THE FAILED FAILSAFE: THE POLITICS OF EXECUTIVE CLEMENCY

By: Cathleen Burnett*

I. INTRODUCTION

This Article discusses the role of executive clemency in light of the current political environment. Attending to the political aspects of the capital litigation process gives insight into the trends in the use of executive clemency. Focusing particularly on the form of clemency decision made by a governor after a non-binding recommendation from the Board of Probation and Parole (as in Missouri), it is clear that although party affiliation does not make a difference, other political considerations do seem to be influential in determining outcomes. The Article's conclusions look toward the winds of change in the political-social circumstances that may shift popular opinion to encourage the granting of more clemency requests in capital cases.

In *Herrera v. Collins*, the U.S. Supreme Court acknowledged that although the criminal justice system is fallible, the integrity of the judicial system is protected by the executive branch through the mechanism of executive clemency.[1] Executive clemency, Justice Rehnquist declared, is the fail-safe in the legal system that prevents miscarriages of justice.[2] This Article explores the counter possibility that executive clemency is so fraught with political considerations that governors, like politicians, prosecutors, and judges, are reluctant to act when correction is necessary.

The clemency petition is the final appeal in a capital case before an execution and is submitted to the governor and/or decision-making board. Clemency may be granted in the form of a reprieve, a commutation or a pardon. A reprieve is a stay of execution, granting time in order to consider other issues, possibly in other jurisdictions. A commutation of sentence is a reduction of the penalty, usually to a life without parole sentence. A pardon is a complete absolution of guilt for a crime, which also releases the prisoner from the penalty for the crime. Although pardons now rarely occur in death penalty situations, before

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[1] 506 U.S. 390, 412-17 (1993).

[2] *Id.* at 411-12.

Furman v. Georgia[3] commutations were a more routine occurrence, granted in as many as 25 percent of death penalty cases.[4] Reasons for granting clemency varied and included:

1. proof of actual innocence;
2. violation of prevailing standards of decency (such as diminished mental capacity, retardation, intoxication, or minority);
3. an express request by the prosecution;
4. guilt is in doubt;
5. disparate proportionality or equity in punishment among equally guilty codefendants;
6. the public has shown conclusively albeit indirectly that it does not want any death sentences carried out;
7. a non-unanimous vote by the appellate court to uphold a death sentence conviction, leaving disturbing doubt about the lawfulness of the death sentence;
8. the statutes under which the defendant was sentenced to death are unconstitutional;
9. mitigating circumstances;
10. rehabilitation of the offender while on death row undermines the rationale for carrying out the death penalty;
11. the death penalty is morally unjustified; or
12. fairness of trial (such as eyewitness testimony, perjury by real killers, confessions).[5]

Since re-instatement of the death penalty in 1976 there have been 223 clemencies granted[6] and 875 executions.[7] However, when commutations granted by governors exiting office are excluded, only 35 clemencies have been granted since *Gregg v. Georgia* re-instituted the death penalty in 1976.[8] This represents a ratio of 1 clemency for every

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[3] 408 U.S. 238 (1972).

[4] Victoria Palacios, *Faith in Fantasy: the Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996); *see also* Daniel Lim, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 COLUM. J.L. & SOC. PROBS. 47 (1994). "[B]etween 1909 and 1930, 46 percent of those receiving the death penalty in North Carolina had their sentences commuted to life. From 1909 to 1970, 358 prisoners were executed and 236 (40 percent) had their sentences limited. High rates of clemency (1:1) were maintained from the mid-50s to 1970, even though juries had been given more discretion to reject the harshest sanction." Gene Nichol, *cited in* NEWS AND OBSERVER, Oct. 10, 2001, op-ed, *available at* http://www.deathpenaltyinfo.org/article.php?did=126&scid=13.

[5] CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES 158 (2002).

[6] Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/article.php?did=126&scid=13 (last visited Sept. 20, 2003).

[7] Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/article.php?scid=8&did=464 (last visited Sept. 20, 2003).

[8] *See* Death Penalty Information Center, *at* www.deathpenaltyinfo.org/article.php?did=126&scid=13#list (last visited Sept. 20, 2003).

