schwarzenegger that, since being on death row, he had become associated with an Oakland church.¹⁶¹ The pastor and members of the church wrote letters on his behalf and described, *inter alia*, his involvement in counseling young people away from crime.¹⁶² While the Governor acknowledged Cooper’s religious change in his decision, the circumstances of the case and Cooper’s record of violence led to a denial of clemency.¹⁶³ Governor Davis similarly viewed Jaturun Siripongs claim of remorse as “perhaps even admirable,” but stated that remorse “is not sufficient to override the . . . verdict and sentence of the trial court and jury.”¹⁶⁴ In several cases, the governors did not find the remorse sincere.¹⁶⁵ In the case of Stanley Williams, for example, Governor Schwarzenegger’s decision denying clemency expressed doubt about the sincerity of Williams’ redemption.¹⁶⁶ Although Williams had written books against gang activity, the Governor raised questions about whether the writings in fact advocated violence.¹⁶⁷

158. Decision S. Williams, *supra* note 148.

159. Decision Siripongs–Davis, *supra* note 157.

160. Decision Siripongs–Wilson, *supra* note 118; Decision Babbitt, *supra* note 123; Decision Anderson, *supra* note 134; Decision Cooper, *supra* note 123; Decision S. Williams, *supra* note 148; Decision Morales, *supra* note 137.

161. Petition of Kevin Cooper at 49-53.

162. *Id.*

163. Decision Cooper, *supra* note 123.

164. Decision Siripongs–Davis, *supra* note 157.

165. Decision Rich, *supra* note 154; Decision Anderson, *supra* note 135; Decision S. Williams, *supra* note 148.

166. Decision S. Williams, *supra* note 148.

167. For example, the Governor’s decision referred to the dedication of a book by Williams called *Life in Prison*. The Governor commented that the inclusion of George Jackson, described as “a militant activist and prison inmate who founded the violent Black Guerilla Family prison gang,” in the dedication list was “a significant indicator that Williams [was] not reformed and that he still [saw] violence and lawlessness as a legitimate means to address societal problems.” Decision S. Williams, *supra* note 148.

h. Good adjustment to prison.

The petitioner's good behavior in prison and adjustment to prison life surfaced in six cases.¹⁶⁸ The petitioners argued that their exemplary conduct while incarcerated was evidence that they would not pose a danger to society if their death sentences were commuted to life without parole. Similar to the analysis of remorse or redemption, the governors viewed the good behavior in prison as commendable, but not particularly relevant to a determination of clemency. Governor Davis' comment in the case of Darrell Keith Rich is echoed in most of the other cases: Rich's model behavior was the "legitimate expectation from every prisoner" and "not sufficient to override the verdict in a capital case."¹⁶⁹

i. Other factors.

In the petition of Clarence Ray Allen, the petitioner raised his poor health and advanced age of seventy-six as reasons to grant a commutation.¹⁷⁰ Similar to the position on other life-changes while the petitioner is on death row, Governor Schwarzenegger declined to find that advanced age outweighed the decision by the jury that Allen deserved the death penalty for his crimes.¹⁷¹

Darrell Keith Rich raised as a clemency factor an anticipated moratorium on the death penalty. This argument was dismissed as irrelevant in Governor Davis' decision denying clemency.¹⁷²

An additional unusual factor arose in the case of Jaturun Siripongs, who was a citizen of Thailand. The Thai Ambassador to the United States made a plea for clemency on behalf of the Thai government and apparently offered to take custody of Siripongs and imprison him in Thailand.¹⁷³ Siripongs argued that clemency would further a strong diplomatic relationship with the government of Thailand.¹⁷⁴ The Thai Ambassador had apparently made a reciprocity argument, pointing out that the sentences of forty-nine American citizens in Thailand had been reduced by the Thai King.¹⁷⁵ Governor Wilson acknowledged that the Ambassador made "an eloquent and dignified plea for clemency on humanitarian grounds," but was not swayed to treat Siripongs differently on the basis of this factor.¹⁷⁶ In a related argument, Siripongs claimed that his rights under treaty and customary international law were

168. Decision Thompson, *supra* note 118; Decision Siripongs–Wilson, *supra* note 118; Decision Rich, *supra* note 154; Decision Anderson, *supra* note 135; Decision Beardslee, *supra* note 123; Decision Morales, *supra* note 137.

169. Decision Rich, *supra* note 154.

170. Decision Allen, *supra* note 137.

171. *Id.*

172. Decision Rich, *supra* note 154.

173. Decision Siripongs–Wilson, *supra* note 118.

174. *Id.*

175. *Id.*

176. *Id.*

violated when he was not told that he could contact the Thai consulate when he was arrested.¹⁷⁷ Both Governors Wilson and Davis rejected this ground, noting that there was no prejudice shown from any violation.¹⁷⁸

2. *Information About the Nature of the Crime, Recommendation of the BPH, Views of Family Members, and Views of Other Interested Persons*

In addition to rejecting the reasons for clemency raised by the petitioners, several additional factors played an important role in at least some of the decisions denying clemency: the facts and circumstances of the crime; the recommendation of the BPH; the views of the victims' families; and the views of other parties. One can see in the use of these factors a strong theme of retribution—just deserts for the crime.

a. *Facts and circumstances of the crime.*

Although some decisions are more detailed than others, they all describe the facts of the crimes that the petitioner committed. The facts always serve as an important element in deciding whether to grant mercy or whether the death penalty is the appropriate punishment for the crime. In most cases, the facts as presented portray a calculated and intentional crime, often with extreme viciousness and brutality. The summary of the facts is used both to provide a picture of the petitioner's actions and as support for a conclusion that death is the appropriate sentence. For example, in the case of Darrell Keith Rich, Governor Davis' decision begins by describing in detail the kidnap, rape, and murder of three women and a child, as well as other attacks on female victims. The conclusion returns to these facts as the Governor states:

Mr. Rich was a ruthless predator who terrorized the entire Shasta County community during the summer of 1978. Before his arrest, the community coined the name "Hilltop Rapist" to describe the serial killer who stalked, brutalized, and murdered local young women and a little girl.

The Honorable Warren K. Taylor, who presided at Mr. Rich's trial, observed, "The manner in which each of these victims was killed showed a complete lack of regard for human life and involved brutal, barbarous methods of killing." . . .

For these heinous crimes, the jury has meted out a severe and just punishment. That punishment has been affirmed by the state and federal appellate courts. Nothing in Mr. Rich's Petition or Reply, or in the submitted materials, has made a convincing case for clemency, and I find no reason to grant clemency.¹⁷⁹

177. *Id.*; Decision Sirirpongs–Davis, *supra* note 157.

178. *Id.*

179. Decision Rich, *supra* note 153.

b. Recommendation of the BPH.

As described above, it is within the Governor's discretion to seek input from the BPH. Governor Davis in the Babbitt, Rich, and Anderson cases, and Governor Schwarzenegger in the Beardslee case, directly stated that the Board had unanimously recommended a denial of clemency in support of its decisions.¹⁸⁰ In other cases, the governors indicated that they had considered the recommendation of the Board, but did not state the content of the recommendation.¹⁸¹

c. Views of the victims' families.

The victims' family members often give statements to the BPH or directly to the governors. In addition, the responding District Attorney's Office is likely to present victim impact statements as part of its clemency response. While the emphasis on the views of family members varies in the decisions, it appears that such views are important to the governors' decision-making processes. Governor Davis, for example, referred to the views of family members as a "key concern" and often quoted from family members' statements.¹⁸² In the case of Darrell Keith Rich, the clemency decision quoted a statement by the son of one of the victims, describing how difficult his life had been without his mother, and from a statement by one of the surviving victims, describing her continuing fear and panic attacks as a result of the crime.¹⁸³ In the case of Jaturun Siripongs, Governor Davis wrote that "[t]he views of the decedents' families are a key concern, since they are the ones who continue to suffer most as a result of these murders."¹⁸⁴ He concluded the clemency decision with a quote from the daughter of one of the victims:

My intention is not to seek revenge, but to see that justice is done and that this serves as an example for anybody who thinks that they can get away with committing such a serious crime. . . . Thank you very much for taking time to consider this matter and let me once again tell you how strongly I feel that clemency should not be granted. Governor Davis, I am pleading with you on behalf of my family members as well as myself to please do what is right so that my mother can finally rest in peace.¹⁸⁵

180. Decision Babbitt, *supra* note 123; Decision Rich, *supra* note 154; Decision Anderson, *supra* note 135; Decision Beardslee, *supra* note 123.

181. Decision Thompson, *supra* note 118 (refers to recommendation from BPT, but does not state what the recommendation was); Decision Siripongs–Wilson, *supra* note 118 (refers to BPT, but does not say what the recommendation was); Decision Siripongs–Davis, *supra* note 157 (refers to courts and BPT and generally states that "[e]ach and every one of these bodies has rejected the nearly identical arguments included in this plea for clemency.").

