

2001

# The Diffusion of Responsibility in Capital Clemency

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## Repository Citation

Gershowitz, Adam M., "The Diffusion of Responsibility in Capital Clemency" (2001). *Faculty Publications*. 1260.  
<https://scholarship.law.wm.edu/facpubs/1260>

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## Essay: The Diffusion of Responsibility in Capital Clemency

Adam M. Gershowitz\*

*"[C]lemency has not traditionally 'been the business of courts.'"*<sup>1</sup>

-The Supreme Court of the United States

*On denying clemency to Gary Graham: "He's had full and fair access to the courts."*<sup>2</sup>

-Governor George W. Bush

*"The appeals process, although lengthy, provides many opportunities for the courts to review sentences and that's where these [death-penalty] decisions should be made."*<sup>3</sup>

-Governor Bill Clinton

### INTRODUCTION

The Supreme Court of the United States has described executive clemency<sup>4</sup> as the "'fail safe' in [the] . . . criminal justice system."<sup>5</sup> In death-penalty cases that fail safe is essential. Capital punishment is being used more often than at any time in recent memory and, despite occasional predictions to the contrary,<sup>6</sup> there is no decline on

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\* Associate, Covington & Burling. My thanks to Ken Haas, Laura Killinger, John Monahan, Michelle Morris, and Rip Verkerke for valuable suggestions. All errors and opinions remain my own.

<sup>1</sup> *Ohio v. Woodard*, 523 U.S. 272, 284 (1998) (citation omitted).

<sup>2</sup> Salatheia Bryant et al., *Graham Executed After Struggle*, HOUSTON CHRON., June 23, 2000, at A1 (Star Edition).

<sup>3</sup> *Clemency Becoming Rare As Executions Increase*, CORRECTIONS DIGEST, July 8, 1987, at 2.

<sup>4</sup> Throughout this essay I use the term clemency. Clemency is defined as "an official act by an executive that removes all or some of the actual or possible punitive consequences of a criminal conviction." KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST* 4 (1989). Clemency includes pardons, amnesty, reprieves, and commutations. *See id.* at 5. In the death-penalty context we are concerned primarily with the commutation of death sentences to life imprisonment.

<sup>5</sup> *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

<sup>6</sup> *See Executioner's Swan Song*, THE NATION, Jan. 8/15, 2001 at 3.

the foreseeable horizon.<sup>7</sup> At the same time that the use of capital punishment has increased, the Supreme Court has "deregulated" the death penalty.<sup>8</sup> The Court no longer conducts proportionality review of death sentences,<sup>9</sup> habeas corpus has been scaled back,<sup>10</sup> and trial courts are not obligated to instruct juries about mitigating evidence.<sup>11</sup> Moreover, in the substantive realm, the Court has determined that it does not violate the Constitution to execute children over age sixteen,<sup>12</sup> or even actually innocent persons.<sup>13</sup> Given the Court's hands-off approach and the more frequent use of capital punishment, executive clemency takes on even greater importance. In short, clemency truly does have the potential to be the fail safe of the criminal justice system.<sup>14</sup> Unfortunately, however,

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<sup>7</sup> See Kenneth C. Haas, *The Rise and Fall of the American Death Penalty in the Twenty-First Century*, in *VISIONS FOR THE FUTURE: CRIME AND JUSTICE IN THE TWENTY-FIRST CENTURY* (Roslyn Muraskin & Albert Roberts eds., 2001).

<sup>8</sup> See generally Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677 (2000); Robert Weisberg, *Deregulating Death*, 1983 S. CT. REV. 305.

<sup>9</sup> See *Pulley v. Harris*, 465 U.S. 37 (1984).

<sup>10</sup> Although Congress and not the Supreme Court is responsible for the 1996 Antiterrorism and Effective Death Penalty Act, the Supreme Court had begun constricting habeas corpus long before that statute was enacted. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 5-12 (1997).

<sup>11</sup> In *Buchanan v. Angelone*, 522 U.S. 269, 270 (1998) the Court held that trial courts are not obligated to instruct juries about the concept of mitigating evidence (that which suggests the death penalty is not deserved) or on particular statutorily defined mitigating factors. *Buchanan* stands in stark contrast to the Court's earlier sweeping pronouncement that juries, "in all but the rarest kind of capital offense," must not be precluded "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

<sup>12</sup> See *Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>13</sup> See *Herrera v. Collins*, 506 U.S. 390 (1993). The holding in *Herrera* is subject to debate. Some scholars contend that the *Herrera* Court forbade the execution of the innocent. See Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CALIF. L. REV. 485, 509 (1995). Other observers are not so optimistic. See Vernon E. Googe III, *Herrera v. Collins: Federal Habeas Corpus Renew and Claims of Actual Innocence*, 27 GA. L. REV. 971, 993 (1993).

<sup>14</sup> All 50 states and the federal system provide for the possibility of executive clemency. For a list of statutes, see Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 429-30 n.82 (1999).

that potential has not been realized.<sup>15</sup> In fact, the use of executive clemency has dramatically declined in the last few decades.<sup>16</sup>

The decline in executive clemency has been well documented (and lamented<sup>17</sup>) and the explanation for it is quite simple: self-interest. Governors seeking re-election or other elective office believe that they need to be tough on crime in order to be elected.<sup>18</sup> Granting clemency undermines the appearance of toughness and therefore governors are very reluctant to risk their political careers by granting mercy to convicted murderers.<sup>19</sup> As such, governors deny executive clemency and attempt to shift the responsibility elsewhere. For instance, as governor of Texas, George W. Bush was frequently called upon to grant clemency to death-row inmates. He denied all but one of these clemency requests,<sup>20</sup> however, and he often remarked that clemency was inappropriate because the defendant had had full and fair access to the courts.<sup>21</sup> Implicitly, Governor Bush seemed to be saying that the blame for any questionable executions should lie with the courts and not with the chief executive

<sup>15</sup> See Daniel T. Kobil, *The Evolving Role of Clemency in Capital Cases*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 537 (James R. Acker et al. eds., 1998) (describing clemency as a "haphazard fail safe at best").

<sup>16</sup> Compare WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 76 n.b (1974) (noting the substantial use of executive clemency prior to the 1970s), with Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 304 (1993) ("The data presented in this Article show that clemency in a capital case is extremely rare."). See also Margery M. Koosed, *Some Perspectives on the Possible Impact of Diminished Federal Review of Ohio's Death Sentences*, 19 CAP. U. L. REV. 695, 759-63 (1990) (statistically analyzing the decrease in commutations).

<sup>17</sup> For the best treatment, see Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996).

<sup>18</sup> See Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1300 (2000).

<sup>19</sup> The case of then-Governor Bill Clinton provides a useful example. During his first term Governor Clinton commuted a number of death sentences. After losing his bid for re-election Clinton again ran for governor, this time promising not to commute so many death sentences if he were elected. See Wendell Rawls, Jr., *Arkansas Gubernatorial Candidates in Close Race*, N.Y. TIMES, Oct. 28, 1982, at B10.

<sup>20</sup> Governor Bush commuted serial killer Henry Lee Lucas' death sentence to life imprisonment because of doubt over whether Lucas had committed the actual murder for which he had been sentenced to death. Lucas had confessed to 600 murders, including the one for which he was sentenced to death, but authorities determined that he could not have committed those crimes. Lucas subsequently recanted his confessions. See *Bush Spares Lucas From Death Penalty: Governor Commutes Sentence to Life, Cites Doubts Over Guilt*, DALLAS MORNING NEWS, June 27, 1998 at A1.

<sup>21</sup> See Bryant et al., *supra* note 2.

of the state that was executing the prisoner. Governors also attempt to avoid responsibility for clemency by using state pardon boards as political cushions. In some states, governors can claim that they are simply following the pardon board's recommendation not to grant clemency. In other states, where a pardon board's decision to reject a clemency request is binding, governors can maintain that they have no choice but to deny clemency. Whether the governors really are bound by the boards' recommendations is debatable,<sup>22</sup> but it is clear that the pardon boards enable the governors to avoid responsibility.

The governors, however, are not the only ones who have failed to ensure the proper use of executive clemency; the courts have also shirked their responsibility. The traditional role of courts is to ensure that proper procedures are followed.<sup>23</sup> Yet, in the clemency context the courts have declined to police the procedural guarantees. In *Ohio v. Woodard*<sup>24</sup> a divided Supreme Court determined that there was either no due process protection or, at best, "minimal" due process protection in clemency proceedings. In *Woodard* four justices determined that no abuse of the clemency procedure could result in a due process violation,<sup>25</sup> while another four justices concluded that judicial intervention *might* be warranted if state officials flipped a coin to determine whether clemency should be granted.<sup>26</sup> The Court concluded that executive clemency is solely a "matter of grace committed to the executive,"<sup>27</sup> and in doing so indicated that it too was unwilling to take responsibility for executive clemency. While the Supreme Court is willing to create substantive due process guarantees in other areas, such as privacy,<sup>28</sup> abortion,<sup>29</sup> and the size of punitive damages awards,<sup>30</sup> it is unwilling to ensure even procedural guarantees in the clemency arena.

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<sup>22</sup> See *infra* notes 70-79 and accompanying text.

<sup>23</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88 (1980).

<sup>24</sup> 523 U.S. 272 (1998).

<sup>25</sup> See *Woodard*, 523 U.S. at 280. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas denied the existence of any due process protection.

<sup>26</sup> See *id.* at 289 (O'Connor, J., concurring). Justice O'Connor was joined by Justices Souter, Ginsburg, and Breyer.

<sup>27</sup> *Id.* at 285.

<sup>28</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>29</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>30</sup> See *BMW v. Gore*, 517 U.S. 559 (1996).

What is striking about executive clemency is not that both the executive and the courts have responsibility but, rather, that neither is willing to accept that responsibility. In short, the area of capital clemency is the site of a total diffusion of responsibility: The Court will not regulate the clemency process because it is a matter for the executive and some governors will not grant clemency because the execution process belongs entirely to the courts. All the while, the use of capital punishment continues to increase, the deregulation of the death penalty continues, and the Supreme Court continues to proclaim executive clemency as the fail safe of the criminal justice system.

The diffusion of responsibility in capital clemency is dangerous. Social science and historical evidence demonstrate that when responsibility is diffused, actors will engage in behavior that they might otherwise believe to be immoral or unacceptable. An innocent defendant wrongly sentenced to death is no doubt deserving of clemency. And while most individuals sentenced to death clearly are guilty of vile acts, some guilty defendants also may be deserving of clemency. Yet, governors who have doubts about certain death sentences may not use their authority to grant clemency (or use their bully pulpits to encourage pardon boards to do so) because they believe responsibility for the execution lies elsewhere. Conversely, courts will not step forward to ensure a proper clemency system because they believe that the executive branch alone is responsible for clemency. Under these circumstances the clemency mechanism may fail to halt questionable executions.

Part I of this Essay analyzes the governors' failure to take responsibility. It recounts the decline of executive clemency and explores governors' "full and fair access to the courts" explanation for not granting mercy. Part I then discusses the dangers that are created when pardon boards are added to the mix. Part II explains the Supreme Court's decision in *Ohio v. Woodard* in which the Court concluded that clemency is a gift of the executive branch and that, as a result, capital prisoners are not entitled to due process protection. Part III then briefly explores historical and psychological evidence about the diffusion of responsibility. Part III uses social science literature to demonstrate the dangers inherent in a system where no one takes responsibility for capital clemency. Part IV then discusses how the Court could have taken responsibility for capital clemency



and could have remedied the diffusion of responsibility. Part IV argues that procedural due process safeguards at the clemency stage can be doctrinally justified and that they are not overly burdensome. In imposing procedural safeguards, not only would the Court be taking responsibility, but it also would force the final decision-makers – governors and pardon boards – to take substantive responsibility for capital clemency.

