

# A False Beacon of Hope: How Iowa’s Executive Clemency System is Broken and What the Iowa Legislature Must Do to Fix It

*Andrew A. Wendel\**

## Abstract:

Executive clemency finds its roots in ancient history. It is a system designed to be a tool for mercy and forgiveness. The Framers embraced this idea and they made it a core function of any executive’s power. Presidents and Governors used their executive clemency power to correct unjust laws and at times heal a nation; however, with the War on Drugs, executive clemency—and specifically commutations—declined nationally. Iowa is no different. The last commutation in Iowa was in 2013. The Iowa Board of Parole plays a pivotal role in the commutation process because it recommends to the governor whether to commute an applicant’s sentence. The Iowa Board of Parole consistently misapplies and misconstrues the purpose of executive clemency leading to 92.2% of all commutation applications failing to receive a favorable recommendation. This Note argues that the Iowa commutation system is broken and proposes a two-pronged solution. First, the Iowa Legislature must adopt a set of clear factors which narrows the Iowa Board of Parole’s analysis to the proper balancing test that is the hallmark of executive clemency decisions. Second, the Iowa Legislature must reform the membership qualifications for the Iowa Board of Parole so that it becomes a body of experts who have a well-rounded understanding of prison rehabilitation and reentry.

I.	INTRODUCTION .....	544
II.	BACKGROUND.....	547
	A. <i>The Origins of Executive Clemency</i> .....	547
	B. <i>The Three Models of Executive Clemency</i> .....	552
	1. Executive and Advisory Board Model.....	553
	2. Shared System Model.....	554
	3. Clemency Board Alone Model.....	555
	C. <i>Executive Clemency Factors and The Balancing Test</i> .....	557

---

\* J.D., University of Iowa College of Law, 2024. A special thanks to Professor Alison K. Guernsey for her mentorship and guidance. Thank you to every editor and student writer at *The Journal of Gender, Race & Justice*. This Note is dedicated to the first commutation applicant I met, one of the most selfless and caring people I have had the honor and privilege of knowing, and one of the people that this system has failed.

D.	<i>Politics, Public Opinion, and Executive Clemency</i> .....	562
E.	<i>Commutation System in Iowa Today</i> .....	568
1.	Basis for Executive Clemency Power .....	568
2.	The Composition of the Iowa Board of Parole .....	569
3.	The Board Investigation, Hearing, and Recommendation.....	570
4.	The Board’s Recommendation and the Governor’s Decision	572
F.	<i>History of Iowa Commutations</i> .....	573
1.	Judy White .....	576
2.	Denise Rhode.....	579
G.	<i>Commutation Reform Efforts and Second Chance Rhetoric in Iowa</i> .....	580
1.	2021 Legislative Session: H.F. 377 .....	581
2.	2022 Legislative Session: H.F. 2191 .....	584
III.	ANALYSIS.....	587
A.	<i>The Problem: The Current Board’s Qualifications, Factors, and The Balancing Application</i> .....	588
B.	<i>The Solution: Professional Background, H.F. 377 Factors, H.F. 2191 Purpose</i> .....	590
1.	Introduce Professional Requirements for Board Members ...	591
2.	Adopt the H.F. 377 Factors with H.F. 2191’s Residual Factor as a “Guidepost” .....	594
IV.	CONCLUSION .....	596

## I. INTRODUCTION

In 1969, Clyde Johnson was convicted of first-degree murder after he shot and killed a man for directing a racial slur toward him at a party.<sup>1</sup> Since that time he has been incarcerated in the Iowa prison system.<sup>2</sup> The crime that Mr. Johnson committed was horrific and is one of the most heinous crimes that a person can commit. It surely has left an impact on the victim’s family and community to this day. However, Mr. Johnson is no longer the same

---

<sup>1</sup> Kate Payne, *An 88-Year-Old Iowan Has Served 52 Years on a Life Sentence. Should That Be Enough?*, IOWA PUB. RADIO (Dec. 17, 2021, 1:50 PM), <https://www.iowapublicradio.org/ipr-news/2021-12-17/an-88-year-old-iowan-has-served-52-years-on-a-life-sentence-should-that-be-enough> [<https://perma.cc/QZ5U-SDNX>].

<sup>2</sup> *Id.*

man.<sup>3</sup>

In 1981, Mr. Johnson saved the lives of four nurses and two guards during a prison riot at the Iowa State Penitentiary.<sup>4</sup> He stepped between the inmates who had successfully taken control of the prison and those he saved.<sup>5</sup> The prisoners killed one inmate, took 12 employees hostage, and caused over \$1 million dollars in property damage.<sup>6</sup> After the riot, Mr. Johnson was temporarily moved to a New Mexico prison because he was finding crushed glass in his breakfast once word had spread that he stood against his fellow inmates.<sup>7</sup>

Mr. Johnson works as a van driver, which is a job that requires him to take a group of inmates to their jobsite every morning.<sup>8</sup> This likely requires the prison to immensely trust Mr. Johnson. Growing up, Mr. Johnson did not go to church or celebrate any sort of faith.<sup>9</sup> However, he found religion later in life, and now it plays an important role in his everyday life.<sup>10</sup> In addition to realizing that his life was missing a sense of faith, he began to wonder about going back to school, and so he obtained his education through the programs offered in the Iowa prison system.<sup>11</sup>

Mr. Johnson and many of his family members recognized that he made incredible progress since beginning his incarceration, and he decided to apply for commutation<sup>12</sup> of his life without parole sentence. At 88 years old, he sat in front of the Iowa Board of Parole (the Board) a changed man. He told the

---

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

<sup>4</sup> *Id.*

<sup>5</sup> Chris Faulkner, *Fort Madison Prison Uprising in 1981 Made Lasting Impact*, DAILY GATE CITY (Dec. 14, 2011), [https://www.mississippivalleypublishing.com/daily\\_gate/news/fort-madison-prison-uprising-in-1981-made-lasting-impact/article\\_1bba960f-7a25-5fab-9545-56bf04b7c373.html](https://www.mississippivalleypublishing.com/daily_gate/news/fort-madison-prison-uprising-in-1981-made-lasting-impact/article_1bba960f-7a25-5fab-9545-56bf04b7c373.html) [<https://perma.cc/PP95-5CDK>].

<sup>6</sup> *Id.*

<sup>7</sup> Payne, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> “Commutation” means “[t]he substitution of one punishment for another, after conviction of the party subject to it.” *Commutation*, BLACK’S LAW DICTIONARY, (2d ed. 1995). It is a form of executive clemency, similar to a pardon. See *Executive Clemency & Commutation*, IOWA BD. PAROLE, <https://bop.iowa.gov/executive-clemency-commutation#:~:text=Commutation%20of%20Sentence%3A%20This%20clemency,sentence%20once%20every%20ten%20years> [<https://perma.cc/WTY5-39X8>].

Board that he was now “trustworthy and dependable.”<sup>13</sup> In 2021, the Board, in an incredibly rare case, recommended to Governor Kim Reynolds that she commute Mr. Johnson’s sentence to a term of years, which would make him immediately eligible for parole. A favorable recommendation is increasingly rare.<sup>14</sup> Prior to Mr. Johnson’s application, the Board had not given a favorable recommendation to the Governor since 2013 despite reviewing 72 commutation applications.<sup>15</sup> Despite his progress, Governor Reynolds denied his commutation.<sup>16</sup> She did not deny Mr. Johnson a commutation because he would be an unproductive member of society or that he would be dangerous to the public. Rather, she denied his application because his recollection of the facts of the crime were too different from what he said in the past.<sup>17</sup>

Mr. Johnson’s case is unfortunately too familiar for Iowa’s executive clemency system. In fact, Governor Reynolds has never granted a commutation despite the Board receiving dozens of applications every year, and even granting a few favorable recommendations since Mr. Johnson’s.<sup>18</sup> This trend is not unique to the Reynolds administration. Iowa governors’ commutation grants have drastically decreased over the last 50 years, and since 1983 they have all but ceased to exist.<sup>19</sup> This issue transcends partisan lines, suggesting that the problem lies within the system.

There are many potential issues that lead to this inept commutation system. This Note will focus on two of those issues: the executive clemency factors and the qualification requirements for Board membership. The Board

---

<sup>13</sup> Payne, *supra* note 1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (reporting on Clyde Johnson’s favorable recommendation from the Board in 2021); Erin Jordan, *Model Inmate Granted Freedom After 39 Years*, CEDAR RAPIDS GAZETTE (Apr. 16, 2014, 11:40 AM), <https://www.thegazette.com/crime-courts/model-inmate-granted-freedom-after-39-years> [<https://perma.cc/KVS7-LFZ5>] (reporting on Raspberry Williams’s commutation in 2013); IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2014 9 (2015); IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2015 9 (2016); IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2016 10 (2017); IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2017 10 (2018); IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2018 12 (2019); IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2019 11 (2020); IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2020 12 (2021).

<sup>16</sup> Payne, *supra* note 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Erin Jordan, *Modern Iowa Governors Stingy with Commutations Compared to Past*, CEDAR RAPIDS GAZETTE (Apr. 6, 2013, 7:05 AM), <https://www.thegazette.com/news/modern-iowa-governors-stingy-with-commutations-compared-to-past> [<https://perma.cc/5J2R-7242>].

uses a set of factors to determine whether to recommend a commutation.<sup>20</sup> The Board however misunderstands and misapplies these clemency factors, and therefore they should be changed so that the Board's decision-making better reflects the purpose of executive clemency. That purpose is a balance between the applicant's rehabilitative efforts and changes in circumstances against society's interest in continuing to impose their criminal sentence.<sup>21</sup> Further, the Board currently has few qualification requirements for its members.<sup>22</sup> If the Board was required to have a level of expertise in the criminal justice field, they may better understand their role in the larger scheme as a "second-look mechanism,"<sup>23</sup> enabling them to better effectuate the purpose of executive clemency and better influence in the governors who hold the ultimate discretion in these decisions.<sup>24</sup>

## II. BACKGROUND

To understand the issues with the Iowa commutation system, it is first important to recognize the Framers' original philosophy behind clemency to see how Iowa, like many other states, no longer reflects that philosophy. It is then important to understand how states in general construct their executive clemency systems. There are three models of executive clemency, one of which most states use. There is a common set of factors that most states consider, and most states use those factors in a balancing test. There is no perfect executive clemency system, and many states have reformed their systems in response to the COVID-19 pandemic. Finally, to understand the problems in the Iowa system, one must understand the system as it stands today, its history, and the efforts already made to change the system.

### A. *The Origins of Executive Clemency*

The idea of clemency goes far beyond American history; in fact the concept of clemency can be found in texts dating back thousands of years.<sup>25</sup>

---

<sup>20</sup> See IOWA ADMIN. CODE r. 205-13.6(3)(b) (2023) (establishing the criteria that the Board uses to evaluate specifically Class A felon commutation applications).

<sup>21</sup> See RACHEL ELISE BARKOW, PRISONERS OF POLITICS 79 (2019).

<sup>22</sup> See IOWA CODE ANN. § 904A.2(2) (West 1986).

<sup>23</sup> "Second-look mechanisms" is a general term for any system that allows for the reevaluation of an individual's criminal punishment, either by reexamining the person or the policies behind the punishment. See BARKOW, *supra* note 21, at 73. Examples of second-look mechanisms include "parole, good-time credits, compassionate release mechanisms, retroactive adjustments, [and] clemency." *Id.* at 78.

<sup>24</sup> See BARKOW, *supra* note 21, at 73.

<sup>25</sup> See, e.g., THE CODE OF HAMMURABI, § 129,

When the Framers wrote the Pardon Clause into Article II of the Constitution,<sup>26</sup> they were drawing on these deeply engrained values.<sup>27</sup> When British settlers established the colonies, they brought with them the English system of clemency.<sup>28</sup> That system was heavily influenced by Blackstone's differentiation between reprieves and pardons, which established that a reprieve was a temporary way to avoid punishment while a pardon was permanent.<sup>29</sup> The actual clemency procedure slightly differed in the colonies than in England, but that was due to the development of the American criminal legal system as well as influences such as wars and the emerging penitentiary system.<sup>30</sup>

What always remained the same between the English and Early American system was that the executive retained the clemency power and it was recognized as a supreme act of mercy.<sup>31</sup> When drafting the Constitution, Alexander Hamilton believed that the President's clemency power could be used as a tool of correction for when criminal punishments were too severe.<sup>32</sup> Along with Hamilton, the other Framers likely greatly valued the pardon power given that it was placed next to the Commander-In-Chief Clause in Article II of the Constitution.<sup>33</sup>

In the first case where the Supreme Court interpreted the President's Pardon Power, Chief Justice John Marshall wrote, "[a] pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."<sup>34</sup> President Lincoln demonstrated the merciful nature of this power when he pardoned former

---

<http://avalon.law.yale.edu/anicut/hamframe.asp> [<https://perma.cc/5EA4-BC9A>] ("If a man's wife be surprised (in flagrante delicto) with another man, both shall be tied down and thrown into the water, but the husband may pardon his wife and the king his slaves."); *Isaiah* 55:7 (NRSV) ("[L]et the wicked forsake their way, and the unrighteous their thoughts; let them return to the Lord, that he may have mercy on them, and to our God, for he will abundantly pardon."); *Jeremiah* 52:31–32 ("King Evil-merodach of Babylon, in the year he began to reign, showed favor to King Jehoiachin of Judah and brought him out of prison; he spoke kindly to him, and gave him a seat above the seats of the other kings who were with him in Babylon.").

<sup>26</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>27</sup> *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993) ("Clemency is deeply rooted in our Anglo-American tradition of law . . .").

<sup>28</sup> Ronald S. Everett & Deborah Periman, "The Governor's Court of Last Resort: An Introduction to Executive Clemency in Alaska," 28 ALASKA L. REV. 57, 63 (2011).

<sup>29</sup> *Id.* at 62.

<sup>30</sup> *Id.* at 63.

<sup>31</sup> *Id.*

<sup>32</sup> THE FEDERALIST NO. 74 (Alexander Hamilton) ("The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.").

<sup>33</sup> U.S. CONST. art. II, § 2, cl.1.

<sup>34</sup> *United States v. Wilson*, 32 U.S. 150, 160 (1833).

Confederate soldiers after the Civil War<sup>35</sup> or when he pardoned over 300 Dakota Nation men that Minnesota had captured during the Dakota War of 1862, and had sentenced to death after sham trials.<sup>36</sup>

Although it took time for the states to adopt the clemency power for their governors, early on in American history, governors tended to use the power on a quid pro quo basis.<sup>37</sup> Gustave De Beaumont and Alexis De Tocqueville even noticed this trend, stating that “the grant of pardon does not depend on the degree of guilt, but on the pecuniary means of the convict to hire the members of this corps.”<sup>38</sup> Executives’ use of their clemency power contingent on a quid pro basis continued until the Reconstruction Era.<sup>39</sup> During the Reconstruction Era, President Lincoln and President Johnson recognized that the pardon power could be used to further “restore peace and reintegrate those who had fought against the Union.”<sup>40</sup> Despite this additional recognition of the power of the pardon, the Southern states fell behind in developing their clemency practices.<sup>41</sup>

The Southern states had a far less developed clemency system for two reasons. The first was that they valued corporal punishment over prison and second was the South resisted the penitentiary movement because that was conflated with the abolitionist movement, and therefore the emphasis on rehabilitation never became rooted in the South.<sup>42</sup> Even when the Southern states began to adopt the penitentiary model common in the North, the convict–lease system eventually became the primary Southern punishment–model.<sup>43</sup> The convict–lease system allowed prisons to lease out convicts to private contractors for labor, but there was little oversight over

---

<sup>35</sup> Everett & Periman, *supra* note 28, at 67.

<sup>36</sup> Paul Finkelman, *I Could Not Afford to Hang Men for Votes—Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, 39 WILLIAM MITCHELL L. REV. 406, 448 (2013); Matthew L. M. Fletcher & Peter S. Vicaire, *Indian Wars: Old and New*, 15 J. GENDER, RACE & JUST. 201, 224–25 (2012). When Lincoln commuted the death sentences of 355 out of the 393 prisoners, and subsequently saw noticeable decline in votes out of Minnesota in the 1864 presidential election, he told a sitting U.S. Senator that “I could not afford to hang men for votes.” Finkelman, *supra* note 36, at 447–49.

