A Coming Executive Branch Civil War Over the Death Penalty?

Conflict over the death penalty has driven California politics and law since the 1976 reinstatement of capital punishment by the United States Supreme Court in *Gregg v. Georgia*, and reached a peak moment with the 1986 ouster of Chief Justice Rose Bird and two associate justices of the California Supreme Court. In the last decade or so, it appeared that the conflict between pro- and anti-death penalty advocates had settled into a de facto detente. For the pro-death penalty faction, the death penalty remained on the books, with a declining number of death penalty prosecutions emerging from a small number of mostly southern California counties, particularly Los Angeles and Riverside. For the anti-death penalty faction, no one had actually been executed since Stanley Tookie Williams in 2005, who was only the 13th person to be executed in California since the reinstatement of capital punishment in 1976. As a point of comparison, Texas has executed 560 people in the same time period.

Two ballot initiative attempts at abolishing the death penalty narrowly failed in 2012 and 2016, with a competing ballot initiative to speed-up the death penalty (Proposition 66) narrowly passing in 2016. Yet the effect of Proposition 66 has hardly been felt and the death penalty remained mostly off the political radar of the average voter. All this changed on March 13 of this year when Governor Gavin Newsom signed an executive order suspending all executions in California. Overnight, long-simmering political conflicts re-emerged in California along with new forms of political conflict, which this article will examine.

The Moral Duty of Legislators

In explaining his reasons for imposing his moratorium on executions,

Governor Newsom presented several public policy reasons — that it would save the state money, that it was within his discretionary power over executions, and that it represented the will of the voters. David Carrillo and I have elsewhere written about those policy justifications.[1]
But Governor Newsom did not shy away from also discussing his decision in personal terms. What apparently precipitated the Governor's decision was that several death penalty cases had finally made their way through the federal courts and the Governor was facing the prospect of signing their death warrants and presiding over their executions. This, the Governor stated, was simply something he could not do, on a personal moral basis.[2]

The conflict between following the public law versus following one's private moral law is, of course, as old as the law itself. In recent memory, Governors Schwarzenegger and Brown (and Attorneys General Brown and Harris) declined to defend in federal court the constitutionality of California's anti-same-sex marriage statute created by Proposition 8.

But previously there was a sense of the singular and exceptional nature of such a stance. This was not something you did every day — it was a once–in-a-political-career moment. The political rhetoric now seems to suggest otherwise. Consider, for example, the situation that California Senator Kamala Harris finds herself in now that she is running for President. She has been criticized by some progressive Democrats for positions she took on the death penalty when she was California's Attorney General. Critics note that in July 2014 then-AG Harris appealed a federal judge's decision that California's death penalty was unconstitutional, and succeeded in overturning that ruling. The idea that she was doing her job as Attorney General in defending the death penalty as one of the laws of California is simply not part of the political discussion.[3]

That it is the job of the California Attorney General to defend the validity of the laws of the state used to be an uncontroversial proposition. No longer. The shoe now appears to be on the other foot, and Senator Harris finds herself in the position of explaining why she decided *not* to let her personal moral opposition to the death penalty

override her ostensible legal duty to defend the validity of California's death penalty law. Previously, it was defense attorneys who faced criticism — how can you defend such horrible criminals? Now it is the former prosecutor who faces the analogous criticism — how could you defend such a horrible law? The answer to both questions is that our adversarial political and legal systems do not work unless someone defends the horrible criminals or the horrible laws. At least that is the answer of a traditional liberal proceduralist. But traditional liberal proceduralism is now out of favor in the increasingly polarized climate of moral certainty that has taken hold of both sides of the political spectrum. The Governor's openness in foregrounding the role of his private morality in making a political decision represents the culmination of this national political trend.

A New Civil War of the Executive Branch

What happens when members of the executive branch cease to do their assigned role of defending the law? It causes procedural shocks to the system. When Attorney General and then-Governor Brown declined to defend the anti-same-sex marriage statute created by the ballot initiative Proposition 8 in federal court, it generated a legal controversy concerning who could defend Proposition 8. In *Perry v. Brown* (2011), the California Supreme Court held that the ballot proponents had standing to defend Proposition 8 under the California constitution. But the United States Supreme Court subsequently decided in *Hollingsworth v. Perry (2013)* that the proponents of Proposition 8 lacked standing under the federal constitution to do so.