182. Decision Rich, *supra* note 154; Decision Siripongs–Davis, *supra* note 157.

183. Decision Rich, *supra* note 154.

184. Decision Siripongs–Davis, *supra* note 157.

185. *Id.*

Governors Wilson and Schwarzenegger were less likely to refer directly to the victims' family members in their decisions, but at times acknowledged their views. Clearly information about family members' views were included in the District Attorneys' responses to the petitions. For instance, in the case of Kevin Cooper, Governor Schwarzenegger commented that he had considered "the views of those who [would] be most impacted by [his] decision"—the family and friends of both the victims and the petitioner.¹⁸⁶

It should be noted that, even in the relatively few clemency petitions that have arisen in California, not all the victims' families are opposed to commutation. This information, too, is considered by the governors. While not ultimately persuasive to them, Governors Wilson and Davis, for example, noted in their decisions in the Siripongs case that the former husband of one of the victims supported clemency.¹⁸⁷

d. Views of other interested persons.

Governors receive letters and calls from various interested persons when a clemency petition is pending. These may include anti-death penalty groups, corrections officers or the warden, jurors from the trial,¹⁸⁸ international figures such as Sister Helen Prejean, actors or recording artists, and others. While the governors have not often referred to this information in their decisions, their legal affairs advisors have indicated that all such communications are included in their records of the case.

The source of information that appears to be most commonly considered in decisions is the view of the trial judge.¹⁸⁹ For example, in the Thomas Martin Thompson case, Governor Wilson wrote that he asked for the views of the trial judge who sentenced Thompson.¹⁹⁰ He quoted from the response in which the judge stated: "There is absolutely no basis for the granting of clemency . . . I can assure you that this case and this defendant belong to that special category for which the death penalty was intended."¹⁹¹ In other instances, governors have quoted from either the trial transcript or a written decision. For example, in the case of Clarence Ray Allen, Governor Schwarzenegger quoted the Ninth Circuit Court of Appeals as stating, "[I]f the death penalty is to serve any purpose at all, it is to prevent the very sort of

186. Decision Cooper, *supra* note 123.

187. Decision Siripongs–Wilson, *supra* note 118; Decision Siripongs–Davis, *supra* note 157.

188. See Decision Thompson, *supra* note 118 (referring to statements of seven former prosecutors and two jurors); Decision Siripongs–Wilson, *supra* note 118 and Decision Siripongs–Davis, *supra* note 157 (Governors Wilson and Davis refer to juror statements); Decision Anderson, *supra* note 135 (referring to three jurors supporting clemency).

189. See Decision Thompson, *supra* note 118 (view of trial judge requested by Governor); Decision Rich, *supra* note 154 (quoting from trial transcript); Decision Anderson, *supra* note 135 (quoting from trial transcript).

190. Decision Thompson, *supra* note 118.

191. *Id.*

murderous conduct for which Allen was convicted.”¹⁹² The significance of contrary views of the trial judge regarding clemency is also addressed. In the case of Michael Morales, Governor Schwarzenegger felt it necessary to acknowledge the trial judge’s support for clemency before indicating why he disagreed with it.¹⁹³

B. Pre-1976 Clemency Petitions

From 1893 through 1967, there were 500 executions and 106 commutations of death sentences in California. The chart in Section II.B, *supra*, indicates the distribution by governor. There is little reported information regarding the number of, or reasons for, denials of clemency, but there is some basic information on reasons for commutations, as grants of clemency had to be reported to the Legislature.

Among the few reported denials, there are five¹⁹⁴ from 1925-1926 (Governor Richardson) and four¹⁹⁵ from 1927-1928 (Governor Young). All of the cases involved murder charges. Similar to the denials of clemency in the modern era, the Governors emphasized the nature of the crimes, deference to the findings of the juries and courts, and a lack of evidence of insanity or other incapacity. Interestingly, there must have been significant press coverage of a couple of the cases because the Governors commented negatively on the pressure from the newspapers. Both Governors also reviewed cases in which petitioners had not done the actual killing and raised petitioners’ relative levels of culpability as a clemency issue. In each case, the Governor relied on the fact that California law assigned the same level of culpability to those who participated in felonies that resulted in death (felony-murder rule) as to the actual perpetrator.¹⁹⁶ Additionally, Governor Young described his clemency decision process in one decision, describing personally reviewing records and meeting with not only the attorney for one of the petitioners, but also the relatives of both petitioners.¹⁹⁷

Since grants of clemency must be reported to the legislature, there are many more records of commutations, reprieves, and pardons than of denials of

192. Decision Allen, *supra* note 137.

193. Decision Morales, *supra* note 137.

194. Although the denials involved five individuals, three of those individuals were co-defendants in the same crime. The cases were (1) Reid, (2) Ferdinand, Sears, and Geregac, and (3) Kels. Message of the Governor Regarding Acts of Executive Clemency, Cal. State Assembly Journal 46 (Jan. 9, 1925); Message from the Governor, Cal. State Assembly Journal 43, 46 (Jan. 4, 1927).

195. Message of Governor C.C. Young Regarding Acts of Executive Clemency, Cal. State Assembly Journal 121 (Jan. 10, 1929) (Two of the four were co-defendants. The cases were (1) Arnold and Sayer, (2) Vukich, and (3) Kelly.)

196. *Id* (Young); Message of the Governor Regarding Acts of Executive Clemency, Cal. State Assembly Journal 46 (Jan. 9, 1925); Message from the Governor, Cal. State Assembly Journal 43, 46 (Jan. 4, 1927) (Richardson).

197. Message of Governor C.C. Young, *supra* note 125 (Arnold and Sayer cases).

such petitions. The details of why clemency was granted vary tremendously in the record. Some reports barely state that a death sentence was commuted to life without parole while others describe the case and reasoning in detail. Most commutations, however, indicate who recommended clemency and indicate the influence that trial judges, jurors, politicians and other notable figures had on the decision maker. We have the most information about the commutations granted by Governor Pat Brown due to his book: *Public Justice, Private Mercy*.¹⁹⁸

What factors led governors to grant, rather than deny, clemency?¹⁹⁹ The dominant reasons include doubt about guilt, mental illness or infirmity at the time of the crime or subsequently while on death row, and the young age of the petitioner.²⁰⁰ Often, governors stated the trial judge, the district attorney, the jurors, the State Advisory Board of Pardons, or a combination thereof, recommended clemency. For example, in one of the earliest reported commutations by Governor Stanford in 1862, he indicated doubt about defendant's motive and intent, as expressed by the trial judge, a majority of the jurors, and other citizens, and further cited the defendant's young age of nineteen.²⁰¹ In 1941, Governor Olson commuted a death sentence on the grounds the petitioner was old and ill, there were doubts about guilt, and the Advisory Pardon Board recommended a commutation.²⁰²

The last commutation of a death sentence occurred in 1967 when Governor Reagan commuted the death sentence of Calvin Thomas, who was on death row for having set fire to his girlfriend's house, resulting in the death of her three-year old child. The report to the legislature is not detailed, but does indicate that justices (the number is not stated, but it had to have been at least four) of the California Supreme Court recommended commutation. From other sources, it is clear that the reason for commutation was Thomas' low level of mental capacity.²⁰³ Testing occurred after Thomas was on death row that indicated epilepsy and brain damage such that there were questions about his mental functioning.²⁰⁴

198. Brown, *supra* note 110.

199. It is interesting to note that reprieves were far more common in the early years in California than they are now. Many of them were granted in order to allow time for investigation for the consideration of clemency.

200. Although less frequent, other reasons include the non-homicide nature of the crime, use of alcohol, ineffective assistance of counsel, and inequity due to a co-defendant receiving a lesser sentence.

201. Commutation of Sentence, Appendix to Governor's Message, Cal. State Assembly Journal 71 (Jan. 7, 1863).

202. Message of Governor Concerning Pardons, Commutations and Reprieves Granted by Governor Culbert L. Olson for Period 1941-1943, Cal. State Assembly Journal 265 (1943).

203. See, e.g., John H. Culver & Chantal Boyens, *Political Cycles of Life and Death: Capital Punishment as Public Policy in California*, 65 ALBANY L. REV. 991, 997-98 (2002); Interview with Edwin Meese, Legal Affairs Secretary to Governor Ronald Reagan, 1967-1968, February 21, 2008.

204. *Id.*

During the administration of Governor Pat Brown, twenty death row sentences were commuted, and thirty-five death row inmates were executed.²⁰⁵ Because of the volume of commutations and executions, and because Governor Brown wrote a book²⁰⁶ that described the deliberations and reasoning, we have more insight into the process of his administration than that of any other predating 1976.