<sup>37</sup> Everett & Periman, *supra* note 28, at 67.

<sup>38</sup> *Id.* at 66 (quoting GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE xxix (Francis Lieber trans., 1833)).

<sup>39</sup> *Id.* at 67.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Everett & Periman, *supra* note 28, at 68.

the treatment of the convicts.<sup>44</sup> Most of the “leased-out” convicts were black men who were former slaves.<sup>45</sup> In effect, the convict-lease system was a way for the South to continue to sustain its pre-Civil War agricultural economy while still relying on slave labor.<sup>46</sup> As a result, the South did not have as much of an opportunity to define its clemency procedure.<sup>47</sup> The procedure that did develop was apt for corruption since it was still under the sole control of the governor, and often required the applicant to obtain the “‘best’ white opinion in town.”<sup>48</sup>

These clemency processes were common among the states until the 1900s, when the focus of criminal punishment became rehabilitation.<sup>49</sup> In the early 1900s, states began to develop parole systems and indeterminate sentencing regimes, with the goal that these systems would serve as incentives for the incarcerated population to rehabilitate themselves.<sup>50</sup> States often designed their parole systems to alleviate the fairness issues inherent with the clemency system and to address some of the secondary uses for clemency, such as a way to reduce prison overcrowding and an incentive for good behavior.<sup>51</sup> This left executives to use their clemency systems more in a way to mitigate severe punishments, especially the commutation of death sentences.<sup>52</sup> By the 1950s, this key difference between the parole system and the clemency system became firmly established and executives mainly used their clemency power to commute death sentences to life imprisonment.<sup>53</sup> This trend began to change as “tough on crime” politics became a necessary stance for many politicians.<sup>54</sup>

Prior to *Furman v. Georgia*—in which the Supreme Court eliminated the death penalty and halted executions nationwide in 1972<sup>55</sup>—one out of every four to five death sentences were commuted to life imprisonment.<sup>56</sup> It

---

<sup>44</sup> *Id.* at 68, n.61.

<sup>45</sup> *Id.* at 68.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 67.

<sup>48</sup> *Id.* at 68–69 (quoting DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 179, 180 (1996)).

<sup>49</sup> Everett & Periman, *supra* note 28, at 69.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 71.

<sup>55</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

<sup>56</sup> Everett & Periman, *supra* note 28, at 70. In the years leading up to *Furman*, fewer people were being executed by the federal government already. *Id.* For example, in 1933, 199 people



was right around the time when *Furman* was decided where the focus on rehabilitation began to fall out of favor among the electorate, and the “War on Drugs” began.<sup>57</sup> The “War on Drugs” was firmly entrenched when Congress began to remove the Judiciary’s and parole boards’ discretion.<sup>58</sup> These measures included the elimination of the traditional parole system, implementation of the Federal Sentencing Guidelines, and the establishment of mandatory minimum sentencing schemes.<sup>59</sup>

An important mark of how quickly and influential “tough on crime” politics became was in 1976 when the Supreme Court ruled that the death penalty did not violate the Eighth Amendment in *Gregg v. Georgia*, thus resuming executions that *Furman* had stopped just four years earlier.<sup>60</sup> By 1990, the pre-*Furman* rate of commutations declined from one commutation out of every four to five death sentences, to one commutation for every 40 death sentences.<sup>61</sup> At this point, including to present day, it is now a common trend for most executives to decline to use their clemency power out of the fear that they may appear “soft on crime.”<sup>62</sup>

In the context of presidential pardons, presidents are less likely to grant acts of clemency when the crime rate is high because the public is more anxious about crime.<sup>63</sup> Similarly, the “Willie Horton effect” gives governors pause when it comes to their clemency decisions.<sup>64</sup> Willie Horton was a man

---

were put to death compared to 1967 to 1972, where there was not a single federal execution. *Id.*

<sup>57</sup> See *id.* at 71 (“Get-tough criminal justice politics and the overall war on crime and drugs beginning in the late 1970s created a political climate wherein few elected officials wanted to risk appearing to be soft on crime.”).

<sup>58</sup> *Id.* at 70.

<sup>59</sup> *Id.*

<sup>60</sup> *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

<sup>61</sup> Everett & Periman, *supra* note 28, at 70 (quoting Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669, 675–76 (2001)).

<sup>62</sup> *Id.* at 71.

<sup>63</sup> William M. Landes & Richard A. Posner, *The Economics of Presidential Pardons and Commutations*, 38 J. LEGAL STUD. 61, 69 (2009). In fact, Presidents are most likely to grant acts of clemency when it is the most politically beneficial to do so. *Id.* One example would be the unique situation where they are either at the beginning or nearing the end of their first term while facing reelection and there is a popular pardon applicant among their potential supporters. *Id.* at 69. Similarly, Presidents are most likely to grant acts of clemency when it is least politically costly to do so, which would be during their lame-duck sessions. *Id.* at 70.

<sup>64</sup> BEN NOTTERMAN, N.Y.U. CTR. ON THE ADMIN. OF CRIM. L., THE DEMISE OF CLEMENCY FOR LIFERS IN PENNSYLVANIA 7  
[https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA\\_Final%20\(1\).pdf](https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA_Final%20(1).pdf)  
[\[https://perma.cc/9ZAK-XDGG\]](https://perma.cc/9ZAK-XDGG).

who was put on furlough from prison while Michael Dukakis was the Governor of Massachusetts and also the Democratic Presidential Nominee.<sup>65</sup> While Horton was out on furlough, he raped a woman and attacked her fiancé.<sup>66</sup> Even though Dukakis was not at all involved in the decision to release Horton, a political action committee called Americans for Bush ran an ad using the Horton story to paint Dukakis as “soft on crime.”<sup>67</sup> This ended up being the turning point in the Dukakis campaign, and has since served as a cautionary tale to all governors about early prison-release decisions.<sup>68</sup>

### B. *The Three Models of Executive Clemency*

Every state and the federal government have a system for executive clemency.<sup>69</sup> Each generally takes one of three forms based on their respective constitutions.<sup>70</sup> Under the first model, the executive is vested with the sole authority to grant executive clemency.<sup>71</sup> For example, the federal government’s system uses this model.<sup>72</sup> Since 1852, the Attorney General’s Office has processed clemency applications and issued nonbinding recommendations to the President.<sup>73</sup> Most states that employ this model have passed legislation to create a similar recommendation regime, but normally in the form of an advisory board that will issue a nonbinding recommendation.<sup>74</sup> Under the second model, the executive shares the authority with a clemency board.<sup>75</sup> Finally, under the third model, clemency authority is vested completely in a clemency board.<sup>76</sup> However, under this model, the clemency board often includes the executive along with other

---

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Kathleen Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 CRIM. JUST. 26, 31 (2009).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> U.S. CONST. art. II, § 2, cl. 1 (“[The President] shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”).

<sup>73</sup> U.S. SENT’G COMM’N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 4 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901\\_clemency.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf) [https://perma.cc/H85B-5ZPC].

<sup>74</sup> Ridolfi & Gordon, *supra* note 69.

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

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

government officials such as the secretary of state,<sup>77</sup> attorney general,<sup>78</sup> or a member of the state supreme court.<sup>79</sup> So although a “clemency board” may seem like it is independent from the executive, the executive still has some—albeit limited—power under this model.

### 1. Executive and Advisory Board Model

If a state’s constitution provides for the executive to have the clemency power, it adopts the first model.<sup>80</sup> The governor is then guided by an advisory board, created by either the state constitution or by subsequent statute or regulation.<sup>81</sup> The governor is not required to follow the advisory board’s recommendation.<sup>82</sup> This is similar to the federal executive clemency system, where the United States Constitution gives the executive clemency power to the President, who often forms a clemency commission to guide decision-making.<sup>83</sup> This is also the model that many states follow, including Iowa.<sup>84</sup> Typically, the advisory board is the state’s parole board.<sup>85</sup>

Arkansas is a good example of how this model works. To begin, the applicant sends their executive clemency application directly to the parole board for them to begin an investigation.<sup>86</sup> The parole board then investigates, which involves receiving recommendations from the committing court, prosecuting attorney, and the county sheriff of the county of commitment.<sup>87</sup> For a violent offender’s application, the parole board must contact the victim and consider their recommendation.<sup>88</sup> The parole board

---

<sup>77</sup> See, e.g., NEB. CONST. art. IV, § 13 (“The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations . . .”).

<sup>78</sup> See, e.g., NEV. CONST. art. V, § 14, cl. 1 (“The governor, justices of the supreme court, and attorney general shall constitute the State Board of Pardons Commissioners.”).

<sup>79</sup> See, e.g., MINN. CONST. art. V, § 7 (“The governor, the attorney general and the chief justice of the supreme court constitute a board of pardons.”).

<sup>80</sup> Ridolfi & Gordon, *supra* note 69.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> U.S. SENT’G COMM’N, *supra* note 73.

<sup>84</sup> Ridolfi & Gordon, *supra* note 69.

<sup>85</sup> See, e.g., IOWA CODE § 902.2 (1995); ARK. CODE ANN. § 16-93-204 (2005); IND. CODE § 11-9-1-2 (2014); KAN. STAT. ANN. § 22-3701(c)–(d) (2015); MASS. GEN. LAWS ch. 127, § 152 (2010).

<sup>86</sup> ARK. CODE ANN. § 16-93-204(a)(3) (2005).

<sup>87</sup> *Id.* § 16-93-204(d)(1).

<sup>88</sup> *Id.* § 16-93-204(d)(2)(A).

then issues a recommendation to the governor, and that recommendation is nonbinding.<sup>89</sup> There also is a mechanism for the parole board to conduct an open hearing as part of the investigation.<sup>90</sup> Typically the hearing takes place in two parts, the first is where the parole board will meet directly with the prisoner and they will have two hours to make their case.<sup>91</sup> At this part, the applicant, their lawyer, and two other individuals are allowed to speak.<sup>92</sup> The second part of the hearing occurs later in the day where the parole board will hear from any victims, the prosecutors, and any others who wish to be heard.<sup>93</sup> After the hearing, the parole board will make a recommendation to the governor, and they will make the ultimate decision.<sup>94</sup>

## 2. Shared System Model

Under a Shared System, the executive shares the clemency power with a clemency board, but often there is some sort of requirement to consult with the board or to receive their favorable recommendation.<sup>95</sup> Indiana is one of the few states that uses this model.<sup>96</sup> The Indiana Constitution provides that the governor has the executive clemency power unless the general assembly creates a council that the governor would be required to consult with before making any decision.<sup>97</sup> Essentially providing that by default the Indiana executive clemency system is the first clemency model, but allows for the legislature to convert that system to a Shared System. In 1979, The Indiana legislature converted the system and created a council with which the governor was *required* to consult.<sup>98</sup> The council must issue recommendations to the governor regarding acts of clemency and in order to so, it can conduct investigations, hold hearings, issue subpoenas, and even interview an incarcerated applicant without notice.<sup>99</sup> The council must hold a public hearing where the applicant and other interested persons have a chance to

---

<sup>89</sup> *Id.* § 16-93-204(d)(4).

<sup>90</sup> *Id.* § 16-93-204(d)(5)(A).

<sup>91</sup> Memorandum from the ABA Cap. Clemency Res. Initiative, Arkansas Capital Clemency Information Memorandum (Feb., 2017), <https://www.capitalclemency.org/state-clemency-information/arkansas> [<https://perma.cc/A4P8-9V2W>].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

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

<sup>95</sup> Ridolfi & Gordon, *supra* note 69 (“[I]n Delaware, the governor cannot grant a pardon or commutation in the absence of an affirmative recommendation of a majority of the Board of Pardons.”).

<sup>96</sup> IND. CONST. art. V, § 17.

<sup>97</sup> *Id.*

<sup>98</sup> IND. CODE § 11-9-1-1(a) (2012). Interestingly, the Indiana governor appoints five members to the parole board for a four-year term and no more than three can be from the same political party. *Id.*

<sup>99</sup> *Id.* § 11-9-1-2(a)(3), (b) (2014).

provide input.<sup>100</sup> After the investigation, the council comes together and makes their recommendation collectively.<sup>101</sup>

### 3. Clemency Board Alone Model

Under the third model of executive clemency, a clemency board alone has the executive clemency power.<sup>102</sup> However, the board normally consists of the governor along with other high ranking government officials, so the governor still retains some—albeit limited—power in these decisions.<sup>103</sup> The exact structure of this model often varies depending on the state. For example, in Minnesota, the clemency board considers the application by itself whereas in Nebraska, the clemency board relies on guidance from the parole board.<sup>104</sup> By looking at the differences between these two states, it becomes clear that this model inherently can have issues, but states like Nebraska have found ways to cure some of them namely by using their parole board to give recommendations to the clemency board.<sup>105</sup>

In Minnesota, the constitution requires that the governor, attorney general, and the chief justice of the supreme court sit on the clemency board together and work together.<sup>106</sup> By statute, the board must unanimously agree to commute a sentence in order for a commutation to be granted.<sup>107</sup> After this board, in a 2-1 decision where the lone “no” vote was the chief justice, denied Amreya Shefa’s pardon application, she sued the governor and the

---

<sup>100</sup> *Id.* § 11-9-2-2(b)(3) (1994).

<sup>101</sup> *Id.* § 11-9-1-3(b) (1979) (“The board shall, based upon the record and the findings, conclusions, and recommendations [of investigating board members], render a final decision [regarding recommendation].”)

<sup>102</sup> Ridolfi & Gordon, *supra* note 69.

<sup>103</sup> *See, e.g.*, MINN. CONST. art. V, § 7 (“The governor, the attorney general and the chief justice of the supreme court constitute a board of pardons.”); NEB. CONST. art. IV, § 13 (“The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations . . . .”); NEV. CONST. art. V, § 14, cl. 1 (“The governor, justices of the supreme court, and attorney general shall constitute the State Board of Pardons Commissioners.”).

<sup>104</sup> *Compare* MINN. STAT. § 638.01 (1986) (“The board may grant pardons and reprieves and commute the sentence of any person convicted of any offense against the laws of the state, in the manner and under the conditions and rules hereinafter prescribed, but not otherwise.”) *with* NEB. REV. STAT. § 83-194 (1969) (“The Board of Parole shall, when requested by the Board of Pardons, advise it concerning applications requesting the exercise of pardon authority and shall make such investigation and collect such records as may bear on such applications.”).

<sup>105</sup> NEB. REV. STAT. § 83-194 (1969).

<sup>106</sup> MINN. CONST. art. V, § 7.

<sup>107</sup> MINN. STAT. § 638.02(1) (2003).

attorney general, arguing that the unanimity requirement violated the governor's pardon power because—as the prisoner argued—the governor's sole vote to exercise the clemency power should be sufficient.<sup>108</sup> The governor agreed with the chief justice and the attorney general that they must act together, but the governor alone argued that this standard was satisfied as long as the governor acted with one other member of the board.<sup>109</sup> The Minnesota Supreme Court held that the unanimity requirement does not violate the constitution's pardon power because the constitution's language does not prohibit a unanimous vote; it just requires the board to work together.<sup>110</sup> The court also rejected both the prisoner's and governor's argument that this structure gave a unilateral veto to the judicial branch since the chief justice of the supreme court must agree with the governor.<sup>111</sup> The court did note that the chief justice believed the pardon power should be returned to the governor alone because the “pardoning power is really not a judicial function.”<sup>112</sup>

Like in Minnesota, the Nebraska board of pardons is comprised of some of the state's high officials.<sup>113</sup> Those officials include the governor, attorney general, and the secretary of state.<sup>114</sup> However, a key difference is that the board of pardons can seek a recommendation on applications from the parole board.<sup>115</sup> The Nebraska parole board does the bulk of the investigation,<sup>116</sup> including the interview in the case of a death penalty commutation.<sup>117</sup> Ultimately, the recommendation from the parole board needs to be a majority vote rather than a unanimous vote.<sup>118</sup>

The Nebraska parole board has unique composition and qualification requirements as well. The board consists of five members, all of whom are

---

<sup>108</sup> Shefa v. Ellison, 968 N.W.2d 818, 821, 835 (Minn. 2022).