#### I: THE GOVERNORS' FAILURE TO TAKE RESPONSIBILITY

*"The Framers granted the pardoning power to the executive alone because they believed that, in one set of hands, the pardoning power would be the most effective tool for preventing injustice and achieving the goals of the state."*<sup>31</sup>

—Professor Kathleen Dean Moore

From 1959 to 1963, Michael DiSalle, the one-term governor of Ohio,<sup>32</sup> considered twelve clemency requests by death-row prisoners.<sup>33</sup> In six cases Governor DiSalle permitted the executions to go forward, but in six cases, he commuted the sentences to life imprisonment.<sup>34</sup> More startling than the number of commutations Governor DiSalle granted was his practice of personally interviewing each death-row inmate requesting clemency at the penitentiary to resolve the most questionable cases.<sup>35</sup> In 1965 Governor DiSalle wrote a book detailing his experience with capital punishment, and he began by pointing out that "I believe this is the first book on the subject by someone who . . . had the final word on whether or not a fellow man was to die . . ."<sup>36</sup> Governor DiSalle's actions differ from contemporary accounts in two ways. First, governors do not ordinarily drive to the penitentiary to interview death-row inmates. Rather, they make decisions based on what others have told them about the case. Second, and more disturbing, many of today's governors are unwilling even to acknowledge that they have "the

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<sup>31</sup> MOORE, *supra* note 4, at 91.

<sup>32</sup> Governor DiSalle lost his bid for re-election at least in part (and probably largely) because of his clemency decisions. See MICHAEL V. DISALLE WITH LAWRENCE G. BLOCHMAN, *THE POWER OF LIFE OR DEATH* 203-04 (1965).

<sup>33</sup> See *id.* at 3.

<sup>34</sup> See *id.* at 3-5, 27.

<sup>35</sup> See *id.* at 36, 53, 80.

<sup>36</sup> *Id.* at 3.

final word on whether a fellow man dies." In an unfortunate number of contemporary cases, no one in the executive branch is willing to take responsibility for executive clemency the way Governor DiSalle did.

#### A. *The Decline in Executive Clemency*

The most obvious evidence of the failure of chief executives to take responsibility for executive clemency is the drastic decline in the number of commutations. In 1972 the Supreme Court suspended the use of the death penalty, finding all then-existing death-penalty laws to be unconstitutional because of their arbitrariness.<sup>37</sup> Four years later, in *Gregg v. Georgia*,<sup>38</sup> the Court concluded that states' revised death-penalty laws were less arbitrary, and the Court permitted executions to go forward. In the nearly twenty-five years between *Gregg* and January 2001, only forty-four<sup>39</sup> death-row inmates were granted clemency for humanitarian reasons.<sup>40</sup> This is a marked decrease from the number of clemencies granted prior to the Court's 1972 moratorium on capital punishment. For instance, from 1960 to 1971 – only an eleven-year period, as opposed to the twenty-five years from *Gregg* to the present – 204 death sentences were commuted.<sup>41</sup> Before the Supreme Court's moratorium, one out of every four or five death sentences was commuted to life imprisonment.<sup>42</sup> By 1990 that ratio had dwindled to one commutation for every forty death-sentences.<sup>43</sup> The post-1976 decrease in commutations is even more marked when we consider that the number of executions is on the rise. While there were 191

<sup>37</sup> See *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>38</sup> 428 U.S. 153 (1976).

<sup>39</sup> In late 2001 and early 2002, as this Essay was going to press, four additional individuals were awarded clemency. See Death Penalty Information Center, Facts About Clemency, <http://www.deathpenaltyinfo.org/clemency.html> (last visited Aug. 31, 2002).

<sup>40</sup> See *id.* There have been an additional forty-one clemencies granted for judicial expediency purposes. See National Coalition to Abolish the Death Penalty, *Facts and Stats*, <http://www.ncadp.org/html/factsandstats.html> (last visited Aug. 31, 2002). Of the forty-four humanitarian commutations, eight were granted by Ohio Governor Richard Celeste and five by New Mexico Governor Toney Anaya upon leaving their governorships. See Facts About Clemency, *supra* note 39. But for the political statements by these two governors, there would have been only thirty-one humanitarian commutations between 1976 and January 2001.

<sup>41</sup> See Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 266 (1990-91).

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*



executions in the 1960's<sup>44</sup> and 3 executions in the 1970's,<sup>45</sup> there were 117 executions in the 1980's<sup>46</sup> and 478 in the 1990's.<sup>47</sup> As the number of executions has increased<sup>48</sup> the number of commutations has drastically decreased.

What explains this trend? The most optimistic answer would be that governors have found fewer legitimate reasons to grant clemency in recent years. One hypothesis might be that trials have become fairer, or that the mentally retarded and mentally ill are no longer convicted of capital offenses. Another might be that racism is no longer omnipresent in the criminal justice system or that innocent people are no longer wrongly sentenced to death. Most death-penalty experts would quickly dispose of these rosy scenarios, however. In our modern era, capital defense attorneys still sleep through trials,<sup>49</sup> the merits of appeals are not considered if they are submitted a day too late,<sup>50</sup> and the danger of convicting the innocent is as great as ever.<sup>51</sup>

Instead, the decrease in commutations seems to be the result of political ambition. Governors secure their reputation of being tough on crime (and, by extension, their re-election) by refusing to grant clemency. Governors deftly take credit for being tough on crime

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<sup>44</sup> See STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, chart #388.

<sup>45</sup> See *id.* From 1968 to 1972 no executions were carried out. From the Court's 1972 decision in *Furman v. Georgia* – striking down all then-existing death penalty statutes – to the Court's 1976 decision in *Gregg v. Georgia* – permitting capital punishment to re-commence – executions were not constitutionally permitted. The first post-*Gregg* execution did not take place until 1977, and there were only two additional executions during the remainder of the 1970's.

<sup>46</sup> See Death Penalty Information Center, *Additional Execution Information*, <http://www.deathpenaltyinfo.org/dpicexec.html> (last modified Aug. 28, 2002).

<sup>47</sup> See *id.*

<sup>48</sup> It is noteworthy, however, that prior to the 1960s there were a substantially larger number of executions. In the 1930's there were 1667 executions; there were 1284 in the 1940's and 717 in the 1950's. See STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, chart #388. Unfortunately data on the number of clemencies prior to the 1960's was not kept. See Elkan Abramowitz & David Paget, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 191 n.\* (1964) (lamenting the lack of data).

<sup>49</sup> See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (*en banc*) (explaining how lawyer slept through substantial portions of the trial and concluding that it constituted ineffective assistance of counsel).

<sup>50</sup> See *Coleman v. Thompson*, 501 U.S. 722 (1991). For a description of the Coleman case, see JOHN C. TUCKER, *MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT* (1997).

<sup>51</sup> See Death Penalty Information Center, *Innocence: Freed From Death Row*, at <http://www.deathpenaltyinfo.org/Innocentlist.html> (last visited Aug. 31, 2002) (cataloging 102 innocent prisoners released from death row since 1973).

while avoiding any blame for refusing to grant executive clemency. They do this in two ways. First, governors explain away their decisions not to grant clemency by saying that the prisoner had fair access to the courts. Second, governors utilize state pardon boards to insulate themselves from responsibility for declining to grant clemency.

*B. The "Full and Fair Access to the Courts" Excuse*

From 1976 until 2000, 683 people were executed in the United States of America. The State of Texas carried out 239 of those executions.<sup>52</sup> As governor of Texas, George W. Bush presided over more than 150 executions and denied all but one request for executive clemency.<sup>53</sup> In denying these clemency requests, Governor Bush said that he had only two criteria: first whether the prisoner was innocent and second whether he had full and fair access to the courts.<sup>54</sup> In no instance did Governor Bush find that a prisoner had not had full and fair access to the courts. Despite evidence that appointed lawyers had slept through parts of the trial,<sup>55</sup> or that they were incompetent and only appointed because they were the political cronies of the judges sitting in the cases,<sup>56</sup> Governor Bush never found fault with the judicial process.

Even more disturbing than Governor Bush's failure to recognize that defendants had not received fair access to the courts, is the fact that Governor Bush employed the "full and fair access to the courts" test in the first place. Defendants are constitutionally entitled to full and fair access to the courts. When a prisoner reaches the clemency stage of the process—the point at which all direct and collateral appeals have been exhausted—there should not even be a question whether he has received full and fair access to the courts. To deny clemency based on the fact that he has received sufficient access to the courts is to view access to the courts as an end in itself. However, a prisoner who had full and fair access to the courts could still be

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<sup>52</sup> See Death Penalty Information Center, *Executions in the U.S. 2000*, at <http://www.deathpenaltyinfo.org/dpicexec00.html> (last visited Aug. 31, 2002).

<sup>53</sup> See *supra* note 20.

<sup>54</sup> See, e.g., T. Christian Miller, *Race Issues Raised in Latest Texas Death Penalty Appeal*, L.A. TIMES, June 29, 2000 at A22.

<sup>55</sup> See Paul Duggan, *The Record in Texas: Attorney's Ineptitude Doesn't Halt Executions*, WASH. POST, May 12, 2000 at A1.

<sup>56</sup> See *id.*

morally entitled to clemency. Governor Bush implicitly recognized as much by contending that clemency is appropriate when the prisoner's innocence has been established. Governor Bush failed, however, to consider other situations in which a prisoner might be morally entitled to clemency even though he had had full and fair access to the courts. For instance, clemency might be appropriate if the prisoner has been rehabilitated in prison,<sup>57</sup> if the prisoner's co-defendant received a more lenient sentence, or when mitigating circumstances—such as mental retardation—are present. In failing to even consider these circumstances Governor Bush shirked his responsibility to ensure the possibility of executive clemency. Governor Bush instead attempted to foist his responsibility for Texas's executions onto the courts.<sup>58</sup>

Though Governor Bush is the most prominent exponent of the "full and fair access to the courts" excuse he is not the only one. Another quite famous attempt to diffuse responsibility for executions was offered by then-Governor Bill Clinton. During his first term as governor of Arkansas, Clinton commuted a number of death-sentences. After losing his bid for re-election, Clinton ran again and this time promised not to commute so many death sentences if elected.<sup>59</sup> Subsequently he tried to shift responsibility for executions to the courts. In refusing to commute a death sentence Clinton said

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<sup>57</sup> The obvious citation here is to Karla Fay Tucker, a pick-ax murder who found god while in prison and began ministering to other prisoners. See Sam Howe Verhovek, *Execution in Texas: The Overview; Divisive Case of Killer of Two Ends as Texas Executes Tucker*, N.Y. TIMES, Feb. 4, 1998 at A1. Whether Tucker in particular deserved clemency is not so much the issue as Governor Bush's refusal to consider that a rehabilitated prisoner might be a candidate for executive clemency. For an argument that capital sentences of rehabilitated offenders should be commuted, see B. Douglas Robbins, Comment, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted Upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115 (2001).

<sup>58</sup> Governor Bush has also been recently involved in a non-capital diffusion of responsibility. A few years ago a man named Achim Marino wrote to Governor Bush and admitted to committing a murder for which another man had been wrongly convicted. The governor's office did not follow-up on Marino's confession letter and the wrongly-convicted man was not released from prison until two years later. A Bush spokesman explained that the governor's office did not take any action because Marino's letter said that he had also written a letter to Austin police and to the district attorney. Because the letter went to other parties Governor Bush's office assumed that someone else would take care of it. Fortunately, someone else did determine that the confession was in fact true. However, if the governor's office had taken action—rather than assuming that someone else would do it—the innocent man might not have languished in prison for another two years. See Paul Duggan, *Falsely Accused Texas Man Freed From Life Term*, WASH. POST, Jan. 17, 2001 at A3.

