Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases

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FORGIVING THE UNFORGIVABLE: REINVIGORATING THE USE OF EXECUTIVE CLEMENCY IN CAPITAL CASES

Abstract: Clemency, the power to reduce the sentence of a convicted criminal, has existed since ancient times. Yet, the use of this power in the United States has significantly declined in recent decades. The U.S. Supreme Court has called executive clemency “the fail safe” of the criminal justice system, and has determined that some minimal procedural safeguards apply in clemency proceedings. Lower courts, however, have failed to require any significant procedural safeguards in the clemency process. Because clemency plays a crucial function in the criminal justice system, this Note argues that states should enact both procedural requirements and substantive guidelines to ensure death row inmates receive due process.

Introduction

In August 1989 after attending a party and shooting pool with a small group of friends, Troy Davis fell into a situation that would change his life forever.1 That night, Davis was involved in a scuffle in a Burger King parking lot in Savannah, Georgia.2 At the same time, off-duty police officer Mark MacPhail was working security at the Burger King restaurant.3 Hearing someone scream for help, MacPhail ran outside.4 The scene was frenzied—one man was lying bloodied on the ground with two men surrounding him.5 As MacPhail approached the scene, shots were fired and MacPhail fell to the ground, dead.6 Troy Davis claims he did not have a gun on that late August night.7 Yet, nine eyewitnesses identified Davis as the gunman in the Burger King parking

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3 Id.
4 Id.
5 Id.
6 Id.
7 Id. at 445; John Rudolf, Troy Davis’ Last Words Released by Georgia Department of Corrections, HUFFINGTON POST (Mar. 1, 2012), http://www.huffingtonpost.com/2011/10/07/troy-davis-execution-last-words_n_1000648.html.
lot.\textsuperscript{8} Davis would spend the next twenty-two years of his life on death row, exhausting appeal after appeal.\textsuperscript{9}

After new evidence emerged suggesting Davis may actually have been innocent, the Supreme Court ordered the U.S. District Court for the Southern District of Georgia to hear the evidence and determine whether it established Davis’s innocence.\textsuperscript{10} The district court ultimately found that the evidence casted some minimal doubt on his conviction, but not enough to prove his innocence.\textsuperscript{11} As his execution drew nearer, Troy Davis’s last hope was executive clemency which could be granted by the Georgia Board of Pardons and Paroles.\textsuperscript{12} In light of the extreme doubt in Davis’s case, his clemency petition attracted the attention of thousands of Americans who rallied to support his cause.\textsuperscript{13} Fifty members of Congress, Pope Benedict XVI, President Jimmy Carter, Archbishop Desmond Tutu, and many others urged the Georgia Board to grant clemency in the form of a life sentence.\textsuperscript{14} On September 20, 2011, however, the Georgia Board of Pardons and Paroles denied executive clemency to Troy Davis.\textsuperscript{15} He was executed by the state of Georgia on September 21, 2011, maintaining his innocence even in his last words.\textsuperscript{16}

\begin{footnotes}
\item[8] Lott, supra note 2, at 445.
\item[10] See \textit{In re Davis}, 130 S. Ct. 1, 1 (2009). The evidence that suggested Davis may have been innocent included the fact that seven out of the prosecution’s nine key witnesses had either recanted or backed off their testimony, several people came forward to give sworn statements that Sylvester Coles, who was at the scene of the crime with Davis, had told them that he was actually the trigger man, and a handful of the jurors who sentenced Davis to death gave sworn statements expressing their doubt in the verdict. See Bill Rankin, \textit{Troy Davis’ Lawyers Tell Parole Board There’s Too Much Doubt}, ATLANTA J.-CONST., Sept. 16, 2011, http://www.ajc.com/news/news/local/troy-davis-lawyers-tell-parole-board-there-is-too-mu/nQLsY/.
\item[11] \textit{In re Davis}, 2010 WL 3385081, at *61 (“Ultimately, while Mr. Davis’s new evidence casts some additional, minimal doubt on his conviction, it is largely smoke and mirrors.”).
\item[14] Id.
\item[16] See Rudolf, supra note 7. Davis’s last words before his execution were the following: Well, first of all I’d like to address the MacPhail family. I’d like to let you all know that despite the situation—I know all of you are still convinced that I’m the person that killed your father, your son and your brother, but I am innocent. The incidents that happened that night was not my fault. I did not have
The Troy Davis case highlights the importance of executive clemency as the fail-safe of the American criminal justice system.\textsuperscript{17} As the last step in the criminal justice process, clemency fulfills a crucial function in the death penalty context.\textsuperscript{18} Although there has been an increase in the number of death sentences over the past few decades, there has been a corresponding decrease in the number of clemencies granted to death row inmates.\textsuperscript{19} As clemency is often a defendant’s final plea for relief from execution, it is important to analyze the current clemency structures in each state to ensure that they provide appropriate relief.\textsuperscript{20}

In \textit{Ohio Adult Parole Authority v. Woodard} in 1998, the U.S. Supreme Court held that some minimal procedural safeguards apply to clemency proceedings.\textsuperscript{21} Despite the Court’s holding, lower courts have routinely rejected due process challenges to clemency proceedings.\textsuperscript{22} In light of \textit{Woodard} and the important role clemency plays in the criminal justice process, states should ensure that their clemency process is providing adequate procedural safeguards for death row inmates petitioning for executive clemency.\textsuperscript{23}

This Note will focus on clemencies granted in capital cases, beginning in Part I with a brief overview of the history and theory supporting the use of executive clemency.\textsuperscript{24} Part II examines the current use of executive clemency in the states and outlines the recent decline in

\begin{itemize}
\item a gun that night. I did not shoot your family member. But I am so sorry for your loss. I really am—sincerely. All that I can ask is that each of you look deeper into this case, so that you really will finally see the truth. I ask to my family and friends that you all continue to pray, that you all continue to forgive. Continue to fight this fight.
\end{itemize}

\textit{Id.}

\textsuperscript{17} \textit{See} Herrera v. Collins, 506 U.S. 390, 415 (1993) (observing that “executive clemency has provided the ‘fail-safe’ in our criminal justice system”).


\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{See id.} (noting that a clemency petition is often a final plea of relief from execution).


\textsuperscript{22} \textit{See, e.g.}, Anderson v. Davis, 279 F.3d 674, 676 (9th Cir. 2002) (rejecting a claim that the governor’s blanket policy not to commute sentences violated due process); Parker v. State Bd. of Pardons & Paroles, 275 F.3d 1032, 1034, 1037 (11th Cir. 2001) (rejecting petitioner’s claim of bias in the chair of the Board of Pardons and Paroles who said, “[N]o one on death row [will] ever receive clemency”); Allen v. Hickman, 407 F. Supp. 2d 1098, 1103–04 (N.D. Cal. 2005) (finding that the minimal due process standard in clemency requires only that the state does not arbitrarily deny the prisoner all access to the clemency process).

\textsuperscript{23} \textit{See infra} notes 277–345 and accompanying text.

\textsuperscript{24} \textit{See infra} notes 33–141 and accompanying text.
use. Finally, Part III argues that states should enact minimal procedural requirements and substantive guidelines to ensure that the states provide due process for death row inmates.

I. THE HISTORY AND THEORY SUPPORTING THE USE OF EXECUTIVE CLEMENCY IN THE UNITED STATES

Executive clemency has come to play an important role in the American criminal justice system. As such, it is essential to understand the origin of the clemency power and how it currently operates on both the federal and state level. Section A first provides an overview of the history of executive clemency and its place in the criminal justice system. Next, Sections B and C briefly examine the theories that support the use of executive clemency and the development of the clemency power in the United States. Section D reviews the current use of the clemency power in the states and the importance of that power in recent decades. Finally, Section E provides an overview of the case law regarding due process in clemency proceedings.

A. Historical Overview

The term “clemency” encompasses a variety of mechanisms an executive can use to remit the consequences of a crime. A pardon is the broadest of the clemency mechanisms, and it effectively nullifies both a conviction and a sentence. Pardons, however, are rarely granted in capital cases. When an inmate has received the death penalty, the executive is more likely to grant a commutation, a type of clemency in which a severe penalty is replaced with a lesser punishment.
tionally, a *reprieve* is a limited form of clemency that postpones or delays a scheduled punishment.\(^{37}\)

The clemency power has existed in some form since the time of the ancient Greeks and Romans.\(^{38}\) Both groups employed a system of clemency for criminal offenders.\(^{39}\) For example, one of the earliest and most notorious grants of clemency occurred when Pontius Pilate, a Roman leader, pardoned Barnabas, leaving Jesus to be crucified.\(^{40}\)

Centuries later, Britain adopted its clemency power from these ancient systems.\(^{41}\) Originally, the institution of clemency in Britain had more to do with power than justice.\(^{42}\) The British pardon functioned as a “tool of pecuniary and political aggrandizement,” and not as an act of grace.\(^{43}\) The power was frequently abused by the King, clergy, and feudal courts.\(^{44}\) King James II, for example, was notorious for selling pardons for a sum of money, of which he would keep half and split the rest between his two most favored women.\(^{45}\)

By 1535, the modern pardon power was formally consolidated in the Crown with King Henry VIII.\(^{46}\) The King’s clemency powers were very broad; he could pardon with or without condition, and could exercise the pardon at any time throughout the judicial process.\(^{47}\) Although the clemency power was still abused at times, it formed one of

\(^{37}\) Id.; Ridolfi & Gordon, *supra* note 33, at 28.


\(^{39}\) Id. at 583–84. Although not highly developed, the Athenians employed a system in which an offender was required to garner 6000 citizens to support his or her petition for clemency in a secret poll. Id. at 583. The Romans, on the other hand, had a more refined system of clemency than the Greeks and were willing to use clemency for a variety of different reasons and purposes, for example, to quell discord among the subjugated inhabitants of the Roman empire. Id. at 584.


\(^{41}\) Kobil, *supra* note 38, at 585–86. Sir William Blackstone, the great English jurist, decried the cruelty of the inhabitants of the Isle of Gurnsey for failing to postpone the execution of a pregnant woman, a “barbarity which they never learned from the laws of *antient* Rome.” Id. (quoting 4 William Blackstone, *Commentaries* *390–91*).

\(^{42}\) Kobil, *supra* note 38, at 583.


\(^{44}\) Kobil, *supra* note 38, at 586; Ruckman, *supra* note 43, at 252.

\(^{45}\) Ruckman, *supra* note 43, at 252 n.16.

\(^{46}\) Id. at 252.

\(^{47}\) Id. at 251–52.
the great advantages of monarchies over any other kind of government because it ensured justice was administered with mercy.  