<sup>109</sup> *Id.* at 826.

<sup>110</sup> *Id.* at 833.

<sup>111</sup> *Id.* at 834–35. The court in dicta also notes that if it were true that this system created a unilateral veto in the executive, the opposite may also be true, that the executive may infringe on the judiciary when the chief justice votes to grant a pardon, but the executive members vote against. *Id.*

<sup>112</sup> *Id.* at 834 (citing MINN. CONST. STUDY COMM'N, *Executive Branch Committee Report*, in FINAL REPORT AND COMMITTEE REPORTS 21 (1973)).

<sup>113</sup> NEB. CONST. art. IV, § 13.

<sup>114</sup> *Id.*

<sup>115</sup> NEB. REV. STAT. § 83-194 (1969) (“The Board of Parole shall, when requested by the Board of Pardons, advise it concerning applications requesting the exercise of pardon authority . . .”).

<sup>116</sup> *Id.* (“The Board of Parole shall, when requested by the Board of Pardons . . . make such investigation and collect such records as may bear on such [pardon] applications.”).

<sup>117</sup> 4 NEB. BD. OF PAROLE RULES § 206(B) (2021).

<sup>118</sup> NEB. REV. STAT. § 83-196 (1986).

appointed by the governor.<sup>119</sup> All of the members are full time employees of the state, and they may not have another job while serving.<sup>120</sup> The board members also may not serve any political organization or political party while serving.<sup>121</sup> The members must be of “good character and judicious temperament.”<sup>122</sup> Further, at least one member of board must be part of an ethnic minority group, at least one member must be a female, and at least one member must have a professional background in corrections.<sup>123</sup>

### C. Executive Clemency Factors and The Balancing Test

Executive clemency decisions are made through a balancing test of several factors. The focus of that balancing test changes depending on the type of executive clemency. Commutations focus on how “*one offender and his sentence, . . . compare[s] against other similarly situated offenders and their punishments,*” whereas pardons focus on the “*one offender and his crime.*”<sup>124</sup> Therefore, for commutations, the test is broader since it considers circumstances outside just the applicant, such as policy changes or public opinion on the criminal punishment. The federal system’s method for recommending commutations reflects this balance. When deciding whether to recommend commutations to the President, the Department of Justice considers

[d]isparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g., cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action. A combination of these and/or other equitable factors (such as demonstrated rehabilitation while in custody or exigent circumstances unforeseen by the court at the time of sentencing) may also provide a basis for recommending commutation in the context of a particular case.<sup>125</sup>

The Department of Justice also notes that a commutation “does not

---

<sup>119</sup> NEB. REV. STAT. § 83-189 (2018).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* § 83-191.

<sup>122</sup> *Id.* § 83-189.

<sup>123</sup> *Id.* § 83-191.

<sup>124</sup> Paul J. Larkin Jr., *Focusing Presidential Clemency Decision-Making*, 70 BUFF. L. REV. 1, 64 (2022) (emphasis in original).

<sup>125</sup> U.S. Dep’t of Just., Just. Manual § 9-140.113 (2018).

necessarily reflect upon the fairness of the sentence originally imposed.”<sup>126</sup> Here, commutation decisions are about a balance between the applicant’s rehabilitative efforts or changing circumstances and society’s interest in continuing to impose the same criminal sentence. Scholars often consider this “balance” to be the purpose of second-look mechanisms, including clemency.<sup>127</sup>

President Biden’s commutation of 75 people serving sentences for non-violent drug offenses shows how this balancing test works. In announcing their commutations, President Biden stated that these recipients had been “serving long sentences for non-violent drug offenses, many of whom have been serving on home confinement during the COVID pandemic—and many of whom would have received a lower sentence if they were changed [sic] with the same offense today, thanks to the bipartisan First Step Act.”<sup>128</sup> President Biden noted the changed circumstances—changing public opinion toward drug policy shown through the First Step Act—and emphasized that society could trust these individuals upon their permanent release because they were already temporarily released through COVID home confinement.<sup>129</sup> Although this was on the federal level, it is a strong example of how the factors that this specific system uses interact with one another through a balancing test.

Although the states also use a balancing test, their factors or the weight placed on a certain factor may slightly differ. For example, Tennessee requires the applicant to show that they have been “rehabilitated to an extraordinary degree, *relative* to the nature of the offense(s), will be a law-abiding citizen and positive contributor to society upon release”<sup>130</sup> whereas other states

---

<sup>126</sup> *Id.*

<sup>127</sup> See BARKOW, *supra* note 21, at 73–74.

<sup>128</sup> Kathryn Watson, *Biden Issues First Pardons and Commutations of His Presidency*, CBS NEWS (Apr. 26, 2022, 6:02 AM), <https://www.cbsnews.com/news/biden-pardons-commutations-2022> [https://perma.cc/65BZ-BSRK].

<sup>129</sup> *Id.* Many advocates have argued that the individuals who were released on temporary COVID home confinement should not return to prison once the COVID-19 pandemic ends. See, e.g., Sarah N. Lynch, *U.S. Civil Rights Groups Propose Path to Keep Inmates Home After Pandemic Emergency*, REUTERS (Aug. 4, 2021, 2:24 PM), <https://www.reuters.com/world/us/us-civil-rights-groups-propose-path-keep-inmates-home-after-pandemic-emergency-2021-08-04> [https://perma.cc/VV32-8RYE]. Groups have argued this position by showing that the individuals who have been released on temporary home confinement have had a 0.15% recidivism rate compared to the 30–65% recidivism rate for people reentering society after a term of incarceration. Molly Gill, *Opinion, Thousands Were Released from Prison During COVID. The Results Are Shocking.*, WASH. POST (Sept. 29, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/09/29/prison-release-covid-pandemic-incarceration> [https://perma.cc/T87M-LKBW].

<sup>130</sup> TENN. BD. OF PAROLE DIV. OF BD. OPERATIONS, APPLICATION FOR COMMUTATION 1 (2022) <https://www.tn.gov/content/dam/tn/boardofparole/documents/BP-0044%20Application%20for%20Commutation%20form%207.1.2022.pdf> [https://perma.cc/8TQ5-LPDB].



emphasize factors focused on the public's interest or the interest of justice.<sup>131</sup> For example, New York requires the applicant to prove that they have made “exceptional strides in self-development” and that their commutation would be in the interest of justice.<sup>132</sup> Although it is not explicit like the Tennessee system, New York's system still weighs the applicant's level of rehabilitation against factors that relate to “interest[s] of justice.”<sup>133</sup> This is exemplified by Governor Kathy Hochul's commutation of convicted drug dealer Roger Cole because of changes in the sentencing schemes for drug crimes, his extraordinary educational attainment while in prison, and his commitment to “bettering [his] communit[y].”<sup>134</sup>

The factors that states consider can be grouped into nine general categories: (1) applicant's background,<sup>135</sup> (2) rehabilitation efforts,<sup>136</sup> (3)

---

<sup>131</sup> See, e.g., N.M. Exec. Clemency Guidelines § 3 (2019) (“The Governor's pardoning power should only be exercised when doing so is in the interests of justice and equity”); S.D. ADMIN. R. 17:60:05:12(1) (2006) (“Substantial evidence indicates that the sentence is excessive or constitutes a miscarriage of justice”).

<sup>132</sup> STATE OF N.Y. EXEC. CHAMBER, GUIDELINES FOR REVIEW OF EXEC. CLEMENCY APPLICATION, 2 (2022).

<sup>133</sup> *Id.*

<sup>134</sup> *Convicted Jamaican Drug Dealer Granted Clemency by New York Governor*, JAM. OBSERVER (Dec. 29, 2021), <https://www.jamaicaobserver.com/2021/12/29/convicted-jamaican-drug-dealer-granted-clemency-by-new-york-governor/#> [<https://perma.cc/NTR7-39MK>].

<sup>135</sup> See, e.g., OHIO REV. CODE ANN. § 2967.03 (2019) (“The authority may investigate . . . mental and moral qualities and characteristics [of the inmate] . . . .”); 4 NEB. BD. OF PAROLE RULES § 206(B)(1) (“Questions may include . . . [s]ocietal and economic background of the offender.”); S.D. ADMIN. R. 17:60:05:12(5) (2006) (“The factors to be considered by the board . . . may include . . . [r]eview of the applicant's personal and family history; the applicant's attitude, character, capabilities, and habits . . . .”).

<sup>136</sup> See, e.g., 4 NEB. BD. OF PAROLE RULES § 206(B)(5) (“Questions may include . . . [t]he offender's rehabilitative efforts since incarceration”); *Id.* § 206(B)(7) (“Questions may include . . . [i]ndividuals who have had an effect on the offender since incarceration and how these individuals have influenced the offender”); N.M. Exec. Clemency Guidelines, *supra* note 131 (“[A]pplicant has demonstrated personal growth. Applicants should provide any information which they feel shows personal development and positive life chances since the commission of the offense. Any evidence that the applicant has accepted responsibility, demonstrated remorse, or atoned for their offense(s) should also be provided.”); STATE OF N.Y. EXEC. CHAMBER, *supra* note 132 (“[T]he applicant has the burden of demonstrating, by clear and convincing evidence that he or she has, within his or her capability, made exceptional strides in self-development and improvement [and] he or she has made responsible use of available rehabilitative programs and has addressed identified treatment needs . . . .”); N.D. DEP'T OF CORR. AND REHAB. PARDON ADVISORY BOARD § 5(A) (2010) (“[T]he applicant's efforts to address substance abuse and behavioral health issues and needs, the personal and social development and achievement of the applicant . . . will be considered.”); S.D. ADMIN. R. 17:60:05:12(3) (2006) (“The factors to be considered by the board . . . may include . . . [t]he applicant has shown remarkable rehabilitation . . . .”); TENN. BD. OF PAROLE DIV. OF BD.

medical hardship,<sup>137</sup> (4) public interest or interest in justice,<sup>138</sup> (5) education and work history,<sup>139</sup> (6) applicant's psychological health,<sup>140</sup> conduct during

---

OPERATIONS, *supra* note 130 (“The Governor will give serious consideration to commutation requests where . . . [t]he petitioner has made exceptional strides in self-development and self-improvement and would be a law-abiding citizen upon release . . .”).

<sup>137</sup> See, e.g., STATE OF N.Y. EXEC. CHAMBER, *supra* note 132 (“[T]he applicant has the burden of demonstrating, by clear and convincing evidence, that . . . [h]e or she is suffering terminal illness or has a severe and chronic disability which would be substantially mitigated by release from prison . . .”); S.D. ADMIN. R. 17:60:05:12(7) (2006) (“The factors to be considered by the board . . . may include . . . [t]he applicant’s age and medical status is such that is in the best interest of society that the applicant receive clemency.”); TENN. BD. OF PAROLE DIV. OF BD. OPERATIONS, *supra* note 130 (“The Governor will give serious consideration to commutation requests where . . . [p]etitioner is suffering from a life-threatening illness or has a severe chronic disability, said illness or disability is supported by appropriate medical documentation, and the relief requested would mitigate said illness or disability . . .”).

<sup>138</sup> See, e.g., 4 NEB. BD. OF PAROLE RULES § 206(B)(6) (“Questions may include . . . [t]he offender’s ability to contribute meaningfully to society.”); N.M. Exec. Clemency Guidelines, *supra* note 131 (“The Governor’s pardoning power should only be exercised when doing so is in the interests of justice and equity . . . . In making this determination, the Governor . . . gives due consideration to . . . the impact of the crime on . . . society as a whole . . .”); STATE OF N.Y. EXEC. CHAMBER, *supra* note 132 (“[T]he applicant has the burden of demonstrating, by clear and convincing evidence, that . . . commutation of the sentence is in the interest of justice, consistent with public safety and the rehabilitation of the applicant . . .”); *id.* (“[T]he applicant has the burden of demonstrating, by clear and convincing evidence, that . . . commutation of sentence is in the interest of justice, consistent with public safety . . .”); S.D. ADMIN. R. 17:60:05:12(5) (2006) (“The factors to be considered by the board . . . may include . . . the community indicates that the applicant has carried the stigma of the crime for a long enough period to justify its removal . . .”); *id.* R. 17:60:05:12(1) (“The factors to be considered by the board . . . may include . . . [s]ubstantial evidence indicates that the sentence is excessive or constitutes a miscarriage of justice . . .”); *id.* R. 17:60:05:12 (“The factors to be considered by the board . . . may include . . . [t]he applicant’s innocence of the crime for which the applicant was convicted under South Dakota law has been proven by clear and convincing evidence . . .”).

<sup>139</sup> See, e.g., OHIO REV. CODE ANN. § 2967.03 (West 2019) (“The authority may investigate . . . [the inmate’s] knowledge of a trade or profession, their former means of livelihood . . .”); N.M. Exec. Clemency Guidelines, *supra* note 131 (“The Governor will view favorably any civic contributions and educational accomplishments of applicants both prior to and after conviction. These include charitable and civic contributions, voluntary community service activities, military service, and educational degrees or professional certificates earned by the applicant after conviction.”).

<sup>140</sup> See, e.g., 4 NEB. BD. OF PAROLE RULES § 206(B)(3) (“Questions may include . . . [p]sychological information and profile of the offender.”); N.D. DEP’T OF CORR. AND REHAB. PARDON ADVISORY BOARD 1A-14 (2010) (“[T]he impact of substance abuse and behavioral health issues on the applicant and/or the conviction . . . will be considered.”).

incarceration,<sup>141</sup> (7) nature of the crime,<sup>142</sup> (8) effect on the victim,<sup>143</sup> (9) and a residual factor.<sup>144</sup> States normally consider their list of factors to be non-exhaustive.<sup>145</sup> However, even where a particular criterion is not listed, the recommending or deciding body may still hear or see facts that pertain to that issue. For example, the factors that the North Dakota parole board considers does not include anything about the victim.<sup>146</sup> However, when a person applies for a commutation, the victim is able to submit a statement for the

---

<sup>141</sup> See, e.g., OHIO REV. CODE ANN. § 2967.03 (West 2019) (“The authority may investigate . . . [the inmate’s] conduct in the [state correctional] institutions . . . .”) 4 NEB. BD. OF PAROLE RULES § 206(B)(4) (“Questions may include . . . [t]he offender’s behavior and conduct while incarcerated.”); N.M. Exec. Clemency Guidelines, *supra* note 131, at § 2(B) (“Commutation of sentence will normally be considered only in cases of unusual meritorious service. Examples of unusual meritorious service include: saving the life of an inmate or Corrections Department employee; assistance in stopping an insurrection which threatens the administration’s control of an institution; and risking serious bodily harm in attempting to secure or securing the release of a hostage.”).

<sup>142</sup> See, e.g., 4 NEB. BD. OF PAROLE RULES § 206(B)(8) (“Questions may include . . . [t]he offender’s attitude and feelings about the crime for which he or she has been sentenced.”); N.M. Exec. Clemency Guidelines, *supra* note 131 (“In making this determination, the Governor . . . gives due consideration to the nature of the underlying offense and the applicant’s role in the underlying offense . . . .”); S.D. ADMIN. R. 17:60:05:12(5) (2006) (“The factors to be considered by the board . . . may include . . . the nature and circumstances of the offense or offenses . . . .”).

<sup>143</sup> N.M. Exec. Clemency Guidelines, *supra* note 131 (“In making this determination, the Governor . . . gives due consideration to . . . the impact of the crime on any victim(s) . . . .”); S.D. ADMIN. R. 17:60:05:12(5) (2006) (“The factors to be considered by the board . . . may include . . . the effect the applicant’s clemency will have on the victims of the crime . . . .”).