24 executions. Thus, in the post-*Gregg* period, the great majority of clemencies are granted at the end of the executive term, suggesting a clear connection between political considerations and the denial of clemency.[9] This scarcity of grants of clemency is evident in Missouri, where 60 persons have been executed since re-instatement and only 2 persons have received commutations.[10] Given the rise in salience of crime, law and order, and the death penalty in political campaigns since the late 1960s, it is reasonable to suspect that the dramatic decline in granting clemencies is tied to the political agenda of elected officials and their perception that public opinion strongly favors capital punishment.[11]

When centralized record keeping began in the 1930s, the average number of executions per year in the United States steadily dropped from 167 in the 1930s, to 128 in the 1940s, to 72 in the 1950s, to just 19 per year in the 1960s.[12] Robert Bohm believes that this decline in executions was "partly as a result of the lingering horrors of World War II and the movement by many allied nations either to abolish the death penalty or to restrict its use."[13] Public support for the death penalty reached its lowest level, 42 percent, in 1966.[14] Bohm attributes this strong disapproval of the death penalty to the national controversy that surrounded the California execution of Caryl Chessman in 1960.[15]

From 1968 until 1977 there were no executions in the United States.[16] Of course, the 1972 decision of the U.S. Supreme Court in *Furman v. Georgia* declaring Georgia's death penalty statute to be unconstitutional effectively established a moratorium on executions.[17] All states followed that ruling by commuting their death-sentenced prisoners to some type of life sentences.[18] However, since that time, 38 states have re-instituted the death penalty and their death rows have steadily increased.[19] Executions have also followed this crescendo,

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[9] Stephen Silverman, *Note: 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 (1995).

[10] BURNETT, *supra* note 5, at 171-74.

[11] Another factor that might contribute to the dramatic decline in grants clemency could be "the erroneous belief that clemency is unnecessary today because death row inmates receive 'super due process' in the courts." American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 63 OHIO ST. L.J. 487, 510 (2002).

[12] BURNETT, *supra* note 5, at 157.

[13] ROBERT BOHM, DEATHQUEST 7 (1999).

[14] *Id.* at 10.

[15] *Id.* at 10. *See also* Silverman, *supra* note 10, at 393 n.182 ("Reflecting on the Chessman execution, [Gov.] Brown now appears to acknowledge an injustice occurred. First, Chessman was executed for committing rape and not murder. Second, his trial was so fundamentally tainted so as to require commutation. Brown, however, attributes the execution to the perceived arrogance of Chessman and the certain political fallout attendant to a commutation.").

[16] HUGO BEDAU, THE DEATH PENALTY IN AMERICA 25 (1982).

[17] BURNETT, *supra* note 5, at 157.

[18] BOHM, *supra* note 13, at 107.

[19] Death Penalty Information Center, *at*

peaking at 98 executions in 1999.[20] In the year 1998, the United States ranked third in the world in executions.[21] Only China (1067) and Congo (100) executed more of their citizenry than the United States (68).[22] The state of Missouri ranks fourth in executions since re-instatement (60), behind Texas (310), Virginia (89) and Oklahoma (69).[23] Looking to the prevailing social and political views, it is possible to understand why this punishment has persisted and even escalated. As this Article shows, an increase in death sentences increases the political pressures on governors to deny petitions for clemency.

II. ELECTION POLITICS

To understand the increasing popularity of the death penalty since 1976, one can point to the use of the "crime in the streets" issue during the 1968 presidential election. Responding to social concerns that were erupting during the 1960's, politicians claimed to be tough on crime by setting crime on the political agenda, thereby intensifying the public's concern. In response, society hardened its attitude toward criminals and the demand for harsher penalties grew.[24] Executions became a simple solution provided by political leaders in response to the public's demand for safety and revenge. Finding fertile soil, presidential campaigns reverberated with the theme of law and order to deal with violence, rising crime rates, and the perceived threats of drug use. Support for the death penalty became part of conventional political wisdom while the voices for abolition were rendered impotent. Since Michael Dukakis's defeat in 1988, attributed in part of his opposition to the death penalty, presidential candidates of both major political parties have all unequivocally supported the death penalty.[25] In Missouri's senatorial campaign of 2000, incumbent John Ashcroft tried to demonstrate that he was better at enforcing the death penalty than his opponent because he had given no commutations as governor, despite the fact that challenger Mel Carnahan had overseen 38 executions during his terms as governor.[26] By 1989, public support for the death penalty had increased to 80 percent.[27] Ironically, the heightened fear of crime

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http://www.deathpenaltyinfo.org/article.php?did=121&scid=11 (last visited Sept. 20, 2003).