The clemency power in the United States stems from the English pardoning power. The King delegated the pardoning power to the colonial governors and his direct representatives in the New World. Few rules controlled this power and governors had complete discretion to grant or deny a pardon for any reason. Therefore, colonial governors granted many pardons to correct legal errors, to pardon defendants with upstanding moral character, and to encourage the pardonee to incriminate his or her colleagues in crime. Additionally, in colonial America the death sentence was applicable to many more crimes than it is today. Therefore, there was no real expectation that all condemned criminals would be executed, thus explaining the high number of clemencies granted.

B. Theory Supporting Executive Clemency

Executive clemency has three main theories that justify its use. Retributivist theory justifies executive clemency as an act of justice, whereas redemptive theory justifies clemency as an act of mercy. Additionally, in some situations, clemency can be justified on utilitarian grounds.

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48 See Kobil, supra note 38, at 586. Blackstone praised the clemency power of England, claiming that it empowered the sovereign to stray from the “rigid dictates of the common law.” Breslin & Howley, supra note 40, at 246. Additionally, he believed that the clemency power was an effective tool for the monarch to gain affection from his people. See id. According to Blackstone, clemency would ensure the people would look up to the monarch as “the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince.” Id. at 246–47.


50 Kobil, supra note 38, at 589; Moylan & Carter, supra note 49, at 41.

51 See Stuart Banner, The Death Penalty: An American History 55 (2002) (explaining that clemency was understood as a means to tailor the sentence to the individual case).

52 Id. at 56–58.

53 See id. at 54.

54 Id.

55 See Ridolfi & Gordon, supra note 33, at 26.

56 See id.

Supporters of the retributivist theory of executive clemency believe clemency is justified as an act of justice.\textsuperscript{58} Retributivists support executive clemency when it is used to rectify unjust punishment and to ensure justice is served when the system is incapable of reaching a just result.\textsuperscript{59} For example, executive clemency is justified when there are doubts about innocence, questions about the proportionality of the sentence to the crime, or questions of culpability.\textsuperscript{60}

Additionally, executive clemency is justified as an act of mercy under a redemptive theory.\textsuperscript{61} Redemptive theory overlaps with retributivist theory in that redemptionists believe that the purpose of executive clemency is to provide mercy when the system is too harsh in an individual case.\textsuperscript{62} Redemptive theory, however, focuses on the rehabilitation and reconciliation of the offender, victim, and community as the most important factors in clemency decisions, as opposed to retributivist theory’s focus on justice.\textsuperscript{63} Although redemptive theory has declined in recent decades, from the beginning of the twentieth century until the 1960s, governors frequently relied on a redemptive rhetoric to claim responsibility for the final decision to execute or commute a death row inmate.\textsuperscript{64} For example, in 1966 the Governor of North Carolina explained that the courts exercise the powers of justice, but that the executive exercises “an equally important attitude of a healthy society—mercy beyond the strict framework of law.”\textsuperscript{65}

\textsuperscript{58} Moylan & Carter, \textit{supra} note 49, at 42; Elizabeth Rapaport, \textit{Retribution and Redemption in the Operation of Executive Clemency}, 74 CHI.-KENT L. REV. 1501, 1502 (2000) (noting that retributivists argue that the clemency power should only be used to rectify unjust punishment, to free the innocent, those of uncertain guilt, and those whose sentences are excessive when measured against their offenses and culpability).

\textsuperscript{59} See Moylan & Carter, \textit{supra} note 49, at 42; Rapaport, \textit{supra} note 58, at 1502.


\textsuperscript{61} Ridolfi & Gordon, \textit{supra} note 33, at 26.

\textsuperscript{62} Moylan & Carter, \textit{supra} note 49, at 42.

\textsuperscript{63} Rapaport, \textit{supra} note 58, at 1503.

\textsuperscript{64} \textit{Id.} at 1507.

\textsuperscript{65} \textit{Id.} at 1507 & n.16 (citing Terry Sanford, \textit{On Executive Clemency, in Messages, Addresses, and Public Papers of Governor Terry Sanford} 1961–1965, at 552 (Memory F. Mitchell ed., 1966)).
Today, executive clemency is more often justified on retributive principles rather than redemptive principles, because governors are more likely to portray themselves as bound to respect the decision of a jury. That does not mean, however, that the redemptive theory of executive clemency has completely disappeared. In his dissenting opinion in the U.S. Supreme Court case *Dretke v. Haley* in 2004, Justice Kennedy advocated for applying both retributive and redemptive principles in executive clemency. He argued that the clemency power can correct injustices that ordinary criminal processes are unable or unwilling to consider, which is largely a retributive view of clemency. He also, however, stressed the point that mercy is required in those cases as a way to serve justice, implying that justice and mercy are not always distinct.

In addition to redemptive and retributive justifications, executive clemency can also be justified on utilitarian grounds. Many presidents have used the pardon power in justice-neutral ways that benefit the country as a whole. For example, President George Washington granted unconditional pardons to many of the participants in the Pennsylvania Whiskey Rebellion and President John Adams issued pardons to insurgents in Pennsylvania to serve “the public good.” Furthermore, President Abraham Lincoln repeatedly issued pardons to those who had fought against the Union, conditioned on their voluntarily taking an oath to uphold the Constitution. These types of pardons are unjustified in a retributive sense because they treat some offenders differently than others. Nonetheless, they still represent a proper use of the executive clemency power.

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66 See id.
67 See Justice Kennedy Comm’n, Am. Bar Ass’n, Reports with Recommendations to the ABA House of Delegates 64–71 (2004) (recommending that old age, heroic acts, and extraordinary suffering should all be considered in the application of executive clemency).
68 See 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) (noting that clemency can be used to correct injustices that the ordinary criminal process cannot fix, therefore indicating that mercy is not foreign to our criminal justice system).
69 Id.
70 Id.
71 Kobil, *supra* note 57, at 222.
72 Kobil, *supra* note 38, at 592.
73 Id.
74 Id. at 593.
75 See Kobil, *supra* note 57, at 222.
76 Id.; see Dretke, 508 U.S. at 399 (Kennedy, J., dissenting) (arguing that mercy is part of the American criminal justice system).
C. Federal Clemency Power

When drafting the Constitution, the Framers recognized the importance of clemency and its theoretical justifications in the early criminal justice system. Therefore, they included the clemency power as one of the President’s enumerated powers. The Framers recognized the retributivist need to counterbalance possible “injustices that inevitably result in any criminal justice system.” For example, Alexander Hamilton expressed the importance of the clemency power in Federalist No. 74, in which he explained that because criminal codes are necessarily severe, there must be some exceptions, otherwise “justice would wear a countenance too sanguinary and cruel.” Because the Framers considered the clemency power to be so important, they rejected any proposals limiting the President’s power to pardon, such as requiring the Senate’s consent or exempting treason from the list of pardonable offenses.

Accordingly, the U.S. Supreme Court has interpreted the President’s federal clemency power broadly. The Court first examined the federal pardon power in 1833 in United States v. Wilson, where Chief Justice John Marshall described the pardon as “a private, official act” of the executive. Shortly thereafter, in 1867 the Court held in Ex parte Garland that the clemency power is unlimited, may be exercised at any time, and is not subject to legislative control. Five years later, the Supreme Court expressed the breadth of the power in one short sentence: “To the executive alone is intrusted the power of pardon; and it is granted without limit.”

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77 See Kobil, supra note 38, at 589.
78 See U.S. Const. art. II, § 2, cl. 1 (“The President shall . . . have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”); see also Gavriel B. Wolfe, Note, I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability in Massachusetts, 27 B.C. THIRD WORLD L.J. 417, 423 (2007) (noting that the founders of the nation considered clemency so important that they enumerated it in the Constitution among the first of the President’s powers).
83 32 U.S. at 160–61.
84 71 U.S. at 380.
D. The Importance of the State Clemency Power

State executive clemency procedures were born out of the wide, discretionary federal clemency power. In drafting their constitutions, most states assigned their governors sole clemency decision making authority, although some states allowed for legislative override of the governor’s pardon. Regardless of structure, in early America, grants of clemency at the state level were fairly common. Governors routinely granted clemency to offenders without fear of political consequences.

Today, however, state executive clemency practices are much different. Using their broad discretion, the states have created a variety of clemency procedures. In particular, of the thirty-three states that still employ the death penalty, the structure and process of the clemency power in each state is significantly different. Twelve death penalty states have kept a traditional clemency procedure by vesting the sole clemency authority in the governor, mimicking the federal Constitution. In contrast, five death penalty states have spread the clemency power over a group of people by investing the power in an administrative board. The remaining sixteen death penalty states divide the

86 Heise, supra note 18, at 255.
87 Id.
88 Breslin & Howley, supra note 40, at 249; Heise, supra note 18, at 255. Georgia originally allowed legislative override of the governor’s pardon, whereas most states, like Massachusetts, vested the pardoning power solely in the executive. Breslin & Howley, supra note 40, at 249.
89 Breslin & Howley, supra note 40, at 250.
90 Id.
91 Heise, supra note 18, at 255 (explaining contemporary executive clemency practices).
93 Id. (providing an overview of the executive clemency structures in each state).
94 See State by State Database, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/state_by_state (last visited Mar. 16, 2013). The states that vest sole clemency power in the governor are California, Colorado, Kentucky, Mississippi, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wyoming. See CAL. CONST. art. V, § 8; COLO. CONST. art. IV, § 7; KY. CONST. § 77; MISS. CONST. art. 5, § 124; N.C. CONST. art. III, § 5; OR. CONST. art. V, § 14; S.C. CONST. art. IV, § 14; S.D. CONST. art IV, § 3; TENN. CONST. art. III, § 6; VA. CONST. art. V, § 12; WASH. CONST. art. III, § 9; WYO. CONST. art. IV, § 5; Additionally, California has a unique clemency model where although the governor typically has exclusive authority, if the petitioner is a twice convicted felon, the governor can only grant clemency with the concurrence of four members of the state supreme court. CAL. CONST. art. V, § 8; LINDA E. CARTER, UNDERSTANDING CAPITAL PUNISHMENT LAW 254 (2004).
95 The five death penalty states that vest the clemency power solely in a group or an administrative board are Georgia, Idaho, Nebraska, Nevada, and Utah. See GA. CONST. art.
Of the states that follow this mixed structure, nine states have an administrative board in place solely to give the governor a non-binding recommendation on clemency decisions. The other seven states, however, require the governor to receive a recommendation from an administrative board before he or she can make any clemency decisions.