<sup>144</sup> See, e.g., OHIO REV. CODE ANN. § 2967.03 (West 2019) (“The authority may investigate . . . any other matters affecting [the inmate’s] fitness to be at liberty without being a threat to society.”); N.M. Exec. Clemency Guidelines, *supra* note 131 (“In making this determination, the Governor . . . gives due consideration to . . . any other factors weighing on the fundamental fairness of granting a pardon to the applicant.”); STATE OF N.Y. EXEC. CHAMBER, *supra* note 132 (“[T]he applicant has the burden of demonstrating, by clear and convincing evidence, that . . . further incarceration would constitute gross unfairness because of the basic inequities involved.”); N.D. DEP’T OF CORR. AND REHAB. PARDON ADVISORY BOARD 1A-14 (2010) (“[A]ny significant problems or circumstances the applicant may be encountering due to the conviction, will be considered.”); TENN. BD. OF PAROLE DIV. OF BD. OPERATIONS, *supra* note 130 (“The Governor will give serious consideration to commutation requests where . . . [t]he petitioner has been rehabilitated to an extraordinary degree, relative to the nature of the offense(s) committed, will be a law-abiding citizen and positive contributor to society upon release, and has, to the extent age and health permit, a desire and an ability to maintain gainful employment.”).

<sup>145</sup> See, e.g., S.D. ADMIN. R. 17:60:05:12 (2006) (“The factors to be considered by the board in all hearings on applications for executive clemency *may include the following* . . . .”) (emphasis added).

<sup>146</sup> N.D. DEP’T OF CORR. & REHAB. PARDON ADVISORY BOARD 1A-14 (2010).

board's consideration.<sup>147</sup> Therefore, there are some procedural rules in place that could impact the board's decision even though they may not be a listed factor.

Most states primarily focus on the applicant's rehabilitation efforts. This category is often described in terms of the applicant's "demonstrated personal growth"<sup>148</sup> or "exceptional strides in self-development and improvement."<sup>149</sup> Often, states consider whether the applicant participated in substance abuse or behavioral health programming,<sup>150</sup> or educational or professional training programming while in prison.<sup>151</sup>

States also consider the conduct of the applicant while incarcerated. This can include their disciplinary record<sup>152</sup> or acts of service while in prison.<sup>153</sup> For example, in New Mexico, commutation is only considered in cases of "unusual meritorious service," which includes saving the life of an individual involved in an altercation, stopping an insurrection that could overthrow the administration's power, and risking serious bodily harm in attempting to secure or securing the release of a hostage.<sup>154</sup> In Iowa, this was also a factor in Raspberry Williams's commutation and Clyde Johnson's favorable recommendation for clemency.<sup>155</sup>

#### *D. Politics, Public Opinion, and Executive Clemency*

Researchers and legal scholars have pointed out flaws in state executive clemency systems, especially as "tough on crime" stances became ubiquitous in American politics.<sup>156</sup> Efforts to reform executive clemency and second-look mechanisms sharply increased once it became clear that the COVID-19

---

<sup>147</sup> *Id.*

<sup>148</sup> N.M. Exec. Clemency Guidelines, *supra* note 131.

<sup>149</sup> N.Y. EXEC. CHAMBER, *supra* note 132.

<sup>150</sup> *See, e.g.*, N.D. DEP'T OF CORR. & REHAB. PARDON ADVISORY BOARD 1A-14 (2010); STATE OF N.Y. EXEC. CHAMBER, *supra* note 132.

<sup>151</sup> *See, e.g.*, 4 NEB. BD. OF PAROLE RULES § 206(B)(2); N.M. Exec. Clemency Guidelines, *supra* note 131.

<sup>152</sup> Ben Finholt & Jamie Lau, *Everything You Need to Know About Clemency in North Carolina*, WILSON CTR. FOR SCI. & JUST. AT DUKE U., (Sept. 17, 2021), <https://wsj.law.duke.edu/news/everything-you-need-to-know-about-clemency-in-north-carolina> [<https://perma.cc/R2BS-RUQA>].

<sup>153</sup> *See, e.g.*, N.M. Exec. Clemency Guidelines, *supra* note 131, at § 2(B).

<sup>154</sup> *See, e.g., id.*

<sup>155</sup> Terry Branstad, *Branstad to the Iowa Board of Parole: Williams's Sentence Should Be Commuted*, WATERLOO-CEDAR FALLS COURIER (Apr. 26, 2013), [https://wfcourier.com/branstad-to-the-iowa-board-of-parole-williamss-sentence-should-becommutated/article\\_42879e3e-acb7-11e2-add6-0019bb2963f4.html](https://wfcourier.com/branstad-to-the-iowa-board-of-parole-williamss-sentence-should-becommutated/article_42879e3e-acb7-11e2-add6-0019bb2963f4.html) [<https://perma.cc/3UNS-6D94>]; Payne, *supra* note 1.

<sup>156</sup> *See, e.g.*, Everett & Periman, *supra* note 28, at 71 (describing how the decline of discretionary decision-making power as a sign of "tough on crime" politics has resulted in a decline in the use of executive clemency).

pandemic would be especially dangerous to the incarcerated population.<sup>157</sup> These efforts have been recently scrutinized because of the more prevalent “tough on crime” stances since the summer of 2020 often drawing on the recent uptick in crime.<sup>158</sup> Regardless, there are two competing arguments about the most effective way in going about executive clemency reform: pushing state legislatures to restructure the advising bodies or relying on the electorate to elect candidates who promise to reform the criminal legal system.

The side which argues that the state legislatures should restructure the advising bodies advocates for reintroducing expertise requirements for members on boards that make criminal justice related policy choices.<sup>159</sup> This argument reasons that

[f]ew people would want to establish air pollutant limits or workplace safety conditions by popular vote. Instead, most people prefer to trust experts with specialized knowledge to set policies based on studies of what maximizes public safety and an analysis of the costs and benefits of different courses of action . . . . We understand that we would get inferior outcomes if instead we relied upon the emotional preferences of the body politic or politicians’ intuitive guesses about what is likely to work.

Yet that is precisely what we do when it comes to decisions about public safety and crime control.<sup>160</sup>

The other side argues that executive clemency should be reformed via the electoral process. This side often points to how, younger generations—the generations that did not live through the 1990s crime wave—are, as a group, less punitive and therefore “we might be at the dawn of a new era of electorally motivated criminal-justice reform.”<sup>161</sup>

Advocates for state legislative action point to the history of parole boards

---

<sup>157</sup> Ed Lyon, *COVID-19 Pandemic Bumps Still Anemic Clemency Numbers*, PRISON LEGAL NEWS (Jan. 1, 2022), <https://www.prisonlegalnews.org/news/2022/jan/1/covid-19-pandemic-bumps-still-anemic-clemency-numbers> [<https://perma.cc/93UM-FR8G>].

<sup>158</sup> Astead W. Herndon, *They Wanted to Roll Back Tough-On-Crime Policies. Then Violent Crime Surged*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html> [<https://perma.cc/S83K-W4QB>].

<sup>159</sup> BARKOW, *supra* note 21, at 1.

<sup>160</sup> *Id.*

<sup>161</sup> Rebecca Goldstein, *The Politics of Decarceration*, 129 YALE L.J. 446, 446 (2019).

and the “tough on crime” movement to support the notion that state legislative action is the next most logical step. Parole previously played a crucial role in the criminal justice system because it allowed for sentences to be easily reevaluated.<sup>162</sup> However, the 1970s and the emergence of “tough on crime” politics caused many states and the federal government to lose faith in the rehabilitation of criminal offenders.<sup>163</sup> This trend was not just limited to parole, but all second-look mechanisms, including clemency.<sup>164</sup> Before the parole system was implemented, governors and presidents relied on clemency.<sup>165</sup> Naturally, when the parole system became common practice in the 1900s, clemency rates fell.<sup>166</sup> The side advocating for expert decision-making bodies points out however that when many states and the federal government abandoned parole during the 1970s, clemency did not return as a dominant second-look mechanism as one might expect.<sup>167</sup> This was likely because “tough on crime” politics invaded the public’s beliefs in rehabilitation, and governors did not want to risk losing reelection if a person they granted clemency committed a crime upon their release.<sup>168</sup>

Even if a state did maintain a parole board or board of pardons, many of those boards changed from being a panel of experts to political bodies.<sup>169</sup> In addition to being politically appointed, many of those boards’ members had a law enforcement focus.<sup>170</sup> Research suggests that a parole board member that has too heavy of a law enforcement background may be more punitive and therefore not consider the application holistically.<sup>171</sup> Some states have adopted laws to attempt to reintroduce expertise requirements for their parole board members. For example, Indiana passed a law in 2012 which required that each parole board member must either have a bachelor’s degree or at least ten years of law enforcement experience, however it is not clear whether this would be too law enforcement focused.<sup>172</sup> Each member also must have the “skill, training, or experience to analyze questions of law,

---

<sup>162</sup> BARKOW, *supra* note 21, at 78.

<sup>163</sup> *Id.* at 73.

<sup>164</sup> *Id.* at 81.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 82.

<sup>168</sup> BARKOW, *supra* note 21, at 82–83.

<sup>169</sup> *Id.* at 79.

<sup>170</sup> *Id.*

<sup>171</sup> SARAH MEHTA, ACLU, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES 39 (2016), [https://www.aclu.org/sites/default/files/field\\_document/121416-aclu-parolereportonlineingle.pdf](https://www.aclu.org/sites/default/files/field_document/121416-aclu-parolereportonlineingle.pdf) [<https://perma.cc/DB9Z-YB9R>].

<sup>172</sup> IND. CODE § 11-9-1-1 (2012).

administration, and public policy.”<sup>173</sup>

Advocates for state legislative action use the public’s disbelief in rehabilitation to argue that one way to revitalize all second-look mechanisms is to have state legislatures require expertise once again in decision-making bodies.<sup>174</sup> The type of expertise required would be individuals who are familiar with the most up-to-date research and data, but also independent enough that they are willing to go where the data will lead them.<sup>175</sup> This requirement would then make these bodies more independent.<sup>176</sup> These experts who are more familiar with the data and research are in a better position to increase future public safety with limited resources, as opposed to a group of laypersons or their representatives who may make decisions “based on their notions of right and wrong and morality.”<sup>177</sup> Interestingly, when clemency decisions are made on a more personal or emotional basis as compared to a more reasoned or logical fashion, the clemency recipients’ recidivism rate is higher.<sup>178</sup>

Both sides tend to agree that since the 1990s, many people have changed their views toward “tough on crime” politics, such that members of both the Democratic and Republican parties have advocated for criminal justice reform.<sup>179</sup> The side advocating to rely on electoral politics points to this change to argue that electoral politics may play a more important role than the other side suggests.<sup>180</sup> Accordingly, state legislatures may not have to restructure decision-making bodies to include more experts yet, because reforming those systems could be up to the increasingly less punitive electorate to elect officials who promise to reform the criminal justice system

---

<sup>173</sup> *Id.*

<sup>174</sup> BARKOW, *supra* note 21, at 167–68.

<sup>175</sup> *Id.* at 176–77.

<sup>176</sup> *Id.* at 167–68.

<sup>177</sup> *Id.* at 167.

<sup>178</sup> Lucien Bruggeman, *Trump-Era Pardon Recipients Are Increasingly Back in Legal Jeopardy*, ABC NEWS (Dec. 22, 2022, 4:13 AM), <https://abcnews.go.com/US/trump-era-pardon-recipients-increasingly-back-legal-jeopardy/story?id=95568587> [https://perma.cc/GK6E-HXXP] (reporting on how of the 238 people that former President Donald Trump granted a pardon or commutation to, at least 10 had faced further criminal prosecution as compared to the Obama Administration’s 1,700 commutation recipients, only three had been rearrested since 2017).

<sup>179</sup> Goldstein, *supra* note 161, at 460–63.

<sup>180</sup> *Id.* at 446.

from the inside.<sup>181</sup>

As evidence that more credence should be given to electoral politics, this side points to the success of local pro-reform movements in achieving criminal justice reform and specifically the election of “progressive prosecutors.”<sup>182</sup> For example, the 2018 election of progressive prosecutors in Boston, Houston, Chicago, Brooklyn, Orlando, Philadelphia, and San Francisco shows that there is potential for a new electoral movement to take hold and spur further change within the criminal legal system.<sup>183</sup> In addition to the election of progressive prosecutors, the election of criminal-justice reform oriented candidates for city council, mayor, or alderman, as well as criminal justice related ballot initiatives shows that the electoral system may not need to be given up on yet.<sup>184</sup>

In addition to analyzing the results of the 2018 election, a public opinion survey conducted in 2019 evaluated whether voters were more willing to embrace less punitive criminal justice policies.<sup>185</sup> The study found that, on average, younger Americans were less punitive than older Americans regardless of the racial group tested.<sup>186</sup> This result shows that future generations most likely will be, on average, less punitive, and therefore more welcoming to criminal justice reform.<sup>187</sup>

There are three possible explanations for this difference in punitiveness. First, older Americans lived through the 1990s crime wave and are therefore more prone to believe that “tough on crime” policies are the best solution, while Americans who were born after 1990 have lived in a time of lower crime rates and have not been exposed to the same “tough on crime” rhetoric.<sup>188</sup> Second, younger Americans grew up in a time where aggressive policing and high incarceration rates—as a result of “tough on crime” politics—became more common, while also being the most likely targets of such practices, and therefore are more likely to oppose the continuance of “tough on crime” policies.<sup>189</sup> Finally, the main audience for local television

---

<sup>181</sup> *Id.* at 449 (“If these trends [(falling crime rates, increasing strength of grassroots movement, and younger generations remaining less punitive)] hold, it is possible to envision widespread public support for an end to mass incarceration.”).

<sup>182</sup> *Id.* at 467.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 469–70.

<sup>185</sup> Goldstein, *supra* note 161, at 472.

<sup>186</sup> *Id.* (“[Y]ounger Americans are less punitive than older Americans. This is true within each racial group: younger whites are less punitive than older whites, younger Blacks are less punitive than older Blacks, younger Hispanics are less punitive than older Hispanics, and younger Asians are less punitive than older Asians.”).

<sup>187</sup> *See id.* at 473.

<sup>188</sup> *Id.* at 475–76.

<sup>189</sup> *Id.* at 477–78.



news is older Americans, so they are exposed to higher amounts of crime coverage leading them to overestimate crime rates; therefore, they may believe that there is a need for a more punitive system.<sup>190</sup>

No state has reformed its system to fully reflect either of these arguments. However, there have been several reform efforts across the United States, some of which partially reflect pieces of each argument. For example, Minnesota and Michigan have focused on restructuring their advisory boards.

During the 2022 legislative session, the Minnesota legislature attempted to make drastic changes to its executive clemency system.<sup>191</sup> It proposed the creation of an advisory body to recommend applications to its board of pardons as well as a more comprehensive set of criteria for that advisory body to consider.<sup>192</sup> The bill did not pass, but advocates believed that it represented a strong first step toward reincorporating mercy in the corrections system.<sup>193</sup>

During Governor Jennifer Granholm's administration in Michigan, she created the Executive Clemency Advisory Council to advise the parole board on its clemency investigations and recommendations.<sup>194</sup> Later in her term, Governor Granholm changed the parole board to the "parole and commutation board."<sup>195</sup> The parole board was expanded to 15 individuals, appointed by the governor, and a minimum of six of the individuals could never have held a position in the Michigan Department of Corrections before.<sup>196</sup> One of the missions of the reorganization of the parole board was to "increase . . . consideration of . . . commutation requests."<sup>197</sup>

Alaska reformed its executive clemency system mainly due to the work of local proreform interest groups. In 2007, Governor Frank Murkowski pardoned a group of construction company executives of criminal negligence convictions resulting from an on-site accident that killed a local construction

---

<sup>190</sup> *Id.* at 478–79.

<sup>191</sup> See Tim Walker, *Changes to Board of Pardons Would Bring More Efficiency and More Mercy*, Bill Sponsor Says, MINN. H.R. (Mar. 4, 2022, 1:53 PM), <https://www.house.leg.state.mn.us/SessionDaily/Story/17196> [<https://perma.cc/U7KV-QLYT>].