[20] Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/article.php?did=127&scid=30#interexec (last visited Sept. 20, 2003).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Joseph Rankin, *Changing Attitudes Toward Capital Punishment*, 58 SOC. FORCES 194 (1979).

[25] *See* KIMBERLY COOK, DIVIDED PASSIONS (1998).

[26] BURNETT, *supra* note 5, at 178.

[27] BOHM, *supra* note 13.

that has risen in proportion to the increase in the "get tough on crime" rhetoric does not reflect the statistical reality: the number of homicides in the nation has been falling since 1993.[28]

III. THE POLITICS OF LEGAL PROCESS

The Houston Chronicle reported that "judges as well as prosecutors devote much of their campaigns to declaring their willingness to impose the death penalty in order to not appear 'soft on crime.'"[29] Scholars have explained this phenomenon in the following way:

> One of the most frequently traveled routes to the state trial bench is through prosecutors' offices. A capital case provides a prosecutor with a particularly rich opportunity for media exposure and name recognition that can later be helpful in a judicial campaign. Calling a press conference to announce that the police have captured a suspect and the prosecutor will seek the death penalty provides an opportunity for a prosecutor to obtain news coverage and ride popular sentiments that almost any politician would welcome. The prosecutor can then sustain prominent media coverage by announcing various developments in the case as they occur. A capital trial provides one of the greatest opportunities for sustained coverage on the nightly newscasts and in the newspapers. A noncapital trial or resolution with a guilty plea does not produce such coverage.[30]

This self-promotion through the prosecutor's office may have a real cost to society. For example, when public pressure to get a conviction is high, prosecutors may make deals with the wrong person, resulting in an accomplice being charged with the death penalty while the actual killer receives a lesser sentence in exchange for testimony. Prosecutors may refuse to accept a guilty plea in order to proceed with a trial that will dominate the headlines for weeks, or prosecutors may use

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[28] Bureau of Justice Statistics, U.S. Department of Justice, *at* http://www.ojp.usdoj.gov/bjs/homicide/hmrt.htm (last visited Sept. 20, 2003).

[29] Michael King, Editorial, *Executions in Texas about Politics Not Justice*, HOUS. CHRON., Mar. 6, 2003, *available at* 2003 WL 3242043.

[30] Stephen Bright & Patrick Keenan, *Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 781 (1995) [hereinafter Bright & Keenan].

the testimony of jailhouse snitches and withhold evidence from the defense in order to get convictions, albeit unreliable ones.

Even if mistakes in a case are recognized, it is virtually impossible for the prosecutor (or Attorney General) to change course. An example of such tenacity is the Joe Amrine case in Missouri. Having exhausted all of his appeals, Amrine was granted an unusual hearing before the state supreme court on February 4, 2003.[31] The conviction against Amrine had been made solely on the basis of three prison witnesses who had since recanted their testimony, raising the strong presumption that Missouri was planning to execute an innocent prisoner.[32] In the oral arguments, the assistant attorney general stated that it is legally permissible to execute an innocent person if he had a fair trial.[33] In such instances where the courts elevate procedure over justice, clemency may be the only means for remedying the cycle of errors.

Whether appointed or elected, judges cannot escape the political dimension of their work. Stephen Bright and Patrick Keenan have observed that in "some instances, political considerations make it virtually impossible for judges to enforce the constitutional protections to a fair trial for the accused, such as granting a change of venue or continuance, or suppressing evidence."[34] Judges sensitive to the public's intense interest in capital murder cases are more likely to sentence a defendant to death than are juries hearing the same evidence.[35]

It is not hard to understand why trial judges would be more likely than jurors to favor executions. Justice Stevens put his finger on the problem in a dissenting opinion to the U.S. Supreme Court ruling upholding the Alabama provisions for judicial override in death penalty cases: "the 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty."[36] Gerald Uelmen has called this political factor the "crocodile in the bathtub" and urges attention to these issues to preserve the independence and impartiality of the judiciary.[37] The so-called "crocodile in the bathtub" is meant to describe the theory that legal professionals know the impartiality of the judiciary, and consequently the administration of justice, is contaminated by the

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[31] For information on the entire Amrine case see Public Interest Litigation Clinic, Joseph Amrine, *at* http://www.pilc.net/clients2.html (last visited Sept. 20, 2003).