Despite varying structures, the Supreme Court has held that state clemency proceedings are of the utmost importance to the criminal justice system. The Court, however, has noted that executive clemency power between the governor and an administrative board.

IV. § 2 (providing that “the State Board of Pardons and Paroles shall be vested with the power of executive clemency”); IDAHO CONST. art. IV, § 7 (giving a board the power to pardon and commute sentences and granting the governor the power to grant respites and reprieves); NEB. CONST. art. IV, § 13 (“The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to . . . grant respites, reprieves, pardons, or commutations . . . .”); NEV. CONST. art. V, §§ 13–14 (“The governor, justices of the supreme court, and attorney general . . . may . . . commute punishments . . . .”); UTAH CONST. art. VII, § 12 (“The Board of Pardons and Parole . . . may . . . commute punishments, and grant pardons after convictions . . . .”); State by State Database, Death Penalty Info. Center, supra note 94.

96 See State by State Database, Death Penalty Info. Center, supra note 94.


98 See State by State Database, Death Penalty Info. Center, supra note 94. The seven death penalty states that require authorization from an administrative board before the governor may exercise the clemency power are Arizona, Delaware, Florida, Louisiana, Oklahoma, Pennsylvania, and Texas. See ARIZ. CONST. art. V, § 5 (“The governor shall have power to grant reprieves, commutation, and pardons, after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as may be provided by law.”); DEL. CONST. art VII, § 1; Fla. Const. art IV, § 8; LA. CONST. art IV, § 5; OKLA. CONST. art VI, § 10; PA. CONST. art IV, § 9; TEX. CONST. art IV, § 11; Ariz. Rev. Stat. § 31-402 (2002) (“[T]he board of executive clemency shall have exclusive power to pass upon and recommend reprieves, commutations, paroles and pardons. No reprieve, commutation or pardon may be granted by the governor unless it has first been recommended by the board.”). Additionally, in Florida the governor is a member of the administrative board. State by State Database, Death Penalty Info. Center, supra note 94.

99 See Woodard, 523 U.S. at 278 (“[C]lemency . . . was a significant, traditionally available remedy for preventing miscarriages of justice when judicial process was exhausted.”); Herrera, 506 U.S. at 411–12 (“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.”).
ency, for the most part, is outside legislative and judicial control. In 1981 in *Connecticut Board of Pardons v. Dumschat*, the Court emphasized this position, reasoning that clemency at the state level has not traditionally been the business of the courts.

Additionally, the Supreme Court placed extreme confidence in state clemency proceedings in 1993 in *Herrera v. Collins*, where the Court labeled executive clemency the fail-safe of the criminal justice system. The Court denied federal habeas corpus relief to a state death row inmate and held that actual innocence, absent some other procedural violation in the offender’s underlying case, is not a ground for habeas relief. The majority viewed the petitioner’s actual innocence claim as an attempt to relitigate a state trial. The Court therefore held that the state executive clemency process, rather than the federal court system, is the proper mechanism for assessing claims of innocence. Additionally, the Court reasoned that executive clemency is deeply rooted in our Anglo-American tradition of law and is therefore the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.

E. Executive Clemency Case Law

Although the Supreme Court has stressed the importance of clemency, it is an executive power isolated from the other branches of government, making it difficult for courts to actually impose standards on the process. The Fifth Amendment of the U.S. Constitution requires that “no person shall . . . be deprived of life, liberty, or property, without due process of law.” In *Mathews v. Eldridge* in 1976, the Supreme Court established a three-part test to determine if procedural due pro-

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100 See Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (“[P]ardon and commutation decisions have not traditionally been the business of the courts.”).


102 See *Herrera*, 506 U.S. at 415.

103 Id. at 416 (noting that executive clemency has been the traditional remedy for claims of innocence based on new evidence discovered too late to file a new trial motion); Ridolfi & Gordon, *supra* note 33, at 29. Habeas corpus is a traditional way for state prisoners to challenge their detention by state authorities in federal court. See *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657, 657–60 (1948).

104 *Herrera*, 506 U.S. at 401. The Court determined that to allow federal habeas review of freestanding claims of actual innocence would be severely disruptive to the court system. *Id.*

105 Id. at 416–17; Ridolfi & Gordon, *supra* note 33, at 29.

106 *Herrera*, 506 U.S. at 411–12.


108 U.S. Const. amend. V.
cess has been met in a particular instance.\textsuperscript{109} Therefore, in any review of the procedure afforded in executive clemency decisions, courts must keep the \textit{Mathews} factors in mind.\textsuperscript{110} Yet, requiring procedural due process in state clemency procedures is difficult because courts tend to view clemency as a wholly executive function outside the reach of the judiciary.\textsuperscript{111}

Another difficulty with providing procedural due process in executive clemency determinations is that state clemency procedures are unlike any other judicial proceeding because they are purposely standardless.\textsuperscript{112} Typically, clemency decisionmakers may grant or deny clemency for any reason.\textsuperscript{113} Therefore, because of clemency's unique nature, there has been very little judicial review of clemency procedures and decisions.\textsuperscript{114}

Although courts have found little to no legal authority for judicial intervention in executive clemency decisions, one state supreme court was willing to require due process in state clemency proceedings.\textsuperscript{115} In 1962 in \textit{McGee v. Arizona State Board of Pardons & Paroles} the Arizona Supreme Court held that a prisoner applying for commutation of a death sentence is entitled to due process in the form of notice an opportunity to be heard, and a meaningful hearing.\textsuperscript{116} The court reasoned that if the state is going to take a human life “it must not be done with less formality than the spirit and the traditions of the law contemplate,”\textsuperscript{117}

Thirty-six years after \textit{McGee}, the Supreme Court in \textit{Woodard} held that there are minimal due process requirements in state clemency proceedings.\textsuperscript{118} The Court held that judicial intervention may be required in situations where a state official essentially flipped a coin to determine whether to grant clemency or where the state arbitrarily de-

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\textsuperscript{109} 424 U.S. 319, 334–35 (1976). The test requires courts to balance (1) “the private interest that will be affected by the official action,” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” \textit{Id.}

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} See id.

\textsuperscript{112} See Moylan & Carter, \textit{supra} note 49, at 48.

\textsuperscript{113} Carter, \textit{supra} note 94, at 257.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} Id. at 259.


\textsuperscript{117} McGee, 376 P.2d at 781; Kobil, \textit{supra} note 115, at 220.

\textsuperscript{118} McGee, 376 P.2d at 781.
nied a prisoner any access to its clemency process.\textsuperscript{119} Essentially, the Court determined that due process prohibits entirely arbitrary decisions to grant or deny clemency.\textsuperscript{120} This holding contradicts the Court’s prior decision in \textit{Dumschat}, in which the Court held that prisoners sentenced to life imprisonment in Connecticut did not possess a protectable liberty interest in having their sentences commuted, and were therefore not entitled to procedural due process from the Connecticut Board of Pardons.\textsuperscript{121} In \textit{Woodard}, however, by a five-to-four margin, the Court held that \textit{Dumschat} does not completely bar due process challenges to state clemency procedures in capital cases.\textsuperscript{122}

The plurality opinion, written by Justice Sandra Day O’Connor, held that some minimal procedural safeguards apply to clemency proceedings.\textsuperscript{123} The Court reasoned that a prisoner under a death sentence remains a living person and therefore has an interest in his or her life.\textsuperscript{124} The Court did not explain what type of due process is required in executive clemency procedures, but suggested the standard is relatively low.\textsuperscript{125}

Despite the procedural due process rights granted by the Supreme Court in \textit{Woodard}, lower courts have routinely rejected challenges to

\textsuperscript{119} Id.

\textsuperscript{120} Kobil, \textit{supra} note 115, at 575.


\textsuperscript{122} \textit{Woodard}, 523 U.S. at 275–76. The justices were divided over what constitutes a protected life interest and disagreed as to whether an inmate on death row has an interest in life that would allow him to raise a due process claim to challenge unfair clemency practices. \textit{Id.}

 Justice Sandra Day O’Connor, joined by Justices Stephen Breyer, Ruth Bader Ginsburg, and David Souter, wrote a concurring opinion that combined with Justice John Paul Stevens’s opinion formed the plurality holding of the Court. \textit{Id.} at 288 (O’Connor, J. concurring) (“A prisoner under a death sentence remains a living person and consequently has an interest in his life.”); \textit{id.} at 292 (Stevens, J. concurring) (“Thus, it is abundantly clear that respondent possesses a life interest protected by the Due Process Clause.”). Chief Justice William Rehnquist wrote an opinion, joined by Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas, stating that a death row inmate does not have a life interest requiring due process in executive clemency procedures. \textit{Id.} at 285 & n.5 (majority opinion). The Chief Justice argued that subjecting clemency to due process would effectively extinguish it because executives consider a wide range of factors when making clemency decisions that are not comprehended by judicial proceedings. \textit{Id.} at 284; Sarat & Hussain, \textit{supra} note 60, at 1328 (citing \textit{Woodard}, 523 U.S. at 280–81).

\textsuperscript{123} \textit{Woodard}, 523 U.S. at 289 (O’Connor, J., concurring).

\textsuperscript{124} \textit{Id.} at 288.

