

Written Testimony to Sunset Advisory Commission
Texas Board of Pardons and Paroles

Recommendations for Capital Clemency
in response to the Sunset Advisory Commission's Staff Report

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ISSUE: Texas' capital clemency process lacks transparency and accountability, hindering its intended purpose as an avenue for mercy and a judicial safeguard against wrongful executions.

These surrounding transparency, consistency, and fairness, are acknowledged under Issue 6 of the Sunset Advisory Commission's Staff Report.¹

To mitigate these concerns and restore the integrity of capital clemency, we recommend that the Texas Board of Pardons and Paroles (1) hold public hearings for capital cases; (2) improve recordkeeping related to petitions; (3) provide written justification of decisions; (4) create written guidelines for clemency petitions; and (5) consider clemency petitions when there is no execution date scheduled.

BACKGROUND: Capital clemency is a cornerstone of the Texas justice system. It can correct errors, prevent wrongful executions, and uphold fundamental principles of fairness and justice.

The capital clemency process provides an avenue for reconsideration and review of death sentences in light of various factors – some of which may be procedurally barred from consideration in court. These factors can include miscarriages of justice, mitigating circumstances like severe mental illness, testimony or wishes of relevant parties such as victims' family members, or even evidence of remorse and rehabilitation.

Capital clemency acknowledges the fallibility of the legal system and offers a mechanism to rectify potential injustices, demonstrating Texas' commitment to upholding human dignity and the rule of law even in the most severe cases.

The risk of wrongful execution is real. Since *Furman v. Georgia*, at least 190 people sentenced to death in the United States have been exonerated and sixteen wrongfully convicted people have been removed from Texas' death row alone.²

¹ Sunset Advisory Commission, *Staff Report: 2024-2025 89th Legislature*, https://www.sunset.texas.gov/public/uploads/2024-09/Texas%20Criminal%20Justice%20Entities%20Staff%20Report_9-26-24.pdf (last accessed Nov. 14, 2024)

² Am. Bar Ass'n, *Overview of Capital Clemency in Texas*, <https://www.capitalclemency.org/state-clemency-information/texas/> (last accessed Nov. 12, 2024)

In addition, some individuals in Texas have had their sentences reduced due to a variety of reasons, including unfair sentencing that did not match the crime. Capital clemency is an important method to address these injustices. In fact, the Board has recommended clemency to five individuals since 1982.³ Given these facts, capital clemency is necessary for correcting the rigidity of the judicial system because it provides supplemental oversight and ensures that justice is fairly and accurately served on behalf of victims and their families.

Just as important as preventing wrongful executions for innocent or unfairly sentenced petitioners is the need to uphold the values of redemption and mercy. While the law provides for punishment commensurate with the severity of the crime, mercy serves as a vital counterbalance, acknowledging the complexity of human experiences and the potential for redemption.

In capital cases, where the stakes are highest and the consequences irreversible, mercy offers a compassionate lens through which to reconsider the imposition of the ultimate punishment. It recognizes the inherent dignity of every individual, even those who have committed grave offenses, and allows for the possibility of mitigating circumstances or rehabilitation. Embracing mercy in the clemency process reflects society's commitment to fairness, forgiveness, and the recognition of shared humanity, ultimately enriching the pursuit of justice with appropriate compassion and empathy.

Ultimately, capital clemency creates a balance between the need for accountability of the judicial system and petitioners, and the recognition of humanity and the potential for redemption.

Under Section 11, Article IV of the Texas Constitution, the Texas Board of Pardons and Paroles has the power to make recommendations to the Governor regarding clemency. Except in the case of a one-time 30-day reprieve, the Governor lacks the power to grant a reprieve or commute a capital sentence to a life sentence without a recommendation from the Board.

Despite this immense responsibility afforded to the Board, the capital clemency process lacks transparency and accountability, severely hindering its purpose and effectiveness.

Of the six states with similar clemency procedures, Texas is the only one that does not require the Board to deliberate or hold meetings on cases, and Texas is only one of two states that does not require clemency hearings or interviews.⁴ No official record of meetings, hearings, deliberations, votes, or other components of the process that have been utilized are required. This raises concerns about fairness and due process and undermines the public's trust not only in the justice system, but in the State of Texas.

In addition, the Board does not provide criteria or guidelines used to assess clemency requests, and the Board does not provide reasons for its decisions. Without clear standards or rationales, petitioners and their counsel

³ The Board of Pardons and Paroles recommended clemency in the cases of Henry Lee Lucas (commuted in 1998), Kenneth Foster (commuted in 2007), and Thomas "Bart" Whitaker (commuted in 2018). Then-Governor Rick Perry rejected the Board's recommendations to grant clemency for Kelsey Patterson (executed in May 2004) and Robert Lee Thompson (executed in 2009). See Tex. Coal. to Abolish the Death Penalty, *Stop Executions*, <https://tcadp.org/stop-executions/> (last accessed Feb. 14, 2024); Death Penalty Information Center, *Clemency and Executions*, <https://deathpenaltyinfo.org/facts-and-research/clemency/clemency-by-state> (last accessed Nov. 12, 2024).

⁴ Death Penalty Information Center, *Idaho, Additional Information, available at <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/idaho>*; Statement Regarding Senate Bill 685 by Laura Schaefer, Esq.

do not know what evidence to present in petitions. This lack of transparency runs the risk of weakened petitions.

We saw this most recently in the case of Robert Roberson, a likely innocent man who was scheduled for execution in Texas on October 17, 2024. Deviating from their traditional practice, the Board provided their recommendation for this specific case a day later than expected. No reason or explanation was given – not only for the delay in their decision, but for the decision itself. Not only this, but the Board did not notify Mr. Roberson’s counsel of the delayed decision, instead choosing to release this information to the media.

The Board has also stated in the past that it would not consider commutation requests without a scheduled execution date, even though there is nothing in Texas statute that prevents the Board from considering such requests before an execution date is set. This precedent impedes the board’s ability to rectify injustice.

The lack of accountability and transparency within the Texas capital clemency process undermines its fundamental purpose. It creates a system prone to inconsistencies and arbitrary decisions. Without transparency, there is limited public oversight, which erodes public trust in the integrity of the process and compromises the Board’s ability to fulfill its intended role. Consequently, the lack of accountability not only diminishes its effectiveness but also raises concerns about the potential for miscarriages of justice and wrongful executions.

RECOMMENDATIONS:

According to the American Bar Association, “Texas should have confidence that the final safeguard to prevent wrongful execution is a meaningful one.”⁵ To improve transparency and strengthen the capital clemency process, we recommend that the Texas Board of Pardons and Paroles:

- Hold public hearings on all petitions for capital clemency. These hearings can be conducted virtually or in person and should include opportunities for relevant parties to speak to the Board, including but not limited to victims’ families, petitioners, petitioners’ families, petitioners’ counsel, and counsel for the state. The Board should also deliberate and hold all votes in public.
- Improve recordkeeping related to capital clemency petitions. This should include a public record of all deliberations, votes, meetings, and hearings – both internal and external.
- Provide a written justification or explanation of recommendations in each case.
- Create written guidelines for capital petitioners and their counsel regarding the criteria the Board considers when evaluating clemency petitions.
- Consider capital clemency petitions regardless of whether there is a scheduled execution date.

⁵ See AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TEXAS CAPITAL PUNISHMENT ASSESSMENT REPORT xiv (2013).