Immediately upon taking office in 1959, Governor Brown was faced with a clemency decision in the case of John Crooker. Governor Brown commuted Crooker's death sentence to life without parole and later, in 1966, commuted the sentence to life imprisonment, which made Crooker eligible for parole.²⁰⁷ Crooker was a UCLA law student who murdered a wealthy woman in what Governor Brown viewed as a heat of passion, rather than calculated, crime. He had no record, had given a confession that was possibly involuntary, and had suffered a deteriorating mental illness with delusions and hallucinations while on death row.²⁰⁸

Governor Brown conducted his own hearing in Crooker's case in his office. Present at the same time were Crooker's attorney, Crooker's sister, a psychiatrist, and members of the press. The District Attorney's Office could have also had a representative there, but chose to send a written statement instead of appearing in person.²⁰⁹ Thus, unlike the proceedings in recent times, the hearing involved presentations by the attorneys, and the presence of both parties and the press before the Governor himself. Governor Brown indicated in his book that this was the procedure used in all cases.²¹⁰

In reviewing the description of the cases in Governor Brown's book and based on interviews we conducted, some of the most compelling reasons Governor Brown cited in his decisions to grant clemency were mental illness or brain damage, mental retardation, geographic disparity in rates of capital convictions, capital punishment for non-homicide crimes, unplanned murders, and disparity in sentence compared with the sentence of a co-defendant. Recommendations from the clemency secretary, the trial judge, the district attorney, and the warden also played an important role.²¹¹ In at least some of the cases involving two-time felons, Governor Brown also contacted the Chief Justice of the California Supreme Court in advance to see if he would have the

205. As noted earlier in Section II.B, above, there are some discrepancies in the numbers of commutations and executions during Governor Brown's administration. The number of commutations sometimes is documented as twenty-three and the number of executions is sometimes documented as thirty-six.

206. Brown, *supra* note 110.

207. Brown, *supra* note 110, at 14, 19.

208. *Id.* at 6-8, 10.

209. *Id.* at 11.

210. *Id.*

211. While Governor Brown relied on these recommendations, he also made decisions in disagreement with those recommendations at times.

four votes necessary to commute.²¹² In general, Governor Brown weathered political pressures and unfavorable press in making his decisions. In one notable exception, Governor Brown states, self-critically, a case in which he denied clemency in part because he thought granting it might jeopardize the passage of a farm workers minimum wage bill.²¹³

Governor Brown's book looks not only at reasons to grant clemency, but also his reasons to deny clemency, most notably in the case of Caryl Chessman. Governor Brown granted a reprieve to Chessman at one point in order to give the Legislature time to consider a moratorium on the death penalty.²¹⁴ When the Legislature rejected a moratorium, Chessman's execution went forward. Among the reasons that Governor Brown gave for denying a commutation were the lack of remorse by Chessman and the lack of four votes from the justices of the California Supreme Court.²¹⁵ Other reasons to deny clemency included the cold-blooded, planned nature of the crime, the lack of significant mental illness or disturbance, and the recommendations against clemency from the clemency secretary, the trial judge, and the district attorney.²¹⁶

VI. APPROACHES IN OTHER STATES

Up to this point, we have focused on the clemency process in California. In order to consider alternatives or modifications to the California procedure, it is useful to know how other states handle clemency petitions. The Death Penalty Information Center has identified five categories of clemency procedures.²¹⁷ The categories are: (1) decision by Governor acting alone; (2) decision by Governor conditioned upon a recommendation by a Board in order to grant clemency; (3) decision by Governor alone with required advisory decision from a Board; (4) decision by a Board alone; and (5) decision by a Board with the Governor sitting as a member of the Board. California is listed in the first category, because its state Constitution places the power to grant clemency exclusively in the Governor's hands. However, among the states listed in this category, California is unique. No other state requires, as California does, the concurrence of a majority of state supreme court justices to grant clemency in a situation where the inmate is a twice-convicted felon.²¹⁸

Since each state has its own procedures and nuances with respect to the review and reporting of clemency decisions, an examination of the details of clemency procedures in every state would be impractical and not particularly

212. See, e.g., Brown, *supra* note 110, at 34, 49 (discussion of the *Chessman* case), 152 (discussion of the *Bates* case).

213. *Id.* at 72, 83-84.

214. *Id.* at 40.

215. *Id.* at 47.

216. *Id.* at 34, 36, 49.

217. See Death Penalty Information Center, *Clemency*, *supra* note 13.

218. See CAL. CONST. art. V, § 8(a).

illuminating. However, it does seem relevant to examine at least one state in each category and to consider the scope and source of authority for the clemency power across different state systems. To give a manageable picture, we have selected one state from each category—North Carolina, Ohio, Georgia, Texas, and Nevada—as a sample and have compared the systems, the percentages of capital clemencies granted under each system, and the role of the various branches of government in the process.

A. *Decision by Governor Alone: North Carolina*

Executions: 43

Commutations: 5

In the modern era, North Carolina has executed forty-three people since 1984 and granted five commutations.²¹⁹ Like California, North Carolina has a system in which the Governor is authorized by the state constitution to “grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons.”²²⁰ Similar to the advisory BPH in California, the North Carolina Governor may gain assistance in making clemency determinations from the Post-Release Supervision and Parole Commission (PRSP Commission).²²¹ The Commission was created by legislative enactment, but is made up of three members appointed by the Governor who serve at the pleasure of the Governor.²²² The role of the PRSP Commission appears to be determined by each governor, although it seems that matters decided by the Commission must be by majority vote of the full Commission.²²³

Governors in North Carolina also may use the services of the Office of Executive Clemency in the process of making a decision on commutation or parole. The OEC is part of the Governor’s office and is charged with performing investigations of clemency applications, notifying victims of crimes and their families when a defendant has filed an application for clemency, and presenting the Governor with all information he or she requires to make an informed decision.²²⁴ This is similar to the work of the investigative unit of

219. See Death Penalty Information Center, *Clemency*, *supra* note 13.

220. N.C. CONST. art. III, § 5(6).

221. N.C. GEN. STAT. § 143B-266 (2007).

222. *Id.*

223. David R. Dow, et al., *Is it Constitutional to Execute Someone Who is Innocent (And if it Isn't, How Can it be Stopped Following House v. Bell)?*, 42 TULSA L. REV. 277, 368-369 (2006).

224. *Id.* at 369; N.C. Office of Executive Clemency, <http://www.doc.state.nc.us/clemency> (last visited Apr. 1, 2009) (The OEC must notify victims’ families and collect and present written statements from these individuals, as North Carolina permits victims and their families to submit written statements to the Governor when a defendant has applied for a pardon or a commutation. As of February 23, 2008 there were eighteen people with pending applications for commutations, although none were capital cases, and about 240 applications for pardons.)

BPH in California, but in North Carolina, the investigative unit is part of the Governor's office. The process in North Carolina is also similar to California's in that it does not appear to require that clemency and pardon decisions be written.

*B. Decision by Governor to Grant Clemency Conditioned Upon
Recommendation by Board: Texas*

Executions: 405

Commutations: 2

Texas has more executions per year and has more total executions in the modern era than any other state. Since 1976, Texas has executed 405 people and granted two clemencies.²²⁵ In the Texas clemency system, there is a Board of Pardons and Paroles similar to the BPH in California. In Texas, however, the Board plays a much stronger role in the clemency process than does BPH. Texas requires that, in order to grant clemency, the Governor must have the recommendation of a majority of the Board.²²⁶ Without the recommendation of the Board, a governor on his or her own may grant one reprieve of up to thirty days, but may not grant further reprieve, commutation or pardon without Board approval.²²⁷ The Board of Pardons and Paroles is constitutionally mandated, but the criteria for membership of the Board are established by statute.²²⁸ The seven members of the board are appointed by the Governor, with the advice and consent of the State Senate, for six-year terms. These terms are staggered, with one-third of the members' terms expiring every two years.²²⁹

Another difference between California and Texas is the statutory specification of the basic procedures and deadlines that a petitioner must meet. These procedures and timelines in California are set by each governor or by BPH if they are holding a hearing. The Texas administrative code specifies that, after a death warrant has issued, an inmate may file an application for a reprieve and/or a commutation with the Governor.²³⁰ The application for a reprieve must be delivered to the Board of Pardons and Paroles no later than twenty-one days before the scheduled execution, and all submissions on behalf

225. Death Penalty Information Center, *Clemency*, *supra* note 13 (The Death Penalty Information Center records only those clemencies granted for humanitarian reasons. Clemencies granted as the result of judicial efficiency are not included. People freed as a result of innocence are reported separately on the website and do not appear on the clemency chart.)

226. TEX. CONST. art. IV, §11.

227. *Id.*

228. TEX. GOVT. CODE §§ 508.031–508.033 (2008).

229. *Id.*; see also Dow, *supra* note 223, at 387.