\textsuperscript{125} \textit{Id.} at 289. Judicial intervention may be required in situations where 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.” \textit{Id.}
clemency proceedings.\textsuperscript{126} \textit{Woodard} opened the door for courts to step in when a defendant is deprived of minimal due process or when he or she is denied access to clemency proceedings.\textsuperscript{127} Yet, despite a high number of due process challenges to state clemency procedures, none of those challenges have been successful.\textsuperscript{128} For example, inmates have challenged clemency procedures for bias on the part of the governor or clemency board without success.\textsuperscript{129} Petitioners have also challenged clemency procedures for undue political pressure on the decision-maker with similar results.\textsuperscript{130} Additionally, inmates have filed unsuccessful claims against blanket policies not to commute death sentences.\textsuperscript{131} Courts have also rejected due process challenges when a petitioner claims he or she has not had adequate time to prepare his or her clemency petition.\textsuperscript{132} Moreover, courts have found that there is no right to present any particular information during clemency hearings.\textsuperscript{133}

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\item \textsuperscript{126} \textit{Carter}, supra note 94, at 260; Moylan & Carter, \textit{supra} note 49, at 50.
\item \textsuperscript{127} \textit{Woodard}, 523 U.S. at 289.
\item \textsuperscript{128} Moylan & Carter, \textit{supra} note 49, at 52.
\item \textsuperscript{129} See \textit{Parker}, 275 F.3d at 1034, 1037 (rejecting petitioner’s claim of bias in chair of the Board of Pardons and Paroles, who said, “[N]o one on death row [will] ever receive clemency,” and holding that the statement was very old, and noting that the board member testified that he has an open mind to clemency petitions); Gilreath v. State Bd. of Pardons & Paroles, 273 F.3d 932, 934 (11th Cir. 2001) (reasoning there was no violation of due process when two of the five members of the Georgia Board were under investigation by the attorney general because there was no indication that they would side with the state to help their own investigations).
\item \textsuperscript{130} See \textit{Roll v. Carnahan}, 225 F.3d 1016, 1017 (8th Cir. 2000). Petitioner challenged Missouri’s clemency procedure because the governor was running for the U.S. Senate, executive clemency for death row inmates was an election issue, and the governor therefore would not commute any sentences. \textit{Id.} The court held that the petitioner failed to state a claim upon which relief may be granted because the decision to grant or deny clemency was left to the discretion of the governor, and therefore the petitioner’s complaint that the governor would not be objective failed. \textit{Id.} at 1018.
\item \textsuperscript{131} See \textit{Anderson}, 279 F.3d at 676 (rejecting a claim that the governor’s blanket policy not to commute sentences violated due process because petitioner could not prove that his case would not receive individual treatment and because other courts have not found that a general policy to refuse clemency violates due process); \textit{In re Sapp}, 118 F.3d 460, 465 (6th Cir. 1997) (observing that “the governor may agonize over every petition; he may glance at one or all such petitions and toss them away”).
\item \textsuperscript{132} See, e.g., \textit{Allen}, 407 F. Supp. 2d at 1103–04 (holding that in executive clemency decisions, minimal due process requires only that the state does not arbitrarily deny the prisoner all access to the clemency process and that the clemency decision is not wholly arbitrary or capricious).
\item \textsuperscript{133} See, e.g., \textit{Alley v. Key}, 431 F. Supp. 2d 790, 802 (W.D. Tenn. 2008) (holding that a “potential clemency applicant is [not] constitutionally entitled to what amounts to discovery for the preparation of a clemency application”); \textit{Nabelek v. Bradford}, 228 S.W.3d 715, 718 (Tex. Ct. App. 2006) (holding that “there is no due process right to present any particular information when seeking clemency”).
\end{itemize}
In perhaps the most extreme example of how low the threshold is for minimal due process, in *Faulder v. Texas Board of Pardons and Paroles* in 1999 the U.S. Court of Appeals for the Fifth Circuit held that despite the Texas clemency system’s glaring deficiencies, it nonetheless did not violate due process. In *Faulder* an inmate challenged the Texas clemency scheme because the board never met, the members faxed in their votes, and the board members did not receive all relevant information regarding specific clemency requests. Despite these flaws, the Fifth Circuit held that the Texas system satisfied minimal procedural due process.

In *Young v. Hayes* in 2000, however, the U.S. Court of Appeals for the Eighth Circuit seemed amenable to a due process claim when the state interfered with an inmate’s ability to present information to the governor in clemency proceedings. In *Young* an inmate wanted to submit an affidavit from a prosecutor, but the prosecuting office threatened to fire the prosecutor if she submitted the affidavit for the petitioner. The inmate argued that the state official’s interference with the clemency process threatened to deprive him of his life without due process of law. The Eighth Circuit held that the inmate presented a valid claim and remanded the case to the district court. The prosecutor eventually left office, however, and there was no final determination of a due process violation.

\begin{itemize}
\item In *Faulder*, 178 F.3d 343, 344 (5th Cir. 1999); see Kobil, *supra* note 121, at 576.
\item Kobil, *supra* note 121, at 576. Mr. Faulder, the petitioner, was a Canadian sentenced to death in Texas, and Madeline Albright, the Secretary of State, had sent an eight-page letter concerning the United States’s treaty obligations with Canada to the Board. *Id.* The Board, however, was not initially given the letter until after most of the members had already voted, and after receiving the information, none of the members changed their votes. *Id.*
\item In *Young*, 178 F.3d at 344.
\item See 218 F.3d 850, 853 (8th Cir. 2000); Carter, *supra* note 94, at 261; Moylan & Carter, *supra* note 49, at 50. The Eight Circuit in *Young* determined that Woodard replaced the older view that there was no right whatever to due process of law in connection with a clemency proceeding. *Young*, 218 F.3d at 853. The court held that the Constitution does not require that a state have a clemency procedure, but it does require that if such a procedure is created, the state’s own officials must refrain from frustrating it by threatening a witness. *Id.*
\item In *Young*, 218 F.3d at 851.
\item *Id.*
\item *Id.* at 853.
\item Moylan & Carter, *supra* note 49, at 50.
\end{itemize}
II. CURRENT USE OF EXECUTIVE CLEMENCY

Despite the window for procedural due process opened by the U.S. Supreme Court in 1998 in Ohio Adult Parole Authority v. Woodard, lower courts have interpreted the Court’s holding very narrowly. Requiring procedural due process in executive clemency decisions, however, may be especially important given the rise in executions and the corresponding decline in clemency grants. Section A of this Part first gives an overview of the current use of the death penalty in the United States. Then, Sections B and C explain that over the past few decades the number of executions has risen dramatically, while executive clemency has slowly dwindled into disuse. Section D provides a case study exemplifying the decline of the use of executive clemency. Finally, Section E analyzes the different factors that influence clemency decisions and attempts to explain the decline in clemency.

A. Death Penalty Practice in the United States

Modern death penalty practice has a history that begins with the U.S. Supreme Court’s decision in Furman v. Georgia in 1972. In Furman the Supreme Court considered the death sentences of three defendants sentenced under the sentencing statutes of Texas and Georgia. The statutes allowed the jury to sentence defendants to life in prison or to death without providing any guidelines. The Court reversed the death sentences of the three defendants and held that in the absence of sentencing guidelines the death penalty is randomly and discriminatorily applied in a way that violates the Eighth Amendment. Because

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142 523 U.S. 272, 289 (1998); see, e.g., Anderson v. Davis, 279 F.3d 674, 676 (9th Cir. 2002) (rejecting a claim that the governor’s blanket policy not to commute sentences violated due process); Allen v. Hickman, 407 F. Supp. 2d 1098, 1103–04 (N.D. Cal. 2005) (holding that the minimal due process standard for clemency decisions requires only that the state does not arbitrarily deny the prisoner all access to the clemency process).

143 See infra notes 168–209 and accompanying text.

144 See infra notes 148–167 and accompanying text.

145 See infra notes 168–209 and accompanying text.

146 See infra notes 210–238 and accompanying text.

147 See infra notes 239–271 and accompanying text.

148 See Furman v. Georgia, 408 U.S. 238, 240 (1972) (holding that Georgia’s statutory death penalty scheme violated the Eighth Amendment’s prohibition against cruel and unusual punishment); Kobil, supra note 121, at 572 (noting that Furman abolished the death penalty in 1972).


150 Furman, 408 U.S. at 240; Korengold et al., supra note 149, at 356.

151 Furman, 408 U.S. at 239–40; Korengold et al., supra note 149, at 356 n.86.
most states had similar sentencing statutes lacking guidelines, *Furman* invalidated the majority of death penalty statutes existing at that time.\(^{152}\)

After *Furman*, death penalty states rushed to enact new death penalty statutes.\(^{153}\) At the time, states could choose between mandatory sentencing or sentencing guidelines.\(^{154}\) Shortly after *Furman*, however, in 1976 the U.S. Supreme Court held in *Woodson v. North Carolina* that mandatory death sentences were also unconstitutional.\(^{155}\) In effect, *Furman* and *Woodson* caused a moratorium on the death penalty as all of the death penalty states were forced to redraft their death penalty statutes to impose sentencing guidelines and strict procedural requirements.\(^{156}\)

Eventually, however, the Supreme Court found some state death penalty statutes constitutional, beginning with *Gregg v. Georgia* in 1976.\(^{157}\) In *Gregg*, a defendant sentenced to death under Georgia’s newly enacted death penalty scheme challenged his death sentence as cruel and unusual punishment in violation of the Eighth Amendment.\(^{158}\) The Court noted that *Furman* had invalidated death penalty statutes because the statutes promoted a “freakish” and arbitrary application of the death penalty.\(^{159}\) In contrast, the Court determined that Georgia’s new scheme no longer allowed for freakish and wanton imposition of the death penalty.\(^{160}\) The Court reasoned that because the new system enabled the jury to focus on the particularized nature of the crime, the particularized characteristics of the individual defendant, and any aggravating or mitigating circumstances, the application of the death penalty would be

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152 Korengold et al., *supra* note 149, at 356–57.
153 *Id.* at 357.
154 *Id.*
155 *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (invalidating a mandatory death sentence for first degree murder because a statute requiring a mandatory death sentence did not provide a standard for determining when death sentences are appropriate and did not provide a method of appellate review); see Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103, 1114 (1990) (noting that the shift from mandatory to discretionary death penalties reflected a consensus in favor of individualized consideration of the character of the offender and the circumstances of the offense).
156 Korengold et al., *supra* note 149, at 356–57.
157 428 U.S. 153, 207 (1976); see also Jurek v. Texas, 428 U.S. 262, 276 (1976) (“Because this system serves to assure that sentences of death will not be ‘wantonly or freakishly’ imposed, it does not violate the Constitution.”); Proffitt v. Florida, 428 U.S. 242, 259 (1976) (“Florida, like Georgia, has responded to *Furman*, by enacting legislation that passes constitutional muster.”).
158 428 U.S. at 162.
159 *Id.* at 206.
160 *Id.*
less random. Therefore, the Court held that Georgia’s system did not violate the Eighth Amendment’s prohibition on cruel and unusual punishment.

Following Gregg, the majority of death penalty states redrafted their statutes and enacted constitutional death penalty statutes that focused the jury’s attention on the particular crime, the particular defendant, and any mitigating or aggravating factors. Since Gregg, however, the Supreme Court has restricted the applicability of the death penalty to certain groups. In 2002, the Court categorically excluded the mentally retarded from capital punishment in Atkins v. Virginia. Similarly, in 2005 in Roper v. Simmons the Court categorically excluded juveniles from capital punishment. Despite the Court’s limitations, today, thirty-three states have active death penalty statutes and there have been 1324 executions since the reinstatement of the death penalty in 1976 in Gregg.