[32] *Id.*

[33] MissouriNet, *at* http://www.missourinet.com/gestalt/go.cfm?objectid=5A867D12-4D3B4A1E850F4A36F3A31744&dbtranslator=local.cfm (last visited Sept. 20, 2003).

[34] Bright & Keenan, *supra* note 30, at 793.

[35] *Id.*

[36] Gerald Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1142 (1997).

[37] *Id.*

political considerations of career development, but almost all refuse to discuss it.[38]

Perhaps there is good reason for judges to be sensitive to public opinion. There have been several successful campaigns to oust state judges whose decisions reflected opposition to the death penalty.[39] In California, Rose Bird and two other California Supreme Court justices lost their positions because of their opposition to the death penalty.[40] This has also happened in Mississippi and Texas where judges "have been voted off the bench upon accusation that they were 'soft on crime' and replaced with judges who would give the voters what they want."[41] These election outcomes jeopardize the independence and impartiality of the court. North Carolina and Tennessee have also documented reversal rate declines after the politicization of the death penalty in judicial selection.[42] This threat of replacement significantly changes the pattern of review in capital cases.

The politics of the death penalty can lead the courts to ratify errors rather than reverse them. Although appeals resulted in various reversal rates prior to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), some jurisdictions were very reluctant to overturn death penalty convictions.[43] For example, the proportionality review conducted in Missouri has been described as "little more than allowing the reviewing court to justify a death sentence."[44] This impression, coupled with allegations of judicial misconduct, has given the Missouri Supreme Court the reputation of an execution-happy state judiciary since they have rarely found a death sentence disproportionate.[45] Since the AEDPA, courts have increasingly made use of several legal doctrines to limit their review of substantive issues. The prediction is that fewer errors will be caught by judicial review and

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[38] Elected state judges are more likely to override jury conclusions and impose death sentences. Fred Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WISC. L. REV. 1017, 1041. These apparent biases are more likely in those jurisdictions in which prosecutors and judges are elected or retained in office by a vote. *See Id.*

[39] Bright & Keenan, *supra* note 30, at 760,

[40] Michael Korengold, Todd Noteboom, & Sara Gurwitch, *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 365 (1996).

[41] Stephen Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive, and Corrupting*, 36 SANTA CLARA L. REV. 1077 (1996)[hereinafter Bright].

[42] John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999).

[43] James Liebman, Jeffrey Fagan, & Valerie West. *A Broken System: Error Rates in Capital Cases, 1973-1995* (1999), *at* http://justice.policy.net/cjedfund/jpreport cited by James Liebman, Jeffrey Fagan, Valerie West, & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000).

[44] Donald Wallace & Jonathan Sorensen, *Missouri Proportionality Review: An Assessment of a State Supreme Court's Procedures in Capital Cases*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 313 (1994).

[45] Stuart Taylor, *He Didn't Do It*, AM. LAW. 69, 70 (1994).

miscarriages of justice will escalate. These concerns have led some to propose reforms aimed to distance the judiciary from the taint of politics. Suggested reforms include appointing judges for longer terms and moving trials out of the county in which the crime occurred.[46] Ultimately the only way for courts to avoid losing their integrity and ensure their survival as institutions of justice may be to directly address the issue and to find the death penalty inherently unconstitutional.

The accepted political wisdom for governors has been that an anti-death penalty position will hurt one's political future.[47] For example, California governor Pat Brown believed that he lost his re-election to Ronald Reagan in part because of his death penalty decisions.[48] "Republican Dave Treen challenged incumbent Louisiana Governor Edwin Edwards in 1979 and used Edwards' clemency record to help defeat him."[49] Most recently, the 1996 New York State gubernatorial election witnessed George Pataki make use of a pro-death penalty platform to overcome incumbent Mario Cuomo.[50] However, despite these examples of the political significance of the death penalty, scholars claim that "there is no evidence to suggest that a large portion of the electorate are single-issue death penalty voters."[51] These scholars maintain that a candidate's position on the death penalty would not be the only issue to influence most voters.[52] Support for the minimal political impact of holding an anti-death penalty position was uncovered in a public opinion poll conducted in Missouri in 1999, which found that respondents opposed to the death penalty were more likely than respondents who supported the death penalty to say that their vote for a candidate was affected by a candidate's particular stand against the death penalty.[53] The survey revealed that only 35% of respondents would be less likely to vote for a state legislator if that legislator voted against the death penalty, 43% would not be affected, and 22% would be more likely to vote for such a legislator.[54] In other words, respondents in favor of the death penalty were not likely to base their votes on the similarity of the candidate's death penalty position with their own view. Perhaps it is only when an opponent makes an issue of the death penalty that the candidate's positions on the death penalty become salient to