California faces an even more complicated situation concerning the death penalty because, instead of a conflict between the executive branch and the proponents of a ballot initiative, we are facing a conflict within the California executive branch itself — between the Governor as the head of the entire executive branch, and the Attorney General (himself an elected state constitutional officer) as the head of law enforcement in the state, and local

prosecutors.

After the initial excitement of the Governor's executive order staying any executions died down, it became clear that although no executions would proceed, every other aspect of the death penalty system remained as it was before and would proceed as usual. About a week after issuing his executive order, Governor Newsom said that he was considering a plan to prohibit any new death sentences in local criminal cases and to "shut down" the "system of death."[4] As one newspaper report put it, while it was not entirely clear how Newsom would carry out such an order, he could either have Attorney General Becerra direct local district attorneys not to seek the death penalty or order him to not defend appeals.[5]

Some local prosecutors have stated that they retain the autonomy to charge capital murder, despite the Governor's statements.[6] And indeed, on April 11, prosecutors from Sacramento, Santa Barbara, Orange, and Ventura Counties announced in court their intent to charge the Golden State Murderer with capital murder.[7]

The Governor also appears to not have yet ordered the Attorney General to not defend death penalty appeals, as is reflected in *People v. Potts (2019)* (S072161), the first opinion on a death penalty case to be issued by the California Supreme Court since the Governor's executive order staying executions. Justice Liu wrote a concurrence, which begins with the following:

> *Today's decision is our first to affirm a death judgment since Governor Newsom signed Executive Order N-09-19 effecting a moratorium on capital punishment in California. Neither defendant nor the Attorney General has suggested that the Executive Order raises any new issues bearing on this appeal. We thus decide this case on the claims and arguments as submitted.[8]*

Arguably the Governor could have instructed the Attorney General to inform the court in *Potts* that he was withdrawing support from defending the death sentence, including

previous
arguments supporting the penalty phase of Potts's trial. But such a gesture would have had little practical effect. The court would have still retained its independent duty to scrutinize the case, and because the court had already read the Attorney General's brief, it would have been impossible to unring the bell, so to speak. Still, the Governor could have made a symbolic gesture, assuming the Attorney General agreed, and assuming he did not want to provoke a constitutional battle by just ordering the Attorney General to do so. A second California Supreme Court capital sentence affirmance has recently issued, with no sign that the Attorney General has changed his traditional practice of defending such judgments.[9]

A Unitary or Dis-Unified California Executive Branch?

David Carrillo recently
presented a strong case that California constitutional text and court precedents would favor the Governor if he sought to issue an executive order to the Attorney General to both cease defending capital cases and to order local prosecutors in turn to cease bringing new capital murder indictments.[10] Dr. Carrillo's account depicts the California state executive branch as similar to the federal executive branch, in which a unitary executive branch is presided over by an all-powerful President.

But as Professor Vikram Amar has discussed, models of *state* executive branch structure are
more varied, with some states giving considerable autonomy to their Attorney General in relationship to the Governor.[11]
A basic structural difference between the federal and California state executive branches is that the Governor cannot simply fire those elected executive officials who fail to carry out his orders and replace them with someone who can, as the President is generally free to do with his executive branch appointees. Rather, the Governor must engage in a court battle, with all its attendant delays and uncertainties.

As Professor Amar discusses, recent history in California has shown executive branch officials at various levels defying the will of the Governor — a city mayor, a state Controller, and the state Attorney General — resulting in protracted litigation and several California Supreme Court decisions.[12] Dr. Carrillo is correct in noting that in all these cases, the executive branch official higher on the ladder ultimately prevailed. But Professor Amar has put his finger on a significant feature of the California executive branch distinguishing it from the federal one: namely, that state elected officials have deemed it well within their rights to assert their independent authority against the Governor.