B. Executions Are on the Rise

Gregg effectively changed the landscape of capital punishment in the United States for the decades to follow. As states reinstated their death penalty statutes, the number of executions increased each year until 1999. For example, in the 1960s and 1970s combined there were 194 executions nationwide, followed by 117 executions in the 1980s. In the 1990s, however, there were 478 executions, more than all of the executions combined from the previous thirty years. The number of executions peaked in 1999 when ninety-eight death row inmates were executed. Yet, since 1999 the number of executions each

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161 Id.
162 Id. at 207.
163 Korengold et al., supra note 149, at 357; see Gregg, 428 U.S. at 206.
165 536 U.S. at 321.
166 543 U.S. at 578.
167 Facts About the Death Penalty, DEATH PENALTY INFO. CENTER 1, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Mar. 17, 2013). This number includes the three executions carried out by the federal government since 1976. Id. at 3.
168 See Korengold et al., supra note 149, at 357.
169 See Facts About the Death Penalty, DEATH PENALTY INFO. CENTER, supra note 167, at 1.
171 Id. at 676.
172 Facts About the Death Penalty, DEATH PENALTY INFO. CENTER, supra note 167, at 1.
year has dropped slightly. The average number of executions per year from 2000 to 2010 was 57.9. Additionally, there were forty-three executions in 2011 and 2012.

In the post-*Gregg* era the increase in executions is largely attributable to an increased sense of legitimacy surrounding the death penalty. This sense of legitimacy stems from a belief that under contemporary capital punishment law only the most deserving defendants will be sentenced to death. First, *Gregg* ensured that the death penalty sentencing process is less arbitrary and more reliable. Additionally, the Supreme Court’s categorical exclusion of juveniles and the mentally retarded from eligibility for the death penalty has reduced the number of eligible defendants. Therefore, by requiring a reliable sentencing process and exempting two undeserving classes of defendants from capital punishment, the Supreme Court increased the sense of legitimacy in death sentences.

Although states must comply with more procedural requirements to issue death sentences in the post-*Gregg* period, executive clemency still plays a vital role in current death penalty practice because of the limited potential for federal review of actual innocence claims. Under 28 U.S.C. § 2254, an inmate convicted by a state court may challenge the conviction in federal court by applying for a writ of habeas corpus. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), however, imposed strict limits on an inmate’s ability to file a federal petition for habeas corpus. For example, the AEDPA introduced a one-year statute of limitations for first-time petitioners bringing a claim in federal court. This statute of limitations effectively bars constitutional

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173 *Id.*
174 *Id.*
175 *Id.*
177 *Id.*
178 See 428 U.S. at 206.
179 See *Roper*, 543 U.S. at 578; *Atkins*, 536 U.S. at 321; *supra* notes 163–167 and accompanying text.
181 See Ridolfi & Gordon, *supra* note 33, at 33.
184 Ridolfi & Gordon, *supra* note 33, at 33.
claims that arise after the one-year period and therefore prevents valid claims from ever being heard in federal court. If the statute had been in place in 1985, the boxer immortalized by Bob Dylan, Rubin “Hurricane” Carter, would still be in prison serving three consecutive life sentences for a triple homicide that he did not commit.

In light of the AEDPA, executive clemency is the only possible relief for some inmates who have failed to file a federal habeas petition within the statute of limitations. A study in 2000 revealed that of the 5760 capital convictions between 1973 and 1995, sixty-eight percent of them were subject to serious reversible error, an error that directly impacted either the finding of guilt or the sentence itself. The AEDPA removed the federal habeas review that typically found forty percent of serious reversible errors. Therefore, executive clemency is now the only avenue of relief for prisoners with these types of errors.

Along with the AEDPA’s limits on death row inmates’ appeals, the errors inherent in the criminal justice system also increase the need for executive clemency. Because it is impossible to completely prevent false positives in the criminal justice system, wrongful convictions in capital cases are bound to occur. Errors can occur because of eyewitness mistake, errors by police and prosecutors, plea bargaining, community pressure for a conviction, inadequacy of counsel, or false accusations. Although many errors are caught on appeal, it is inevitable

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185 Id.
186 Clemency and Consequences: State Governors and the Impact of Granting Clemency to Death Row Inmates, Am. Bar Ass’n 4 (July 2002), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_jdpclemeffect02.authcheckdam.pdf [hereinafter Clemency and Consequences]. Rubin “Hurricane” Carter was falsely convicted of a triple homicide in 1966. Id. In 1985, after reviewing old and new evidence, a federal district court judge held that Carter’s conviction was groundless and granted his freedom. Id. The AEDPA eliminated this type of federal review, and thus if Carter were still in prison today he would not have a forum to bring his innocence claim. Id. Carter’s only viable option would be executive clemency, but several governors had denied his clemency requests. Id. Carter’s case gained national attention and prompted Bob Dylan to write his famous song about the false conviction. Bob Dylan, Hurricane (Columbia Records 1975).
187 Ridolfi & Gordon, supra note 33, at 33.
189 Id.
190 Id. at 316.
192 Id. at 316.
193 Id. at 317.
that some errors are never caught.\textsuperscript{194} Therefore, executive clemency, as the fail-safe of the criminal justice system, is the mechanism responsible for catching these errors.\textsuperscript{195}

**C. Executive Clemency Is on the Decline**

Despite the fact that the Supreme Court has hailed executive clemency as the fail-safe of the criminal justice system, the actual use of executive clemency has steadily decreased from 1972 to the present day.\textsuperscript{196} After Gregg, executives have granted clemency in fewer cases, both numerically and as a relative percentage, than in the pre-Gregg period.\textsuperscript{197} Prior to 1976, about twenty-five percent of death sentences were commuted to life imprisonment nationwide.\textsuperscript{198} From 1960 to 1970, for example, 261 inmates were executed, whereas 204 death row inmates were granted clemency.\textsuperscript{199} Additionally, it was commonplace for governors to commute death sentences at will.\textsuperscript{200} For example, in the 1930s Governor Herbert Lehman of New York would commute a death sentence any time a judge issued a dissent in a capital case in which the death penalty was upheld.\textsuperscript{201} As a more modern example, former Governor Pat Brown of California commuted twenty-three of fifty-nine death sentences from 1959 to 1966.\textsuperscript{202}

In the post-Gregg period, however, clemency decisionmakers have granted commutations less frequently.\textsuperscript{203} In the pre-Gregg period in 1960, 190 people were sentenced to death and twenty-two received commutations.\textsuperscript{204} In the post-Gregg period in 1988, however, 296 people were sentenced to death and only four received commutations.\textsuperscript{205} In the pre-Gregg era about twenty-five percent of death sentences resulted

\textsuperscript{194} \textit{See id.} at 316.


\textsuperscript{196} \textit{Carter, supra} note 94, at 256; \textit{see} Kobil, \textit{supra} note 121, at 572; Sarat & Hussain, \textit{supra} note 60, at 1310.

\textsuperscript{197} Korengold et al., \textit{supra} note 149, at 359.

\textsuperscript{198} Gershowitz, \textit{supra} note 170, at 675 (finding that before the Supreme Court’s moratorium on the death penalty, one out of every four or five death sentences was commuted to life imprisonment); Kobil, \textit{supra} note 121, at 572.

\textsuperscript{199} Korengold et al., \textit{supra} note 149, at 350.

\textsuperscript{200} \textit{See} Rapaport, \textit{supra} note 58, at 1509 (noting that contemporary governors are less likely to use their clemency power than governors of the past).

\textsuperscript{201} \textit{Id.}

\textsuperscript{202} Kobil, \textit{supra} note 121, at 572.

\textsuperscript{203} Korengold et al., \textit{supra} note 149, at 359.

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{Id.}
in commutation and that ratio has since dropped to about 2.5%.\textsuperscript{206} Since 1976, 1324 inmates have been executed nationwide, whereas only 273 clemencies have been granted.\textsuperscript{207} Commenting on how rarely clemencies are granted, one scholar compared the chance of receiving clemency to the chance of being struck by lightning or winning the lottery.\textsuperscript{208} One extreme example comes from Florida, where between 1924 and 1966, governors commuted twenty-three percent of death sentences, but did not commute any death sentences in the 1990s.\textsuperscript{209}

D. Troy Davis: A Case Study in the Failure of Executive Clemency

A recent situation in Georgia exemplifies the current reluctance of states to grant executive clemency.\textsuperscript{210} In 2011, the Georgia Board of Pardons and Paroles denied clemency to Troy Davis, a case in which clemency may have been an appropriate remedy.\textsuperscript{211} Troy Davis was convicted for the murder of off-duty police officer Mark MacPhail on August 30, 1991, and was sentenced to death.\textsuperscript{212} On May 19, 2009, Davis filed a habeas petition with the Supreme Court, including new evidence that suggested he may be innocent.\textsuperscript{213} The Supreme Court took an exceptional step that it had not taken in nearly fifty years and transferred Davis’s petition to the U.S. District Court for the Southern District of Georgia to receive testimony and make findings of fact as to the new evidence.\textsuperscript{214} The district court, however, found that although the new evidence did cast some additional doubt on Davis’s conviction, it was largely “smoke and mirrors.”\textsuperscript{215} Therefore, Davis’s only remaining hope for relief from execution lay in the hands of Georgia’s executive clemency board.\textsuperscript{216}

\textsuperscript{206} Gershowitz, supra note 170, at 675 (noting that by 1990 the ratio had dropped to one commutation for every forty death sentences).


\textsuperscript{209} Sarat & Hussain, supra note 60, at 1310.


\textsuperscript{211} Id.

\textsuperscript{212} Lott, supra note 2, at 445.


\textsuperscript{214} Id.