<sup>59</sup> See Rawls, *supra* note 19.

"[t]he appeals process, although lengthy, provides many opportunities for the courts to review sentences and that's where these [death-penalty] decisions should be made."<sup>60</sup>

Other governors have used the "full and fair access to the courts" excuse without being as blunt as Bush and Clinton. In denying a number of clemency petitions, Jim Gilmore, the governor of Virginia, has repeatedly remarked "Upon a thorough review of the Petition for Clemency, the numerous court decisions regarding this case, and the circumstances of this matter, I decline to intervene."<sup>61</sup> In Alabama, a spokesperson for Governor Guy Hunt explained that "The Governor declines to alter the decision of the jury and the courts."<sup>62</sup>

When governors are presented with a request for clemency they should grant or deny commutation on the merits. The fact that a defendant did not have full and fair access to the courts is one reason to consider commutation. However the fact that a defendant (properly) had full and fair access to the judicial process is not in-and-of-itself a valid reason to summarily dismiss a clemency request. To refuse to consider a clemency request simply because a defendant's constitutional rights were not violated amounts to a failure by the governor to take responsibility for the defendant's execution.

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<sup>60</sup> See *Clemency Becoming Rare*, *supra* note 3. More recently, President Clinton avoided responsibility for what was to be the federal government's first execution since 1963. One month before the end of his term, Clinton ordered a six-month stay of execution for Juan Raul Garza, thus leaving Garza's clemency petition to be decided by President-Elect Bush. See Edward Walsh, *Clinton Stays Killer's Execution: Delay Prompted by Need to Complete Study on Disparities*, WASH. POST, Dec. 8, 2000, at A12.

<sup>61</sup> Frank Green, *Joseph Executed for Slaying*, RICHMOND TIMES-DISPATCH, Oct. 20, 1999, at B1 (emphasis added). See also George A. Quesinberry, Jr., *Death Row Inmate Who Killed Businessman During Botched Burglary Is Executed*, WASH. POST, Mar. 10, 1999, at B5 (same); Frank Green & Bob Piazza, *Mackall Executed for 1986 Slaying*, RICHMOND TIMES-DISPATCH, Feb. 11, 1998, at B1 (same).

<sup>62</sup> *Alabama Executed Man in Death of a Widow*, N.Y. TIMES, May 27, 1989, at A24. In disclaiming responsibility, Governor Hunt tried to shift responsibility not just to the courts but also to the jury. Interestingly, however, the death sentence had been imposed in spite of the jury's recommendation of a life sentence. Governor Hunt thus tried to shift responsibility for the execution to an entity that did not even support the execution. See Jan Hoffman, *Execution in Texas: Legal Debate; Seeking Clemency in a Labyrinth that Varies by State*, N.Y. TIMES, Feb. 4, 1998, at A20. Alabama's practice of permitting judges to impose the death penalty even though the jury voted for life imprisonment has been called into question in light of the Supreme Court's recent decision in *Ring v. Arizona*, 122 S. Ct. 2428 (2002).

*C. How the Pardon Boards Enable Governors to Avoid Responsibility*

Many states have pardon boards that advise governors on whether death-sentences should be commuted to life sentences. The existence of pardon boards unfortunately creates a diffusion of responsibility that permits governors to avoid their clemency duties. The diffusion happens as follows: pardon boards recommend that clemency not be granted. Governors then deny clemency and point to the pardon board's negative recommendation as the reason why clemency should be denied. Governors can say that they are merely following the recommendation of the pardon board and therefore are not responsible for the execution. Quantitative analysis suggests, and qualitative analysis confirms, that this diffusion of responsibility results in fewer clemencies.

*Quantitative Analysis*<sup>63</sup>

All thirty-eight death-penalty states, as well as the federal government, have some type of clemency mechanism. In fourteen states the governor has the sole responsibility for granting or denying clemency. (In the federal government, the president has the sole responsibility for clemency decisions.)<sup>64</sup> As Table 1 indicates, the fourteen sole-responsibility states carried out less than 24% of the nation's executions between 1976 and 2000, but they constitute more than 36% of the forty-four clemencies granted during that time-period.

The other twenty-four death-penalty states utilize pardon boards. In nine states the pardon board's opposition to clemency is binding on the governor; the governor cannot commute a death-sentence without the approval of the pardon board.<sup>65</sup> If the board recommends clemency, the final decision then rests with the governor. The number of executions in this category is extremely large (and is disproportionate to the number of clemencies), primarily due to Texas.

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<sup>63</sup> In this section, I utilize data compiled by The Death Penalty Information Center and The National Coalition to Abolish the Death Penalty, which is available, respectively, at [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org) and [www.ncadp.org](http://www.ncadp.org).

<sup>64</sup> Requests for presidential pardons are vetted by the Department of Justice. Though the Justice Department may make a recommendation to the president, the institution does not resemble a pardon board.

<sup>65</sup> However, in these states the governors appoint the members of the board and have substantial influence over how the board members vote. See *infra* notes 70-79 and accompanying text.



**Table 1: Governor Has Sole Authority to Consider Clemency Request**

| State                   | Executions<br>1976-2000 | Commutations<br>1976-2000 |
|-------------------------|-------------------------|---------------------------|
| Alabama                 | 23                      | 1                         |
| California              | 8                       | 0                         |
| Colorado                | 1                       | 0                         |
| Kansas                  | 0                       | 0                         |
| Kentucky                | 2                       | 0                         |
| New Jersey              | 0                       | 0                         |
| New Mexico              | 0                       | 5                         |
| New York                | 0                       | 0                         |
| North Carolina          | 16                      | 3                         |
| Oregon                  | 2                       | 0                         |
| South Carolina          | 25                      | 0                         |
| United States (Federal) | 0                       | 1                         |
| Virginia                | 81                      | 6                         |
| Washington              | 3                       | 0                         |
| Wyoming                 | 1                       | 0                         |
| Total                   | 162 (of 683)            | 16 (of 44)                |
| Percentage of Total     | 23.7                    | 36.4                      |

**Table 2: Governor Cannot Grant Clemency Without the Recommendation of the Clemency Board**

| State               | Executions<br>1976-2000 | Commutations<br>1976-2000 |
|---------------------|-------------------------|---------------------------|
| Arizona             | 22                      | 0                         |
| Delaware            | 11                      | 0                         |
| Florida             | 50                      | 6                         |
| Indiana             | 7                       | 0                         |
| Louisiana           | 26                      | 1                         |
| Montana             | 2                       | 1                         |
| Oklahoma            | 30                      | 0                         |
| Pennsylvania        | 3                       | 0                         |
| Texas               | 239                     | 1                         |
| Total               | 390 (of 683)            | 9 (of 44)                 |
| Percentage of Total | 57.1                    | 20.5                      |



Nine other states also have clemency boards that make recommendations. In these states, however, the boards' decisions are not binding on the governor. The governor is free to abide by or reject the pardon board's positive or negative recommendation.

**Table 3: Clemency Board Makes Non-Binding Recommendation to the Governor**

| State               | Executions<br>1976-2000 | Commutations<br>1976-2000 |
|---------------------|-------------------------|---------------------------|
| Arkansas            | 23                      | 1                         |
| Illinois            | 12                      | 1                         |
| Maryland            | 3                       | 2                         |
| Mississippi         | 4                       | 0                         |
| Missouri            | 46                      | 2                         |
| New Hampshire       | 0                       | 0                         |
| Ohio                | 1                       | 8                         |
| South Dakota        | 0                       | 0                         |
| Tennessee           | 1                       | 0                         |
| Total               | 90 (of 683)             | 14 (of 44)                |
| Percentage of Total | 13.1                    | 31.8                      |

Finally, six states have systems in which the clemency board itself makes the final determination whether to grant or deny clemency. As Table 5 reflects, in three of these six states the governor sits on the clemency board.

**Table 4: Clemency Board Makes Decision Without the Governor**

| State               | Executions<br>1976-2000 | Commutations<br>1976-2000 |
|---------------------|-------------------------|---------------------------|
| Connecticut         | 0                       | 0                         |
| Georgia             | 23                      | 4                         |
| Idaho               | 1                       | 1                         |
| Total               | 24 (of 683)             | 5 (of 44)                 |
| Percentage of Total | 3.5                     | 11.4                      |

**Table 5: Governor Sits on Clemency Board That Makes the Decision**

| State               | Executions<br>1976-2000 | Commutations<br>1976-2000 |
|---------------------|-------------------------|---------------------------|
| Nebraska            | 3                       | 0                         |
| Nevada              | 8                       | 0                         |
| Utah                | 6                       | 0                         |
| Total               | 17 (of 683)             | 0 (of 44)                 |
| Percentage of Total | 2.5                     | 0                         |

Obviously, there are enormous political and cultural differences among the thirty-eight states that authorize the death penalty. It is therefore dangerous to over-generalize by clumping states into categories such as pardon-board states or non-pardon board states. Nevertheless, these categorizations yield interesting results. The data suggest that states in which governors have the sole responsibility for clemency decisions have considerably higher rates of commutations in comparison to the rates of executions. As Table 6 demonstrates, states in which there is a diffusion of responsibility between the governor and the pardon boards (adding together binding pardon-board states and non-binding pardon board states) account for 70.3% of the executions but only 52.3% of the clemencies. By comparison, sole-responsibility states in which the governor is the only decision-maker account for only 23.7% of the executions but 36.4% of the clemencies.

**Table 6: Diffusion of Responsibility**

| Type of State   | Number of<br>Executions<br>1976-2000 | Percentage of<br>Total Executions | Number of<br>Commutations<br>1976-2000 | Percentage of<br>Total<br>Commutations |
|---|--------------------------------------|-----------------------------------|--|--|
| Governor is only<br>decision-maker  | 162                                  | 23.7%                             | 16                                     | 36.4%                                  |
| Diffusion of<br>Responsibility<br>Between<br>Governor and<br>Clemency Board | 480                                  | 70.3%                             | 23                                     | 52.3%                                  |
| Clemency Board<br>Makes Final<br>Decision                                   | 41                                   | 6.0%                              | 5                                      | 11.4%                                  |

The conclusion that larger numbers of clemencies are granted when there is no diffusion of responsibility is further amplified when we consider the six states in which the clemency board is the sole and final decision-maker. In these states there is no diffusion of responsibility because the board has the final say on all clemencies. As Table 7 demonstrates, adding these states to the governor-only states accounts for 29.7% of the executions but 47% of the clemencies. By way of comparison, recall that the states in which there is a diffusion of responsibility between the governor and the pardon board account for 70.3% of the executions but only 52.3% of the clemencies.

**Table 7: Diffusion of Responsibility**

| Type of State  | Number of Executions 1976-2000 | Percentage of Total Executions | Number of Commutations 1976-2000 | Percentage of Total Commutations |
|--|--------------------------------|--------------------------------|----------------------------------|----------------------------------|
| Governor Only<br>PLUS<br>Clemency Board<br>Only        | 203                            | 29.7%                          | 21                               | 47%                              |
| Diffusion<br>Between<br>Governor And<br>Clemency Board | 480                            | 70.3%                          | 23                               | 52.3%                            |

This data suggests that clemency is less likely to be granted when responsibility for its use is diffused between the governor and the pardon board. This conclusion could be challenged however because, between 1976 and 2000, Texas was responsible for 35% of the executions but only .02% of the clemencies. Texas therefore may be an outlier resulting in a false suggestion that the diffusion of responsibility between pardon boards and the governor lowers the number of clemencies. As Tables 8 and 9 demonstrate, excluding Texas shows that there is some merit to this objection.