230. TEX. ADMIN. CODE tit. 37, §143.43 (2006) (outlining procedures for applying for a reprieve); TEX. ADMIN. CODE tit. 37, §143.57 (2006) (outlining the procedures for applying for a commutation).

of the inmate must be filed fifteen days before the execution.²³¹ Unlike California, in Texas the petitioner is able to request an interview with a Board member. If granted, the interview takes place at the prison with only the inmate, Board member, and staff of the Texas Department of Criminal Justice present.²³² Subsequent to the interview, the Board may consider the inmate's statements in formulating its recommendation. Although the Board is an essential part of the clemency process, the Texas Board is not required to meet to deliberate, although it has the discretion to schedule a public hearing at which trial officials, the victim's family, advocates for and against the death penalty, and members of the public may present information.²³³ Unlike the confidential recommendation of the advisory BPH in California, the Texas Board's decision must be made and announced in an open meeting.²³⁴ Litigation challenging the Texas Board in recent years suggests that, although there exists a possibility for the Board to conduct interviews, hold hearings and meet together to deliberate, these processes rarely, if ever, occur in practice.²³⁵

The Texas Governor is not obligated to grant clemency based on the Board's affirmative recommendation, but may do so if clemency is recommended by the majority vote.²³⁶ In one example, the Board of Pardons and Paroles voted five to one²³⁷ to commute the death sentence of Kelsey Patterson, a mentally ill inmate, but Governor Rick Perry turned down the recommendation, and Patterson was executed in May 2004.²³⁸

In Texas, although the decision of the Board of Pardons and Paroles must be announced at an open meeting, it does not appear that the Governor must issue written reasons for denying or granting a request for clemency as is the case in both California and North Carolina.

*C. Decision by Governor Alone but Required Advisory
Recommendation by Board: Ohio*

Executions: 26

Commutations: 10

Since Ohio re-enacted its death penalty statute in 1981, there have been

231. Dow, *supra* note 223, at 388.

232. *Id.*; see also TEX. ADMIN. CODE tit. 37, §143.43 (2006).

233. Dow, *supra* note 223, at 388-90.

234. *Id.*

235. *LaGrone*, 2003 U.S. App. LEXIS 18150 (determining that since 1972 there had been only one live capital clemency hearing in Texas, board members regularly voted by facsimile and there had been no mercy commutations, but that the system nonetheless did not violate the due process rights of a condemned inmate); *Tex. Board of Pardons and Paroles v. Williams*, 976 S.W.2d 207 (Tex. Crim. App. 1998) (finding that the Texas Board kept no records of Board actions and gave no reasons for its actions but nonetheless satisfied due process requirements).

236. TEX. CODE CRIM. PROC. ANN. art. 48.01 (Vernon 2006)

237. One of the seven positions on the Board was vacant at the time.

238. Ralph Blumenthal, *Governor Commutes Sentence in Texas*, N.Y. TIMES, Aug. 31, 2007, at A14.

twenty-six executions and ten commutations. While the Ohio Governor has authority to grant a reprieve, commutation, or pardon, except in cases of treason or impeachment, state law requires that the Ohio Parole Board, which is part of the Adult Parole Authority (APA), provide a recommendation to the Governor on all applications for clemency.²³⁹ At first blush, the constitutional and statutory provisions of Ohio appear to be very similar to those of California. However, unlike the discretionary use of BPH in California, the Adult Parole Authority is statutorily obligated to investigate all applications for clemency at the direction of the Governor.²⁴⁰ The Ohio statute also requires the Adult Parole Authority to gather information and submit in writing a summary of the facts of the case, as well as a recommendation on the granting or denying of clemency and the reasons for the recommendation.²⁴¹

In Ohio, the clemency process in a capital case is technically commenced with an application to the APA. However, as a practical matter, the APA will commence its investigation as soon as the Ohio Supreme Court has set a date for execution.²⁴² The Governor is empowered to grant a reprieve for a definite period of time without awaiting an application. Further, the extensive notice requirements to victims' families and other interested parties that are contained in the Ohio Code may be sidestepped if the Governor seeks to grant a short reprieve.²⁴³

The requirements for appointment to the Ohio Parole Board, operating under the direction and control of the APA, are complex and much more specific than the requirements for the Commissioners in California's BPH. According to statute, the Board may consist of up to twelve members.²⁴⁴ All members of the Board must be qualified through education or experience in correctional law, and at least one member must represent a victims' rights organization or be a family member of a victim.²⁴⁵ The Board may transmit a recommendation to the Governor on majority vote.²⁴⁶

A December 2007 Associated Press article, published in numerous Ohio newspapers, noted that Governor Ted Strickland had not used his power of executive clemency to issue a pardon or commute a sentence in his first year of office,²⁴⁷ although he had issued reprieves in three death penalty cases.²⁴⁸

239. OHIO CONST. art. III, § 11; OHIO REV. CODE ANN. § 2967.03 (2008); OHIO ADMIN. CODE § 5120:1-1-15.

240. OHIO REV. CODE ANN. § 2967.07 (2008).

241. *Id.*

242. ABA DEATH PENALTY MORATORIUM & IMPLEMENTATION PROJECT, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report*, at 49 (2007), available at <http://www.abanet.org/moratorium/assessmentproject/ohio/final-report.pdf>.

243. *Id.*

244. OHIO REV. CODE § 5149.10(A) (2008).

245. OHIO REV. CODE § 5149.10(B) (2008).

246. OHIO REV. CODE § 5149.10(A) (2008).

247. The Associated Press State & Local Wire, *Strickland Has Not Used Clemency Power*

Quoting the Governor's chief legal counsel, the article stated that the Governor had instituted a new review process in which he first would review petitions without the input of his advisors and then would consider the recommendations of his staff, the Ohio Parole Board, judges, victims and other interested parties.²⁴⁹ Governor Strickland's system of review illustrates the flexibility of the Ohio clemency process, despite its many statutory and regulatory requirements.

In addition to the requirement that the APA submit a written recommendation to the Governor concerning clemency applications, Ohio law, like California's, also requires the Governor to report all grants of reprieves, commutations and pardons to the Legislature at every regular session.²⁵⁰ These reports are generally provided biennially and in writing.²⁵¹

D. Decision by Board Alone: Georgia

Executions: 40

Commutations: 6

Georgia's clemency process is quite different from California's as it is a process in which executive clemency is granted or denied solely through an appointed Board. The Governor has no authority to grant reprieves, commutations or pardons.²⁵² The Georgia Constitution creates the State Board of Pardons and Paroles and the Governor, with confirmation by the State Senate, must appoint five members to sit on this Board for renewable seven-year terms.²⁵³ Georgia's Board has granted clemency six times in the modern era. Since its first modern era execution in 1983, forty inmates have been executed.²⁵⁴

Death row inmates who wish to apply for commutation must submit a written application to the State Board of Pardons and Paroles.²⁵⁵ The Board then decides whether to consider the application after it appears that all court

During First Year of Office, Dec. 16, 2007.

248. He later denied clemency in all three of those cases and the inmates were executed. Office of the Governor, Statement Regarding Executive Clemency Request of Kenneth Biros, Mar. 16, 2007, *available at* <http://governor.ohio.gov/Default.aspx?tabid=203>; Office of the Governor, Statement Regarding Parole Board Recommendation for James Filiaggi, Apr. 19, 2007, *available at* <http://governor.ohio.gov/Default.aspx?tabid=248>; Office of the Governor, Statement Regarding Parole Board Recommendation for Christopher Newton, May 21, 2007, *available at* <http://governor.ohio.gov/Default.aspx?tabid=264>.

249. Associated Press, *supra* note 247.

250. OH. CONST. art. III, § 11.

251. Ohio Department of Rehabilitation and Correction, *Clemency Report*, <http://www.drc.state.oh.us/web/Reports/reports17.asp> (last visited Feb. 24, 2008).

252. GA. CONST. art. IV, § II.

253. GA. CONST. art. IV, § II(2)(a); GA. CODE ANN. §42-9-2 (1997).

254. Death Penalty Information Center, *State by State Information*, *available at* <http://www.deathpenaltyinfo.org/state/> (last visited Apr. 6, 2009).

255. GA. COMP. R. & REGS. 475-3-.10(1)(a) (2009).

proceedings have concluded or seventy-two hours before the execution date even if court proceedings continue. The Board may suspend a sentence for up to ninety days to review an application.²⁵⁶ The Board may or may not conduct a hearing in the process of review.²⁵⁷

The Georgia statute directs the Board to obtain as much information as possible about the inmate who has applied for clemency. This information must include: (1) a statement of the crime for which the inmate is sentenced, the circumstances of the crime, and the inmate's sentence; (2) the name of the court in which the inmate was sentenced; (3) the term of his/her sentence; (4) the name of the presiding judge, the prosecutors, the investigating officers, and defense counsel; (5) a copy of the presentence investigation and any previous court record; (6) a fingerprint record; (7) a copy of all probation reports that may have been made; and (8) any social, physical, mental or criminal record of the person.²⁵⁸ Although California does not specify that the same information must be collected, the investigation by BPH includes this type of information. The Georgia statute also requires that the Board keep records of all people who contact the Board on behalf of an inmate and submit a written report of all its activities to the Governor, the Attorney General and all members of the General Assembly each year.²⁵⁹

E. Decision by Board Alone, but Governor is Member of the Board: Nevada

Executions: 12

Commutations: 1

In Nevada, the decision-makers for clemency are the Governor, Attorney General and the Justices of the Supreme Court, sitting together as the State Board of Pardons Commissioners. Thus, the Governor has a role, as in California, but is only one member with one vote on a clemency board. The State Board of Pardons has the power to remit fines and forfeitures, commute punishments and grant pardons, except in cases of treason or impeachment. The Board cannot, however, commute a sentence of death or life imprisonment without parole to a sentence allowing parole.²⁶⁰ Since 1976, Nevada has executed twelve people and the Board has granted one commutation.