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Exec. Order No. 2007-2 §§ 2–3 (Mich. 2007).

<sup>195</sup> MICH. COMP. LAWS § 791.304(1) (2009).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* § 791.304.

worker.<sup>198</sup> The decedent's family expressed their displeasure with the governor's decision, especially after it came out that legislators lobbied the governor for the pardon because the construction industry was hesitant to invest in Alaska given the conviction.<sup>199</sup> Ethics reform was at the heart of then Governor-elect Sarah Palin's campaign, so her first legislative action was an executive clemency reform bill which required the governor to go to the parole board for investigation and notify the victims of the applicant to give a chance for public comment before granting executive clemency.<sup>200</sup>

### *E. Commutation System in Iowa Today*

There are numerous holes in the Iowa commutation system that enable Iowa governors to ignore this power. However, there are two issues that greatly contribute to the decline in Iowa commutations: the membership requirements for Board members and the factors it uses. To understand how the requirements and the factors it uses contribute to the declining number of commutations in Iowa, it is important to understand how those components interact. This requires an understanding of the basis for the executive clemency power, what dictates the composition of the Board, how the Board conducts its investigations and hearings, and ultimately how the Board makes its recommendation and the Governor's consideration of that recommendation.

#### 1. Basis for Executive Clemency Power

Iowa's clemency power is based in its constitution. The Iowa Constitution provides that the "governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offences except treason and cases of impeachment, subject to such regulations as may be provided by law."<sup>201</sup> In Iowa, a commutation is defined as a "reduction or lessening of the original sentence."<sup>202</sup> A commutation represents the governor granting an applicant a next step toward regaining their physical liberty, as compared to the restoration of citizenship and pardons which, for the most part, are granted when a person has already regained their physical liberty.<sup>203</sup>

Through time, the governor's executive clemency power has become subject to several statutes and regulations. Namely, the Board is now heavily

---

<sup>198</sup> Everett & Periman, *supra* note 28, at 89–90.

<sup>199</sup> *Id.* at 90.

<sup>200</sup> *Id.* at 92–93.

<sup>201</sup> IOWA CONST. art. IV, § 16.

<sup>202</sup> *Commutations*, STATE OF IOWA BD. OF PAROLE, <https://bop.iowa.gov/executive-clemency-commutation/commutations> [<https://perma.cc/AU4F-G8TQ>].

<sup>203</sup> *Id.*

involved in the executive clemency process.<sup>204</sup> This reflects the most common executive clemency model, since the clemency authority is solely vested in the Iowa Governor and the Board acts as an advisory board which issues nonbinding recommendations to the governor.<sup>205</sup>

## 2. The Composition of the Iowa Board of Parole

The Board has five members, who are all appointed by the governor subject to Senate confirmation.<sup>206</sup> Each of the members serves a four year term.<sup>207</sup> The Board is led by the chairperson and the vice chair, which are the only full-time positions on the Board.<sup>208</sup> The chairperson serves at the pleasure of the governor, meaning they can be fired for any reason.<sup>209</sup> In addition to the regular five members, the governor appoints three alternate members.<sup>210</sup> Those alternate members serve on hearing panels when one of the regular members is not available or must be disqualified due to a conflict of interest.<sup>211</sup> When an alternate member's term expires, the governor can appoint that person to be a full time member.<sup>212</sup>

There are few qualifications required for a person to be named a Board member. Each member of the Board must be in "good character and [have a] judicious background."<sup>213</sup> The Board must also have a member of a minority group and it may also include a "person ordained or designated as a regular leader of a religious community and who is knowledgeable in correctional procedures and issues."<sup>214</sup> Finally, the Board must have at least two of the following: (1) a member who is a "disinterested layperson," (2) a member who is a licensed attorney in Iowa and has knowledge in correctional procedures and issues, and/or (3) a member that has at least a master's degree

---

<sup>204</sup> See IOWA CODE § 914.3 (1995).

<sup>205</sup> Ridolfi & Gordon, *supra* note 69.

<sup>206</sup> IOWA CODE § 904A.1 (2000); IOWA CODE § 904A.3 (2013).

<sup>207</sup> IOWA CODE § 904A.1 (2000).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* § 904A.3 (2013).

<sup>210</sup> *Id.* § 904A.2A(1) (2013) (establishing the alternate board member position); *Id.* § 904A.3 (2013) (establishing the governor's appointment power over all board members, including the alternate members).

<sup>211</sup> *Id.* § 904A.2A(1) (2013) (establishing the alternate board member position for the purpose of replacing the board members who are disqualified from certain hearing panels).

<sup>212</sup> *Id.* § 904A.2 (1986).

<sup>213</sup> IOWA CODE § 904A.2 (1986).

<sup>214</sup> *Id.*

in social work or counseling and has knowledge in correctional procedures and issues.<sup>215</sup> Currently, the Board includes members falling under the first two of these classifications.<sup>216</sup> The Board's composition is an important feature of the clemency system because the people who make up the Board are the ones who will be recommending whether to grant clemency. Their terms, training, and qualifications are pertinent to that great power, but individual characteristics are not wholly determinative of how the clemency system operates. Even the most merciful Board member can be hindered by the system's procedural requirements.

### 3. The Board Investigation, Hearing, and Recommendation

The Board is in charge of parole decisions and clemency recommendations.<sup>217</sup> Since these two large systems are within the Department of Corrections, the Board governs in accordance with a complex regulatory scheme. Since this Note is only focused on commutations, this Part will only focus on the procedure for handling commutations.

Each commutation begins with an executive clemency application. Iowa Code § 914.2 provides that a person convicted of a criminal offense “has the right to make application to the board of parole for recommendation or to the governor for a . . . commutation of sentence . . . at any time following the conviction.”<sup>218</sup> Class A felons—individuals that have been sentenced to life without parole—can only apply once every ten years, unless the director of the Department of Corrections specifically requests that the governor review the application within the ten year period.<sup>219</sup> The application is found on the Iowa Governor's website and asks for information such as criminal history, treatments sought, employment history, education, volunteer information, and honors.<sup>220</sup> The application also asks for the applicant's reasons for why

---

<sup>215</sup> *Id.*

<sup>216</sup> At the time of writing this Note, the Board currently consists of Chairman Nick Davis, a licensed attorney in Iowa with knowledge of correctional procedures and issues, Vice Chairwoman Meredith Lamberti, also a licensed attorney in Iowa with knowledge of correctional procedures and issues, Thomas Darden, a disinterested “layperson,” Ralph Haskins, a member with extensive connections to the Lutheran Church, and Sue Weinacht, a disinterested “layperson.” *Meet the Board Members*, STATE OF IOWA BD. OF PAROLE, <https://bop.iowa.gov/about/meet-board-members> [https://perma.cc/XG3B-C7BE].

<sup>217</sup> IOWA CODE § 904A.4(1) (2017) (“The board of parole shall interview and consider inmates for parole and work release and a majority vote of the members is required to grant a parole or work release.”); *Id.* § 904A.4(7) (“The board of parole shall review and make recommendations to the governor regarding all applications for reprieves, pardons, commutation of sentences . . .”).

<sup>218</sup> *Id.* § 914.2 (1995).

<sup>219</sup> *Id.* § 902.2.

<sup>220</sup> OFF. OF GOVERNOR KIM REYNOLDS, APPLICATION FOR COMMUTATION OF SENTENCE, <https://governor.iowa.gov/sites/default/files/documents/Application%20for%20Commutation.pdf> [https://perma.cc/N5UD-9HI7].

the governor should grant them a commutation.<sup>221</sup> The applicant can also attach Letters of Support and documents to serve as “evidence.”<sup>222</sup>

After a non-class A felon submits their commutation application, the governor *may* forward the application to the Board so that it can review the application, investigate the applicant, and issue a recommendation of whether the governor should grant clemency.<sup>223</sup> When class A felons apply for a commutation, the governor *must* forward the application to the Board, and it must investigate and interview the applicant before the Board issues its recommendation and investigation to the governor.<sup>224</sup>

If the Board investigates, it has broad discretion in determining what to use as part of its investigation. The Board is authorized to investigate the following subjects: the applicant’s personal history, their current situation, parole prospects, and anything else it deems pertinent.<sup>225</sup> In order to investigate these subjects, the Board can consider transcripts of judicial proceedings, corrections information, all of the documents submitted with the application, and all documents that it deems appropriate.<sup>226</sup> The Board may also interview public officials, victims, witnesses, and other individuals that it deems appropriate.<sup>227</sup>

For the commutation of class A felons, the Board is required to notify the victim of the pending application and consider any subsequent statement made by the victim regarding the application.<sup>228</sup> According to the Iowa Board of Parole rules, the term “victim” includes “immediate family members of a victim who died or was rendered incompetent as a result of the offense or who was under 18 years of age at the time of the offense.”<sup>229</sup> So the number of victim statements that the Board must consider could go beyond just the person who was directly harmed by the applicant’s actions.

At the end of the investigation for the commutation application of a class

---

<sup>221</sup> *Id.*

<sup>222</sup> Any evidence that the “governor deems advisable” can be used during this process, including during the interview, and so it is thought that the rules of evidence are not in effect. See IOWA CODE § 914.5(2) (1993); OFF. OF GOVERNOR KIM REYNOLDS, *supra* note 220.

<sup>223</sup> IOWA CODE § 914.3(2) (1995).

<sup>224</sup> *Id.* § 902.2.

<sup>225</sup> IOWA ADMIN. CODE r. 205-13.4 (2023).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* r. 205-7.2 (2023).

<sup>229</sup> *Id.* r. 205-7.1.

A felon, the Board must interview the applicant, which generally occurs in public.<sup>230</sup> The interview is typically done via teleconference<sup>231</sup> with a five-person panel made up of Board members, with alternate members filling in when necessary.<sup>232</sup> Each panelist asks a series of questions, gives the applicant a chance to respond, and then asks some follow-up questions.

There is no time requirement for the interviews and there is no requirement for how long an applicant must wait before an interview. Finally, after the interview, while the applicant is still present, the Board votes on whether to recommend the commutation.<sup>233</sup> After the Board's vote, the hearing ends and the Board will submit its report and recommendation to the governor.<sup>234</sup>

#### 4. The Board's Recommendation and the Governor's Decision

For the Board to favorably recommend a non-class A felon for commutation, at least three Board members must agree that "the person has demonstrated that the person will become or continue to be a law-abiding citizen."<sup>235</sup> For the Board to favorably recommend a class A felon for commutation, the Board must unanimously agree that that the "inmate should be considered for release on parole."<sup>236</sup> This vague standard makes it unclear precisely how the Board is supposed to make a finding of a favorable recommendation. Despite the vague standard, there is still a process for which the Board must follow for a class A felon's commutation application, which may help explain how the Board is supposed to come to their decision.

---

<sup>230</sup> IOWA CODE § 902.2 (1995).

<sup>231</sup> Rod Boshart, *4 Iowa 'Lifers' Await a Rare Reprieve from Governor*, CEDAR RAPIDS GAZETTE (Oct. 25, 2021, 6:00 AM), <https://www.thegazette.com/state-government/4-iowa-lifers-await-a-rare-reprieve-from-governor/#:~:text=Prison%E2%80%9Clifers%E2%80%9D%20Denise%20Rhode%2C,potentially%20eligible%20for%20eventual%20release> [https://perma.cc/R5X4-UDWM] ("No representatives for the victims spoke at any of the four separate video commutation hearings . . .").

<sup>232</sup> *Id.* ("She told the five-member panel . . ."). The statute does not define how many members must sit on the panel, but the Board always requires that five members sit on a panel.

<sup>233</sup> IOWA ADMIN. CODE r. 205-13.6(3)(a) (2023). Although the regulation does not provide that the Board votes while the applicant is still present, that is the common practice for commutation interviews. *See* Jon August Commutation Hearing, Iowa Dep't of Corr. Bd. of Parole, in Des Moines, Iowa (Jan. 5, 2023) (on file with author).

<sup>234</sup> IOWA CODE § 902.2 (1995) ("The board shall conduct an interview of the class "A" felon and shall make a report of its findings and recommendations to the governor.").

<sup>235</sup> IOWA ADMIN. CODE r. 205-13.5(1)(b) (2023).

<sup>236</sup> *Id.* r. 205-13.5(1)(a). Currently, there are proposed changes to lower the voting threshold for class A felons from unanimity to a simple majority, however those changes have not yet been made effective. *See* Proposed Rule Changes to Iowa Administrative Code Chapter 13 (to be codified at IOWA ADMIN. CODE r. 205-13) [https://perma.cc/LC3X-RJUR]. Since these rules are not yet effective, this Note will analyze the Iowa commutation system in light of the unanimity requirement.

For a class A felon's commutation, the Board has to produce a written report of its findings and recommendation, attach any victim statements that were made, and submit those documents to the governor.<sup>237</sup> The Board can "consider any factor it deems appropriate" to make its decision.<sup>238</sup> As discussed further in Section II.F, Governor Branstad's reasoning for commuting Raspberry Williams's sentence in 2013 may be an example of "any factor [the Board] deems appropriate."<sup>239</sup> The Board's regulations does have a list of nonexhaustive factors which the Board can consider: (1) the nature and circumstances of the crime, (2) the number of years the applicant has served, (3) the applicant's previous criminal record, (4) the applicant's conduct while confined, (5) the impact on the victim, (6) the public interest involved, and (7) any other factor that the Board deems appropriate.<sup>240</sup>

Once the Board submits its written report and recommendation to the governor, the governor has 90 days to submit their decision.<sup>241</sup> According to the Iowa Constitution, the executive clemency power is completely vested in the executive; therefore, the Board's recommendation cannot be binding.<sup>242</sup> The governor's decision must state whether the request was granted and outline their reasoning.<sup>243</sup> A non-class A felon who wishes to submit another application may do so immediately, while class A felons must wait ten years before refiling.<sup>244</sup>

#### F. *History of Iowa Commutations*

Iowa has not always had a poor history of commutations. During Governor Herschel C. Loveless' administration (1957–1961), he commuted over 40 sentences.<sup>245</sup> In the preceding administration, which only lasted two years, Governor Leo A. Heogh commuted around 30 sentences.<sup>246</sup> This high number of commutations per administration continued until Governor Terry Branstad's first administration (1983-1999) in which he granted two

---

<sup>237</sup> *Id.* r. 205-13.6(3)(c), (d).

<sup>238</sup> *Id.* r. 205-13.6(3)(b).

<sup>239</sup> *Id.*; Branstad, *supra* note 155.

<sup>240</sup> IOWA ADMIN. CODE r. 205-13.6(3)(b) (2023).

<sup>241</sup> IOWA CODE § 914.4 (1993).

<sup>242</sup> IOWA CONST. art. IV, § 16

<sup>243</sup> IOWA CODE § 914.4 (1993).

<sup>244</sup> IOWA CODE § 902.2 (1995).

<sup>245</sup> Jordan, *supra* note 19.

<sup>246</sup> *Id.*

commutations.<sup>247</sup> The Board tracks its commutation data in their fiscal year (FY) performance summaries.<sup>248</sup> Between FY2009 and FY2023—the Culver Administration through the current Reynolds administration—the Board reviewed 309 commutation applications and issued 24 favorable recommendations, meaning that they issued unfavorable recommendations for 92.2% of the commutation applications that they received.<sup>249</sup> The administrations that followed Branstad’s first administration, which ended in 1999—Vilsack, Culver, Branstad Second Administration, and Reynolds—commuted nine sentences collectively.<sup>250</sup> The last commutation granted in Iowa was in 2013 when Governor Branstad commuted Raspberry Williams’ life-without-parole sentence to a term of years.<sup>251</sup>

During the second Branstad administration between 2011 and 2017, Governor Branstad exercised his commutation power twice. The first was in response to the Supreme Court’s ruling in *Miller v. Alabama*, where the Court held that mandatory life without parole sentences were unconstitutional, under the Eighth Amendment, for juvenile offenders.<sup>252</sup> In 2012, shortly after *Miller*, Governor Branstad commuted the sentences of individuals who fell under the *Miller* holding from life without parole to a 60 year sentence.<sup>253</sup> The Iowa Supreme Court deemed that this set of commutations was unconstitutional because this new sentence had the same effect as the

---

<sup>247</sup> *Id.*

<sup>248</sup> *Annual Reports*, STATE OF IOWA BD. OF PAROLE, <https://bop.iowa.gov/about-us/annual-reports> [https://perma.cc/K4W9-C2DZ].