**Table 8: Excluding Texas**

| Type of State                                 | Number of Executions 1976-2000 | Percentage of Total Executions | Number of Commutations 1976-2000 | Percentage of Total Commutations |
|---|--------------------------------|--------------------------------|----------------------------------|----------------------------------|
| Governor is only decision-maker               | 162                            | 36.5%                          | 16                               | 37.2%                            |
| Diffusion Between Governor and Clemency Board | 241                            | 54.3%                          | 22                               | 51.2%                            |
| Clemency Board Makes Final Decision           | 41                             | 9.2%                           | 5                                | 11.4%                            |

**Table 9: Excluding Texas**

| Type of State                                 | Number of Executions 1976-2000 | Percentage of Total Executions | Number of Commutations 1976-2000 | Percentage of Total Commutations |
|---|--------------------------------|--------------------------------|----------------------------------|----------------------------------|
| Governor Only PLUS Clemency Board Only        | 203                            | 45.7%                          | 21                               | 48.8                             |
| Diffusion Between Governor And Clemency Board | 241                            | 54.3%                          | 22                               | 51.2%                            |

When Texas is excluded, the data suggest that there is no substantial difference between states where there is one clemency decision-maker and states in which there is a diffusion of responsibility between the governor and the pardon boards. As a matter of statistics it may be proper to exclude Texas as an outlier. However, in an analysis of the death penalty and capital clemency, it is inconceivable that Texas – the site of half of the nation's executions in some years – should be excluded. Moreover, excluding Texas as an outlier, while not controlling for some northern states that infrequently utilize the death penalty but still actively exercise clemency,<sup>66</sup> would be problematic.

One way to compensate for Texas's large number of executions, while still including it in the analysis, is to narrow the sample to the so-called "death-belt states," those southern states where most of the

<sup>66</sup> For instance, between 1976 and 2000 only one person was executed in Ohio while eight inmates were granted clemency.

nation's executions are carried out.<sup>67</sup> Between 1976 and 2000, the ten death-belt states – Alabama, Arkansas, Georgia, Florida, Louisiana, Missouri, Oklahoma, South Carolina, Texas, and Virginia – accounted for 83% of the nation's executions. In total, these states accounted for only 51% of the nation's commutations.

**Table 10: Death Belt States**

| Type of State                                 | Number of Executions 1976-2000 | Percentage of Total Executions in the Death Belt | Number of Commutations 1976-2000 | Percentage of Total Commutations in the Death Belt 1976-2000 |
|---|--------------------------------|--|----------------------------------|--|
| Governor is only decision-maker               | 129 (of 566)                   | 22.8%  | 7                                | 31.8%  |
| Diffusion Between Governor and Clemency Board | 414 (of 566)                   | 73.1%  | 11                               | 50.0%  |
| Clemency Board Makes Final Decision           | 23 (of 566)                    | 4.1%   | 4                                | 18.2%  |

More interesting than the low percentage of clemencies in the death-belt states is the breakdown between those states in which there is a diffusion of responsibility between the governor and the pardon board and those states in which there is no diffusion of responsibility. As Table 11 demonstrates, states in which either the governor or the clemency board is the sole decision-maker account for 152 executions and 11 clemencies. States in which responsibility is diffused between the governor and the pardon board also account for 11 clemencies but 414 executions. Thus, where there is no diffusion of responsibility, clemency appears substantially more likely to be granted.

<sup>67</sup> See, e.g., Hugo Adam Bedau, *Background and Developments, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 21-23 (Hugo Adam Bedau ed., 1997) (explaining the "Death Belt").

**Table 11: Death Belt States**

| Type of State                                 | Number of Executions 1976-2000 | Percentage of Death Belt Executions 1976-2000 | Number of Commutations 1976-2000 | Percentage of Death Belt Commutations 1976-2000 |
|---|--------------------------------|---|----------------------------------|---|
| Governor Only PLUS Clemency Board Only        | 152 (of 566)                   | 26.9  | 11                               | 50.0  |
| Diffusion Between Governor And Clemency Board | 414 (of 566)                   | 73.1  | 11                               | 50.0  |

The quantitative data do not prove anything definitively. Tables 1 through 11 do not control for the political culture of individual states, the use of commutation as a political statement, or the circumstances of the particular cases in which clemency was or was not granted. Nevertheless, the numbers are still instructive. The data provide a jumping-off point for the claim that commutations are much less likely when there is a diffusion of responsibility between the governor and a clemency board. As the subsequent sections will demonstrate, qualitative analysis buttresses this conclusion.

### *Qualitative Analysis*

#### *1. Governor Only*

In fourteen states, the governor must assess each clemency petition by himself. The upside of this system is that there is no diffusion of responsibility. When it comes time to deny or grant clemency, the governor cannot say his hands are tied or that the decision falls to another body in the executive branch.<sup>68</sup> The downside of this system, of course, is that because sole responsibility lies with the governor, so does the potential political fall-out that may accompany a grant of clemency. Thus, a sole-responsibility system has the virtue of forcing the governor to take responsibility for denying clemency but at the same time includes the risk that a governor concerned with being tough-on-crime will carry out that responsibility by denying all clemency requests.

<sup>68</sup> Of course, the governor can still use the full and fair access to the courts excuse and try to place the responsibility with the courts alone.



*2. Involving a Pardon Board**a. Governor Avoids Responsibility*

In many states, the existence of pardon boards permits governors to avoid responsibility for executions by claiming that they are just following the pardon boards. For example, imagine that a death-row inmate petitions the Arkansas Pardon Board for commutation of his death sentence. Imagine also that the prisoner, although guilty, is not as culpable for the crime as his co-conspirator who received a life sentence. The pardon board recommends against commuting the death sentence. The governor of Arkansas, although not required to do so, abides by this recommendation and permits the execution to go forward. When death-penalty opponents protest the execution, the governor can hide behind the pardon board and say that he is just following their informed recommendation. This excuse may even serve to eliminate any of the governor's personal qualms when he tries to sleep at night.<sup>69</sup> Though the governor might have had some doubts about whether a mentally retarded prisoner was sufficiently culpable to deserve execution, the governor may be able to convince himself that he is not responsible for the execution. After all, the pardon board recommended against commutation, and either the board was correct to do so or, if it was incorrect, the blame should fall on the board members and not the governor. Thus, although the Arkansas governor is responsible for the execution, in the course of declining clemency he may be able to convince the public and himself that the responsibility lies with the pardon board.

Governors can abdicate their responsibility for executions even more effectively when given the cloak of law. In other words, it is easier for governors to deny responsibility for executions in the nine states that prevent the governor from granting clemency unless the pardon board has first recommended mercy. In these states the governor is able to say not only that he should defer to the pardon board's decision but that, by law, he *must* defer to its decision.

The legal constraint on governors to follow the recommendations of the pardon board is only nominal however. Although on paper the governor must abide by the pardon board's decision, in reality it

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<sup>69</sup> Cf. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 235 (1975) ("[Discomfort] will be reduced insofar as [the individual] can view himself as a mechanical instrument of the will of others.").

is the pardon board members who must follow the dictates set down by the governor. In the nine "binding" states, the governors appoint the members of the pardon boards.<sup>70</sup> Appointment to the pardon board is a form of political patronage, and it can be expected that loyalty to the governor is part of the unspoken price for a political appointment. In turn, board members will be under pressure to follow the governor's wishes. This form of political pressure can be more extreme when the threat of removal exists.<sup>71</sup> In a number of states, the members of the pardon board must do what the governor wants or face losing their seats on the pardon boards. The case of Tim Baldwin provides an extreme example.

Baldwin appealed to the Louisiana Board of Pardons and Paroles to have his death sentence commuted. (Louisiana is one of the nine states in which the governor cannot grant clemency unless the pardon board recommends it.) After hearing new evidence of Baldwin's innocence, the chairman of the Pardon Board, Howard Marsellus, concluded that "I just couldn't convince myself that the man was really guilty and deserved to die . . . ."<sup>72</sup> Marsellus, however, knew that he was supposed to be a team player and that he was supposed to keep clemency cases from ever getting to the governor's desk.<sup>73</sup> In Baldwin's case Marsellus really believed that mercy was warranted, and he called the governor's chief legal counsel to explain why he wanted to recommend granting clemency.<sup>74</sup> The governor's counsel responded that "the governor [does] not like to be confronted with these cases and . . . [Marsellus should] handle it."<sup>75</sup> In no uncertain terms, Marsellus was then told "[i]f you can't hack it, we'll just have to replace you with someone who can."<sup>76</sup> This

<sup>70</sup> See 61 ARIZ. REV. STAT. § 31-401 (2000); DEL. CODE ANN. tit. 11, § 4341 (2000); FLA. STAT. § 947.02 (2000); IND. CODE ANN. § 11-9-1-1 (2000); LA. REV. STAT. 15:572.1 (2000); MONT. CODE ANN. § 2-15-2302 (2000); OKL. CONST. art. VI, § 10 (1999) (three of the five members appointed by the Governor); PA. STAT. ANN. 331.2 (2000) (with the advice and consent of the Senate); Tex Gov't Code § 508.036 (1999).

<sup>71</sup> In a number of states, governors have the power to remove members of the pardon boards. See 61 ARIZ. REV. STAT. § 31-401 (2000) (removal for cause); DEL. CODE ANN. tit. 11, § 4341 (2000) (removal for any reason); IND. CODE ANN. § 11-9-1-1 (2000) (removal for cause); LA. REV. STAT. 15:572.1 (2000) (replaced for any reason); OKL. CONST. art. VI, § 10 (1999) (removal for cause); PA. STAT. ANN. 331.2 (2000) (removal for any reason).

<sup>72</sup> SISTER HELEN PREJEAN, *DEAD MAN WALKING* 170-71 (1993).

<sup>73</sup> See *id.* at 171.

<sup>74</sup> See *id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

hardly paints a picture of a governor who is constrained by the pardon board. Instead, it was the governor who actually denied clemency while using the pardon board as a political cushion to avoid responsibility.

A less egregious example is the case of Gary Graham. Graham claimed to be innocent, and his cause attracted the attention of celebrities and civil rights leaders. After the Texas Board of Pardons and Paroles denied clemency, Jesse Jackson castigated Governor Bush. Jackson stated that the 18 members of the board owe their \$80,000-a-year jobs to the governor and that a "nod" from Bush to the Board could have resulted in a vote for clemency.<sup>77</sup> At the time, Bush was campaigning for the presidency and touting his record of being able to work with Democrats and other diverse groups to reform education and solve problems.<sup>78</sup> Yet, while Bush proclaimed his ability to work with opponents to get things done, he denied that he had any influence over the pardon board members whom he had appointed.<sup>79</sup> The idea that Bush had been able to persuade Democrats to support his legislation but that he was unable simply to suggest to his pardon board appointees that clemency might be appropriate is untenable.

In sum, to suggest that the governor is bound by the pardon board's recommendation is technically true, but only nominally so. In actuality, governors have the real power, and the pardon boards serve as political cushions. In this way, governors are able to pass the buck to the pardon board while creating the appearance that they are helpless to do anything about it.

*b. Pardon Boards Refuse to Accept Responsibility*

As we have seen, governors can successfully avoid their clemency responsibility by passing it to the pardon boards. The pardon boards, however, do not shoulder the responsibility for the executions either. As Howard Marsellus, former chairman of the Louisiana Board of Pardons, said in rejecting a clemency petition,

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<sup>77</sup> See Paul Duggan, *Texas Executes Graham After Appeals Fail: Death Penalty Case Dogs Bush in His Bid for Presidency*, WASH. POST, June 23, 2000, at A1.