\textsuperscript{216} See Rankin, supra note 10.
Troy Davis was denied clemency in Georgia, a state that vests its clemency power solely in a Board of Pardons and Paroles.\footnote{Ga. Const. art. IV, § II, para. 2; Press Release, Ga. State Bd. of Pardons & Paroles, supra note 12. In Georgia, the governor has no authority to grant clemency. Ga. Code Ann. § 42-9-56 (West 2011). The governor does, however, appoint the five members of the clemency Board, who must then be confirmed by the Georgia Senate. Ga. Const. art. IV, § II, para. 1. Additionally, the members of the Board serve a term of seven years, with the chairman selected from its membership. Id. Any of the members can suspend the execution of a death sentence until the Board has an opportunity to hear the petitioner’s application for relief. Id. § II, para. 2. If the Board suspends a sentence, however, it must make a final decision within ninety days of the suspension. Ga. Code Ann. § 42-9-20.} Although there are a few requirements for the Board to grant a clemency petition, there are no explicit guidelines as to when a clemency grant is appropriate.\footnote{See Ga. Code Ann. § 42-9-42. The decision must be signed by the required majority of Board members. Id.} First, a majority of the Board must vote in favor of clemency and the decision must be rendered in writing.\footnote{Id.} There are no requirements, however, for how long the written decision must be or whether it should include the Board’s reasoning.\footnote{See id.} The governing statute informs the clemency Board that it should favorably consider good conduct, education, and efficient performance of duties while incarcerated.\footnote{See id.} Additionally, the statute lists various factors the Board may consider, such as reports from the petitioner’s warden, physical and mental exams, and testimony of the victim or victim’s family.\footnote{Id. § 42-9-43. The factors the Board may consider are the following: a report by the superintendent, warden, or jailer of the jail or state or county correctional institution in which the person has been confined; the results of any physical or mental exams; the extent to which the person appears to have responded to the efforts made to improve his or her social attitude; the industrial record of the person while confined; the educational programs in which the person has participated and the level of education which the person has attained based on standardized reading tests; and the testimony of the victim, the victim’s family, or a witness having personal knowledge of the victim’s personal characteristics. Id.} Moreover, the Board may conduct any investigation it deems necessary in order to be fully informed about the inmate.\footnote{Id.} The statute, however, does not absolutely require the Board to consider any particular factors.\footnote{See Ga. Code Ann. §§ 42-9-42 to -43 (West 2011).}

Despite multiple challenges to Georgia’s Board arising from the impropriety of its members, statements expressing extreme bias against clemency grants, and failure to follow proper procedure, the Board has
consistently been determined to meet procedural due process requirements.\textsuperscript{225} In 2001 in \textit{Gilreath v. State Board of Pardons \& Paroles} the U.S. Court of Appeals for the Eleventh Circuit considered a prisoner’s due process claim against the Georgia Board because two of its members were under investigation by the state attorney general’s office.\textsuperscript{226} The court determined that there was no evidence that the attorney general’s investigation had any effect on the Board members’ votes, and thus held that the clemency procedure satisfied due process.\textsuperscript{227}

Less than one month after its decision in \textit{Gilreath}, the Eleventh Circuit again held in \textit{Parker v. State Board of Pardons and Paroles} that a death row inmate did not have a valid due process challenge.\textsuperscript{228} The petitioner in \textit{Parker} challenged Georgia’s clemency procedure because the chairman of the Board allegedly said, “No one on death row [will] ever get clemency as long as [I am] Chairman of the Board.”\textsuperscript{229} The court, however, held that the chairman’s statement did not preclude him from hearing clemency petitions and upheld the Georgia clemency procedure.\textsuperscript{230}

The Georgia clemency Board was responsible for the decision of whether to grant or deny clemency to Troy Davis in 2011.\textsuperscript{231} To cast doubt on Davis’s guilt, his attorneys presented evidence that seven out of the prosecution’s nine key witnesses had either recanted or backed off their testimony.\textsuperscript{232} Additionally, a few people gave sworn statements that Sylvester Coles, who was at the scene of the crime with Davis, had confessed to them that he was the actual trigger man.\textsuperscript{233} Furthermore,

\textsuperscript{225} See Parker v. State Bd. of Pardons \& Paroles, 275 F.3d 1032, 1037 (11th Cir. 2001); Gilreath v. State Bd. of Pardons \& Paroles, 273 F.3d 932, 934 (11th Cir. 2001) (holding that “an appearance of impropriety would not violate the Federal Constitution’s due process clause in the context of a clemency proceeding”).

\textsuperscript{226} 273 F.3d at 935.

\textsuperscript{227} Id.

\textsuperscript{228} Parker, 275 F.3d at 1037.

\textsuperscript{229} Id. at 1034. Additionally, the petitioner objected to the chairman’s statement because he was the Board member responsible for collecting all of the Board members’ votes, putting him in a unique position to manipulate the results of the vote without being discovered. Id.

\textsuperscript{230} Id. at 1037. The court reasoned that the statement was made three years earlier, which was long enough for the chairman to change his mind, and he had testified that he had an open mind to clemency petitions. Id.


\textsuperscript{232} Rankin, \textit{supra} note 10.

\textsuperscript{233} Id. One of Davis’s attorneys explained that one woman who had grown up with Coles and had no connection to Davis came forward on her own to testify that she had heard Coles confess to the murder. Telephone Interview with Brian Kammer, Exec. Dir., Ga. Res. Ctr. (Mar. 9, 2012). This woman had not been allowed to testify at the district
some of the jurors who sentenced Davis to death in 1991 gave sworn statements expressing doubt in their verdict and asked that Davis be spared the death penalty. 234 Finally, the attorneys also presented evidence that debunked the state’s original ballistics evidence against Davis. 235 Because of the overwhelming doubt cast on Davis’s guilt, over half a million people signed a petition asking the Georgia Board to grant Davis’s clemency petition. 236

After a day of hearing evidence, the Georgia clemency Board released a final statement denying clemency to Troy Davis. 237 Once its decision was made, the Board did not reveal the breakdown of its vote; it simply released a short statement explaining that it voted to deny clemency. 238

E. Factors Influencing the Use of Executive Clemency

The Georgia Board did not explain its reasoning for denying clemency in the Troy Davis case as it is uncommon for clemency decisions to be explained. 239 Thus, it is difficult to conclude why states deny clemency in certain cases. 240 It is clear, however, that numerous factors play into the executive’s decision whether to grant a clemency petition. 241 First, there is evidence suggesting that politics play a large role in clemency decisions and have pushed executives away from broad use of the clemency power. 242 Additionally, statistics reveal that executives court proceeding that analyzed the new evidence in Davis’s case, and therefore this was the first time any decisionmaker was hearing her story. 234 Rankin, supra note 10.

235 Id.

236 Id. Additionally, Davis’s attorneys had Davis’s nephew testify as to his relationship with Davis. Telephone Interview with Brian Kammer, supra note 233. Specifically, the nephew testified as to how Davis had taken on the role of a father figure for him, even while incarcerated. Id. This testimony was intended to show that Davis was a redeemable man worthy of clemency. Id.


238 Id.


241 See Heise, supra note 18, at 241–42 (explaining that gender, race, and politics are some of the factors that influence clemency decisions).

242 See Justice Kennedy Comm’n, supra note 67, at 68–69.
treat certain individual characteristics more favorably than others in
clemency decisions.\textsuperscript{243}

Of the factors that influence clemency decisions, politics play an
important role because in the late 1960s politicians developed a “tough-
on-crime” attitude, which resulted in a dramatic decline in the number
of clemencies granted in most jurisdictions.\textsuperscript{244} The tough-on-crime
stance peaked during the 1988 presidential campaign between then-
Massachusetts Governor Michael Dukakis and then-Vice President
George H.W. Bush.\textsuperscript{245} Governor Dukakis had released inmate Willie
Horton from prison, who then committed a homicide shortly after his
release.\textsuperscript{246} President Bush seized on that fact to identify Dukakis as a
soft-on-crime politician, while portraying himself as tough on crime.\textsuperscript{247}
This episode likely influenced clemency governors to believe that lib-
eral use of the pardon power would not garner strong public sup-
port.\textsuperscript{248} For example, former Governor Mike Foster of Louisiana took
the tough-on-crime stance to the extreme and announced that he
planned to stack the pardon and parole board with crime victims in an
effort to keep convicted criminals in jail.\textsuperscript{249}

As a result, governors fear using their clemency power too fre-
quently because, as elected officials, they are mainly concerned with
reelection.\textsuperscript{250} For example, former California Governor Pat Brown ad-
mitted outright that political pressures affected his clemency deci-
sions.\textsuperscript{251} Additionally, former Ohio Governor Richard Celeste admitted
that he wanted to commute the death sentences on Ohio’s death row
because he opposed the death penalty.\textsuperscript{252} Due to public opinion against
mass commutations, however, Celeste granted only eight death sen-

\textsuperscript{243} See Heise, \textit{supra} note 18, at 275–306 (detailing the results of a study analyzing the
role of gender, race and ethnicity, age, education level, prior felonious conduct, marital
status, political variables, and structural variables in clemency decisions); Pridemore, \textit{supra}
note 101, at 161 (noting that there is much literature analyzing the factors that are impor-
tant in the executive’s decision whether to execute or commute). In addition, one scholar
has noted that the decline of executive clemency may be due to the rise of an administra-
tive state within the federal and state governments that disfavors the use of unreviewable
discretion. Barkow, \textit{supra} note 81, at 1335.

\textsuperscript{244} See Barkow, \textit{supra} note 81, at 1349; see also \textbf{JUSTICE KENNEDY COMM’N}, \textit{supra} note 67,
at 68–69 (discussing the development of the War on Crime movement).

\textsuperscript{245} \textbf{JUSTICE KENNEDY COMM’N}, \textit{supra} note 67, at 69.

\textsuperscript{246} Id.

\textsuperscript{247} Id.

\textsuperscript{248} Id.

\textsuperscript{249} Id.

\textsuperscript{246} Id.

\textsuperscript{247} Id.

\textsuperscript{248} Id.

\textsuperscript{249} Id.

\textsuperscript{250} \textbf{JUSTICE KENNEDY COMM’N}, \textit{supra} note 67, at 69.

\textsuperscript{251} \textbf{Ridolfi & Gordon}, \textit{supra} note 33, at 33.

\textsuperscript{252} \textbf{Kobil}, \textit{supra} note 57, at 227.
tence commutations and still received an overwhelmingly unfavorable public reaction.  

Surprisingly, despite governors’ fears about exercising the clemency power, a study of the fifteen governors who granted clemency between 1993 and 2002 revealed that they did not suffer any measurable political consequences for granting clemency to death row inmates. Of the fifteen governors, three of the most politically successful politicians in the group granted clemency twice during their gubernatorial tenures. In fact, close to all of the fifteen governors who exercised the clemency power received high approval ratings or were re-elected if they sought re-election. Furthermore, a 2010 poll found that sixty-one percent of voters would choose a punishment other than the death penalty for murder, which suggests that Americans may not be opposed to increasing grants of clemency for death row inmates.

Additionally, numerous studies reveal that a number of inmate-specific characteristics influence clemency decisions. First, women are much more likely to receive executive clemency than men. Women on death row between 1986 and 2005 had nearly eleven times the odds of receiving clemency than their male counterparts. Additionally, black, Hispanic, or other minority petitioners have slightly over twice the odds of commutation than white inmates. Young offenders are also much more likely to receive executive clemency than older of-

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253 Id. Additionally, public opinion affected Arkansas Governor Winthrop Rockefeller’s decision to commute the death sentences of all fifteen men on Arkansas’s death row in 1970. Id. He granted the commutations because the public reaction was decidedly favorable. Id.