Applications for commutation or pardon are made to the Board and, at least thirty days before the Board meets to consider any application, it must notify the district attorney and the district judge in the county of conviction and invite them to submit written recommendations and testify at the hearing.²⁶¹ Nevada also requires notification of victims and victims' families, if they elect

256. *Id.*

257. *Id.*

258. GA. CODE ANN. § 42-9-41 (2008).

259. GA. CODE ANN. §§ 42-9-18 & 42-9-19 (2008).

260. NEV. CONST. art. 5, § 14.

261. Dow, *supra* note 223, at 363.

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to be notified.²⁶² It appears that these notifications may be waived for applications for commutation of the death penalty.²⁶³

Although in Nevada the Board conducts semi-annual meetings to consider commutations and may schedule hearings at other times, it also appears to be within the discretion of the Board to decide a matter without a hearing.²⁶⁴ In the event of a death sentence commutation, the Board must issue a written statement including the name of the person whose punishment is commuted, the time and place of conviction, the amount, kind and character of punishment substituted, and the place where the remaining punishment will be served.²⁶⁵

F. Comparisons

Because there are so many variables in each individual petitioner's case, it is hard to draw any conclusions from this sample. For comparison purposes, however, the statistics on executions and commutations since 1976 in our sample states are:

Type of Process	Executions	Commutations
Governor Alone (NC)	43	5
Governor with Recommendation of Board to Grant (TX)	405	2
Governor with Required Use of Board but not Required Recommendation of Board (OH)	26	10
Board Alone (GA)	40	6
Board Alone but Board Includes Governor (NV)	12	1

For a chart showing the ratio of commutations to executions for all states in each of the five categories, see Appendix B.

From the sample of only five states, it would appear that the third category, decision by Governor with required use of a Board but not required recommendation of the Board to grant clemency, yielded the highest number of commutations compared to executions. We would be hesitant, however, to

262. *Id.* at 363-64; *see also* NEV. REV. STAT. ANN. §213.010 (2007).

263. NEV. STAT. ANN. § 213.030 (2007).

264. NEV. STAT. ANN. § 213.010 (2007).

265. NEV. STAT. ANN. § 213.080 (2007).

conclude on the basis of such a sample that the variations of the systems employed by these states have a significant effect on the likelihood or frequency with which clemency is granted in capital cases. While Ohio has a higher percentage of commutations to executions than the other sampled states, eight of those commutations were part of an end-of-term series of commutations that took place in Ohio in 1991 when Governor Celeste was leaving office. A governor could not take such an action in Texas, which requires the Governor to have the approval of the Board, or Nevada or Georgia where the Board is the decision maker. Apart from that single instance of multiple clemencies, Ohio has a rate of granting clemency similar to the other states sampled.²⁶⁶

In an article published in 2006, Professors Carol and Jordan Steiker categorized all death penalty states as falling into two categories: executing states and symbolic states. “Executing” states are those states that actively executed those penalized to death while “symbolic” states are those states that retain the death penalty, but largely refrain from using it.²⁶⁷ The authors identify Texas as the prime example of an executing death penalty state and California as the prime example of a symbolic death penalty state.

In the short portion of the article devoted to capital clemency, they discuss factors that have led to the reduced use of clemency in the death penalty process and note that while executing states are perhaps using clemency more than symbolic states, neither category of state is using it much.²⁶⁸ In the thirty years since most states re-enacted their death penalties, very few governors or boards have used the clemency power with the ease that pre-*Furman* executives did. Perhaps because of a reality, or perception, that narrow death penalty statutes and additional layers of judicial review relegate executive clemency to a last resort in truly unique situations, executives across the country, whether sitting with boards or without them, use the power exceedingly sparingly.

VII. MODIFICATIONS OF THE CLEMENCY PROCESS

In addition to the models of executive clemency used in other states as set forth in Section VI, this section is a description of recommendations, suggestions, and arguments for modifying typical clemency procedures. In this section, we are not attempting to evaluate the strengths or weaknesses of these ideas. Rather, this section provides an overview of what has been proposed by the American Bar Association (“ABA”) and academic commentators, and

266. It should also be noted that while Governor Celeste commuted eight sentences at the end of his final term, he did not engage in a mass commutation. He left large numbers of people on death row, and Ohio presently has 186 people under death sentence in the state.

267. Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869 (2006).

268. *Id.* at 1906-08.

compares those proposals with the practice in California. In our final section on Recommendations, we will make a few suggestions based on our evaluation of the California process.

The critiques and suggestions from the ABA and the academic literature described here are based on the goals of mercy and correcting miscarriages of justice that arise out of the judicial process. Suggestions in the academic literature for modifying clemency fall roughly into two categories: (1) procedural and substantive standards and (2) insulation from political pressures. The ABA's comprehensive efforts are first described below, followed by a discussion of both standards and political pressures.

A. ABA Projects on Clemency

The ABA has provided suggestions on improving clemency procedures in two contexts: the Kennedy Commission and the Death Penalty Moratorium Project. The Kennedy Commission was set up in response to Justice Kennedy's strong remarks at the 2003 annual meeting of the ABA. In that address, Justice Kennedy called for renewed attention to post-conviction matters, including sentencing, corrections, prisons, and clemency. Regarding the "pardon power," Justice Kennedy stated: "The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy."²⁶⁹

Professor Stephen Salzberg chaired the Commission that ultimately generated proposed resolutions in four areas, one of which was commutation, elimination of collateral disabilities and restoration of rights.²⁷⁰ While the focus of the Commission's research was largely noncapital cases, it is still noteworthy that they considered the clemency function to have atrophied. They found that, in general, the pardoning power decreased in use after 1990.²⁷¹ They also found that the clemency power was more likely to be used in states where the decision maker was the most protected from political fallout.²⁷² The resolutions included one that urged the establishment of "standards governing applications for executive clemency" and the specification of "procedures that an individual must follow in order to apply for clemency."²⁷³ The report does not, however, give details about either proposed standards or procedures, so it is unclear exactly what the Commission contemplated. One theme of the

269. ABA JUSTICE KENNEDY COMMISSION, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES, 3 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> [hereinafter "ABA Kennedy House Report"].

270. *Id.* at iv.

271. *Id.* at 66-71.

272. *Id.* at 70-71. (The report explains that a greater number of pardons are granted in states where the authority rests in an independent board rather than with the Governor.)

273. *Id.* at 64.

Commission was accessibility of the process, so specifying procedures would assist that effort. Another theme was to increase the use of clemency for “exceptional circumstances,” including “old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering.”²⁷⁴

The second ABA effort, by the Death Penalty Moratorium Project, specifically targeted clemency in capital cases. On October 29, 2007, the American Bar Association’s Death Penalty Moratorium Implementation Project (“ABA Project”) issued an “Assessment Guide” for collecting information and evaluating a state’s death penalty process.²⁷⁵ The ABA Project itself conducted assessments of eight states (Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee) and also published “Key Findings” from these assessments. In the Key Findings, there was an emphasis on the importance of clemency and identification of three observations that emerged from the Project’s evaluation of the eight states. Those observations or themes were:

[(1)] Most states fail to require any specific type or breadth of review in considering clemency petitions;

[(2)] Most states do not require the clemency decision-maker to explain the reasons why clemency was or was not granted; and

[(3)] Very few states require that the clemency decision-maker meet with the petitioning inmate and/or the inmate’s counsel.²⁷⁶

Building on these three themes, the ABA Project made eleven recommendations. The first five relate to what should be considered in a clemency process.²⁷⁷ The next two recommend representation of the inmate by counsel and adequate time and resources to investigate.²⁷⁸ The eighth and ninth recommendations are that proceedings should be conducted in public, presided over by the decision maker, and if there are multiple persons responsible for the decision, each should have an in-person meeting with the petitioner.²⁷⁹ The tenth recommendation suggests education of both the decision makers and the general public about the nature of clemency.²⁸⁰ The final recommendation, and perhaps the most difficult one to implement, is to insulate the decisions as much as possible from political pressures.²⁸¹

274. *Id.*

275. See ABA, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES, available at <http://www.abanet.org/irr/finaljune28.pdf> (describing the factors in the Protocol that became the Guidelines) [hereinafter “ABA Guide”].

276. ABA DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT, STATE DEATH PENALTY ASSESSMENTS: KEY FINDINGS, available at <http://www.abanet.org/moratorium/assessmentproject/keyfindings.doc>.