The Attorney General, of all the state elected officials, has the greatest claim to some reserves of autonomy against the Governor. *People ex rel. Deukmejian v. Brown*, the 1981 case in which Attorney General George Deukmejian lost to Governor Jerry Brown, is often cited as recent precedent for the Governor's supreme authority over the Attorney General.[13] But a detailed examination of the case presents a more nuanced model of the power relationship between the offices of the Governor and the Attorney General.

The background of the case is a political clash between then-Governor Jerry Brown and then-Attorney General George Deukmejian. In 1977, during Jerry Brown's first term as governor, the legislature adopted the State Employer-Employee Relations Act ("SEERA"), a collective bargaining statute for state civil service employees as to wages, hours, and other terms and conditions of employment.[14]
The Pacific Legal Foundation filed suit against the Governor, the Controller, the Public Employment Relations Board, and the State Personnel Board, contending that SEERA infringed on the State Personnel Board's constitutional authority to set state worker salaries under the civil service system.[15]
The Attorney Generally initially met with the members of the State Personnel Board in his capacity as attorney for the Governor and the State Personnel Board, outlining the legal posture of the Board and available legal options.[16]
Yet a week later, the Attorney General filed an independent petition for writ of mandate in the Court of Appeal *against*
the Governor and other state agencies, asking for relief comparable to that

sought by the Pacific Legal Foundation.[17]

The Governor moved to dismiss the Attorney General's petition for writ of mandate, and the California Supreme Court ruled for the Governor in *People ex rel. Deukmejian v. Brown*.

There are two bases for the court's ruling for the Governor in *People ex rel. Deukmejian v. Brown*. The first is a narrower one based on the principles that govern attorney/client representation for any attorney, including the Attorney General in his role as an attorney for a state agency. As the court framed the issue: "The issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy." As to that, the court concluded that it could find "no constitutional, statutory, or ethical authority for such conduct by the Attorney General."[18]

But the court also made more sweeping statements about the constitutional relationship between the Governor and the Attorney General. The Attorney General argued that he had a common law right to sue the Governor and other public officials and agencies, in his role as "the People's legal counsel." In response, the court characterized this as presupposing that the Attorney General could determine the public interest, contrary to the views of the Governor.[19]

The court rejected this claim, pointing to California constitution Article V, section 1 ("The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.") and Article V, section 13 (defining the Attorney General's powers as "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State."). The court concluded: "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."[20]

There's much for a Governor to like about the language of *People ex rel. Deukmejian v. Brown* in terms of his constitutional authority over the Attorney General. But the decision does not give the Governor clear carte blanche authority to control the Attorney General. To begin with, the ruling of the case can be entirely explained in terms of the general attorney–client law grounds the court presents in the first part of the majority opinion. Many of the more sweeping statements about the Governor's control over the Attorney General in the case are dicta.

More importantly, if the current Governor sought to instruct the Attorney General to (against his will) stop defending all death penalty judgments, the circumstances surrounding the constitutional issues presented would be significantly different from those litigated in *People ex rel. Deukmejian v. Brown*.

People ex rel. Deukmejian v. Brown states that 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. But in the current controversy, what the Governor appears to be proposing is not a certain kind of execution of the existing death penalty laws, but no implementation of them at all. The Governor does independently possess the clemency power to delay executions. But it is a different constitutional question whether his apparent intent to entirely decline to implement the death penalty laws can be considered "a faithful execution of the laws" such that the Governor can claim the supreme executive power described in *People ex rel. Deukmejian v. Brown.* This is the constitutional paradox at the heart of the Governor's position.