<sup>249</sup> See sources cited *supra* note 15; IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2021 12 (2022); IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2022 11 (2023); IOWA BD. OF PAROLE, IOWA BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2023 11 (2024).

<sup>250</sup> Jordan, *supra* note 19 (reporting that Governor Branstad granted one commutation during his second administration); James Q. Lynch, *Culver Commutes Two Sentences on Last Day in Office*, GLOBE GAZETTE (Jan. 14, 2011), [https://globegazette.com/news/iowa/culver-commutes-two-sentences-on-last-day-in-office/article\\_323b4dda-2027-11e0-9623-001cc4c002e0.html](https://globegazette.com/news/iowa/culver-commutes-two-sentences-on-last-day-in-office/article_323b4dda-2027-11e0-9623-001cc4c002e0.html) [https://perma.cc/C9MG-ZGU2] (reporting that Governor Vilsack granted six commutations, and Governor Culver granted two). These trends are not correlated politically. The large amounts of commutations before 1983 were from both Republicans and Democrats, while the post-1983 administrations have been led by two Republicans (Branstad and Reynolds) and two Democrats (Vilsack and Culver). Jordan, *supra* note 20.

<sup>251</sup> Branstad, *supra* note 155.

<sup>252</sup> *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

<sup>253</sup> Steve Eder, *Iowa Governor Commutes Sentences of Teen Killers*, WALL ST. J. (July 16, 2012, 3:53 PM), <https://www.wsj.com/articles/BL-LB-43061> [https://perma.cc/A57C-ZM2Z]. In Governor Branstad’s commutation, he explicitly opposed the *Miller* holding, saying that “now after the Court’s ruling, up to 38 dangerous juvenile murderers will seek resentencing and more lenient sentences; and [whereas], it is a serious violation of federalism for the federal supreme court to throw out long-standing Iowa sentences.” *State v. Ragland*, 836 N.W.2d 107, 111 (Iowa 2013).



sentences the Court struck down in *Miller*.<sup>254</sup> As a result of this case, many of the individuals in Iowa who were serving mandatory life-without-parole sentences for crimes they committed as juveniles sought resentencing.<sup>255</sup> This included the man who challenged the constitutionality of Governor Branstad's post-*Miller* commutation.<sup>256</sup> He was resentenced to a 25 year sentence, which made him immediately eligible for parole, and in 2016, he was granted parole.<sup>257</sup>

Governor Branstad again exercised his commutation power to commute the sentence of Raspberry Williams in 2013.<sup>258</sup> Williams was convicted of the 1974 murder of Lester Givhan after a fight broke out regarding an outstanding debt that Givhan owed Williams.<sup>259</sup> What caught the attention of Governor Branstad and the Board, which gave a favorable recommendation, was that, in 1979, Williams was part of a group of individuals who helped free a correctional officer that had been taken hostage at the Iowa State Penitentiary in Fort Madison.<sup>260</sup> Although this does not squarely fall under one of the clemency factors, it seems that this could be considered part of the Board's residual factor. Additionally, Governor Branstad noted that many inmates considered Williams a mentor and that the victim's family had forgiven him.<sup>261</sup> Williams was released on parole the following year, but passed away just two years after his release.<sup>262</sup>

---

<sup>254</sup> *Ragland*, 836 N.W.2d at 121 (“For all practical purposes, the same motivation behind the mandates of *Miller* applies to the commuted sentence in this case or any sentence that is the practical equivalent to life without parole.”).

<sup>255</sup> Staff Report, *Court Rules Juveniles May Seek New Sentences*, QUAD-CITY TIMES (Aug. 19, 2013), [https://qctimes.com/news/local/crime-and-courts/court-rules-juveniles-may-seek-newsentences/article\\_9d41dc5f-7768-5aa8-ac93-aa7b6c73c839.html](https://qctimes.com/news/local/crime-and-courts/court-rules-juveniles-may-seek-newsentences/article_9d41dc5f-7768-5aa8-ac93-aa7b6c73c839.html) [<https://perma.cc/4U3F-6AC9>].

<sup>256</sup> *Id.*

<sup>257</sup> Mike Bell, *Paroled After 29 Years in Prison, Ragland Again Living and Working in Council Bluffs*, DAILY NONPAREIL (Aug. 7, 2019), [https://nonpareilonline.com/news/local/paroled-after-29-years-in-prison-ragland-again-living-and-working-in-council-bluffs/article\\_82377e04-6155-5ed1-b5fb-e5410e8b5027.html#tncms-source=login](https://nonpareilonline.com/news/local/paroled-after-29-years-in-prison-ragland-again-living-and-working-in-council-bluffs/article_82377e04-6155-5ed1-b5fb-e5410e8b5027.html#tncms-source=login) [<https://perma.cc/U4E9-SVAA>].

<sup>258</sup> Branstad, *supra* note 155.

<sup>259</sup> Jordan, *supra* note 15.

<sup>260</sup> Branstad, *supra* note 155.

<sup>261</sup> *Id.*

<sup>262</sup> *After 40 Years in Prison, Iowa Man Granted Parole*, KCCI DES MOINES (Apr. 16, 2014, 11:52 AM), <https://www.kcci.com/article/after-40-years-in-prison-iowa-man-granted-parole/6891344#> [<https://perma.cc/NJS2-GB7W>]; *Raspberry Williams Obituary*, VIGEN MEMORIAL HOME (Nov. 14, 2016), <http://www.vigenmemorialhome.com/obituaries/Raspberry-Williams?obId=1209569> [<https://perma.cc/NL9F-5Z2S>].

The Reynolds administration began in 2017, when President Donald Trump appointed Governor Branstad as the United States Ambassador to China, elevating then Lieutenant–Governor Reynolds to Governor.<sup>263</sup> The day after she became Governor, she appointed Adam Gregg, the then Iowa State Public Defender, as acting Lieutenant Governor.<sup>264</sup> Governor Reynolds and Lieutenant Governor Gregg won the gubernatorial election in 2018<sup>265</sup> and won reelection in 2022.<sup>266</sup> This administration still has not commuted a sentence, despite multiple favorable recommendations, including applicants who had similar profiles to Williams'.<sup>267</sup> These applicants include Clyde Johnson, but they also include Judy White and Denise Rhode, both of whom many considered deserved commutation, and in Rhode's case, the Board issued a favorable recommendation.

### 1. Judy White

Judy White was convicted in 1979 for conspiracy to commit the murder of Ady Jensen.<sup>268</sup> Ms. White, Jeanne Jensen, and Robert Kern conspired to hire Andrew Oglevie to take Ady Jensen's parents hostage, with the goal of

---

<sup>263</sup> Erin Murphy, *Kim Reynolds Wins Close Governor Race*, CEDAR RAPIDS GAZETTE (Nov. 7, 2018, 1:06 AM), <https://www.thegazette.com/government-politics/kim-reynolds-wins-close-governor-race> [https://perma.cc/AUH9-7QEJ].

<sup>264</sup> Rod Boshart, *With Caveat, Reynolds Picks Lieutenant*, CEDAR RAPIDS GAZETTE (May 25, 2017, 6:56 PM), <https://www.thegazette.com/news/with-caveat-reynolds-picks-lieutenant> [https://perma.cc/QA4W-WYZV].

<sup>265</sup> Murphy, *supra* note 264.

<sup>266</sup> Erin Murphy, *Kim Reynolds Wins Re-election as Iowa Governor*, CEDAR RAPIDS GAZETTE (Nov. 8, 2022, 10:47 PM), <https://www.thegazette.com/campaigns-elections/kim-reynolds-wins-re-election-as-iowa-governor> [https://perma.cc/8EWQ-N878].

<sup>267</sup> Lee Rood, *Iowa Model Prisoner, 74, Again Loses Bid for Commutation of Life Sentence She's Served for 41 Years*, DES MOINES REG. (Aug. 26, 2020, 5:38 PM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2020/08/26/iowa-woman-judy-white-commutation-life-in-prison-murder-for-hire-kim-reynolds-denies-ady-jensen/5633705002> [https://perma.cc/AUL8-8P32] (reporting that Governor Reynolds denied Judy White's commutation request despite letters of support from three wardens, the Iowa Attorney General, the county of commitment); Gazette Des Moines Bureau, *Governor Reynolds Rejects All Appeals from "Lifers" for Commutations*, CEDAR RAPIDS GAZETTE (Dec. 14, 2021, 6:08 PM), <https://www.thegazette.com/government-politics/governor-reynolds-rejects-all-appeals-from-lifers-for-commutations> [https://perma.cc/U4GU-L2Z9] (reporting that Governor Reynolds denied Denise Rhode's commutation request despite a favorable recommendation from the Board relying on her rehabilitative efforts and acceptance of responsibility); Payne, *supra* note 1 (reporting that Governor Reynolds denied Clyde Johnson's commutation request despite stopping a prison riot and a favorable recommendation from the Board).

<sup>268</sup> Erin Jordan, *Gov. Reynolds Denies Commutation for 74-Year-Old Judy White*, CEDAR RAPIDS GAZETTE (Aug. 25, 2020, 8:52 PM), <https://www.thegazette.com/government-politics/gov-reynolds-denies-commutation-for-74-year-old-judy-white/?state=refreshTokenFallback&auth0Authentication=true> [https://perma.cc/XBC9-5ALB].

collecting Ady's \$50,000 life insurance policy.<sup>269</sup> Kern, an insurance agent, helped Jeanne Jensen take the life insurance policy out for her husband.<sup>270</sup> Oglevie took Ady's parents hostage, and when he came home, Oglevie shot and killed Ady.<sup>271</sup> The plan was then for Jeanne Jensen to collect the life insurance policy.<sup>272</sup>

Robert Kern was married to Ms. White, but Kern was manipulative, sexually abusive, and had previously tried to kill Ms. White.<sup>273</sup> Ms. White and Kern "agreed" to not testify against one another in their trial.<sup>274</sup> Ms. White was considered to be the least culpable of three. Ms. White's level of culpability is best described in her statement from her 1999 commutation hearing. She said,

I was sitting at the kitchen table at my friend's house, Jeanne Jensen. She said, "Oh, I just wish Ady [Jeanne's husband] was dead." I thought she was joking and I said, "Well, Bob knows this guy Andy who would probably kill someone for \$50. He's crazy." She was serious and she asked me if I would ask Bob. I said, no, that she could talk to Bob herself.<sup>275</sup>

After this conversation, Jensen ended up creating the plan between herself, Kern, and Oglevie to murder Jensen's husband.<sup>276</sup> Without Ms. White, it seems that Jensen would never have been able to be connected to Oglevie.<sup>277</sup> For this participation, Ms. White was convicted of conspiracy to commit murder and was sentenced to life without parole.<sup>278</sup>

In 1982, three years after her trial, Ms. White agreed to a deal with the

---

<sup>269</sup> Erin Jordan, *After Serving 41 Years, Iowa Woman Convicted of Murder Asks for Commutation*, CEDAR RAPIDS GAZETTE (May 6, 2022, 1:38 PM), <https://www.thegazette.com/news/after-serving-41-years-iowa-woman-convicted-of-murder-asks-for-commutation> [https://perma.cc/V3BF-D2HJ].

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> Rood, *supra* note 268.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> Jordan, *supra* note 269.

county attorney in Oglevie's trial.<sup>279</sup> The deal was that the county attorney would commute her life imprisonment term, if she testified against Oglevie.<sup>280</sup> The county attorney did not have the means to honor the plea deal, since only the Iowa Governor can commute sentences, but White still agreed to the deal.<sup>281</sup> It is not clear whether the county attorney actually told Ms. White that he could technically not guarantee a commutation in exchange for her testimony. Oglevie was acquitted of the murder charge.<sup>282</sup> Kern was convicted of conspiracy to commit murder, sentenced to life in prison without parole, and died in 2016.<sup>283</sup> Jeanne Jensen pled guilty to conspiracy to commit a forcible felony, she was sentenced to ten years in prison, but she only served four.<sup>284</sup>

In 2020, Ms. White applied for commutation again.<sup>285</sup> She argued that she was deserving of a commutation because she was the least culpable of all the individuals involved, she had served the most time of the three, and she was promised a commutation as part of an agreement for her testimony with the county attorney in Oglevie's case.<sup>286</sup> Ms. White also relied on the fact that she had been a "model inmate" for her entire term of incarceration.<sup>287</sup> She received an unprecedented amount of support, which included more than 60 letters of support. Of the 60 supporters, this included three past or present wardens at her prison and the Iowa Attorney General.<sup>288</sup> The victim's sister did oppose Ms. White's commutation, saying that "[s]he knew was [sic] she was doing, she got life in prison and that's it. She got what she deserved."<sup>289</sup>

The Board voted 4-1 in favor of granting Ms. White's commutation, but because of the unanimity requirement, that meant the Board did not give Ms. White a favorable recommendation.<sup>290</sup> In August 2020, Governor Reynolds denied her commutation, and although she recognized her "laudable" rehabilitation over, at the time, 41 years in prison, "[g]iven the serious and

---

<sup>279</sup> Jordan, *supra* note 270.

<sup>280</sup> *Id.*

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

<sup>282</sup> *Id.*

<sup>283</sup> Jordan, *supra* note 269.

<sup>284</sup> *Id.*; *Woman Who Murdered WB Man Won't Be Released*, WEST BRANCH TIMES (Dec. 7, 2005), <https://www.westbranchtimes.com/article.php?viewID=568> [https://perma.cc/AA9U-9HF2].

<sup>285</sup> Rood, *supra* note 268.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> This was actually the only time in Attorney General Tom Miller's 39-year tenure as Iowa's Attorney General that he wrote a letter of support for a commutation applicant. *Id.*

<sup>289</sup> Jordan, *supra* note 269.

<sup>290</sup> Rood, *supra* note 268.

violent nature of Mr. Jensen's death and [Ms. White's] participation and involvement in that crime, the extraordinary remedy of a commutation is not appropriate at this time."<sup>291</sup> Ms. White will be eligible to apply for commutation again sometime in 2030, when she will be 84 years old.<sup>292</sup>

## 2. Denise Rhode

Denise Rhode was convicted in 1989 of the first degree murder of her nephew.<sup>293</sup> Ms. Rhode was babysitting her nephew when she could not get him to stop crying, and out of frustration she lifted him up and swung him through her legs, and he hit his head on the bed frame.<sup>294</sup> The child died a few days later.<sup>295</sup> Since her conviction, Ms. Rhode earned a cleaning apprenticeship and Associate of Arts degree.<sup>296</sup> At her commutation hearing, Ms. Rhode noted that she was a changed person, and now better understands how to handle her emotions because she has learned her triggers.<sup>297</sup> In 2021, the Board voted 5-0 to support a favorable recommendation, basing their decision on how Ms. Rhode was remorseful, how she complied with prison rules during her term of incarceration, how she had obtained both employable skills and further education while in prison, and the fact that she had a release plan in place that would make her a productive member of society.<sup>298</sup>

In December 2021, Governor Reynolds denied Ms. Rhode's commutation application, despite the favorable recommendation.<sup>299</sup> In the denial letter that Governor Reynolds sent to Ms. Rhode, she explained her decision by saying "it remains unclear whether you have truly accepted responsibility for your actions given the discrepancy in how you described what happened on your application and the version of events you eventually told the board during your interview."<sup>300</sup> This reasoning was despite the fact that Ms. Rhode explicitly stated at her commutation hearing that she had

---

<sup>291</sup> Jordan, *supra* note 269.

<sup>292</sup> This calculation assumes that Ms. White applied in the year 2020, the same year that she had a commutation interview.

<sup>293</sup> Boshart, *supra* note 231.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> Gazette Des Moines Bureau, *supra* note 267.

