A Governor Probably Can Stop Capital Cases by Executive Order

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Overview

The New York Times recently reported that Governor Gavin Newsom is "considering several new steps to dismantle the state's capital punishment system" and "discussing with the attorney general's office what role the state could play in blocking prosecutions of new death sentences." The Times quoted experts who argued that a governor lacks authority to order an attorney general or local prosecutors to stop pursuing capital judgments, and that taking cases from local prosecutors would be "unprecedented."

No California governor has ever tried to direct state prosecutors to this degree. But that does not mean a governor lacks such power. On the contrary: the California constitution, judicial precedent, and Attorney General opinions support the conclusion that a governor can order an attorney general and local prosecutors to stop pursuing capital cases.

In California, a governor has superior executive power over an attorney general. If the two conflict, the governor controls executive branch policy. An attorney general has constitutional power to supervise county prosecutors, and may assume control over local criminal cases. This means that a governor could stop all pending capital cases and bar new capital cases, by issuing an executive order like this:

The Attorney General is hereby ordered to stipulate to dismissal with prejudice of the capital portion (and only that portion) of all capital sentences currently being litigated in California courts, in exchange for each capital inmate's stipulation to converting the capital sentence to

life without possibility of parole. The Attorney General is further hereby ordered to use that office's supervisory power over California's District Attorneys to seek no capital sentences in any pending or future cases.

A
governor has power over other state executive officers

The constitutional pecking order, which places a governor in a supervisory role above an attorney general, suggests that a governor can direct an attorney general to stop defending capital appeals, and to intervene to prevent local prosecutors from pursuing new capital cases. A governor's broad discretionary executive authority flows from Article V, section 1 ("The supreme executive power of this State is vested in the Governor") and the legislature, which granted governors power to "supervise the official conduct of all executive and ministerial officers."[1] Article V, section 1 also provides that a governor "shall see that the law is faithfully executed," and Article V, section 4 gives governors power to require the other executive officers "to furnish information relating to their duties." Absent legislative direction, it is a governor's duty, in seeing that the laws are executed, to provide for carrying out the executive tasks. And in discharging this duty, a governor may direct another elected executive official to act.[2] The attorney general has recognized a governor's expansive executive order authority. An executive order "need not be predicated upon some express statutory provision, but may properly be employed to effectuate a right, duty, or obligation which emanates or may be implied from the Constitution or to enforce public policy embodied within the Constitution and laws."[3]

While California divides its executive branch
into nine independently elected offices,[4]
the state constitution vests primary and superior authority over the executive branch in a governor. A governor's supervisory relationship over the other elected executive officers is well-established: in a conflict between a governor and another elected executive official, the governor prevails. "The constitutional pattern is crystal clear: if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the 'supreme executive power' to determine the public interest; the Attorney General may act only 'subject to the powers' of

the Governor."[5]

The other executive branch officers have sharply limited constitutional powers. The state constitution "follows a minimalist approach" regarding the other elected executive officers: "it provides for the office but primarily leaves it to the Legislature to define the duties and functions" of the office.[6] While the state executive branch is divided "in the sense that the officers are independently elected, and therefore cannot be removed by the Governor, the Governor is charged with supervising the official conduct of these officers."[7]

Viewing the California governor as the final executive authority is consistent with the nature of that office. The lack of any real restriction on state government design makes the state executive different from the national executive.[8] Unlike the President, who only holds those powers expressly granted and necessarily implied by the federal charter, a California governor holds "supreme executive power" limited only by the state constitution's express terms. The California constitution is a limitation, not a grant of power.[9] This makes a unified executive view of the California executive even more suitable than in the federal system.[10] And state governors vary widely in their institutional powers.[11] That variation establishes a spectrum within which California's governor can fall — and the spectrum's high end is the maximum executive power a state can exercise.

Critics will argue that governors cannot undo constitutional provisions by personal fiat. An order like the one suggested here doubtless would be challenged (as by the attorney general in a declaratory relief action) and the lead argument likely will be that because capital punishment is presently lawful in California, the order violates the governor's duty to see that the law is faithfully executed.[12] A recalcitrant attorney general could also argue that, as an independently-elected executive officer, the office has a constitutional mandate to evaluate an executive action's legality in the public interest, and a contrary view deprives the people

of a vigilant watchdog.[13]

Yet the judicial challenge option's availability does not detract from the governor's power to make the order — government officials frequently litigate disagreements in court.[14] Within the state executive branch, barring some constitutional or statutory restriction the California governor has no checks.[15] A governor has the call on state executive policy; the subordinate officer's options are either to comply or to seek judicial protection. This does not mean that California's governor is a king. The other branches have power to check the executive. The courts have the final say on how the law should be enforced.[16] The legislature can remove a governor's statutory powers.[17] And the voters can recall or vote out a governor for nonperformance.