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[46] Uelmen, *supra* note 36, at 1150.

[47] Korengold, et al., *supra* note 40, at 365.

[48] Palacios, *supra* note 4, at 350.

[49] *Id.*

[50] Rick Halperin, Death Penalty News, *at* http://venus.soci.niu.edu/~archives/ABOLISH/june97/0143.html (July 12, 1997).

[51] Korengold, et al., *supra* note 40, at 365.

[52] *Id.*

[53] Telephone survey by Center of Social Sciences and Public Policy Research, Southwest Missouri State University with Missouri residents, Springfield, Mo., (1999) [hereinafter CSSPPR] (surveying Missouri Residents' Opinions on the Death Penalty).

[54] *Id.*

voters. The accepted political wisdom for governors that an anti-death penalty position will damage future political chances may weaken as the public becomes more concerned with the possibility that an innocent person may be executed. At least 111 death row inmates have been exonerated nationally, having been wrongfully convicted and sentenced to death.[55]

These political impressions create a reality that appears to interfere with the power of the clemency process to prevent miscarriages of justice. Missouri is one of 23 states that gives unlimited clemency authority to the governor.[56] According to statute, the Board of Probation and Parole must conduct an investigation before submitting its nonbinding recommendation to the governor.[57] However, there is significant question concerning what investigatory procedures satisfy the Constitution's due process requirements. The Board of Probation and Parole convenes on the Monday before the Wednesday morning (midnight) execution to conduct the investigation.[58] The only "investigation" appears to be an interview conducted by a local probation and parole officer of the condemned prisoner. A report of the interview is then sent to the Board and is included in the materials they review.[59] The Board takes from Monday until some time Tuesday to examine all the arguments and court documents in their possession.[60] No witnesses are given the opportunity to present materials or to answer questions.[61] When the Board reaches a decision, their recommendation is transmitted to the governor's office in secret. This process does not appear to be meaningful review.[62]

Gubernatorial relief, under these circumstances, also fails to provide an adequate safeguard under these circumstances. The governor's legal assistants review cases and brief the governor. The governor does not have any actual direct contact with the condemned inmate or with his attorneys.[63] Seven executions occurred during Republican Governor Ashcroft's term and he granted no commutations. Democratic Governor Carnahan allowed 38 executions to go forward

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[55] Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (last visited Sept. 20, 2003).

[56] Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/article.php?did=126&scid=13#process (last visited Sept. 16, 2003).

[57] MO. REV. STAT. § 217.800(2) (1996).

[58] BURNETT, *supra* note 5, at 163.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Lim, *supra* note 4, at 81.

[63] Interestingly the only two commutations granted by Governor Carnahan were exceptions where the Governor had personal contact with the prisoner's attorney, in the case of Bobby Shaw (personal communication with Shaw's attorney), and with the Pope, in the case of Darrell Mease (*See* BURNETT, *supra* note 5, at 171-74).

and granted just 2 commutations. The political backlash for those commutations was significant.[64] Despite the paucity of grants of clemency, there is strong evidence that Missouri has executed at least 5 actually innocent persons since re-instatement.[65] Prisoners have been executed in cases where appeals were still pending,[66] where their attorneys missed filing issues[67] or filed a brief over the page limit,[68] and where significant, new or withheld evidence was yet to be evaluated by any trier of fact.[69] In the glare of political agendas, what was once due process, becomes a personal vulnerability of politicians: the fear of being accused of being "soft on crime." Not only does the clemency decision require a governor to overrule the decisions of several courts, it also appears to overturn the jury's decision.[70] The fact that the governor's decision comes after all courts have completed their review of appeals (in hopes that a court will reconsider the issues) exacerbates the pressure the governor faces in death penalty cases. Some governors have simply rejected the task of checking the judiciary, viewing clemency powers as "interfering with the judicial process."[71] Such rejection is inappropriate, however, where, as in *Herrera v. Collins*, the courts are closing the doors to multiple review and relying on the governor to correct miscarriages of justice.[72]