<sup>300</sup> *Id.*

“accept[ed] the truth.”<sup>301</sup> Ms. Rhode will be eligible to apply for a commutation again around 2031 when she will be 68 years old.<sup>302</sup>

### G. *Commutation Reform Efforts and Second Chance Rhetoric in Iowa*

Governor Reynolds has advocated for criminal justice reform in the past, often citing to her unique and personal history with second chances.<sup>303</sup> In 2000, then-County Treasurer Reynolds pled guilty to her second driving under the influence offense in under a year and entered an alcohol abuse treatment program.<sup>304</sup> She has expressed publicly that she adamantly believes in second chances, stating, “I am a firm believer that you can make a mistake but that shouldn’t define you . . . . Everybody deserves a second chance.”<sup>305</sup> Governor Reynolds has advocated in the past for changes in “felons’ rights” laws. Notably, she attempted numerous times to convince the Iowa Legislature to restore felons’ voting rights, which would have required a constitutional amendment.<sup>306</sup> Her attempts failed mainly due to the opposition from her fellow Republicans in the Iowa Legislature.<sup>307</sup> In 2020, she signed an executive order restoring felon voting rights, making Iowa the last state in the United States to do so.<sup>308</sup> Despite much of this rhetoric, Governor Reynolds has never granted a commutation of a life sentence. In fact, even when the Board submitted five favorable recommendations to Governor Reynolds in FY2022, she denied all five applications.<sup>309</sup>

The issues with Iowa’s executive clemency system have gone unresolved. As discussed earlier, Iowa granted a high number of commutations up until the first Branstad administration.<sup>310</sup> The first Branstad administration began in the heat of the “tough on crime” movement that was ubiquitous

---

<sup>301</sup> *Id.*

<sup>302</sup> This calculation is assuming that Ms. Rhode applied in 2021, the same year that she had her commutation hearing.

<sup>303</sup> David Pitt, *Iowa Governor Got 2nd Chance; She Thinks Felons Should, Too*, AP NEWS (Apr. 1, 2020, 1:01 PM), <https://apnews.com/article/9a546f80c52fbec551d8dc70aca7d270> [<https://perma.cc/DC4B-8VDQ>].

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> Stephen Gruber-Miller & Ian Richardson, *Gov. Kim Reynolds Signs Executive Order Restoring Felon Voting Rights, Removing Iowa’s Last-in-the-Nation Status*, DES MOINES REG. (Aug. 5, 2020, 7:29 PM), <https://www.desmoinesregister.com/story/news/politics/2020/08/05/iowa-governor-kim-reynolds-signs-felon-voting-rights-executive-order-before-november-election/5573994002> [<https://perma.cc/G9BV-C6N9>].

<sup>309</sup> Gazette Des Moines Bureau, *supra* note 267.

<sup>310</sup> Jordan, *supra* note 19.

throughout the 1980s and 1990s.<sup>311</sup> Since the 2000s, politicians and the public have become more lenient and open to criminal justice reform.<sup>312</sup> After the 2020 executive order restoring felon voting rights, many criminal justice reform advocates in Iowa turned their attention to the executive clemency system. Over the 2021 legislative session, advocates were finally able to convince the Iowa Legislature to seriously consider reform for the first time. After the 2021 reform effort did not make it out of its subcommittee,<sup>313</sup> the Legislature considered a similar bill during the 2022 legislative session. The subcommittee did recommend the 2022 bill for passage, however the bill did not make it to the House floor for a vote.<sup>314</sup>

### 1. 2021 Legislative Session: H.F. 377

During the 2021 legislative session, Rep. Terry Baxter—a Republican from Garner, Iowa—introduced H.F. 377, which was designed to reform the commutation system for class A felons.<sup>315</sup> It ultimately would not pass, but it represents that the Iowa Legislature may be willing to reform the commutation system. The bill proposed to change the commutation system by creating two additional systems distinguished by the qualification requirements for the applicants.<sup>316</sup> Under the first system, hereinafter the 25-year review system, there would be a separate process for individuals to apply for commutation after serving 25 years and who are currently housed in a minimum-security level facility.<sup>317</sup> The second process, hereinafter the terminally ill system, would be an expedited review process for individuals

---

<sup>311</sup> See Everett & Periman, *supra* note 28, at 71 (“The war on crime during the past thirty years has produced numerous changes in the criminal justice system. One of the most obvious and detectable changes is the increasingly punitive focus of the system and its increasingly disproportionate impact on minorities.”).

<sup>312</sup> Goldstein, *supra* note 161, at 477–78 (explaining how generations born in the 1990s and 2000s lived through and were likely subject to the more aggressive policing policies which stemmed from the War on Drugs, making them less punitive generally); BARKOW, *supra* note 21, at 82 (explaining that modern science about criminalization of different drugs, and the harsh sentences associated with possession of those drugs, have caused people to change their view about the drug laws of the 1990s).

<sup>313</sup> Bill History for House File 377, 89th Gen. Assemb., <https://www.legis.iowa.gov/legislation/billTracking/billHistory?billName=HF%20377&ga=89> [<https://perma.cc/9E2M-XJUE>].

<sup>314</sup> *Id.*

<sup>315</sup> Kate Payne, *Bill Would Create Pathway to Release for Iowans Sentenced to Life Without Parole*, IOWA PUB. RADIO (Feb. 15, 2021, 8:22 PM), <https://www.iowapublicradio.org/ipr-news/2021-02-15/bill-would-create-pathway-to-release-for-iowans-sentenced-to-life-without-parole> [<https://perma.cc/2JCH-9C4V>].

<sup>316</sup> H.F. 377, 89th Gen. Assemb., Reg. Sess. § 1 (Iowa 2021).

<sup>317</sup> *Id.*

that have a terminal illness.<sup>318</sup> Thus, had this bill passed, there would have been three systems in Iowa: the regular commutation process, the 25-year review system, and the terminally ill system.

For the regular commutation process and the 25 year review system, the bill established that once the governor receives an application, they must send it to the board within 30 days—rather than no time requirement at all—for investigation and recommendation.<sup>319</sup> The Board would then have 120 days to conduct an interview, make a report, and submit their recommendation.<sup>320</sup> These deadlines are expedited for the terminally ill process since the applicants have a dire medical need for their release.<sup>321</sup> Further, for all systems, any decision by the Board would require a majority vote, rather than a unanimous vote.<sup>322</sup>

The 25-year review system was to be controlled by the newly created “life imprisonment review committee”<sup>323</sup> while the expedited review process was to be fully controlled by the Board.<sup>324</sup> The new committee had five members, one of whom must be a member of a racial minority.<sup>325</sup> Life imprisonment review committee decisions would also have been by a majority vote.<sup>326</sup>

Under H.F. 377, class A felons who have served 25 years in prison and are housed at a minimum-security level facility can petition the governor for commutation once every three years.<sup>327</sup> Once the governor receives an application, they have 30 days to send it to the life imprisonment review committee.<sup>328</sup> At any time the governor can either commute the sentence or send the application to the sentencing district court for resentencing.<sup>329</sup> If and when the governor sends the application to the committee, it must then conduct an investigation, publicly interview the applicant within 120 days of receipt of the application, and then, within 30 days of the interview, issue their recommendation.<sup>330</sup>

---

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *See id.* § 4(2).

<sup>322</sup> H.F. 377, 89th Gen. Assemb., Reg. Sess. § 2 (Iowa 2021).

<sup>323</sup> *Id.* § 3(2).

<sup>324</sup> *See id.* § 4(1).

<sup>325</sup> *Id.* § 3(2)(a).

<sup>326</sup> *Id.* § 3(2)(c).

<sup>327</sup> *Id.* § 3(3).

<sup>328</sup> H.F. 377, 89th Gen. Assemb., Reg. Sess. § 3(3) (Iowa 2021).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* § 3(4); *id.* § 3(5)(c).



That recommendation must be based on all, but is not limited to, the following factors: (1) whether the applicant has performed acts that indicate rehabilitation, (2) whether the case file shows that the applicant respects authority and is a positive influence on others, (3) the applicant's disciplinary record, (4) family or community support, and whether the applicant is no longer in contact with people outside prison who are involved in criminal activity, (5) whether the applicant has a release plan in place that would indicate that they can be a "contributing and positive member of society," (6) the applicant's education and employment history before and during incarceration, (7) the nature of the crime, including whether there were multiple victims, whether torture was involved, and whether there was another felony committed, (8) whether the conviction was for felony murder, (9) whether there was a plea agreement to a lesser sentence but the judge imposed a sentence of life without parole, (10) whether the applicant was just short of a defense like duress or compulsion (11) the applicant's capacity to appreciate criminality, (12) whether the applicant was under the age of 25 at the time of the crime, (13) the applicant's family and home environment prior to the commission of the crime, (14) whether the applicant shows signs of mental illness or feelings of remorse, (15) the likelihood of the applicant committing further offenses considering age, evidence of rehabilitation, and health status, (16) the impact of the crime on each victim, (17) the impact of the crime on the community, (18) whether the applicant would be a threat to society upon release, and (19) recommendations from the Director of the Department of Corrections, chairperson of the Board, or the prison's warden.<sup>331</sup> The committee cannot make their decision based on the presence or absence of just one of the factors.<sup>332</sup>

The committee sends the recommendation to the Board and the governor. The Board then can give its own recommendation within 30 days of receiving the committee's report and recommendation, again decided by a majority vote.<sup>333</sup> The governor then has the option to grant the commutation, deny it, or to take no action.<sup>334</sup> If the committee gives a favorable recommendation and the governor fails to take action within three months from the time of the committee's recommendation, then the committee must send its recommendation and report, along with any relevant Board materials, to the original sentencing district court for reconsideration of the applicant's

---

<sup>331</sup> *Id.* § 3(6).

<sup>332</sup> *Id.* § 3(5)(c).

<sup>333</sup> *Id.*

<sup>334</sup> H.F. 377, 89th Gen. Assemb., Reg. Sess. § 3(7) (Iowa 2021).

sentence.<sup>335</sup> The governor can also choose, either before or after receiving the committee's materials, to send the relevant material to the original sentencing district court for reconsideration of the sentence.<sup>336</sup>

The other system which the bill proposed was the terminally ill system.<sup>337</sup> Individuals would be eligible for this process if they had a terminal illness that would produce death within six months or were in a state that requires 24-hour medical care, such as being in a coma, and would not pose a threat to public safety if they were released.<sup>338</sup> Once the governor received the expedited review application, the Board still must investigate and hold a hearing, but that process would have taken less than 35 days—rather than the 25-year review process which potentially could have taken over a year.<sup>339</sup> The governor then decides to grant the commutation or deny it, but there is no required timeline for their decision.<sup>340</sup>

## 2. 2022 Legislative Session: H.F. 2191

During the 2022 legislative session, there was another bipartisan effort in the Iowa Legislature to reform the commutation process. Again sponsored by Rep. Terry Baxter,<sup>341</sup> but this time it was introduced and referred to the Public Safety Committee, and its subcommittee recommended that the law be passed.<sup>342</sup> It however did not make it out of the Public Safety Committee.<sup>343</sup> H.F. 2191 established a separate commutation application process which was similar to the one in H.F. 377, but this time required that the applicant be housed in a minimum-security level facility and that they had served at least 35 years of their sentence unlike the 25 year requirement in H.F. 377.<sup>344</sup>

Under H.F. 2191, individuals must have waited five years between applications instead of three under H.F. 377 or ten years under the current

---

<sup>335</sup> *Id.* § 3(8).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* § 4(1).

<sup>338</sup> *Id.* § 4(1)(a)–(b).

<sup>339</sup> H.F. 377, 89th Gen. Assemb., Reg. Sess. § 4(2) (Iowa 2021).

<sup>340</sup> *Id.*

<sup>341</sup> Katarina Sostaric, *Family Members of Iowans Serving Life Sentences Ask Lawmakers to Change the Commutation Process*, IOWA PUB. RADIO (Feb. 14, 2022, 6:12 PM), <https://www.iowapublicradio.org/state-government-news/2022-02-14/family-members-of-iowans-serving-life-sentences-ask-lawmakers-to-change-the-commutation-process> [https://perma.cc/3JQK-65RF].

<sup>342</sup> Bill History for House File 2191, 89th Gen. Assemb., <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf2191> [https://perma.cc/S9PV-G5E6].

<sup>343</sup> *Id.*

<sup>344</sup> H.F. 2191, 89th Gen. Assemb., Reg. Sess. § 1(1)(b) (Iowa 2022).

regime.<sup>345</sup> Additionally, after an application had been submitted and forwarded to the Board, the Board then had a 12 month deadline to forward its findings and recommendations to the governor.<sup>346</sup> Just like H.F. 377, the Board's decision to recommend commutation would be by a majority vote.<sup>347</sup> Unlike H.F. 377, H.F. 2191 did not provide for a terminally ill process and also did not establish a life sentence review commission tasked with specifically handling commutations.

Just like H.F. 377, H.F. 2191 had a nonexhaustive set of factors that the Board would have been required to consider in making their recommendation.<sup>348</sup> Most of these factors were the same or similar to H.F. 377, however there were several notable changes. For example, H.F. 2191 had the same or similar factors about rehabilitation,<sup>349</sup> the applicant's disciplinary record,<sup>350</sup> whether the applicant had a sufficient release plan,<sup>351</sup> whether the applicant was convicted pursuant to felony murder,<sup>352</sup> whether there was a plea agreement in place and then the sentence did not follow the agreement,<sup>353</sup> and the impact on the victim.<sup>354</sup>

There were also several factors from H.F. 377 that the Iowa Legislature dropped in H.F. 2191. In H.F. 2191 and unlike H.F. 377, there were no factors that explicitly covered family or community support along with ongoing ties to criminal activity,<sup>355</sup> whether the applicant fell short of a

---

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* § 1(2).

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* § 1(3).

<sup>349</sup> *Id.* §1(3)(a) (“Whether the applicant has engaged in activities that indicate rehabilitation including but not limited to any of the following . . .”).

<sup>350</sup> H.F. 2191, 89th Gen. Assemb., Reg. Sess. §1(3)(f) (Iowa 2022) (“Reports of the department of corrections including disciplinary records . . .”).

<sup>351</sup> *Id.* §1(3)(i) (“Whether a meaningful plan for housing and support is in place including letters of recommendation indicating that the applicant can be a contributing and positive member of society.”).

<sup>352</sup> *Id.* §1(3)(g) (“Whether the applicant was convicted of murder under felony murder law or for aiding and abetting a felony murder but the applicant did not intend for a murder to occur during the commission of the offense.”).

<sup>353</sup> *Id.* §1(3)(h) (“Whether the applicant’s sentence of life without parole was entered following a plea signed and accepted by all parties which recommended a different sentence including a sentence that is excessive compared to other sentences for the same crime.”).

<sup>354</sup> *Id.* §1(3)(c) (“The impact of the applicant’s crime on each victim through the use of victim impact statements . . .”).

<sup>355</sup> H.F. 377, 89th Gen. Assemb., Reg. Sess. § 3(6)(d) (Iowa 2021).

defense,<sup>356</sup> whether the applicant is appreciative of criminality,<sup>357</sup> the educational and employment history both before and during incarceration,<sup>358</sup> the likelihood of recidivism upon the applicant's release,<sup>359</sup> and whether the applicant would be a threat to the public's safety upon their release.<sup>360</sup>

H.F. 2191 also contained several changes to some of the factors that were in H.F. 377. For example, in H.F. 377, one of the factors was about whether the applicant was respectful to authority and a positive influence to others while incarcerated, but in H.F. 2191, that factor only covered whether the applicant was a positive influence.<sup>361</sup> Similarly, H.F. 377 had a factor which covered whether the applicant suffered from a mental illness or whether they were remorseful for their crime, but in H.F. 2191, that factor was only concerned about whether the applicant was remorseful and did not take into account mental health.<sup>362</sup> Finally, H.F. 377 had a factor about the nature of the crime of conviction and then explicitly listed some "aggravating" factors such as whether torture was involved or there was another felony committed, but in H.F. 2191 these "aggravating" factors were not explicitly listed.<sup>363</sup> Instead, H.F. 2191 had a factor which covered the "details of all criminal convictions" which presumably would cover any aggravating factor.<sup>364</sup>

H.F. 2191 also dropped several of the more trauma or developmental-related factors which H.F. 377 contained. For example, H.F. 377 required that the Board consider whether the applicant committed the crime while they were under the age of 25<sup>365</sup> but H.F. 2191 had no such factor. Similarly,

---

<sup>356</sup> *Id.* § 3(6)(j).