Two other contrary arguments — reorganization and delegation — are not persuasive. A governor cannot by fiat reassign or reorganize another constitutional office or its functions. Article V, section 6 allows the legislature to provide statutory authority for a governor to assign and reorganize executive branch functions, other than "elective officers and agencies administered by elective officers."[18] But the contemplated orders relate to the attorney general's office policy and exercise of prosecutorial discretion, not reassignment or reorganization of functions. The delegation argument is similarly infirm.[19] While a governor cannot delegate ultimate responsibility for performing discretionary gubernatorial duties, ordering another officer to take a policy direction is the opposite of delegation.

Based on the office's constitutional and statutory power over the subordinate executive officers, and the judicial decisions upholding that power against objections by them, a governor probably could order an attorney general to stop defending capital appeals, and to use the attorney general's supervisory power over local prosecutors to stop them from pursuing new capital cases.

An attorney general has supervisory power over local prosecutors

In its core function of prosecuting crime, a district attorney is a state actor. True, in some circumstances a district attorney is a county officer.[20] But in the relevant context here (charging and prosecuting crime) an attorney general has constitutional power over local prosecutors. Article V, section 13 provides in part that "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney . . . ."

In *Pitts v. County of Kern*, the California Supreme Court held that this provision makes county prosecutors subordinate to the attorney general: "In California, each county district attorney is supervised by the Attorney General."[21] And that power goes beyond the simple decisions about how to charge an individual case: "the constitutional and statutory supervisory power accorded the Attorney General is not reasonably susceptible to an interpretation that it is limited to oversight of a district attorney's actions when he or she is prosecuting a particular case."[22] The state high court has respected this supervisory authority since at least 1882. In *County of Sacramento v. C. P. R. R. Co.*, the court held that an attorney general had the right to control a criminal action in the trial court and to appeal from the judgment, even to the extent of intervening to override the local prosecutor's position.[23]

The only contrary case is *People v. Brophy*, an old Court of Appeal decision that concluded that direct supervision "does not contemplate absolute control and direction" nor permit "a substitution of judgment."[24] But the California Supreme Court has never adopted that position; indeed, it

appears only in Justice Mosk's dissent in *Pitts*.
And *Brophy*
is questionable authority, because the California Supreme Court distinguished it when holding (again) that an attorney general has constitutional responsibility to oversee local law enforcement.[25]

These supervisory powers are not
theoretical. When actual conflicts have arisen between the constitutional officer and local prosecutors, the courts have consistently upheld the attorney general's authority. For example, in *People v. Hy-Lond Enterprises, Inc.*, the
Court of Appeal held that a district attorney cannot bind an attorney general with a judgment, that the attorney general may intervene to set aside that judgment, and rejected any local authority to restrain the attorney general.[26]
And in *Abbot Laboratories v. Superior Court*, the Court of Appeal held that a district attorney's jurisdiction is limited to its county, and the county officer could not restrict an attorney general's constitutional power to obtain relief on behalf of the entire state.[27]

Given the consistent judicial treatment
of this issue, it is difficult to find authority contradicting the conclusion that an attorney general (as the state's chief law enforcement officer with constitutional supervision powers over local prosecutors) can enforce a policy decision to bar capital prosecutions. And there is even less basis to argue that an attorney general is somehow barred from making a discretionary decision that defending capital appeals is not in the state's interest. Based on the office's constitutional powers and the long-standing respect for those powers shown by the courts, an attorney general would have a good-faith legal basis to issue those orders.

Conclusion

An elected executive officer (like an attorney
general) could make a legal and political decision to follow a governor's order

like the one discussed here, and similarly local prosecutors could accept the state's direction. Or they could refuse. Either choice bears two risks: lawsuits and punishment at the ballot box. Following the order means being sued by stakeholders; refusing the order means the governor will sue the attorney general, or the attorney general will sue the county prosecutor. Following the order has the better legal foundation — in conflicts between higher and lower executive officers the higher officer generally wins.