Little research has been done on executive clemency.[73] Daniel Kobil describes clemency decision making as "largely unprincipled, and almost standardless,"[74] and points to the "widespread support of influential individuals in the community" as the most important factor influencing a governor's use of the

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[64] *Cf.* ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS (2000). *See also* BURNETT, *supra* note 5, at 173.

[65] Cathleen Burnett, Stephana Landwehr, Rita Linhardt, Margaret Phillips, and Jeff Stack, *Miscarriages of Justice* 3-4 (2001) (unpublished monograph) (on file with author), *available at* http://www.umsl.edu/~phillips/dp/MISCARRIAGES%20OF%20JUSTICE.htm (Jan. 26, 2001).

[66] Kelvin Malone. *See* BURNETT, *supra* note 5, at 86-98.

[67] Emmett Nave. *See* BURNETT, *supra* note 5, at 210.

[68] Milton Griffin-El. *See* BURNETT, *supra* note 5, at 139-146.

[69] For example, Maurice Byrd, Walter Blair, Larry Griffin. *See* BURNETT, *supra* note 5, at 169.

[70] BURNETT, *supra* note 5, at 168.

[71] Refers to the 1985-1993 Ashcroft gubernatorial administration. *See* BURNETT, *supra* note 5, at 220.

[72] 506 U.S. 390 (1993).

[73] Michael Heise has done one of the few empirical studies of clemency, focusing on the 32 states that had executions over a 27 year period. Heise found that the factors of the defendant's race and ethnicity, timing of elections and governor's lame duck status do not influence clemency decisions. However, gender does influence the clemency decision. Clemency grants are more likely in states that vest authority in administrative boards than in states that vest authority in the governor. Clemency grants are less likely in Southern states and declined after 1984. He concluded that "the death penalty is inconsistently applied." Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239, 308 (2003).

[74] Daniel Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U.L. REV. 567 (2000) [hereinafter Kobil, *Chance*].

clemency authority.[75] Other evidence of political influence in clemency decisions was revealed in a study by Pridemore, who found that inmates whose final disposition takes place during a gubernatorial election cycle were less likely to receive clemency.[76] As the Houston Chronicle stated, "[i]n the end, capital punishment is not about justice. It's about politics. The Texas capital-punishment system still performs its primary function quite well: It helps elect prosecutors, judges and state politicians."[77]

IV. WINDS OF CHANGE

After the recent peak in 1999 of 98 executions nationwide, executions declined in 2000 and 2001, with a small rise in 2002.[78] It is too early to tell whether this decline indicates a downward trend or just a fluctuation in a general increase in the annual number of executions. Nonetheless, officials report that fewer persons are being sentenced to death row.[79]

We do know that public opinion is changing again. Even after the traumatizing events of the September 11 attacks, support for the death penalty remains relatively low. An ABC News poll on May 7, 2002 reported that 65% support the death penalty when no alternative is given, but only 46% support the death penalty when life without parole is an alternative.[80] The former governor of Illinois, Republican George Ryan, was so troubled by the errors discovered in Illinois that he instituted a moratorium on executions in January 2000 until he could be assured that mistakes would no longer be made.[81] In 2002, the Study Commission he appointed reported 85 recommendations for "fixing" the death penalty system.[82] When the legislature failed to act on these recommendations, Governor Ryan pardoned 4 persons and commuted the sentences of 167 persons before he left office.[83] On January 17, 2003 a Harris Interactive survey for CNN and Time magazine found that 44% of respondents agreed with Illinois Governor Ryan's decision to

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[75] Daniel Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 607-11 (1991). *See also* Kobil, *Chance*, *supra* note 74.

[76] *See* Heise, *supra* note 73.

[77] King, *supra* note 29.

[78] Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/article.php?did=414&scid=8 (last visited Sept. 20, 2003).

[79] *Id.*

[80] Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#ABCnews-5/7/02 (last visited Sept. 20, 2003).