254 Clemency and Consequences, supra note 186, at 2.

255 Id. Missouri Governor Mel Carnahan granted clemency once in each of his terms as governor. Id. Virginia Governor George Allen granted clemency twice in his single term as governor, and was elected to the U.S. Senate after his gubernatorial tenure. Id. Additionally, North Carolina Governor Jim Hunt granted clemency twice and was the first person in North Carolina history to be elected governor for two sets of consecutive terms, first serving from 1977 to 1985 and then again from 1993 to 2001. Id.

256 Id.

257 Facts About the Death Penalty, DEATH PENALTY INFO. CENTER, supra note 167, at 1.


259 Heise, supra note 18, at 275; Pridemore, supra note 101, at 163.


261 Argys & Mocan, supra note 260, at 280 (“Blacks, other minorities, and Hispanics are less likely to be executed than are white inmates.”); Kraemer, supra note 258, at 1410.
Moreover, petitioners with only a grade school or high school diploma are five times more likely to receive clemency than those with some college attendance. The petitioner’s criminal history also plays a role in clemency decisions when an inmate had committed multiple murders, but surprisingly, a lack of criminal history does not play a significant role in decreasing the odds of commutation.

Factors such as location and year in which the clemency petition was received also play a role in clemency decisions. Clemencies are much less likely to be granted in the southern states than any other region in the country. One study found that a prisoner in a non-southern state is five times more likely to receive clemency than a prisoner in a southern state. Additionally, from 1986 to 1999, each year that passed was associated with a fifteen percent decrease in the rate of commutation. Since 1999, however, the rate of commutation has increased by eleven percent each year, but it is important to note that the rate of commutation after 1999 was still much lower than in the late 1980s and early 1990s.

Overall, these studies reveal that individual characteristics play an important role in executive clemency petitions. Based on an inmate’s gender, age, race, education, location, and year of petition, he or she may have a better chance of receiving executive clemency than another death row inmate.

III. DUE PROCESS IN EXECUTIVE CLEMENCY PROCEEDINGS

The Supreme Court has relied on executive clemency as the fail-safe of the criminal justice system, but it is clear that states do not have

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262 Heise, supra note 18, at 284; Pridemore, supra note 101, at 164. But see Kraemer, supra note 258, at 1415 (finding that no age category had significantly different odds of commutation than the reference group of offenders who were under twenty-five years of age at arrest, but noting that prior research has tended to show that younger offenders have a better chance of commutation than older offenders).  
263 Kraemer, supra note 258, at 1415.  
264 Id. at 1412.  
265 Id. at 1414, 1417.  
266 Heise, supra note 18, at 301; Kraemer, supra note 258, at 1414; Pridemore, supra note 101, at 173.  
267 Kraemer, supra note 258, at 1414.  
268 Id. at 1416.  
269 Id. at 1416–17.  
270 See Heise, supra note 18, at 241–42; Kraemer, supra note 258, at 1391.  
271 See Heise, supra note 18, at 275–306; Kraemer, supra note 258, at 1391–92.
clear guidelines as to when clemency is appropriate.\textsuperscript{272} Because clemency is such an integral part of the criminal justice system, clemency procedures should meet the requirements of procedural due process.\textsuperscript{273} Section A of this Part explains why increased procedure in the executive clemency process is justified.\textsuperscript{274} Section B then analyzes the procedure provided in a similar extra-judicial stage of the criminal justice process—parole revocation hearings—to determine the type of procedure that would be appropriate in the clemency context.\textsuperscript{275} Finally, Section C provides substantive examples of factors that clemency decisionmakers should consider in each clemency petition and responds to criticisms against these procedural and substantive changes.\textsuperscript{276}

\textbf{A. Justifying Due Process in Executive Clemency Proceedings}

The Georgia Board’s decision in the Troy Davis case highlights many issues with the current executive clemency process in the states.\textsuperscript{277} The Supreme Court has repeatedly emphasized that capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.\textsuperscript{278} When there is doubt as to the guilt of a death row inmate, it calls into question whether the states are reserving the death penalty for the most deserving offenders as the Supreme Court intended.\textsuperscript{279}

If the death penalty is truly to be reserved for the most deserving offenders, executive clemency boards should carefully consider any possible doubt regarding an inmate’s guilt.\textsuperscript{280} The Georgia Board’s decision to ignore the doubt in Davis’s case disregards the Supreme Court’s determination that executive clemency is the fail-safe of the

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 277–345 and accompanying text.
\item See infra notes 277–323 and accompanying text.
\item See infra notes 277–292 and accompanying text.
\item See infra notes 293–323 and accompanying text.
\item See infra notes 325–345 and accompanying text.
\item See Rankin, \textit{supra} note 10 (quoting Davis’s clemency petition: “[I]f a commutation based on residual doubt is not appropriate here, it is difficult to imagine a death penalty case in which it would be appropriate.”); \textit{supra} notes 210–238 and accompanying text.
\item See \textit{Roper}, 543 U.S. at 568 (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability make them ‘the most deserving of execution.’” (quoting \textit{Atkins}, 546 U.S. at 319)); \textit{Atkins}, 536 U.S. at 319.
\item See Rosen, \textit{supra} note 155, at 1113 (observing that the goal of the Eighth Amendment is to restrict the reach of the death penalty to the most deserving offenders).
\end{enumerate}
\end{footnotesize}
criminal justice system. The Supreme Court recognized the doubt in Davis’s conviction by ordering a district court to review the evidence of an actual innocence claim for the first time in almost fifty years. The district court recognized that doubt did in fact exist in Davis’s case, but refused to overturn his conviction without more evidence. The task then fell to the Georgia clemency Board to analyze that doubt and to ensure that the criminal justice process was being administered properly. The Georgia Board failed in its function as the fail-safe of the criminal justice system because it disregarded such a high level of doubt and allowed a man to be executed who may not have been one of the most deserving offenders.

In light of the Georgia clemency Board’s denial of clemency to Troy Davis, the arbitrary discretion that still remains in the executive clemency process must be reexamined. In 1998 in Ohio Adult Parole Authority v. Woodard, the U.S. Supreme Court determined that clemency is part of the criminal justice system and is therefore subject to some judicial oversight if it is being abused. Therefore, the assumption that clemency is totally discretionary and can be used in an arbitrary way is now anachronistic. Whether clemency is justified retributively as an act of justice or redemptively as an act of mercy, clemency is functionally integrated with the rest of the criminal justice system.

As a functional branch of the criminal justice system, clemency proceedings should provide an inmate the due process that he or she would be provided elsewhere in the criminal justice process. In what has become a fundamental tenet of constitutional law, in 1934 in Snyder

282 See Xue, supra note 213.
283 See In re Davis, No. CV409-130, 2010 WL 3385081, at *61 (S.D. Ga. Aug. 24, 2010). The burden was on Mr. Davis to prove, by clear and convincing evidence, that no reasonable juror would have convicted him in light of the new evidence. Id. at *59. The court found that the new evidence did cast some minimal doubt on Davis’s conviction, but did not meet the clear and convincing standard. Id. at *61.
284 See Rankin, supra note 10.
285 See Roper, 543 U.S. at 568; Atkins, 536 U.S. at 319; Herrera, 506 U.S. at 415.
286 See Kobil, supra note 115, at 216.
287 See 523 U.S. 272, 289 (1998); supra notes 118–125 (discussing the Supreme Court’s consideration of due process rights in executive clemency decisions in Woodard).
288 See Kobil, supra note 115, at 216.
290 See id.
v. Massachusetts the Supreme Court held that due process is violated if a practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. The absence of procedural requirements guaranteeing an inmate a chance to present his or her case not only jeopardizes the reliability of the information the clemency decisionmaker considers, but also offends our principles of justice.

B. Enhancing Procedural Protections in State Clemency Procedures

In light of the Supreme Court’s reliance on clemency as an integral part of the criminal justice process, states should enact requirements to ensure that executive clemency procedures comport with at least minimal due process. Although states may afford more due process protections in clemency proceedings than the Court required in Woodard, most states have failed to implement meaningful procedures. Admittedly, courts cannot guarantee a prisoner the right to clemency; they should, however, require procedural protections that ensure care and accuracy in the clemency decision. Therefore, procedural reforms would enhance the prudent exercise of executive discretion.

To determine what process may be due at the executive clemency stage, it is useful to examine the process required at a similar extra-judicial stage of the criminal justice process. Parole revocation hearings are hearings in which a board of paroles determines whether to

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291 See id.


293 See Acker & Lanier, supra note 34, at 222–24. The states have many different procedures and requirements governing executive clemency. See id. For example, some states have statutes or constitutional provisions that require a limited form of consideration approximating a right to be heard in connection with clemency applications, and others allow an investigation to suffice. Id at 222–23; see, e.g., Ga. Code Ann. § 42-9-20 (West 2011) (providing that board of pardons and paroles members have a duty to make a personal study of clemency requests in capital cases); Va. Code Ann. § 53.1 to 231 (West 2011) (stating that upon request from the governor, the state parole board shall investigate and issue a report in clemency applications). Additionally, some states are silent about the need for a hearing altogether. Acker & Lanier, supra note 34, at 223. Finally, the appointment of counsel similarly varies across jurisdictions. Id. at 224.