<sup>78</sup> See Richard L. Berke, *Bush in Address Will Make Appeal Beyond the G.O.P.*, N.Y. TIMES, July 30, 2000, at A6. (quoting Bush only one month after Graham's execution as saying "[o]ne of the things that people don't really know about me is that I've been good about bringing people together to get things accomplished in Texas").

<sup>79</sup> See Duggan, *supra* note 77.

"the members of the Board . . . [are] not personally responsible for this man, or any man, dying in the electric chair."<sup>80</sup> Currently, Texas provides the best (and the most prolific) example of a pardon board refusing to take responsibility.

The Texas Board of Pardons and Paroles has recommended clemency only once in the past seventeen years.<sup>81</sup> Despite the fact that the board has the power to decide who lives and dies, it has no criteria for making such a decision and board members receive little formal training.<sup>82</sup> There is even evidence to suggest that board members do not read the information presented to them.<sup>83</sup> Some members check only to see whether the prisoner was convicted of a horrible crime and whether he received appellate review.<sup>84</sup> Additionally, letters from the public opposing the executions (sometimes numbering in the thousands) are not delivered to the board members.<sup>85</sup> The eighteen members of the board make their decisions to deny clemency without ever meeting together to discuss the case.<sup>86</sup> This in itself is yet another form of the diffusion of responsibility and it of course means that the condemned prisoner never gets an opportunity to make his case before the board that is deciding his fate. Finally, in the ultimate failure to take responsibility, the board members do not even give a reason for denying clemency.<sup>87</sup> These facts taken together paint a picture of a

<sup>80</sup> See PREJEAN, *supra* note 72, at 169.

<sup>81</sup> See Amnesty International Report AMR 51/085/1999, *United States of America: Killing Without Mercy: Clemency Procedures in Texas*, at <http://www.web.amnesty.org/ai.nsf/index/AMR510851999> (Jan. 6, 1999).

<sup>82</sup> See *id.* at 3.

<sup>83</sup> See *id.* at 8.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.* at 7.

<sup>86</sup> See *id.* at 3. In 1991, at Governor Ann Richards' request, the pardon board, for the only time in its history, met together to consider a clemency request. The board denied clemency. According to Amnesty International, the Texas board refused to convene clemency hearings for Terry Washington, who had an IQ of 58, *id.* at n.13; Robert Drew, who had been convicted even though someone else had confessed to the crime; and Jesse Jacobs, who was convicted even though the prosecution later conceded that he may have had no direct involvement in the crime. See *id.* at 4.

<sup>87</sup> Various challenges to the Texas clemency system consistently have been rejected. Most recently, see *Faulder v. Texas*, 178 F.3d 343 (5th Cir. 1999). In upholding the system a district judge nevertheless found that "[A]dministratively the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient legally sound system. The board would not have to sacrifice its conservative ideology to carry out its duties in a more fair and

group of decision-makers unwilling to take responsibility for the final decision of whether someone lives or dies.

The members of pardon boards remain obscure figures. They do not have to publicly take responsibility for their decisions. Instead the governor of Texas, in the course of announcing the Board's decision, becomes the public face of the Board members. Yet, while assuming the board's public face, the governor is able to disclaim responsibility for the Board's actions. Realizing the problems with this situation, a state senator, Rodney Ellis, introduced a bill that would have required the pardon board to hold a public hearing in death-penalty cases in which the prisoner requested commutation.<sup>88</sup> Ellis remarked, "Maybe we ought to join the other states that give the governor *clear*, final authority whether or not to execute someone."<sup>89</sup> Governor Bush opposed the bill and it died quickly, thus preserving a system in which neither the pardon board nor the governor is ultimately responsible for denying clemency.

Clearly, Texas and Louisiana provide egregious examples of the failures of the clemency process. Nevertheless, the fact remains that even in more progressive states, there is a diffusion of responsibility between the governors and the pardon boards. Governors can avoid taking responsibility for the clemency process by pointing to the pardon boards. In turn, the pardon boards fail to take responsibility for their ultimate decisions.

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In summary, governors have the opportunity to, and in fact do, avoid responsibility for executive clemency. First, governors are able to deny clemency because the defendant had full and fair access to the courts. As we have seen, this is merely an excuse to avoid conducting an inquiry into whether the petitioner is morally entitled to clemency. Governors are also able to deny their clemency responsibilities by pointing to the pardon board's recommendation that clemency be denied. This shifting of responsibility is unacceptable, however, because the pardon boards fail to take the

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accurate fashion." Sara Rimer & Jim Yardley, *Pending Execution in Texas Spotlights a Powerful Board*, N.Y. TIMES, June 21, 2000, at A1.

<sup>88</sup> See John Moritz, *Criticism Intensifying on "Secret" Clemency Review*, FORT WORTH STAR-TELEGRAM, June 24, 2000, at 23.

<sup>89</sup> *Id.* (emphasis added).



responsibility that is passed to them. Additionally, shifting responsibility from the governor to the pardon board is a game of hide-the-ball because in many cases, the governor has control over the pardon board.

## II: THE COURT'S FAILURE TO TAKE RESPONSIBILITY

In *Ohio v. Woodard*,<sup>90</sup> a fractured Supreme Court considered whether clemency petitioners retain a due process interest in clemency procedures until they are executed. Eugene Woodard was sentenced to death in Ohio, and his sentence was affirmed on appeal.<sup>91</sup> Woodard claimed that Ohio's clemency procedures deprived him of due process because he did not have a sufficient opportunity to prepare for the clemency interview and hearing because he was given only a few days notice to prepare.<sup>92</sup> Additionally, Woodard alleged a due process violation because his counsel was not permitted to participate at the clemency hearing and because Woodard himself was precluded from testifying or submitting documentary evidence at the hearing.<sup>93</sup> Eight justices rejected Woodard's claim but, as in many other Rehnquist Court decisions, there was no majority opinion. Speaking for Justices Scalia, Kennedy, and Thomas, Chief Justice Rehnquist acknowledged that a clemency petitioner has a "residual life interest . . . in not being summarily executed by prison guards."<sup>94</sup> According to the Chief Justice, that is where the due process protection ends, however. The Chief Justice contended that a death-row inmate's petition for clemency is a "unilateral hope" and a matter of grace granted by the chief executive.<sup>95</sup> As such, the Governor's discretion to grant or deny

<sup>90</sup> 523 U.S. 272 (1998).

<sup>91</sup> See *id.* at 277.

<sup>92</sup> See *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>93</sup> See *id.* at 289-90 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>94</sup> See *id.* at 281.

<sup>95</sup> *Id.* at 282. There is support for this conclusion. In 1833, Chief Justice Marshall opined that a pardon is "an act of grace." *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833). There is also contradictory precedent however. In 1927 Justice Holmes explained that "[a] pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). See also *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (opinion of Justices Stewart, Powell, and Stevens) (explaining that a capital punishment system that did not provide for executive clemency would be "totally alien to our notions of criminal justice.") Additionally, Kathleen Dean Moore, the leading scholar on this subject, takes the position that pardons are not an act



clemency need not be burdened by procedural protections.<sup>96</sup> Chief Justice Rehnquist rejected Woodard's contention that because executive clemency has been historically available, it constitutes an integral part of the system of adjudicating guilt or innocence and therefore merits due process protections.<sup>97</sup> Instead, the Chief Justice concluded that

[C]lemency proceedings are not part of the trial—or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process . . . .

. . . .  
If clemency is granted, [the inmate] obtains a benefit; if it is denied, he is no worse off than he was before.<sup>98</sup>

The Chief Justice's conclusion that no due process protection attaches to clemency proceedings is quite alarming given his opinion five years earlier in *Herrera v. Collins*.<sup>99</sup> In *Herrera*, a fractured Court held that habeas corpus was not available for free-standing claims of actual innocence.<sup>100</sup> In denying habeas protection, the Chief Justice remarked that executive clemency is the "fail safe" in [the] . . . criminal justice system."<sup>101</sup> In *Woodard* however, the Chief Justice seems to deny that clemency is even part of the criminal justice system, suggesting instead that it is merely a gift that a governor can choose to offer. Moreover, because no due process protection attaches to the "fail safe" of the criminal justice system there would

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of grace. See MOORE, *supra* note 4, at 91 ("[W]hatever may have been true of the great monarchies, in the American democracy the pardon is not a gift from the sovereign.").

<sup>96</sup> See *Woodard*, 523 U.S. at 282.

<sup>97</sup> See *id.* at 283.

<sup>98</sup> *Id.* at 284-85. The logic underlying the Chief Justice's final statement is disturbing. The "no worse off" idea could easily be applied to other aspects of the criminal justice system. For instance, why should there be due process protection in direct or collateral appeals if the convicted defendant would be "no worse off" in the event that those appeals are denied?

<sup>99</sup> 506 U.S. 390 (1993).

<sup>100</sup> *Herrera* has sparked considerable outcry. For the best analysis of the decision see Vivian Berger, *Herrera v. Collins: The Gateway of Innocence For Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943 (1994).

<sup>101</sup> See *Herrera*, 506 U.S. at 415.

be no constitutional violation if the governor denied clemency by flipping a coin or because he had received a bribe. This hardly leaves clemency as a fail safe.

The other *Woodard* plurality was not much more generous. Justice O'Connor, joined by Justices Souter, Ginsburg, and Breyer, concluded that "some *minimal* procedural safeguards apply to clemency proceedings."<sup>102</sup> According to Justice O'Connor, judicial intervention *might* be warranted if "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."<sup>103</sup> However, Justice O'Connor saw no due process problems with the Ohio clemency system. The Fourteenth Amendment's Due Process Clause did not require that Woodard be given more than a few days notice of the clemency hearing.<sup>104</sup> Additionally, due process did not mandate that Woodard's lawyer be permitted to participate or that Woodard himself be permitted to testify or to submit evidence.<sup>105</sup>

While Justice O'Connor deserves credit for recognizing that at least some due process protection must attach to clemency systems, her conclusion that only minimal due process protection is required is problematic. Like Chief Justice Rehnquist, Justice O'Connor has also recognized that executive clemency is the fail safe of the criminal justice system.<sup>106</sup> Clemency can hardly act as a fail safe, however, if the death-row inmate is not permitted to testify or to present evidence at the clemency hearing. Moreover, if the inmate is permitted to testify but is illiterate or inarticulate he may not be able adequately to present his case for clemency without the assistance of a lawyer. Finally, even if the inmate is permitted to testify and to introduce evidence with the assistance of a lawyer, he might not be able convincingly to do so without adequate notice of the clemency hearing.

The lack of constitutionally-mandated due process protection for clemency systems is problematic because many states decline to offer

<sup>102</sup> See *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original).

<sup>103</sup> *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

<sup>104</sup> See *id.* at 289-90 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>105</sup> See *id.* (O'Connor, J., concurring in part and concurring in the judgment).