277. *Id.*; See also ABA Guide, *supra* note 275.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

B. Procedural and Substantive Standard Recommendations

The procedures that were emphasized in the ABA Project's recommendations were representation by counsel, with adequate time and investigative resources, and a hearing conducted by the decision maker(s) in public. Some of the academic literature echoes these suggestions and some goes further in proposing greater procedural guarantees. In the period after the Supreme Court emphasized the role of clemency in resolving miscarriages of justice in *Herrera v. Collins* (1993) and before the Supreme Court found only a minimal guarantee of due process in capital clemency in *Woodard* (1998), some writers suggested that there should be procedural guarantees similar to judicial hearings. For instance, there were arguments in favor of a right to a hearing, the opportunity to introduce evidence, cross-examining witnesses, as well as the right to counsel, a statement of reasons for a denial, and a right to judicial review of the procedures followed.²⁸² Post-*Woodard*, suggested procedures have included providing notice of factors that would be considered in clemency, providing counsel, providing adequate investigative resources for counsel, allowing the inmate to rebut evidence presented by the state, and requiring a statement of reasons for a denial.²⁸³

It is unlikely that most, or any, of these procedures are mandated by the Due Process Clause of the Fourteenth Amendment, given the limited due process interest recognized in *Woodard*. The Kennedy Commission report, which recommended establishing standardized procedures for the clemency process, is aimed at legislatures. Establishing and publishing set procedures is not without controversy. One commentator has argued against a requirement to state reasons for granting clemency on the ground that such a requirement might inhibit granting clemency out of fear of setting a precedent for other cases.²⁸⁴ Others have suggested that any regularized process would be likely to create additional litigation over whether those procedures had been followed correctly in a process that has been historically insulated from judicial oversight.²⁸⁵

In California, some of the concerns about procedures are already covered.

282. Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 224-26 (1993); Daniel Lim, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 COLUM. J.L. & SOC. PROBS. 47, 72-78, 81 (1994); Stephen E. Silverman, *There is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 ARIZ. L. REV. 375, 395-97 (1995).

283. Dinsmore, *supra* note 12, at 1853-54 (proposing that state legislatures should pass procedural guidelines); ABA Kennedy House Report, *supra* note 269, at 71-75.

284. Daniel T. Kobil, *Should Clemency Decisions be Subject to a Reasons Requirement?* 13 FED. SENT'G REP. 150 n.19 (2002) (providing an example of how a commutation of a death sentence might be denied where the inmate has a compelling case of mental illness out of fear that every mentally ill inmate would then seek clemency on that ground).

285. Brian Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 638 (2001).

For instance, there are statutory provisions related to appointment of counsel and provision of resources.²⁸⁶ It has been the practice, even though not mandated, that the Governor issue a statement of reasons for a denial of clemency. Although not legislatively required, the practice is to consider all information that is presented and specifically to consider the extensive compilation of information from the investigative unit of BPH or from the hearing, if there is one. Judge Janice Rogers Brown, former Legal Affairs Secretary to Governor Wilson, described the process which was followed in the Wilson administration and, from the descriptions we received, was generally followed in other administrations as well. She wrote that,

[A] minimally adequate review entails:

1. A review of the existing written record which will in every case include the complete trial transcript, the investigative reports of the Board of Prison Terms, the prisoner's complete prison file, the pleadings, transcripts, and decisions in all direct and collateral appeals;
2. A review of all written and taped submissions from proponents or opponents of the clemency request;
3. An independent review of pertinent literature;
4. An independent review of any expert opinions offered;
5. Independent discussions with custodial and mental health staff who have observed the prisoner during incarceration; and
6. Independent review of any other relevant source materials or discussions with other appropriate individuals.²⁸⁷

Of the factors that Judge Brown lists, most of the Legal Affairs Secretaries indicated that they and/or the Governor reviewed the entire written record from the courts and BPH; all submissions from those in favor of or against clemency; and any materials submitted by the parties, such as new expert reports. No Secretary indicated he or she reviewed pertinent literature or had independent discussions with custodial and mental health staff, although information from the latter would have been considered by all administrations in their processes.

Some of these procedures, however, are not followed on a regular basis in California. For example, some governors have met with the inmate's counsel while others have not. In some circumstances, there have been public hearings before the BPH while in other cases, there were no such hearings. It should also be noted that, even if there is a public hearing before the BPH, it is not a hearing before the actual decision maker as suggested by the ABA Project. While the BPH and Governor's Office have generally been receptive to any evidence that the petitioner, District Attorney, and others wish to present, there

286. CAL. GOV'T CODE § 68661(a) (West 2008).

287. Brown, *supra* note 35, at 332 n.19.

is no practice of establishing a list or guidelines on reasons for granting clemency. In fact, the one time that BPH arguably tried to limit what petitioner presented at a hearing, a lawsuit ensued when the petitioner believed that he had been misled about what the Board would consider.²⁸⁸

The substantive criteria that the ABA Project recommends should be considered by the decision maker include the facts and circumstances of the crime, factors that affect whether death is the appropriate punishment, patterns of racial or geographic disparity (including racially-based exclusion of potential jurors), serious mental illness, lingering doubt about guilt, and rehabilitation or significant positive acts while on death row. The ABA Project does not take a position on whether these factors should be published or otherwise established by law. Nor does the ABA Project indicate the weight that should be given to any of the factors. The Kennedy Commission recommends the “establishment of standards,”²⁸⁹ but similarly does not explain precisely what mechanism is envisioned, such as legislative or executive action.

Academic writers have differed in their views on substantive standards for clemency. Some argue for substantive guidelines that would assist petitioners and the executive.²⁹⁰ Others argue that the function of clemency is better served by not attempting to list substantive factors because there are other possible unforeseen bases for clemency that could arise in future cases that would be excluded from consideration.²⁹¹ In their view, this would defeat the purpose of clemency as the final fail-safe to consider any factor that might warrant mercy.

In California, as stated above, we found that all of the Legal Affairs Secretaries interviewed indicated that they would consider anything presented to them by the petitioner, the District Attorney’s Office, or other interested parties. It is clear from reading the decisions denying clemency since 1992 that the governors considered mental illness or disorders, doubts about guilt, rehabilitation and good behavior on death row, although in no case were these factors sufficient to warrant a commutation. Governors also routinely considered the facts and circumstances of the crime, although perhaps not as an “independent consideration of facts and circumstances” as the ABA recommendations provide.²⁹² If the ABA recommendation are interpreted to mean a clemency decision-maker should undergo a *de novo* consideration of

288. *Wilson v. United States District Court for the Northern District of California*, 161 F.3d 1185 (9th Cir. 1998). The BPH, at the time called the Board of Prison Terms (BPT), and the Wilson administration were compelled to stay the execution of Siripongs as a result of a lawsuit concerning the criteria that Siripongs counsel was told would be considered in clemency. When Wilson’s decision included consideration of factors not listed by the BPT, Siripongs counsel successfully sued. *Id.*

289. ABA Kennedy House Report, *supra* note 269, at 64.

290. Dinsmore, *supra* note 12, at 1853-54.

291. *See, e.g., Hoffstadt, supra* note 285, at 640.

292. *See* ABA Guide, *supra* note 275, at 27.

guilt or innocence, that would constitute a departure from common practice in California. In most decisions, as indicated earlier in Section V, governors have written that they will not reassess the findings of the jury and courts involved in the case. Similarly to the ABA recommendation to consider factors that affect whether death is the appropriate punishment, California governors tend to consider new or omitted evidence of mental illness or other mitigation, but tend not to revisit the facts that led to the original determination of death as the sentence.

Of the ABA's recommended factors, there are two that stand out as either not considered by, or not of much significance to, California governors. The first is geographic disparity, which has not been cited in any decisions since 1992. (In contrast, geographic disparity was clearly a factor in some of the decisions during Governor Brown's administration.)²⁹³ The second factor is the good behavior of the inmate while on death row. Although governors have often acknowledged good behavior, the decisions typically indicate that such behavior is expected and not a reason to grant clemency.

C. *Insulation from Political Pressures*

A number of commentators write of concerns that governors or clemency boards will feel pressured not to commute a death sentence because of political fallout, especially that the board or governor will be perceived as weak on "law and order."²⁹⁴ It is hard to document whether governors have declined to commute a sentence due to this pressure. The ABA Kennedy Commission was concerned with an overall decline in the use of executive clemency in all cases, capital and noncapital. Professors Michael L. Radelet and Barbara A. Zsembik conducted a study that analyzed commutations in death penalty cases granted nationally between 1973 and 1992.²⁹⁵ They found only 29 commutations for humanitarian reasons while the total number of prisoners on death row increased to 2700 by 1992. The authors particularly noted that, at that time, there had been no humanitarian commutations in either California or Texas, which, together, had the largest death row populations.

293. See Brown, *supra* note 110.

294. See, e.g., Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. ON C.L. & C.R. 191, 194 (2003) (describing instances where political campaigns capitalized on an opponent's commutations while governor—such as Carnahan in Missouri and Dukakis in Massachusetts); Victoria J. Palacios, *Faith in the Fantasy: the Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 349 (1996).

295. Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 293, 297 (1993). The authors found seventy commutations, of which forty-one were for judicial expediency and twenty-nine were for humanitarian reasons. Judicial expediency means that a commutation occurred because it was likely that a court would vacate the sentence or there was a desire to avoid a second sentencing proceeding. Humanitarian commutations were for reasons such as mercy, doubt about guilt, mental problems, and co-defendant equity. *Id.*

Other scholars, too, have documented a decline in clemency since 1976.²⁹⁶ Current statistics nationally and in California show a sparing use of clemency in capital cases compared with the first half of the Twentieth Century.²⁹⁷ For example, between 1976 and 2002, there were only 49 commutations nationally compared with 820 executions.²⁹⁸ As of September 2007, there have been 241 commutations compared with 1099 executions. (It should be noted that 167 of the 241 commutations occurred in Illinois as a result of a blanket commutation of all those on death row by Governor Ryan in 2003.)²⁹⁹ Is this decline due to political pressures? Some academic scholars have found little or no evidence of actual political fallout, although they recognize that the belief in political consequences might affect a decision.³⁰⁰ Even if the numbers are not indicative of an increase in political pressures, is it advisable to attempt to insulate a governor from some of the political pressures and, if so, how can that be done?

Some of the academic writers suggest that an independent board is less subject to political pressures. Even boards, however, can be subject to political pressures if members are political appointees.³⁰¹ One academic scholar, who herself had been a member of a parole board, suggested that the Governor should appoint a selection board which would then choose the members of the clemency board.³⁰² In this way, the resulting clemency board would be several steps away from direct political pressure. Other writers have suggested an appointments group comprising the state attorney general, a state supreme court justice, and a present or former member of the state parole board. This appointments group would then select the members of the clemency authority.

296. Kobil, *Chance and the Constitution in Capital Clemency Cases*, *supra* note 18, at 572 (noting that before *Furman*, 25% or more of death sentences were commuted compared with 7.5% after 1976); James R. Acker & Charles S. Lanier, *May God—Or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 215 (2000) (calculating the ratio of executions to commutations as 13.8 to one post-*Furman*, which is significantly higher—3-9 times higher depending on the state—than before *Furman*).

297. Palacios, *supra* note 294, at 347-49.

298. Death Penalty Information Center, *Clemency*, *supra* note 13; Death Penalty Information Center, *Executions in the United States*, available at <http://www.deathpenaltyinfo.org/executions-united-states> (last visited Apr. 6, 2009).

299. There were also broad-based commutations in New Mexico (by Governor Anaya on leaving office) and New Jersey (upon repeal of the death penalty), but the absolute numbers were small (New Mexico—5; New Jersey—8). Governor Celeste in Ohio is sometimes included in a list of mass commutations because commuted the death sentences of eight individuals at one time in 1991, but that is different from Illinois, New Mexico, and New Jersey because 101 individuals remained on death row after the mass commutations.

300. Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239, 295 (2003) (finding no statistical significance between grants of clemency and pending elections); Korengold, *supra* note 17 at 363-364 (belief that commutations are “political suicide” is not supported).

301. See, e.g., Palacios, *supra* note 294, at 352-53.

302. *Id.* at 371 (Victoria Palacios was a member of the Utah Board of Pardons from 1980 to 1990.)

An additional proposal to insulate the decision makers from political influence is to appoint the members of the clemency authority for life terms.³⁰³

Other scholars recognize the political pressures in clemency decisions, but argue that executive clemency should be left alone. In one article, the authors argue that the political and unfettered nature of clemency at times restricts granting clemency, but also works at times to the advantage of death row inmates.³⁰⁴ In other words, the absence of procedures, standards, and judicial review allows for more leeway in granting clemency as well as in denying it.

In California, there is little insulation from political pressures in the structure of our clemency process. In the case of two-time felons, the required votes of four justices serve as a check on a governor whose inclination or whose political pressures would lead him or her to *grant* clemency. The legislative history of the provision on Supreme Court concurrence supports the inference that the legislature was concerned with the discretion of the Governor to grant clemency, not the discretion to deny it. There is no comparable requirement for concurrence of justices in order to *deny* clemency. The use of the advisory Board of Parole Hearings commissioners, however, is another way in which a governor can find some political insulation for either granting or denying clemency. In fact, one can see in several of the decisions denying clemency that the governor included a statement of the recommendation of the Board to deny a commutation. Presumably, a governor would have similar support or insulation for a decision granting clemency if the Board had also recommended a commutation. There is nothing in place in California, however, that attempts to remove some of the political pressure on an elected official, such as by putting a determinative decision into the hands of an independent board.

VIII. RECOMMENDATIONS

It is important to remember what clemency is and what it is not. Clemency is not a judicial proceeding and, as such, it is not a substitute for a guarantee of a review of any particular issue. For any errors in the procedure or result for which there should be a guaranteed process of review, it is necessary to have a judicial proceeding, not clemency. Why is clemency inadequate to guarantee review of particular issues? Although any issue can be raised in clemency, there is no guarantee that the issue will be considered nor any guarantee that clemency will be granted even if the claim is meritorious. In other words, a governor could refuse to consider an issue such as mental illness; similarly, a governor could find that a petitioner is innocent and yet refuse to commute a sentence. While perhaps the latter is unlikely, there is nothing in the clemency process that compels a governor to act. While the

303. Korengold, *supra* note 17, at 368-69.

304. Breslin & Howley, *supra* note 23, at 233-34.

clemency process at times in some states has functioned to correct miscarriages of justice, there is no requirement that a governor or Board use it to do so.

Should clemency be modified to incorporate standards, procedures, and review? In our view, the answer is “No.” Clemency, as it is presently constructed in California and elsewhere, serves a crucial purpose. Although there are tremendous variations from governor to governor and state to state, the concept of clemency as a nonjudicial process that allows for the consideration of any type of issue serves as a safety-valve in the overall criminal justice system. If standards and procedures are adopted, there are likely to be issues that would be precluded from the process. Moreover, the more specific the requirements, the more likely there are to be judicial challenges to the process. One enduring attribute of clemency is to provide a forum outside of the judicial process. This nonjudicial characteristic has allowed governors to consider issues that could not be raised in court, notably Battered Women’s Syndrome in the years before such evidence was admissible in court.

This means, though, that clemency should not be the primary avenue for handling claims of innocence, mental deterioration on death row, or any other issue on which there is a need for a guaranteed form of review. Instead, clemency should be viewed as an extra safeguard in addition to a functioning criminal justice system.

Although we conclude that clemency as an unregulated, extra-judicial process is valuable, there are a few recommendations that we would make with regard to the procedures in California.

The requirement that the Governor report grants of clemency to the legislature should be amended to also require reporting denials of clemency, at least in capital cases. This recommendation will require an amendment to Article V, Section 8(a) of the California Constitution.

This amendment would not greatly affect the current practice of governors as they have all issued written decisions denying clemency since 1992. The amendment, however, would create a more complete database for future governors, legislators, researchers, and the general public. The legislative reports were the best source that we found for tracking commutations. In contrast, it took much more searching to locate the decisions denying clemency. By including denials in the reporting requirement, it would make the data and decisions as available as the actual commutations.

The constitutional requirement that four justices of the California Supreme Court concur with the Governor’s decision to grant clemency to a twice-convicted felon should be deleted from the text of Article V, Section 8(a) of the California Constitution.

Originally, when this provision was drafted in 1879, it was created to serve as a check on the power of the Governor to grant clemency. In the modern-era, this requirement has not been a factor in a clemency decision, as

no governor has yet granted clemency. Moreover, political pressure appears to serve as the check that resolves the potential problem of overuse of clemency power.

Further, the involvement of the California Supreme Court in the clemency process accords the state judicial branch with a power that is exclusively vested in the executive branch by the California Constitution. Interestingly, when the requirement of judicial concurrence was added to the clemency provision of the constitution in 1879, the Article was moved away from the other executive branch constitutional provisions. When the clemency Article was moved back to the executive branch section of the constitution in 1966, no alteration was made to the involvement of the State Supreme Court. In the interest of maintaining the power of clemency as a nonjudicial, and purely executive, function as contemplated by the 1966 revisions to the California Constitution, the requirement of judicial branch involvement should be removed.

The statutory requirement that the Governor refer requests for clemency by a twice-convicted felon to BPH for its review and recommendation should be amended to make it discretionary rather than mandatory, which would eliminate the distinction between twice-convicted felons and other petitioners. This recommendation will require an amendment to California Penal Code § 4813.

The amendment will bring the statute into conformity with the actual practice of governors in recent years and alleviate a possible conflict with the California Constitution and separation of powers doctrine. While Governor Davis referred all of his cases to BPH for a hearing, the practice of Governors Wilson and Schwarzenegger was and is to refer the cases to BPH for a hearing and recommendation only in select cases. It should be noted that all of the recent governors have used the investigative unit of BPH to gather information for them, but if there is no referral for a hearing, BPH does not give the Governor a recommendation. While reasonable minds can differ about the desirability of a hearing before BPH (see discussion below in Recommendation 5), the design of clemency in California is to provide BPH as an advisory tool for the Governor. As such, there may be cases where the Governor decides it is better to hear the parties him or herself (such as occurred with Robert Alton Harris before Governor Wilson and all cases before Governor Pat Brown). Moreover, because the California Constitution does not set forth the requirement of a referral, it is possible to interpret the statutory provision as conflicting with the discretion afforded to the Governor under the Constitution. An amendment to make the referral discretionary in all cases would eliminate any possible conflict.