294 See A Matter of Life and Death, supra note 289, at 907–08.

295 See Acker & Lanier, supra note 34, at 226.

296 See Morrissey v. Brewer, 408 U.S. 471, 487–89 (1972) (determining that the Due Process Clause of the Fourteenth Amendment requires that a state afford an individual some opportunity to be heard prior to revoking his or her parole).
revoke an individual’s parole.\textsuperscript{298} In contrast to the Supreme Court’s vague explanation of the process due in clemency proceedings in \textit{Woodard}, the Court in \textit{Morrissey v. Brewer} in 1972 laid out an extensive list of the process due for parole revocation hearings.\textsuperscript{299} The Court determined that there must be a formal hearing for parole revocation, but left it up to the states to determine the procedural details of such hearings.\textsuperscript{300} The Court, however, did lay out specific minimum requirements for procedural due process, which included written notice of the claimed violations of parole, disclosure to the parolee of evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, a neutral and detached hearing body, and a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.\textsuperscript{301}

The procedure required by the Supreme Court for parole revocation hearings is much more extensive than the procedures currently in place for the clemency process in the majority of death penalty states.\textsuperscript{302} Yet, petitioners at the clemency stage are at risk of being deprived of their lives, whereas parolees are simply at risk of being deprived of their liberty.\textsuperscript{303} The procedure at the clemency stage, the final stage of the criminal justice process and the fail-safe of the criminal justice system, should require at least as much protection as required at the parole revocation stage.\textsuperscript{304} Because the structure of the clemency process varies among states, the procedure will also vary.\textsuperscript{305} Nevertheless, states should require the same minimum due process rights guaranteed in parole revocation hearings: notice, an opportunity to be heard, and a meaningful hearing.\textsuperscript{306} More procedure than the bare minimum, however, should attach if executive clemency is to function as an effective fail-safe of the criminal justice system.\textsuperscript{307} First, in the twenty-one states that have some form of a clemency board, an opportunity to be heard at a meaningful hearing should consist of an open hearing with all of the decisionmak-

\textsuperscript{298} See \textit{id.}.
\textsuperscript{299} See \textit{id.}.
\textsuperscript{300} \textit{Id.} at 488.
\textsuperscript{301} \textit{Id.} at 489.
\textsuperscript{302} See \textit{id.}.
\textsuperscript{303} See \textit{Morrissey}, 408 U.S. at 479.
\textsuperscript{304} See \textit{Herrera}, 506 U.S. at 415.
\textsuperscript{305} See \textit{supra} notes 91–98 and accompanying text.
\textsuperscript{306} See \textit{McGee}, 376 P.2d at 781; Acker & Lanier, \textit{supra} note 34, at 226.
\textsuperscript{307} See \textit{Herrera}, 506 U.S. at 415.
ers present.\textsuperscript{308} Additionally, counsel should be present and the inmate should have the opportunity to present evidence and to call witnesses.\textsuperscript{309} Finally, the decisionmaker should issue a public, written decision including an explanation of the outcome.\textsuperscript{310} The twelve states that employ a governor-only clemency structure should create a board to handle clemency hearings in a similar manner.\textsuperscript{311}

First, the hearing should be open to the public with all of the decisionmakers present.\textsuperscript{312} An open hearing creates a sense of legitimacy in the process by allowing members of the public, family members of the victim, and family members of the inmate to view the proceeding and leave with a sense of closure.\textsuperscript{313} Additionally, all of the decisionmakers should be present at the hearing to ensure that they are making a fully informed decision.\textsuperscript{314} The presence of all the decisionmakers is vital to a fair proceeding because certain evidence, such as an inmate’s remorse or personal testimony, cannot adequately be portrayed on paper.\textsuperscript{315} An open hearing before all the decisionmakers is likely to provide more reliable information than a clemency board would find from investigating a clemency petition on their own.\textsuperscript{316}

Moreover, states should guarantee the assistance of counsel at clemency proceedings.\textsuperscript{317} Counsel plays a distinct role in the clemency context because attorneys are much more familiar and comfortable with structured proceedings than an inmate who has been isolated on death row for many years.\textsuperscript{318} Counsel would be able to help the peti-

\textsuperscript{308} See Herrera, 506 U.S. at 415; Acker & Lanier, supra note 34, at 226; supra notes 95–98 and accompanying text (discussing states that employ an administrative board to aid in the clemency process).

\textsuperscript{309} See Kobil, supra note 115, at 225 (concluding that counsel should be provided in clemency proceedings).

\textsuperscript{310} See Acker & Lanier, supra note 34, at 229.

\textsuperscript{311} See Kobil, supra note 38, at 607–08 (explaining that governors commonly abuse the pardon power and that politics strongly influence a governor’s use of the clemency power).

\textsuperscript{312} See id. at 224 (noting that some states require open hearings); A Matter of Life and Death, supra note 289, at 908 (suggesting that the clemency process should allow for public commentary).

\textsuperscript{313} See U.S. Const. amend. VI (requiring a public trial in criminal prosecutions to increase the legitimacy of the proceeding); A Matter of Life and Death, supra note 289, at 908.

\textsuperscript{314} See Acker & Lanier, supra note 34, at 226 (suggesting that decisionmakers should be informed in the most reliable manner). But see Gilreath v. State Bd. of Pardons & Paroles, 273 F.3d 932, 935 (11th Cir. 2001) (determining that the absence of a member from the oral presentation part of the proceeding did not violate the Constitution).

\textsuperscript{315} See A Matter of Life and Death, supra note 289, at 909.

\textsuperscript{316} See Kobil, supra note 115, at 226–27.

\textsuperscript{317} See id. at 225 (concluding that counsel should be provided in clemency proceedings).

\textsuperscript{318} See Acker & Lanier, supra note 34, at 227.
tioner prepare evidence, such as investigative reports, medical documents, and other information that the inmate may not be able to obtain on his or her own.319

Finally, the clemency decisionmaker should issue a public, written decision with an explanation of the outcome.320 The Delaware Board’s written recommendation to the governor supporting the grant of clemency to death row inmate Robert Grattis provides an example of how these written decisions should be structured.321 The Board discussed the many factors that went into its decision to recommend clemency, including not only the personal characteristics of the inmate, but also policy considerations, such as the Board’s skepticism of the state’s death penalty statute.322 Thus, requiring such written opinions would increase legitimacy in the clemency process by giving inmates a clear explanation of why their petition was granted or denied.323

C. Enacting Substantive Standards to Guide Clemency Decisionmakers

In addition to these procedural requirements, states should enact substantive guidelines informing the clemency decisionmaker what it should consider in each petition.324 Because studies revealed decision-makers base clemency decisions on arbitrary, individual characteristics of inmates, substantive guidelines informing decisionmakers of the appropriate factors for consideration would be immensely helpful.325

319 Id.
320 See id. at 229.
322 See Del. Bd. of Pardons, supra note 321. The Board explained that it weighed heavily the physical, emotional, and sexual abuse that the inmate suffered as a child in its decision to grant clemency. Id. Additionally, the Board outlined other factors that weighed in its analysis, such as the disparity of sentences in serious murder cases and concern over the structure of the death penalty statute in Delaware. Id.
323 See id.
324 See, e.g., Mont. Code Ann. § 46-23-301 (1997) (instructing the Board to base recommendations on (a) all of the circumstances surrounding the crime for which the applicant was convicted; (b) the applicant’s criminal record; and, (c) the individual circumstances relating to social conditions of the applicant prior to commission of the crime, at the time the offense was committed, and at the time of the application for clemency).
325 See supra notes 239–271 and accompanying text.
These guidelines would necessarily vary from state to state. Some states may wish to include redemptive principles that take into account the rehabilitation and reconciliation of the offender, victim, and community. Alternatively, other states may wish to justify clemency decisions solely retributively, and allow clemency grants only where the question whether justice has been served is in doubt. Either way, substantive guidelines would allow states to focus clemency decisions on the factors it deems important.

Some states already have these types of guidelines in place. Montana, for example, directs the decisionmaker to consider the circumstances surrounding the crime for which the inmate was convicted, the inmate’s criminal record, and the individual circumstances relating to the social conditions of the applicant prior to the crime, at the time of the crime, and at the time of the clemency petition. Additionally, the U.S. Department of Justice also lists certain factors that the President considers in making clemency decisions at the federal level. Appropriate grounds for federal commutations include disparity or undue severity of sentence, critical illness or old age, meritorious service rendered to the government, the amount of time already served, and the availability of other remedies.

If states enact procedural requirements for clemency proceedings and substantive guidelines for what decisionmakers should consider at those proceedings, executive clemency will no longer be totally arbitrary. Yet, there are likely to be institutional and traditional objections to these suggestions. Traditionally, executive clemency operates as a highly discretionary power of the executive. Some scholars argue that this discretion is imperative to executive clemency because it gives

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326 See Morrissey, 408 U.S. at 488 (noting that states rather than courts are responsible for writing a code of procedure).
327 See Rapaport, supra note 58, at 1503.
328 See Kobil, supra note 57, at 219.
330 See id.
331 Id.
333 Id.
334 See Kobil, supra note 115, at 216.
335 See Breslin & Howley, supra note 40, at 232; Kobil, supra note 57, at 219 (arguing that clemency should be a political process).
the executive room to consider whatever factors it deems necessary.\textsuperscript{337} Thus, standardizing clemency too much, they argue, would take away the role of mercy and discretion in the clemency process.\textsuperscript{338} If states enacted procedural requirements and standardized guidelines, however, the decisionmaker would still retain discretion over how to weigh the factors presented by the guidelines.\textsuperscript{339} Thus, such reforms would not eliminate the discretion of the executive, they would simply ensure care and accuracy in the clemency decision.\textsuperscript{340}

Furthermore, from an institutional perspective, critics argue that executive clemency should not have strict due process requirements because the inmate has already had full access to the judicial system, and clemency is outside the control of the judiciary.\textsuperscript{341} These critics argue that changes in the criminal justice system have ensured that unjust death sentences are no longer imposed and carried out, making clemency unnecessary.\textsuperscript{342} In light of the strict requirements of the AEDPA, however, inmates’ access to the federal criminal justice system has been significantly curtailed.\textsuperscript{343} Additionally, in the 1993 case \textit{Herrera v. Collins} the U.S. Supreme Court held that executive clemency is the proper avenue for assessing claims of actual innocence.\textsuperscript{344} Therefore, both the AEDPA and \textit{Herrera} highlight clemency as an important element of the criminal justice system warranting at least minimal due process protections.\textsuperscript{345}

\textbf{Conclusion}

Although it has fallen into disuse, executive clemency still holds an important place in our criminal justice system. In fact, it is more relevant today than ever before with the increased reliance on death penalty statutes and limited habeas review under the AEDPA. In \textit{Herrera}, the Supreme Court held that clemency is the proper forum for claims of actual innocence. If courts are going to rely on executive clemency to weigh the validity of actual innocence claims, state clemency proce-

\textsuperscript{338} See Breslin & Howley, \textit{supra} note 40, at 232–33; Brown, \textit{supra} note 337, at 328.
\textsuperscript{339} See supra notes 293–333 and accompanying text.
\textsuperscript{340} See A Matter of Life and Death, \textit{supra} note 289, at 907–08.
\textsuperscript{341} See Kobil, \textit{supra} note 57, at 219.
\textsuperscript{342} See, e.g., Korengold et al., \textit{supra} note 149, at 365.
\textsuperscript{343} See Ridolfi & Gordon, \textit{supra} note 33, at 33.
\textsuperscript{344} See \textit{Herrera}, 506 U.S. at 411.
\textsuperscript{345} See \textit{id.}; Ridolfi & Gordon, \textit{supra} note 33, at 33.
dures must satisfy minimal procedural due process. States should at least require adequate notice and an opportunity to be heard. Moreover, states should enact substantive guidelines informing the clemency decisionmaker of the factors it should weigh when making clemency decisions. By enacting procedures that comport with due process, the states will reinvigorate clemency in the United States and reduce the arbitrariness with which it is granted.

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