<sup>106</sup> See *Herrera*, 506 U.S. at 427 (O'Connor, J., concurring).

those guarantees voluntarily.<sup>107</sup> Only eight death-penalty states statutorily permit or require the clemency applicant's presence.<sup>108</sup> Only nine death-penalty states govern clemency proceedings with formal rules of evidence,<sup>109</sup> and only a handful of state statutes list specific due process guarantees.<sup>110</sup> Without due process guarantees, clemency can hardly be a fail safe against improper execution.<sup>111</sup>

### III. THE DIFFUSION OF RESPONSIBILITY<sup>112</sup>

The Supreme Court has recognized the dangers of the diffusion of responsibility. In *Caldwell v. Mississippi*,<sup>113</sup> the Court held that a prosecutor may not minimize a jury's sense of personal moral responsibility when determining whether to impose the death penalty. Specifically, the Court held that a prosecutor could not tell the jury that its decision to impose the death penalty was

<sup>107</sup> For a survey of variations in state clemency procedures (from which I borrow the citations for the subsequent footnotes), see Dorne and Gewerth, *supra* note 14.

<sup>108</sup> See ARIZ. REV. STAT. ANN. § 31-411B (West 1998); CONN. GEN. STAT. ANN. §18-29 (West 1998); 730 ILL. COMP. STAT. ANN. 5/3-3-13 (West 1998); IND. CODE ANN. § 11-9-2-2 (Michie 1998); LA. REV. STAT. ANN. § 572.4 (West 1998); NEB. REV. STAT. ANN. § 83-1 111 (Michie 1998); PA. STAT. ANN. tit. 61, § 299 (West Supp. 1999); UTAH CODE ANN. § 77-27-7 (1998).

<sup>109</sup> See CONN. GEN. STAT. ANN. §18-30 (West 1998); DEL. CODE ANN. tit. 11, § 4361 (1998); FLA STAT. ch. 940.03 (1998); IND. CODE ANN. § 11-9-1-2 (Michie 1998); LA. REV. STAT. ANN. § 572.4 (West 1998); NEB. REV. STAT. ANN. § 83-1, 111 (Michie 1998); PA. STAT. ANN. tit. 61, 331.19 (West 1998); S.D. CODIFIED LAWS § 24-13-7 (Michie 1998); UTAH CODE ANN. § 77-27-7 (1998).

<sup>110</sup> See ARIZ. REV. STAT. ANN. § 31-411B (West 1998); GA. CODE ANN. §42-9-50 (1997); 730 ILL. COMP. STAT. ANN. 5/3-3-13 (West 1998); IND. CODE ANN. § 11-9-2-2 (Michie 1998); MONT. CODE ANN. § 46-23-306 (1997).

<sup>111</sup> Only Justice Stevens refused to conclude that Ohio's clemency system satisfied due process. Justice Stevens recognized that "if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause." *Woodard*, 523 U.S. at 292 (Stevens, J., concurring in part and dissenting in part). Justice Stevens would have remanded the case to the district court to determine whether Ohio's clemency procedures meet the minimum due process requirements. See *id.* at 295 (Stevens, J., concurring in part and dissenting in part).

<sup>112</sup> Some scholars draw a distinction between the diffusion of responsibility and the dissolution of responsibility. In the former, responsibility is accepted but shared. In the latter, "responsibility is dissolved by rationalizing that someone else has already helped." JANE ALLYN PILAVIN ET AL., *EMERGENCY INTERVENTION* 121 (1981). Under the more nuanced terminology, capital clemency amounts to a dissolution of responsibility because the governors, pardon boards, and courts are assuming that someone else will take care of it. However, because most of the literature does not differentiate between diffusion and dissolution, I will simply utilize the more broadly-used "diffusion of responsibility" terminology.

<sup>113</sup> 472 U.S. 320 (1985).

automatically reviewable by an appellate court.<sup>114</sup> The Court feared that if the jury did not see itself as the responsible agent it might be more willing to mete out a death-sentence.<sup>115</sup> In other words, jurors would be more willing to impose a questionable death sentence because of their belief that someone else would correct the error on appeal. The Court explained that in capital cases the jury has a "truly awesome responsibility" and it is unacceptable for the prosecutor "to minimize the jury's sense of responsibility for determining the appropriateness of death."<sup>116</sup> The *Caldwell* decision thus identified the problem of the diffusion of responsibility and sought to prevent it.

Several years after *Caldwell*, and in an entirely different doctrinal area, the Court again expressed concern about the diffusion of responsibility. In *New York v. United States*,<sup>117</sup> the Court struck down a federal radioactive waste act which required states either to adopt a federally-approved method of disposing of radioactive waste or to take title and liability to all radioactive waste produced in the state. In effect, the statute amounted to federal legislators commandeering state resources to carry out federal policies. The Court expressed concern that the commandeering might make it difficult for the public at large to know whether to blame federal or state officials for the program. In other words, the Court found the commandeering unacceptable, in part, because it would result in a diffusion of political responsibility between federal and state legislators.<sup>118</sup>

#### *A. Historical and Social Science Evidence*

The Supreme Court's concern in *Caldwell* and in *New York* about the dangers of the diffusion of responsibility is supported by both historical evidence and social science data.

Perhaps the best historical example of the diffusion of responsibility is the infamous story of Kitty Genovese. Kitty Genovese was attacked and killed outside of a New York City apartment building in 1964.<sup>119</sup> Her assailants had three chances to attack her

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<sup>114</sup> See *id.* at 325-26.

<sup>115</sup> See *id.* at 330-32.

<sup>116</sup> *Id.* at 341.

<sup>117</sup> 505 U.S. 144 (1992).

<sup>118</sup> See *id.* at 168-69.

<sup>119</sup> See A. M. ROSENTHAL, THIRTY-EIGHT WITNESSES 32-36 (1964).

during a thirty-five minute period. Despite Ms. Genovese's screams for help, not one of the thirty-eight witnesses inside the apartment building called for assistance during the thirty-five minutes.<sup>120</sup> The failure of witnesses to help Kitty Genovese was originally attributed to apathy.<sup>121</sup> Some said they did not want to get involved, and others replied "I don't know" when asked why they did not call for help.<sup>122</sup> While apathy may have had something to do with it, a better explanation is the diffusion of responsibility.<sup>123</sup> From inside their apartments, the witnesses were insulated from responsibility for Kitty Genovese. Moreover, it was clear to each witness that multiple people heard her cries for help. Rather than doing something, each witness was able to assume that someone else had called for help. Had there been only one witness, and had that witness known that he alone was in a position to help, he would have been more likely to aid Kitty Genovese.

Experimental psychology confirmed the dangers of the diffusion of responsibility.<sup>124</sup> In the late-1960s Stanley Milgram designed a series of experiments to test subjects' obedience to authority.<sup>125</sup> Subjects were instructed by a confederate – a legitimate authority figure – to give electric shocks to a "victim" who they could not see.<sup>126</sup> The confederate ordered the subject to give increasingly larger, potentially fatal, shocks to the "victim." Though many of the subjects had reservations, they nevertheless followed orders and administered the shock. (The victim acted as though he had been shocked, sometimes crying out in pain and begging for the subject to stop, though in actuality, and unbeknownst to the subject, the victim had not been shocked.) Milgram then found that when the subjects were brought face-to-face with their victims, the subjects were less willing

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<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 82.

<sup>122</sup> *Id.* at 79.

<sup>123</sup> See John M. Darley & Bibb Latane, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377 (1968) (finding that mere perception that others are witnessing the event markedly decreases the likelihood of intervention).

<sup>124</sup> Well over 50 experimental studies have explored the concept of the diffusion of responsibility. See Bibb Latane & Steve Nilda, *Ten Years of Research on Group Size and Helping*, 89 PSYCHOL. BULL. 308 (1981) (reviewing the literature). See also PILIAVIN ET AL., *supra* note 112, at 120-32 (discussing some of the literature). These studies have found that when responsibility is diffused people engage in or fail to stop immoral or anti-social behavior.

<sup>125</sup> See STANLEY MILGRAM, *OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974).

<sup>126</sup> See *id.* at ch. 1.



to shock the victims.<sup>127</sup> As Professor Craig Haney has put it, when "people . . . are forced to 'get involved' and feel responsible for the safety and well-being of others . . . [they] are more likely to behave in a socially responsible rather than blindly obedient manner."<sup>128</sup> Milgram himself explained that "it is psychologically easy to ignore responsibility when one is only an immediate link in a chain of evil action but is far from the final consequences of the action."<sup>129</sup>

Milgram's conclusions are consistent with accounts of the Holocaust.<sup>130</sup> In *Eichmann in Jerusalem*, Hannah Arendt argues that Adolph Eichman was not a monster but rather a "terribly and terrifyingly normal" bureaucrat.<sup>131</sup> As Milgram explains it,

Even Eichmann was sickened when he toured the concentration camps, but to participate in mass murder he had only to sit at a desk and shuffle papers. At the same time the man in the camp who actually dropped Cyclon-B into the gas chambers was able to justify *his* behavior on the grounds that he was only following orders from above. Thus there is a fragmentation of the total human act; no man decides to carry out the evil act and is confronted with its consequences. The person who assumes full responsibility for the act has evaporated. Perhaps this is the most common characteristic of socially organized evil in modern society.<sup>132</sup>

By utilizing these examples I do not intend to compare the United States courts, governors, and pardon boards to Eichmann and Nazi Germany. Likewise, death-sentenced inmates are not (except in cases of actual innocence) victims in the same way that Kitty

<sup>127</sup> See *id.* at ch. 4.

<sup>128</sup> Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1474 (1997).

<sup>129</sup> MILGRAM, *supra* note 125, at 11.

<sup>130</sup> See DANIEL GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS* 11-12 (1996) (recounting the conventional explanations of the Holocaust). In concluding that Germans were motivated by anti-Semitism and that they did not want to stop the Holocaust, Goldhagen rejects Stanley Milgram's research about obedience to authority. See *id.* at 12 n.26, 383.

<sup>131</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 276 (1963).

<sup>132</sup> MILGRAM, *supra* note 125, at 11.



Genovese was. Nevertheless, the principles extrapolated from Milgram, Arendt, and the case of Kitty Genovese are instructive. When the sense of personal responsibility is diffused among multiple parties, the danger exists that no one will take responsibility. Party A may not stop an immoral practice because she believes that it is party B's responsibility to deal with it. Similarly, party B will not stop the immoral practice because he believes that party A is responsible for it. The Supreme Court's reasoning in *Caldwell v. Mississippi* and *New York v. United States* suggests that this type of situation is unacceptable. And, the Kitty Genovese case and the experimental data compiled by Stanley Milgram and other social scientists demonstrate that the Court was correct to be concerned about the diffusion of responsibility.

*B. The Diffusion of Responsibility in Capital Clemency*

Unfortunately, in the area of capital clemency the Supreme Court and a number of governors have ignored the story of Kitty Genovese and the experiments of Stanley Milgram and other social scientists. There is a vast diffusion of responsibility in capital clemency. In *Woodard*, the Court concluded that clemency is solely a matter for the executive branch. The Court refused to take responsibility and to impose procedural safeguards because it believed that someone else – the executive – was responsible. The executive branch has failed to take responsibility as well however. Governors have disclaimed responsibility for executions (and denied clemency) because the inmate had full and fair access to the courts. Essentially, governors have disclaimed responsibility because they think the courts are responsible for the execution. The situation is further complicated by the diffusion of responsibility between governors and pardon boards. Governors deny clemency because of recommendations from the pardon board; accordingly governors are not responsible because they are following the pardon boards' recommendations. At the same time, the individual members of the pardon board can believe that they are not responsible either. In some states the pardon board merely offers a recommendation, and therefore board members can have the mind-set that it is the governor who is responsible. Board members who are the final decision-makers can also avoid feeling responsible by shifting responsibility to the courts. As noted, some members of the Texas Board of Pardons and Paroles

vote to deny clemency after checking to make sure that courts conducted appellate review of the prisoner's death sentence.<sup>133</sup>

Stanley Milgram's observation about proximity to the victim should give us even more pause. Milgram found that the subject was less likely to shock the victim when the subject and victim were face-to-face. This suggests that participants in the clemency process would be less likely to shirk their duty if they were face to face with the petitioner. Yet governors rarely meet face-to-face with clemency petitioners. Even the members of the Texas Board of Pardons and Paroles – who, in some years, consider half of the nation's capital clemency petitions – do not meet face-to-face with clemency petitioners (or even face-to-face with other members of the pardon board for that matter).