[81] Bruce Shapiro, *A Talk with Governor Ryan*, NATION, Jan. 18, 2001, at 17.

[82] Report *available at* www.idoc.state.il.us/ccp/ccp/reports.

[83] Citizens United for Alternatives to the Death Penalty, Governor George Ryan, Address at Northwestern University College of Law (Jan. 11, 2003), *at* www.cuadp.org/20030111ryan.html.

commute the sentences of Illinois prisoners on death row to life in prison because he believes the administration of capital punishment has not been fair in that state, while 44% disagreed (12% were undecided).[84] On January 24, 2003 an ABC News/Washington Post poll found that while 64% of Americans support the death penalty when no other alternative is offered, 39% (in those states that have the death penalty) would like to see their governor issue a blanket commutation of death row inmates similar to that issued by Governor Ryan in Illinois.[85] The most important factor in shaping the public's view about the death penalty is a strong concern that persons who are innocent should not be executed.[86]

Other politicians are also troubled by errors in the system. In May of 2002, another governor, Maryland's Parris Glendening, instituted a moratorium on executions to allow a study of racial bias to be completed.[87] Overall, 22 of the 38 states with the death penalty have considered, or are considering, moratorium legislation.[88] Missouri, for example, has legislation pending for both abolition and a moratorium.[89] With strong bi-partisan support, Congress is working on a bill known as the Innocence Protection Act to address many of these same issues.[90] Much of the support for these efforts is grounded on abolitionist positions taken by at least 29 religious communities.[91]

V. CONCLUSIONS

Reliance on a gubernatorial sense of professional responsibility as a mechanism for ensuring appropriate application of executive clemency is a failed venture. It fails when, *inter alia,*

1. executive clemencies decline despite a decline in reversal rates by the courts (suggest saying "executive clemencies fail to increase in response to compensate for a decline in reversal rates by courts");
2. 111 mistakes are discovered;
3. innocent persons are executed;

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[84] Harris Interactive Survey, TIME (Jan. 17, 2003), *available at* http://deathpenaltyinfo.org/article.php?scid=23&did=210#Harris1/17/03.

[85] Poll by the WASH. POST (Jan 24, 2003), *available at* http://deathpenaltyinfo.org/article.php?scid=23&did=210#ABCNewsWashPost12403.

[86] CSSPPR, *supra* note 53.

[87] Equal Justice USA, *at* http://www.quixote.org/ej (last visited Sept. 20, 2003).

[88] *Id.*

[89] Concerning abolition see H.R. 223, 92d Gen. Assem., 1st Sess. (Mo. 2002) and S. 169, 92d Gen. Assem., 1st Sess. (Mo. 2002). Concerning a moratorium see S. 22, 92d Gen. Assem., 1st Sess. (Mo. 2002).

[90] *See* S. 486, 107th Cong. (2001). *See generally* The Justice Project, *The Innocence Protection Act*, *at* http://justice.policy.net/cjreform/ipa (last visited Sept. 20, 2003).

[91] *See* Western Missouri Coalition to Abolish the Death Penalty, *at* http://home.kc.rr.com/wmcadp/page15.htm (last visited Sept. 20, 2003).

4. significant political backlash occurs when commutations are granted;
5. executions proceed while appeals are still pending;
6. no substantive evaluation of newly discovered information/evidence is conducted;
7. the governor expresses reluctance to overrule jury or appellate court decisions (institutional barriers); or
8. the disproportionality of sentences goes uncorrected.

There is no constitutional right to clemency, and thus there is no appeal from the governor's decision. Traditionally, clemency was thought to be a matter of individual mercy. Only two states provide for a clemency hearing as a matter of law.[92] Reliance on executive clemency to correct miscarriages of justice, as implicated in *Herrera*,[93] reinforces the Supreme Court's position in *Biddle v. Perovich*,[94] wherein "the Court appeared to abandon the traditional view of pardons as gifts, and instead moved to the view that they were executive decisions made in the best interest of the public welfare."[95]

It could be argued that there is a right to make a clemency appeal based on the existence of statutory provisions for clemency. As such, questions have been raised concerning what due process requires in clemency deliberations. To date, "the federal courts of appeals have refused to require that clemency decisions be made in a fundamentally fair manner and in accordance with due process."[96] However, in *Ohio Adult Parole Authority v. Woodard,* the U.S. Supreme Court may have opened the door for future consideration of due process requirements in clemency decisions.[97] Although Chief Justice Rehnquist reasoned in his plurality opinion that there is no continuing life interest in clemency proceedings that requires constitutional due process protection, Justice O'Connor (and four other Justices) wrote that there is a minimal due process protection requirement even where clemency is discretionary.[98]

It is unfortunate that the clemency process is fraught with political overtones. The petition process needs to be restructured if indeed miscarriages of justice are to be prevented. Despite the Eighth

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[92] Silverman, *supra* note 9, at 396.