The one untenable plan here is to do nothing. The courts may uphold this kind of executive action, or not. But the pause on executions eventually will draw a legal challenge for failure to faithfully execute the law and to exercise the ministerial duty of carrying out a lawful judgment of death, and risk judicial ire for failing to respect a final court judgment.[28] Another executive order is surely required.

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Several of the center's research fellows contributed to this article.

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[1] Gov. Code, §§ 12010, 12011; see also Gov. Code, § 11090.

[2] *Spear v. Reeves* (1906) 148 Cal. 501, 504–05 (rejecting treasurer's argument that the governor lacked a power because the legislature had failed to confer it).

[3] 63 Ops.Cal.Atty.Gen. 583, 584–85 (1980).

[4] See Cal. Const., art. 5, § 14(f), listing nine independently elected state officers: governor, lieutenant governor, attorney general, controller, insurance commissioner, secretary of state, superintendent of public education, treasurer, and board of

equalization.

[5] *People ex rel. Deukmejian v. Brown* (1981) at 158.

[6] *Brown v. Chiang* (2011) at 1230; accord *Tirapelle v. Davis* (1993) at 1327 and *Gilb v. Chiang* (2010) at 463–64.

[7] *Brown v. Chiang*, *supra* note 6, at 1230.

[8] Carrillo & Duvernay, *California Constitutional Law: The Guarantee Clause and California's Republican Form of Government* (2014) 62 UCLA L. Rev. Disc. 104, 109–10.

[9] "[T]he Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the General Government, or prohibited by the Constitution of the United States." *People v. Coleman*, 4 Cal. 46, 49 (1854); see also *Methodist Hosp. of Sacramento v. Saylor* (1971) at 691 ("Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature.").

[10] For a view on the unitary federal executive, see Yoo, *Unitary, Executive, or Both?* (2009) 76 U. Chi. L. Rev. 1935.

[11] For example, in one ranking of relative gubernatorial institutional power, California's governor was among the strongest, while Rhode Island and Vermont governors tied for weakest. Ranking of the Institutional Powers of Governors (Beyle & Ferguson, "Governors and the Executive Branch," Table 7-2) in Politics in the American States, Ninth Edition, Gray & Hanson, eds. (Washington, DC: CQ Press). Another study found that Utah, Alaska,

Maryland, and Minnesota had the strongest governors, and the least powerful are in Georgia, Alabama, Texas, Vermont, and Rhode Island. Little & Ogle, The Legislative Branch of State Government: People, Process, and Politics (ABC-CLIO 2006) at 198.

[12] See, e.g., Times Editorial Board, *The Death Penalty is Wrong, But It's Still the Law in California*, L.A. Times (Mar. 23, 2019).

[13] See, e.g., Justice Richardson's dissent in *Deukmejian*: "The Attorney General's traditional watch-dog function and his power to challenge questionable official conduct are important and necessary tools to assure the continued integrity of our system of government. Their loss would deprive the people of a first line of protection against improper executive conduct in appropriate cases. I trust that courts, including ours, will in the future narrowly limit the applicability of today's decision." *Deukmejian, supra note 5,* at 160 (Richardson, J., dissenting).

[14] See, e.g., *Perry v. Brown* (2011) at 1154 ("In many instances the interests of two or more public officials or entities may conflict and give rise to differing official views as to the validity or proper interpretation of a challenged state law. In such instances, it is not uncommon for different officials or entities to appear in a judicial proceeding as distinct parties and to be represented by separate counsel, each official or entity presenting its own perspective of the state's interest with regard to the constitutional challenge or proposed interpretation at issue in the case.") and 1155 ("it is hardly uncommon for public officials or entities to take different legal positions with regard to the validity or proper interpretation of a challenged state law.").

[15] Even Justice Richardson, dissenting in *Deukmejian*, acknowledged that a governor is a superior executive officer to an attorney general: "Nor can there be any question but that the Governor is the chief executive officer of the state and that in the performance of the Governor's executive function the Attorney General is his subordinate." *Deukmejian, supra note*

5, at 162 (Richardson, J., dissenting).