In short, there is a diffusion of responsibility in the area of capital clemency. This of course does not necessarily mean that any meaningful clemency petitions have been denied (though compelling arguments can be made.<sup>134</sup>) At minimum, however, the situation is ripe for error. With the courts, the governors, and the pardon boards in a position to avoid responsibility for the execution and the clemency process, it is dangerously possible that a questionable execution could occur.

#### IV. ELIMINATING THE DIFFUSION OF RESPONSIBILITY

In *Woodard*, Chief Justice Rehnquist's plurality opinion concluded first that a clemency petitioner did not have a life interest in the clemency proceeding and second that, as a result, the petitioner was not entitled to due process protection. Compelling arguments can be made that both conclusions are incorrect. Death-row inmates have life interests in clemency hearings and they are entitled not just to minimal due process protection (as Justice O'Connor concluded) but, rather, regular due process protection. In determining which procedural safeguards due process requires, the Court can ensure that the final decision-makers in the executive branch take responsibility for capital clemency. Thus, as the Court takes

<sup>133</sup> See *supra* note 84 and accompanying text.

<sup>134</sup> Gary Graham, who was executed in Texas in June, 2000, provides the best recent example. See Bruce Nichols, *Cries of Injustice Grow in '81 Graham Murder Case*, DALLAS MORNING NEWS, June 13, 2000, at A10. See also TUCKER, *supra* note 50 (discussing the possible innocence of Roger Keith Coleman, who was executed in Virginia in 1992).

responsibility for capital clemency procedures, it can also force the executive branch to take responsibility for the substantive clemency decision.

A. *There Is a Life Interest in Capital Clemency*

The Rehnquist plurality in *Woodard* concluded that there was no life interest in capital clemency, but the O'Connor plurality disagreed. The logic underlying three previous cases supports the existence of a life interest.

In *Morrissey v. Brewer*,<sup>135</sup> the Supreme Court held that due process protections apply to revocations of parole. Typically, a paroled inmate is entitled to retain his liberty so long as he abides by the conditions of his parole.<sup>136</sup> In *Brewer* the Court concluded that because a parolee retains many of the core values of unqualified liberty, the termination of parole would be a "grievous loss."<sup>137</sup> As such, due process protections attach to the revocation of parole.<sup>138</sup> Seven years later the Court rejected the idea that an inmate seeking parole had a liberty interest in a parole hearing. In *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*<sup>139</sup> the Court explained that when a person has been fairly convicted and sentenced, his liberty interest in being free from confinement is extinguished.<sup>140</sup> In *Brewer* and *Greenholtz* the Supreme Court construed a liberty interest as whether the inmate had something tangible to lose. A fairly-convicted prisoner has no liberty interest in being granted parole because he has been rightly jailed and loses no entitled freedom when parole is denied. Conversely, a paroled inmate does have a liberty interest in revocation of his parole because revocation would take away the freedom he had been granted. Armed with this logic the Court concluded in *Connecticut Board of Pardons v. Dumschat*<sup>141</sup> that a convicted felon does not have a liberty interest in executive clemency. The Court explained that the decision to commute a long prison sentence is similar to the decision to grant parole.<sup>142</sup> A felon has no expectation that his long sentence

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<sup>135</sup> 408 U.S. 471 (1972).

<sup>136</sup> See *id.* at 479.

<sup>137</sup> *Id.* at 482.

<sup>138</sup> See *id.*

<sup>139</sup> 442 U.S. 1 (1979).

<sup>140</sup> See *id.* at 7.

<sup>141</sup> 452 U.S. 458 (1981).

<sup>142</sup> See *id.* at 464.

might be commuted, and therefore when clemency is denied, he has not lost anything.<sup>143</sup>

In *Woodard* the Rehnquist plurality relied heavily on *Dumschat* in concluding that due process protection does not attach to capital clemency proceedings.<sup>144</sup> Chief Justice Rehnquist contended that "[t]he reasoning of *Dumschat* did not depend on the fact that it was not a capital case."<sup>145</sup> The Chief Justice missed the key point however. The *Dumschat* clemency hearing involved a "liberty interest," whereas the *Woodard* clemency hearing involved a "life interest." When *Dumschat* was denied clemency, he did not lose his liberty because he was already imprisoned; when *Woodard* was denied clemency he lost his life (something he still possessed at the time of the hearing). Simply because *Woodard* was sentenced to death does not mean that *Dumschat* is not controlling. In fact, *Dumschat*, *Brewer*, and *Greenholtz* are directly controlling. Those three cases stand for the proposition that due process protection attaches when the petitioner stands to lose something tangible, what the Court has called a "grievous loss."<sup>146</sup> The question then is whether *Woodard* stood to lose something tangible if denied clemency. Quite obviously, he did. At the time *Woodard* requested clemency he was still a living, breathing human being. If clemency were denied he would be executed and he would lose his life. As such, *Woodard* stood to lose his life – a grievous loss and certainly something tangible – and therefore he had a life interest in the clemency proceeding.<sup>147</sup>

A majority of the justices in *Woodard* supported the view that there is a life interest in capital clemency.<sup>148</sup> However, as in a number of other recent decisions, a clear majority opinion did not stand behind

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<sup>143</sup> See *id.* at 465.

<sup>144</sup> See *Woodard*, 523 U.S. at 280 ("Respondent's claim of a broader due process interest in Ohio's clemency proceedings is barred by *Dumschat*.").

<sup>145</sup> *Id.* at 281.

<sup>146</sup> *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (citation omitted).

<sup>147</sup> For a contrary view see Phillip John Strach, Note, *Ohio Adult Parole Authority v. Woodard: Breathing New "Life" into an Old Fourteenth Amendment Controversy*, 77 N.C. L. REV. 891, 922-25 (1999).

<sup>148</sup> See *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment) (joined by Justices Souter, Ginsburg, and Breyer) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life."); *id.* at 292 (Stevens, J., concurring in part and dissenting in part) ("[I]t is abundantly clear that respondent possesses a life interest protected by the Due Process Clause.").

this proposition.<sup>149</sup> Instead, Chief Justice Rehnquist's lead plurality opinion in *Woodard* stated that there was no life interest in capital clemency, while the five justices who supported the life interest were scattered in concurring and dissenting opinions. Thus, while a majority of the Court supported the proposition that there is a life interest in capital clemency, the salience of that proposition is limited by the lack of a clear majority opinion. When presented with another case involving capital clemency, these five justices should stand together in a majority opinion to announce that there is a life interest.

*B. How Much Process Is Due?*

Having concluded that a prisoner has a life interest in his capital clemency hearing, the next question is how much due process protection should attach to the clemency hearing? The Court has explained that "not all situations calling for procedural safeguards call for the same kind of procedure."<sup>150</sup> Rather, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss;' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."<sup>151</sup>

The range of potential due process protection is quite broad. On the low end, Justice O'Connor remarked in *Woodard* that some "minimal" procedural safeguards apply to clemency proceedings.<sup>152</sup> Similarly, in *Superintendent v. Hill*, the Court concluded that a prison disciplinary board taking away good time credits<sup>153</sup> could satisfy due

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<sup>149</sup> Perhaps the most notable example of a fractured Rehnquist Court opinion is *Henena v. Collins*, 506 U.S. 390 (1993). In *Henena* the lead opinion written by Chief Justice Rehnquist found that freestanding claims of actual innocence were not cognizable on habeas corpus, thus strongly suggesting that the Constitution does not forbid the execution of an innocent person. However, when all the votes are counted in *Henena*, six of the nine justices explicitly rejected the idea that the Constitution would tolerate the execution of an innocent person. As in *Woodard*, those justices were apparently unable to form a majority opinion that explicitly stated this proposition.

<sup>150</sup> *Morrissey*, 408 U.S. at 481.

<sup>151</sup> *Goldberg*, 397 U.S. at 263 (citation omitted).

<sup>152</sup> *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>153</sup> Good time credits are reductions in a prisoner's sentence for good behavior. For instance, for every day that a prisoner complies with the prison's rules without a disciplinary infraction he may receive one day of good time to count toward serving his sentence such that



process as long as "some evidence" supported the decision.<sup>154</sup> On the opposite extreme from "minimal procedural safeguards" and "some evidence" is substantive due process. Substantive due process forbids the government from doing certain things even if proper procedures are employed. In between these two extremes is the large middle-zone of plain-old regular due process.

At the outset we should be able to eliminate the minimum and maximum due process extremes. Providing only minimal due process protection for clemency petitioners discounts the importance of capital clemency. The Supreme Court has observed that clemency is the fail safe of the criminal justice system. This strongly suggests – contrary to Chief Justice Rehnquist's view – that clemency is an integral part of the criminal justice process. If the clemency petitioner is not guaranteed regular due process rights – such as the rights to introduce evidence or to present his case before the clemency board – it is difficult to see how this integral part of the criminal justice process can operate effectively.

Conversely, substantive due process protection of capital clemency is also inappropriate. A substantive due process clemency right would guarantee the existence of state and federal clemency mechanisms and would require the chief executive to award clemency when certain circumstances are met. (For example, clemency might be mandatory when the petitioner's IQ is below 70.) Moreover, if petitioners had substantive due process entitlements to clemency in certain situations, then the petitioner would have the right to appeal the merits of his case to the courts if the chief executive refused to grant clemency.<sup>155</sup> Whether you believe Justice Holmes that clemency is "a part of the Constitutional scheme,"<sup>156</sup> or Chief Justice Marshall that clemency is an "act of grace,"<sup>157</sup> there

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an eight-year sentence could be served in four years. See LYNN S. BRANHAM & SHELDON KRANTZ, *THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS* 177-78 (1997).

<sup>154</sup> 472 U.S. 445, 447 (1985).

<sup>155</sup> Imagine that the Supreme Court held that capital defendants have a substantive due process right to clemency if they have an IQ below 70. Then imagine the following clemency hypothetical: Petitioner's counsel provides the chief executive with evidence demonstrating that the petitioner had an IQ of 65. The chief executive declines to grant clemency and claims that the petitioner's evidence does not conclusively show that he has an IQ below 70. Petitioner would then appeal this rejection to the courts. The court would then have to make its own independent determination whether the petitioner has an IQ below 70.

<sup>156</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

<sup>157</sup> *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833).



seems little doubt that substantive clemency decision-making power has resided within the executive branch.<sup>158</sup> As such, substantive due process protection of clemency would seem inappropriate.

Instead, clemency should fall in the large middle zone of plain-old regular due process. This of course does not tell us much. A helpful starting point, though, is Professor Daniel Kobil's explanation that due process can be satisfied only if capital clemency requests are given "meaningful consideration by the ultimate decisionmaker."<sup>159</sup> We can focus our due process analysis then on what will be needed to ensure "meaningful consideration."