Furthermore, *People ex rel. Deukmejian v. Brown* left the Attorney General some autonomy from the Governor, albeit in a passive rather than an active form. The Attorney General contended that he was not bound by the rules that control the conduct of other attorneys in the state because he had a special status as a protector of

the public interest. The Attorney General pointed to the California Supreme Court's acknowledgment of "the Attorney General's dual role as representative of a state agency and guardian of the public interest" as support.[21]
The *People ex rel. Deukmejian v. Brown* majority rejected this argument, noting that the Attorney General was bound by the general rules of professional conduct preventing an attorney from assuming a position adverse to his former client. But the court granted that the Attorney General could withdraw from his representation of his statutory clients and permit them to engage private counsel, citing Government Code section 11040. The court thus concluded that "the Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients."[22]

This decision can be seen a supporting the proposition that while the Attorney General may not actively sue (as AG Deukmejian did) or "take a position adverse" to the Governor, the Attorney General retains the general power to decline to assert a position desired by the Governor or other executive branch clients. He can also bow out of a case entirely, leaving it to the Governor's office or other executive agency to litigate on its own.[23]

It is uncertain how this "passive" autonomy to decline representation might relate to the circumstances of a Governor ordering an Attorney General to decline to defend death penalty judgments or — even further — to a Governor ordering an Attorney General (against his will) to instruct local prosecutors to not bring death prosecutions. But a plausible argument could be made that the Attorney General could decline to assert a position taken by the Governor against implementing the death penalty laws. The Attorney General could decline to halt (i.e., continue) his apparent legal duty to defend death penalty judgments, so long as the Attorney General did not actively act adversely to the Governor's position — for example, by suing the Governor to revive the death penalty, which would be the act most clearly precluded by *People*

ex rel. Deukmejian v. Brown.

Given the uncertainty of a stark constitutional showdown between the Governor and the Attorney General over implementing the ostensibly-constitutionally-valid death penalty laws, it is not surprising that the Governor is going slow for the moment.

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[1] David A. Carrillo & David A. Kaiser, *Problems With Newsom's Moratorium*, Daily Journal (Mar. 15, 2019).

[2] *In Exclusive Interview, Governor Newsom Says He's Not Finished Trying To Abolished The Death Penalty*, KCBS Radio (Mar. 14, 2019).

[3] See e.g., Nicole Allen, The Unknowable Kamala Harris, The California Sunday Magazine, June 2, 2019, at p. 25. In discussing Harris' decision to pursue an appeal of the federal judge's ruling that the death penalty was unconstitutional, this article implies that Harris' decision involved the same level of discretion that a prosecutor has in choosing how to charge a crime. The article compares Harris'

prior decision as San Francisco District Attorney to not seek the death penalty against
cop-killer David Hill. But these two types of decisions are worlds apart. A prosecutor's discretion concerning how to charge a crime has traditionally been recognized a part of the day-to-day decision-making of that office. An Attorney General's decision to not defend a law of the state is an extraordinary act.

[4] Willon & McGreevy, *Gov. Newsom May Prohibit New Death Sentences, Setting Up Possible Conflict with Becerra*, L.A. Times (Mar. 21, 2019).

[5] *Id.*

[6] *Id.*

[7] *California Prosecutors to Seek Death Penalty in 'Golden State Killer' Case*, NBC News (Apr. 10, 2019).

[8] *Potts* (conc. opn. of Lui, J.).

[9] *People v. Sanchez (2019)* (S087569).

[10] Carrillo, *A Governor Probably Can Stop Capital Cases by Executive Order*, SCOCABlog June 4, 2019.

[11] See Vikram David Amar, *Lessons From California's Recent Experience With Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, And Attorneys General*, 59 Emory L.J. 469 (2009).

[12] Specifically
San Francisco Mayor Gavin Newsom opposing Attorney General Lockyer in *Lockyer v. City and County of San Francisco (2004)*;
State Controller John Chiang opposing Governor Brown in *Brown v. Chiang (2011)*; and Attorney
General Deukmejian opposing Governor Brown in *People ex rel. Deukmejian v. Brown (1981)*.

[13] (1981)
29 Cal.3d 150.

[14] *Id.* at 154, 160.

[15] *Id.* at 154, 160–61.

[16] *Id.* at 154.

[17] *Ibid.*

[18] *Id.* at 155.

[19] *Id.* at 157.

[20] *Id.* at 157–58.

[21] *Id.* at 157 (citing
D'Amico v. Bd. of Medical Examiners
(1974) at 15).

[22] *Ibid.*

[23]
See Amar, *supra* note 11, at p. 487.