[93] 506 U.S. 390 (1993).

[94] 274 U.S. 480 (1927).

[95] Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a national Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 420 (1999).

[96] Daniel Kobil, *The Evolving Role of Clemency in Capital Cases, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 539 (James Acker, Robert Bohm, & Charles Lanier eds., 1998). *See also* Otey v. Hopkins, 5 F.3d 1125 (8th Cir. 1993).

[97] 523 U.S. 272 (1998).

[98] David Hawley, *Ohio Adult Parole Authority v. Woodard: Breathing New "Life" into an Old Fourteenth Amendment Controversy*, 77 N.C. L. REV. 901.

Circuit decision in *Otey v. Hopkins* concluding that the petitioner had no fundamental right to a clemency hearing,[99] most options for improving the neutrality and fairness of the clemency system focus on the role of the Board of Probation and Parole.[100]

The first suggestion to improve the clemency system is for the Board of Probation and Parole to hold public hearings to gather input regarding its recommendation to the governor. Since the governor is the ultimate decision maker in this process, the governor's office should be the forum for the public hearing. This would provide the benefit of giving the governor direct information without any filters. Opening the secret process to media and the public would hold officials accountable in their decision making. Kobil has identified seven elements of due process necessary in clemency proceedings to ensure that unfair judgments are avoided.[101] Such a hearing would not need to be a retrial of the case, but only a consideration of the strength and validity of new information. The seven elements are:

1. An independent, thorough investigation of the circumstances surrounding the clemency application conducted by the clemency authority;
2. The right of the defendant to attend a hearing before an impartial decision maker, with a provision for recusal where it can be demonstrated that the decision-maker is biased;
3. The right of the defendant to present evidence and witnesses, secured by some sort of subpoena power;
4. The right of the defendant to challenge evidence and confront witnesses through cross-examination;
5. The right of the defendant to representation by counsel (including the appointment of counsel for indigent defendants) and an adequate opportunity to prepare for the hearing;
6. The right of the defendant to have the hearing transcribed by videotape or a court reporter; and
7. The right of the defendant to receive a written summary of the findings and the decision.[102]

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[99] 5 F.3d 1125, 1132 (1993).

[100] Korengold, et al., *supra* note 40; Palacios, *supra* note 4; Silverman, *supra* note 9; Dorne & Gerweth, *supra* note 95; American Bar Association, *supra* note 11; James Acker & Charles Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200 (2000).

[101] Kobil, *supra* note 96, at 542.

[102] *Id.*

An alternative strategy to depoliticize the clemency process is to establish a respected three-judge panel to decide clemency petitions. Victoria Palacios suggests that a decision panel be appointed by an appointing panel, such that the political ties to any result are very distant.[103] Both panels would be made up of prestigious persons who would assure the public that the best interests of the public would be considered.[104] The selection of the appointing panel could be made by a bi-partisan group including the governor.[105]

Whether or not a board is involved in the clemency process, the clemency consideration should be a meaningful review. If the governor remains as the final-decision maker in death penalty clemency applications, she should meet personally with the attorneys and publicly report an explanation for the clemency decision. This would have the advantage of restoring accountability for the pending execution and would educate the public about the administration of justice in the state.

Clearly, many miscarriages of justice are not corrected through the executive clemency process. The circumstantial evidence of political influence leads me to convict the clemency process of failure to ensure justice. "Executions... [are] about politics, not justice."[106] States should recognize this, acknowledge its truth, and evaluate their clemency procedures to provide for procedural fairness and depoliticize its administration.

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[103] Palacios, *supra* note 4, at 371.
[104] *Id.*
[105] *Id.*
[106] King, *supra* note 29.