*C. What Procedural Guarantees Should Due Process Afford?*

Meaningful consideration should surely include the opportunity for the petitioner fully and fairly to make his case. This should include the right to present evidence and the right to make a statement on his own behalf.<sup>160</sup> Though the Supreme Court in *Woodard* refused to guarantee these safeguards, the rights to present evidence and to make a statement do not seem very controversial.<sup>161</sup>

More controversial is the question of whether the petitioner should be entitled to counsel at the clemency hearing. The Supreme Court's test on this matter is whether the proceeding is a "critical stage in the prosecution."<sup>162</sup> The Court's claim that clemency is the fail safe of the criminal justice system suggests that clemency hearings are a critical stage of the criminal justice process and therefore that counsel should be required. However, in recent years the Court has

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<sup>158</sup> See Abramowitz & Paget, *supra* note 48, at 140-41. Some clemency power however is vested in the federal legislative branch. See *Brown v. Walker*, 161 U.S. 591, 601 (1896) (explaining that although the Constitution vests the president with the pardoning power, Congress is permitted to pass acts of general amnesty).

<sup>159</sup> Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 218 (1993) (emphasis omitted).

<sup>160</sup> This procedural guarantee has been suggested previously. See Deborah Leavy, Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 909-10 (1981).

<sup>161</sup> Of course, the existence of the due process rights to present evidence and to make a statement were among the things controverted in *Woodard*. Moreover, the Court clearly rejected the conclusion that due process guaranteed the right to present evidence and the right to make a statement. Nevertheless, if we were to move out of Justice O'Connor's "minimal procedural safeguards" regime and Chief Justice Rehnquist's "no procedural safeguards" regime and instead consider clemency as something deserving of regular due process protection, I suggest that the rights to present evidence and to make a statement would be non-controversial.

<sup>162</sup> See, e.g., *United States v. Wade*, 388 U.S. 218, 236-37 (1967).

been reluctant to mandate the assistance of counsel in post-trial proceedings. In discretionary<sup>163</sup> and collateral appeals,<sup>164</sup> even in death-penalty cases,<sup>165</sup> the Court has been unwilling to find that counsel is so critical as to be required by the Due Process Clause. Under these precedents, it is unlikely that the Court, even applying regular (as opposed to minimal) due process protection, would require counsel at clemency proceedings. (Of course, one could argue that the decisions denying the right to counsel in discretionary and collateral appeals are incorrect, but that is a project beyond the scope of this paper.<sup>166</sup>) Still, there are countervailing reasons to require counsel at clemency proceedings. Governors grant clemency for a variety of reasons, including new evidence of the petitioner's innocence<sup>167</sup> and mental illness of the prisoner.<sup>168</sup> The question then is whether we can expect a mentally ill or innocent prisoner to be able fully to present his request for mercy? The answer is almost surely no. Without the assistance of counsel, many death-row inmates may be unable to explain convincingly why new evidence shows that they are innocent.<sup>169</sup> Because one of the primary functions of executive clemency is to prevent the execution of innocent or less culpable individuals, the case for guaranteeing counsel at the clemency stage is compelling.<sup>170</sup>

Thus far I have maintained that due process should require the assistance of counsel as well as the opportunity for the petitioner to present evidence and to make a statement. The most difficult question, however, is whether due process should guarantee the petitioner the right to make his case for clemency to the final

<sup>163</sup> See *Ross v. Moffitt*, 417 U.S. 600 (1974).

<sup>164</sup> See *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

<sup>165</sup> See *Murray v. Giarratano*, 492 U.S. 1 (1989).

<sup>166</sup> For such an argument in the capital context, see Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393 (1999).

<sup>167</sup> New evidence of innocence surfaces more frequently than one might expect. See, e.g., MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992).

<sup>168</sup> See, e.g., *Gilmore Grants Swann Clemency; Sentence Commuted to Life Without Parole*, RICHMOND TIMES-DISPATCH, May 13, 1999, at A1.

<sup>169</sup> For an early assessment of the importance of counsel in this regard, see Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962).

<sup>170</sup> One observer has gone even further by suggesting not only the assistance of counsel, but also the assistance of psychiatric personnel and criminologists. See Leavy, *supra* note 160, at 910.

decision-maker. As explained in Part I.C, there is a diffusion of responsibility for clemency decisions within the executive branch. In many states the chief executive makes the final determination about whether to grant clemency. However, the clemency petitioner almost never has an opportunity to present his petition directly to the governor. Similarly, in Texas – where the governor can only grant a commutation upon the recommendation of a majority of the pardon board – the Texas Board of Pardons and Paroles never meets as a unitary body, and the petitioner therefore has no face-to-face opportunity to present his request for mercy to the Board. As such, in the majority of capital clemency petitions, the prisoner does not have the opportunity to present his clemency request directly to the primary decision-maker. This arguably does not comport with due process.

If clemency petitioners are entitled fully and fairly to present their case for clemency, due process should require that they be able to present their cases to the actual person(s) making the final decision.<sup>171</sup> This at first seems like an unreasonable requirement given that governors are very busy and may not have time to attend clemency hearings. Such an objection is not particularly forceful, however. While it is true that governors spend a full day solving administrative crises, cutting ribbons, and generally governing, they arguably do nothing more important than presiding over their state's execution of a living human being.<sup>172</sup> Thus, a busy schedule should not be an excuse. Moreover, on a practical level, such hearings will not be very time-consuming. In Texas, the state with by far the largest number of executions per year, the main decision-maker in the first round of the clemency process is the Texas Board of Pardons and Paroles. Because the governor cannot grant clemency without

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<sup>171</sup> The Arizona Supreme Court came to a similar realization forty years ago. See *McGee v. Arizona State Board of Pardons and Paroles*, 376 P.2d 779 (Az. 1962). The *McGee* court ordered a capital clemency hearing before the Pardons Board and remarked that “[d]ue process of law requires notice and opportunity to be heard, and there must be a hearing in a substantial sense. And to give the substance of a hearing . . . the officer who makes the determinations must consider and appraise the evidence which justifies them.” *Id.* at 781.

<sup>172</sup> See Austin Sarat, *Capital Punishment as a Fact of Legal, Political, and Cultural Life: An Introduction* in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 4 (Austin Sarat ed., 1999) (“Along with the right to make war, the death penalty is the ultimate measure of sovereignty and the ultimate test of political power.”) (citation omitted); Andrew Sullivan, *Watch It*, *THE NEW REPUBLIC*, Apr. 30, 2001, at 8 (“The taking of a human life . . . is the most profound act any human being can commit. To sanction it blithely, to acquiesce in it easily, to endorse it but not confront it, constitutes moral abdication.”)

the pardon board's recommendation, the board in effect is the primary decision-maker, and therefore the due process scheme I have promulgated would require the pardon board to hear the petitioner's in-person request for clemency. This of course is not a burdensome requirement because the pardon board's primary function is to hear requests for clemency.<sup>173</sup> Only if the pardon board recommends clemency (thus enabling the governor of Texas to potentially grant clemency) would due process then require the governor to entertain an in-person request for clemency. Given that the pardon board has only recommended clemency in a death penalty case once in the last seventeen years,<sup>174</sup> the burden on the governor's time is at most negligible and likely non-existent.<sup>175</sup>

The time burden will be somewhat greater in states in which the governor always has the final decision whether to grant clemency. Again, however, the time-burden would still be relatively minimal. In comparison to Texas, other states execute relatively few prisoners. In 2000, Oklahoma followed Texas with eleven executions; Virginia had the next most active death-chamber with eight executions; while Florida trailed closely behind with six executions.<sup>176</sup> Interestingly, as in Texas, the governor of Oklahoma cannot grant clemency without the recommendation of the clemency board.<sup>177</sup> Thus, the Oklahoma governor would not have to attend any clemency hearings unless the pardon board recommended clemency. Therefore, in 2000, the heaviest burden would have fallen on the governors of Virginia and Florida, who would have had to preside over seven and six clemency hearings, respectively. This is hardly an overwhelming burden.<sup>178</sup>

<sup>173</sup> At least one Texas legislator agrees. Rodney Ellis introduced a bill to require public hearings before the Board in death-penalty cases but it died in committee. See *supra* notes 88-89 and accompanying text.

<sup>174</sup> See Amnesty International Report, *supra* note 81.

<sup>175</sup> Moreover, the Texas governor would already seem to have more free time than the nation's other governors. See Clay Robison, *Lawmakers Push New Constitution*, HOUSTON CHRON., Dec. 5, 1998, at A1. ("The Texas governor's office, in terms of formal powers, is now considered one of the weakest in the country.")

<sup>176</sup> *Executions in the U.S. 2000*, *supra* note 52.

<sup>177</sup> See Facts About Clemency, *supra* note 39.

<sup>178</sup> In Florida, for instance, attorneys for the state and for the prisoner are each granted fifteen minutes to make their cases. The victim's family is permitted to make a statement for up to five minutes. See Joseph B. Schimmel, Comment, *Commutation of the Death Sentence: Florida Steps Back From Justice and Mercy*, 20 FLA. ST. U. L. REV. 253, 282 (1992). If the prisoner is given the additional right to make a statement and to present new evidence of innocence, the proceeding may exceed one hour, but it will still remain quite brief.

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In sum, I have outlined fairly rigorous due process protection for clemency proceedings. While petitioners would not have a substantive right to appeal a denial of clemency, they would have the right to present evidence and a personal statement to the clemency board, the right to the assistance of counsel, and, most importantly, the right to make their clemency plea in person to the primary decision-maker(s). This somewhat rigorous due process protection for capital clemency serves two goals. On the one hand, ensuring a fair clemency hearing with procedural protections provides the petitioner with the opportunity to plead for his life. Giving the petitioner this opportunity allows him fairly to exercise his "life interest" in the clemency proceeding. On the other hand, not permitting appeals of the substantive clemency decision leaves the final decision with the chief executive. This requires the chief executive to take responsibility for the decision to deny (or grant) clemency. Moreover, the requirement that a petitioner be able to present his clemency petition to the primary decision-maker(s) reinforces the decision-makers' responsibility. Thus, these due process protections enable the petitioner actively to protect his life interest in the clemency process while at the same time reinforcing that the chief executive bears the ultimate responsibility for denying (or granting) clemency.

These due process protections can be seen as a compromise on the competing views of how clemency is characterized. Chief Justice Marshall<sup>179</sup> and Chief Justice Rehnquist<sup>180</sup> have argued that clemency is just an act of grace on the part of the executive. Conversely, Justice Holmes suggested that clemency "is a part of the Constitutional scheme,"<sup>181</sup> and the current Court has called clemency the "fail-safe" of the criminal justice system.<sup>182</sup> Requiring procedural safeguards at the clemency hearing but not permitting substantive appeals of the clemency decision strikes a balance between the two divergent views of clemency. It leaves the final act of grace with the executive, but

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<sup>179</sup> See *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).

<sup>180</sup> See *Ohio v. Woodard*, 523 U.S. 272, 282 (1998).

<sup>181</sup> *Biddle*, 274 U.S. at 486.

<sup>182</sup> *Herrera*, 506 U.S. at 415.



recognizes that clemency is an integral part of the criminal justice system that must be operated in a procedurally fair manner.

#### CONCLUSION

There is a diffusion of responsibility in capital clemency. The Court has concluded that clemency is solely a matter for the executive branch. Some governors however have tried to avoid this responsibility by claiming that the matter should be left to the courts or that they are just following the pardon board. In some instances neither the governor, the pardon board, nor the courts are willing to take responsibility for clemency and executions. This diffusion of responsibility is dangerous. Governors, pardon boards, and the courts might not stop questionable executions because they believe it is someone else's responsibility to do so. If clemency is to be the fail safe against improper execution, these entities must take responsibility for denying (or granting) clemency. The first step is for the Court to take responsibility by mandating procedural safeguards: the rights of the petitioner to present evidence, to make a statement, to have the assistance of counsel, and to appear before the final decision-maker(s). These procedural safeguards will eliminate the diffusion of responsibility by forcing the final decision-makers in the executive branches to take responsibility for the substantive decision to decline (or grant) clemency.