If the mandatory referral provision is retained, then our recommendation is to amend it to require a referral for review and recommendation in all capital cases, not just those of twice-convicted felons. There does not seem to be a logical reason to distinguish the two types of cases when the recommendation

of BPH is nonbinding. If it were binding, then one could argue that there is a need to provide a greater check on governors granting clemency with two-time felons.³⁰⁵ However, since the recommendation from BPH is advisory only, the purpose is to assist the Governor, and that assistance is just as pertinent in capital cases that do not involve two-time felons.

Certain features of the California clemency process that are commendable should be safeguarded and funded sufficiently. These include provision of counsel and investigative resources for the inmate, the investigation unit of BPH, the practice of accepting all information submitted by the inmate, and the practice of accepting all information from the victim's family or other interested parties. This recommendation does not require an amendment of a statute or the Constitution, but there should be a process to review and monitor how well these functions are operating.

Each of the four identified attributes of the clemency process in California are worth preserving and encouraging. It is important that the inmate have counsel who can adequately present the case for clemency in order to have an orderly and fair process. The investigation unit at BPH performs an invaluable service for the governors in the collection of documents and in interviewing family members of the victim, family members of the inmate, the trial judge, and others. This investigation results in the "black book" that is used by governors and their staffs to review all pertinent information and has been described as the most, or one of the most, important aspects of the process. The other two features that are mentioned involve accepting information from all of those concerned. There should not be any exclusion of information in the process. While this is not something that we would suggest should be legislated, it is worth noting in any comprehensive messages about clemency that are delivered to the public or to the legislature.

Public access to materials submitted in clemency should be increased to the extent possible. This recommendation does not necessarily require an amendment of a statute or the Constitution, but we urge the Commission to make a recommendation to the Governor's Office that the briefs of the parties in a clemency proceeding be released to the public either during or after the clemency process.

Because clemency is a nonjudicial process, there is no bank of the records filed. The BPH "black book" and the recommendation of the BPH, if given, are confidential. Right now, the parties' briefs and other materials are similarly not released unless the parties themselves release them. There are two reasons to release at least the briefs of the parties. One is a general principle, even though not legally required, of transparency about what is occurring in

305. As discussed earlier, the requirement of concurrence from a majority of the justices of the California Supreme Court in order to commute a sentence of a two-time felon is designed as a check on the Governor's authority.

executive clemency proceedings. A second reason is to establish an institutional history of the clemency process. Although we found counsel for the inmates and the district attorney's offices helpful in sending us their briefs, some were not available to us, largely because they could not be located in archives. The briefs filed by the parties, at least the ones we have seen, are similar to court documents. If there is anything too sensitive or confidential in them, redacted versions could be released. Our suggestion would be that the documents are released through the Governor's Office.

At a minimum, the Governor should meet with the attorneys for each side, regardless of whether or not there is a hearing before BPH. This recommendation does not necessarily require amendment to the state Constitution or code. If the Commission wanted to mandate a hearing with counsel in all cases, an amendment to the state Constitution would likely be necessary, unless the term "application procedure" in California Constitution, Article V, Section 8(a) could be construed to encompass a hearing with counsel. In that case, the legislature could pass the hearing requirement as an application procedure. At a minimum, we recommend that the Commission encourage the Governor's Office to adopt a practice of meeting with counsel for each side.

In California, the Governor is the decision maker. Even if there is a hearing before BPH, the Board's recommendation is advisory only. As the only decision maker, the Governor should hear evidence and arguments as much in person as possible. We considered recommending that a hearing before the Governor be public as is the hearing before BPH. However, several of the Legal Affairs Secretaries pointed out that a governor is less likely to be as candid in the exchange if the proceeding is public. There were a number of references to a concern about the process becoming a "circus." In our view, the clemency process is one that, despite the political pressures, governors should take seriously on a case-by-case basis. The best middle ground we found would be to make some of the records public, such as the briefs indicated in Recommendation 4 above, but leave a meeting with the Governor private if the Governor so prefers. What is more important is the ability to make a personal appeal to the decision maker. Thus, we urge that the Governor conduct a hearing him or herself with at least the attorneys present.

As a general matter, data should be kept in an accessible location. Either the state law library or another site should be the repository for all documents and the decisions themselves.

There should be efforts undertaken to educate the public about the function and process of clemency. This could be done in a number of different ways, such as information on the websites of the Governor's Office, the BPH, the Attorney General's Office, the District Attorney's Association, the California Attorneys for Criminal Justice, and other such government offices or organizations.

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The goal of this article has been to explain the nonjudicial, highly discretionary process of clemency, the type of factors that are taken into account, and how clemency fits within the overall criminal justice system. One way to minimize or neutralize public pressure on sitting governors is to educate the voting public about the purposes and historical use of clemency in the State of California. Given the limited transparency in the process and the very limited use of the process in recent generations, very few members of the public have any idea of the purpose of the power and its intended uses. If voters understand the role that the process has played, governors might feel less public pressure and, as Justice Kennedy suggested in his ABA address, clemency might become a more significant instrument in the criminal justice system, as it was prior to the modern era.

Appendix A**Interviews Conducted**³⁰⁶

Arthur Alarcon, former Legal Affairs Secretary to Governor Pat Brown

Janice Rogers Brown, former Legal Affairs Secretary to Governor Pete Wilson

Ward Campbell, Supervising Deputy Attorney General, California Department of Justice

Gray Davis, former Governor

George Deukmejian, former Governor

James Fox, District Attorney for the County of San Mateo

Barry Goode, former Legal Affairs Secretary to Governor Gray Davis

Andrea Hoch, Legal Affairs Secretary to Governor Arnold Schwarzenegger

J. Anthony Kline, former Legal Affairs Secretary to Governor Jerry Brown

Daniel Kolkey, former Legal Affairs Secretary to Governor Pete Wilson

Michael Laurence, defense attorney for Robert Alton Harris, William Beardslee and Jaturun Siripongs

John McInerny, former Legal Affairs Secretary to Governor Pat Brown

Edwin Meese, former Legal Affairs Secretary to Governor Ronald Reagan

Toni Pacheco, senior investigator for the Board of Parole Hearings

Charles Patterson, defense attorney for Manuel Babbitt and Clarence Ray Allen

Randy Pollack, former Deputy Legal Affairs Secretary to Governor George Deukmejian

Vance Raye, former Legal Affairs Secretary to Governor George Deukmejian

McGregor Scott, former District Attorney for Shasta County

Peter Siggins, former Legal Affairs Secretary to Governor Arnold Schwarzenegger

306. Some interviews were conducted in person and some by telephone. This list of interviewees is alphabetical and indicates the person's position or former position relative to the capital clemency process.

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Appendix B**Statistical Comparison of Death Sentences, Number on Death Row, Commutations, and Executions by Type of Clemency Authority**

State	Death Sentences through 2006	Current Death Row Inmates	Number of Commutations	Number of Executions
Governor has sole authority [*With limitation in CA—Must have agreement of majority of state supreme court justices to commute if two-time felon]				
Alabama	368	201	1	38
California*	851	669	0	13
Colorado	20	1	0	1
Kansas	10	10	0	0
Kentucky	77	39	2	2
New Mexico	28	1	5	1
North Carolina	517	166	5	43
Oregon	56	35	0	2
South Carolina	190	58	0	37
Virginia	145	20	7	98
Washington	38	8	0	4
Wyoming	12	2	0	1
Governor has authority, but must have a recommendation from a Board to grant clemency				
Arizona	261	114	0	23
Delaware	52	19	0	14
Florida	907	388	6	64
Louisiana	228	85	2	27
Montana	15	2	1	3
Oklahoma	332	82	2	86
Pennsylvania	371	228	0	3
Texas	994	370	2	405
Governor has authority, but receives a recommendation from a Board				
Arkansas	105	38	1	27
Illinois	298	13	172	12
Indiana	99	20	3	19
Maryland	53	5	2	5
Mississippi	182	65	0	8
Missouri	174	45	2	66
New Hampshire	0	0	0	0
Ohio	388	186	10	26
South Dakota	5	3	0	1
Tennessee	216	96	1	4
Governor has no authority; clemency determined by a Board				

Connecticut	10	9	0	1
Idaho	42	19	1	1
Georgia	308	107	6	40
Clemency determined by a Board, but Governor sits on the Board				
Nebraska	30	10	0	3
Nevada	141	83	1	12
Utah	26	10	0	6

Statistics from Death Penalty Information Center, www.deathpenaltyinfo.org