[16] *Perry*, *supra* note 14, at 1155 ("Even when the Attorney General has discretion to decline to defend a challenged law or to appeal a lower court ruling invalidating the law, the Attorney General's decision to exercise discretion in that fashion does not preclude other officials or entities from defending the challenged law or appealing an adverse judgment. Although the Attorney General's legal judgment may appropriately guide that official's own discretionary actions, the validity or proper interpretation of a challenged state constitutional provision or statute is, of course, ultimately a matter to be determined by the courts, not the Attorney General.").

[17] The legislature can also expand gubernatorial powers, and in fact has. See, e.g., the California Emergency Services Act (Gov. Code § 8550 et seq.) which grants a governor power to declare emergencies and exercise California's sovereign authority to the fullest possible extent.

[18] See Gov. Code, §§ 12080–81.2, and § 12080(a) (mirroring Cal. Const, art. V, § 6 by expressly excluding "any agency that is administered by an elective officer").

[19] "When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization." *Bagley v. City of Manhattan Beach* (1976) at 24; *Cal. School Employees v. Personnel Com.* (1970) at 144 (public agencies may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action); 71 Ops.Cal.Atty.Gen. 354 (1988); 57 Ops.Cal.Atty.Gen. 594, 598 (1974).

[20] *County of Modoc v. Spencer* (1894) 103 Cal. 498, 501 ("The district attorney in the discharge of the duties of his office performs two quite distinct functions. He is at once the law officer of the county and the public prosecutor. While in the former capacity he represents the county and is largely subordinate to, and under the control of, the board

of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state.").

[21] *Pitts v. County of Kern* (1998) at 345 ("the district attorney represents the state, not the county, when preparing to prosecute and when prosecuting crimes"). See also *People v. Honig* (1996) at 354–55 (Article V, section 13 "confers broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case."); Gov. Code, § 12524 (authorizes the Attorney General to "conference" with the district attorneys to discuss their duties "with the view of uniform and adequate enforcement" of state law); Gov. Code, § 12550 ("The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge. [¶] When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process."); Pen. Code § 923, subd. (a) ("Whenever the Attorney General considers the public interest requires, he may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of such matters of a criminal nature as he desires to submit to it. He may take full charge of the presentation of such matters to the grand jury, issue subpoenas, prepare indictments, and do all other things incident thereto to the same extent as the district attorney may do.").

[22] *Pitts*, *supra* note 21, at 363; see also *D'Amico v. Bd. of Medical Examiners* (1974) at 14–15.

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(1882) 61 Cal. 250, 253.

[24] *People v. Brophy* (1942) at 28 ("Manifestly, 'direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law' does not contemplate absolute control and direction of such officials. Especially is this true as to sheriffs and district attorneys, as the provision plainly indicates. These officials are public officers, as distinguished from mere employees, with public duties delegated and entrusted to them, as agents, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which they, as agents, are active. Moreover, sheriffs and district attorneys are officers created by the Constitution. . . . [I]t is at once evident that 'supervision' does not contemplate control, and that sheriffs and district attorneys cannot avoid or evade the duties and responsibilities of their respective offices by permitting a substitution of judgment.").

[25] *Dibb v. County of San Diego* (1994) at 1210. The court also referenced *Beck v. County of Santa Clara* (1988) at 800 (holding that the "Legislature has always had, and still enjoys plenary power to define the sheriff's duties").

[26] (1979)
at 751–53.

[27] (2018)
at 25–26.

[28] See, e.g., *State of South Dakota v. Brown* (1978) at 780 ("No principle of law applicable to the case justifies a refusal by the Governor, within a reasonable time, either to grant or deny the demand properly before him. Faced with such a demand the Governor may say yes or no. What he may not do is say nothing."). The courts may compel an executive officer to perform a ministerial act; specifically, the California Supreme Court has the power to direct a governor to perform the office's prescribed duties. *Hollman v. Warren* (1948) at 354 ("[I]t is settled in this state that in an appropriate case a writ of mandate will issue against the Governor of the state"); *Elliott v. Pardee* (1906) 149 Cal. 516, 520 ("[T]he duty imposed on the Governor to decide upon the truth of the petition, and, if he finds it true, to appoint commissioners, is statutory and ministerial. He cannot refuse to act in any way upon

the petition of the electors of Compton, as it is alleged he has done."); *Harpending v. Haight* (1870) 39 Cal. 189, 213.