<sup>357</sup> *Id.* § 3(6)(k).

<sup>358</sup> *Id.* § 3(6)(f).

<sup>359</sup> *Id.* § 3(6)(p).

<sup>360</sup> *Id.* § 3(6)(s).

<sup>361</sup> Compare H.F. 377, 89th Gen. Assemb., Reg. Sess. § 3(6)(b) (Iowa 2021), with H.F. 2191, 89th Gen. Assemb., Reg. Sess. § 1(3)(f) (Iowa 2022).

<sup>362</sup> Compare H.F. 377, 89th Gen. Assemb., Reg. Sess. § 3(6)(n) (Iowa 2021), with H.F. 2191, 89th Gen. Assemb., Reg. Sess. § 1(3)(e) (Iowa 2022).

<sup>363</sup> Compare H.F. 377, 89th Gen. Assemb., Reg. Sess. § 3(6)(g) (Iowa 2021), with H.F. 2191, 89th Gen. Assemb., Reg. Sess. § 1(3)(d) (Iowa 2022).

<sup>364</sup> H.F. 2191, 89th Gen. Assemb., Reg. Sess. § 1(3)(d) (Iowa 2022).

<sup>365</sup> H.F. 377, 89th Gen. Assemb., Reg. Sess. § 3(6)(l) (Iowa 2021). Interestingly, in 2022 the Iowa Supreme Court faced two cases which challenged the state's juvenile age. *Sandoval v. State*, 975 N.W.2d 434, 440 (Iowa 2022); *Dorsey v. State*, 975 N.W.2d 358, 358 (Iowa 2022). Two Iowa convicted felons argued that when they were convicted and sentenced to life without parole at the ages of 18 and five days, and 19 years old respectively, that violated the Cruel and Unusual Punishment clause of the Eighth Amendment. *Sandoval*, 975 N.W.2d at 440 ("Sandoval was nineteen at the time he committed two murders in the first degree."); *Dorsey*, 975 N.W.2d at 355 ("Petitioner James Dorsey shot and killed a woman when he was eighteen years and five days old."). Dorsey explicitly argued that the age of adulthood should be 25,

H.F. 377 had a factor which required that the Board consider the applicant's family and home environment prior to the commission of the crime, but again H.F. 2191 had no such factor.<sup>366</sup> As already mentioned, H.F. 377 had factors that covered the applicant's mental state at both the time of the crime and currently, such as whether they suffered from a mental illness but that was short of an insanity defense,<sup>367</sup> or that they currently suffer from a mental condition which may reduce their risk of future violence upon their release.<sup>368</sup> However, H.F. 2191 did not have a factor which explicitly covered the mental health or condition of the applicant.

H.F. 2191 did contain new factors. One of those factors was about the "length of time the applicant has exhibited good behavior at the facility."<sup>369</sup> Additionally, one of the other factors required the Board to consider the details of *all* the applicant's criminal convictions.<sup>370</sup> Most notably, H.F. 2191 contained a residual factor which reflected the overall purpose of clemency. The factor required the Board to consider "[t]he impact of the crime on the community including evidence that circumstances have changed since the applicant's original sentencing indicating the applicant's continued incarceration is no longer in the interest of justice due to sufficient punishment and rehabilitation."<sup>371</sup>

### III. ANALYSIS

The Iowa Legislature, governor, and Board should recognize that an ineffective clemency system only deters incarcerated individuals from applying because they understand it is hopeless. Further, despite popular belief, an effective clemency system will not encourage people to commit crime or allow criminals to avoid legitimate sentences through a grant of executive clemency.<sup>372</sup> Grants of executive clemency can—and probably

---

because modern science shows that is when the brain has finished developing. *Dorsey*, 975 N.W.2d at 362. In both cases, the Iowa Supreme Court declined to extend the juvenile age of 18, mainly relying on the reasoning that society has deemed the age of adulthood to be 18 years of age, and often the law must draw a line out of necessity. *Id.* at 364; *Sandoval*, 975 N.W.2d at 440.

<sup>366</sup> H.F. 377, 89th Gen. Assemb., Reg. Sess. § 3(6)(m) (Iowa 2021).

<sup>367</sup> *Id.* § 3(6)(n).

<sup>368</sup> *Id.* § 3(6)(p).

<sup>369</sup> H.F. 2191, 89th Gen. Assemb., Reg. Sess. § 1(3)(b) (Iowa 2022).

<sup>370</sup> *Id.* § 1(3)(d).

<sup>371</sup> *Id.* § 1(3)(j).

<sup>372</sup> H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. L. & ECON. 453, 473 (2003). This study found that the

should—remain rare, but should not be denied to applicants where their release is in the best interest of the public. Iowa has unjustly denied clemency to many such applicants. Clyde Johnson is only one of these applicants, and unfortunately until the system is reformed, there will be many more.

Part A of the Analysis will argue that the Board's current member qualifications, the factors upon which they base their recommendation decisions, and the way that the Board uses these factors are insufficient. Considering sociological research, a historical survey conducted by the ACLU, and recent commutation decisions made by the Board and governor, it is clear that the system must change.

Part B will propose a two-pronged solution. First, the Iowa Legislature should require that each Board member have expertise in criminal justice or a related field so that the Board is best able to make decisions that “improve public safety and human lives at a lower cost” and are not based on their own notions of morality.<sup>373</sup> Second, the Iowa Legislature should adopt the factors outlined in H.F. 377 because these factors would narrow the Board's reasoning to the proper inquiry, which is whether the applicant's rehabilitative efforts and changing perceptions of their punishment outweigh society's interest in keeping them incarcerated. In addition, the legislature should adopt the language in the H.F. 2191's residual factor as an explicit legislative directive to the Board when it makes its commutation recommendation.

*A. The Problem: The Current Board's Qualifications, Factors, and The Balancing Application*

The Board members currently have few qualifications, with the main one being that each member be in “good character and [of a] judicious background.”<sup>374</sup> Currently, only some of the Board members must have some degree of familiarity with the criminal justice system.<sup>375</sup> As the ACLU has pointed out, this has become an alarming trend among the states.<sup>376</sup> Research has shown that when a parole officer has a heavy law enforcement background, higher rates of recidivism are observed among their parolees than in parolees whose officers have a social work orientation.<sup>377</sup> It is likely that a similar effect occurs in the clemency context because individuals who are only familiar with law enforcement rather than the necessary components

---

commutation rate has no effect on the rate of noncapital crimes (robbery, burglary, rape, and motor vehicle theft), but did find that the commutation rate is positively correlated with the homicide rate. *Id.* at 474.

<sup>373</sup> BARKOW, *supra* note 21, at 167.

<sup>374</sup> IOWA CODE § 904A.2 (1986).

<sup>375</sup> *See id.*

<sup>376</sup> MEHTA, *supra* note 171.

<sup>377</sup> BARKOW, *supra* note 21.

for rehabilitation “may not understand the challenges in accessing programming, to personal safety, and to finding reentry and community services.”<sup>378</sup>

In Iowa, the lack of expertise requirements for the Board members leads them to be an unpredictable decision-making body. They over or undervalue certain aspects of the application because they do not have the background to understand the challenges the applicant may face while in prison or what led them there. For example, in 2021, Mr. Johnson was denied commutation because he did not remember all of the facts of his original case, which occurred over 50 years earlier, despite his helping multiple staffers at Iowa State Penitentiary to safety during a 1981 prison riot.<sup>379</sup> In 2022, the Board did not recommend Ms. White’s commutation after relying heavily on a victim impact statement and ignoring the Iowa Attorney General’s letter of recommendation, evidence that at the time of her trial the prosecution did not honor the plea deal they made with Ms. White, or that the county of conviction had been recommending the commutation since 2006.<sup>380</sup>

In addition to the issue with the Board’s structure, the current factors that the Board considers causes the Board to overvalue or undervalue certain aspects of the application because the factors are too vague. For example, the fact that Mr. Johnson was denied a commutation because his recollection of the facts was slightly different than what it had been before<sup>381</sup> has become fairly common reasoning for the governor and the Board, and likely is grounded either in the “nature and circumstances of the crime” or the residual factor.<sup>382</sup> When decisions are made on this reasoning alone, it essentially finds that the fact that the applicant cannot adequately remember the facts of the crime of conviction outweighs all the rehabilitative efforts that they have made. In fact, advocates for commutation applicants have noted that many incarcerated individuals believe in rehabilitation, but do not think that anything they do to rehabilitate themselves will prove valuable in a clemency application.<sup>383</sup> If the factors were clearer, applicants and advocates may be able to better prepare for interviews because they would have a more certain expectation about what the Board considers important.

---

<sup>378</sup> MEHTA, *supra* note 171, at 40.

<sup>379</sup> Payne, *supra* note 1.

<sup>380</sup> Jordan, *supra* note 270; Rood, *supra* note 268.

<sup>381</sup> Payne, *supra* note 1.

<sup>382</sup> *Id.*; IOWA ADMIN. CODE r. 205-14.6(3)(b) (2019) (establishing the factors that the Board currently considers).

<sup>383</sup> Payne, *supra* note 1 (“They’re very interested in bettering themselves and on the other hand, they feel like no matter what they do, it’s never going to be enough.”).

Regardless of what the factors are, the way that the Board applies those factors does not effectuate the purpose of clemency. The purpose of clemency is to recognize that people and circumstances change over time, at times making continued enforcement of a criminal punishment too severe.<sup>384</sup> The Board's application of the factors does not account for this change over time. The applicant's interview often focuses on their recollection of the facts of the crime, such as the Board asking the applicant to tell them a short description of the crime, their amount of culpability, or what happened directly after the crime was committed.<sup>385</sup>

As with the Board, Governor Reynolds' application of those factors is often skewed toward the facts of the crime rather than the extraordinary rehabilitative efforts that the applicant has made. For example, Governor Reynolds denied Ms. Rhode's commutation because she believed that Rhode had not accepted responsibility for the crime given that Rhode described the crime differently in her application than she had to the Board.<sup>386</sup> This was after the Board recommended Rhode for commutation because of her rehabilitation efforts.<sup>387</sup>

*B. The Solution: Professional Background, H.F. 377 Factors, H.F. 2191 Purpose*

The most efficient solution for Iowa's clemency structure is to change the Board members' qualifications and clarify the factors that the Board uses. The Board members recommend to the governor whether an applicant deserves a commutation. From the FY2009 through FY2023, 24 applicants received favorable recommendations from the Board out of 309 total applications.<sup>388</sup> Only one of those applicants actually received a commutation.<sup>389</sup> It seems that the governor will follow the recommendation

---

<sup>384</sup> See, e.g., BARKOW, *supra* note 21, at 73 (“At the individual level, decisions about someone’s criminal sentence are made after conviction and are typically never revisited, even when the person is sentenced to decades in prison or when he or she is a youthful offender whose brain is not fully developed.”); *id.* at 73–74 (“[T]here is a tendency to panic . . . to a perceived crime wave or when a new illegal drug hits the market. But as more facts develop over time, it often becomes clear that a threat was exaggerated and thus the punishment attached to that threat also went too far.”); *id.* at 81 (“One of the participants in the debate over the ratification of the Constitution, James Iredell, similarly noted that clemency was vital for checking overbroad criminal laws because ‘it is impossible for any general law to foresee and provide for all possible cases that may arise.’” (quoting James Iredell, Address at the North Carolina Ratifying Convention (July 28, 1788))).

<sup>385</sup> Jon August Commutation Hearing, Iowa Dep’t of Corr. Bd. of Parole, in Des Moines, Iowa (Jan. 5, 2023) (on file with author).

<sup>386</sup> Gazette Des Moines Bureau, *supra* note 267.

<sup>387</sup> *Id.*

<sup>388</sup> See sources cited *supra* notes 15, 250.

<sup>389</sup> Branstad, *supra* note 155.



of the Board when it provides them with political cover.<sup>390</sup> Although the most immediate answer would be for the state of Iowa to elect a governor who will take clemency decisions more seriously,<sup>391</sup> the more attainable approach is to increase the amount of favorable recommendations going to the governor so that if they decide to deny applications regardless of the Board's recommendation, their political cover will vanish.

The factors the Board uses in its analysis and its membership's qualifications are the two ways to increase the favorable recommendations going to the governor's desk. There must be a balance between these two solutions. If the factors that guide the Board's recommendation are vague, unclear, or skewed to only consider the facts of the crime of conviction, then the Board members' qualifications will not matter. For this reason, the most pressing matter for Iowa executive clemency reform is to make the factors reflective of the idea that people and circumstances change in relation to society's interest in continuing to punish a person through a criminal sentence.<sup>392</sup> These solutions would require legislation, but there is hope given that the Iowa Legislature has considered such reform as recently as the 2022 legislative session.<sup>393</sup>

#### 1. Introduce Professional Requirements for Board Members

Reintroducing professional requirements to parole board membership may enable members to better evaluate whether an applicant was sufficiently rehabilitated.<sup>394</sup> Although Board members have never been required to be "experts" in a related field, a professional background would be valuable. If the Board members had experience with criminal justice, law, criminology, social work, a related field, or best yet, a combination thereof, they would better understand obstacles in the prison system as well as factors

---

<sup>390</sup> In 2021, the Board did recommend several applicants for commutation and Governor Reynolds denied those applications. *See* Gazette Des Moines Bureau, *supra* note 267. These are outliers as most governors have followed the recommendation, including Governor Branstad's commutation of Raspberry Williams in 2013. *Id.* (reporting on how Williams was the last person in Iowa to receive a commutation); Branstad, *supra* note 155 (explaining how his decision is based on the fact that the Board favorably recommended Mr. Williams for commutation).

<sup>391</sup> This approach may not even be effective given that current Iowa Governor Kim Reynolds has been an advocate for criminal justice reform and "second chance" legislation since her time in office. *See* Pitt, *supra* note 305. Although those may be empty promises, she at least has opened herself up to criticism when she fails to enact or advocate for criminal justice reform.

<sup>392</sup> *See* BARKOW, *supra* note 21.

<sup>393</sup> *See generally* H.F. 2191, 89th Gen. Assemb., Reg. Sess. (Iowa 2022) (example of a bill that received bipartisan support for significant prisoner rights' reform).

<sup>394</sup> BARKOW, *supra* note 21.

which led the applicant to prison in the first place. Currently, only three of the five Board members have an extensive background in one these areas.<sup>395</sup> Two Board members are lawyers, one of whom has previously worked as the executive director of the Board, and the other was an Assistant Iowa Attorney General who represented the Department of Human Services in child abuse appeals.<sup>396</sup> The other Board member with an extensive background in one of these areas is a civil rights activist and has received numerous awards for her work.<sup>397</sup> Although this constitutes a majority of the Board, all Board decisions in Iowa require a unanimous vote; therefore, all it takes for the Board to issue an unfavorable recommendation is for one of the other two Board members to undervalue an applicant's achievements or rehabilitation because of their unfamiliarity with the system.<sup>398</sup>

In the parole context, a professional background requirement that is too law enforcement oriented is counterproductive for the parolee.<sup>399</sup> This effect would likely occur in the clemency context as well if the professional background requirement was too law enforcement oriented. So, although a background in law enforcement may be valuable for a Board member, any such professional qualifications should go beyond just a law enforcement background and require more well-rounded experience. This experience should include (1) a demonstrated, practiced understanding of the corrections system, (2) an education or experience which demonstrates an understanding of some of the factors which lead an individual to prison, such as juvenile brain development and effects of trauma, and (3) an education or experience in rehabilitation.

Although a professional background is not a common requirement among state parole boards,<sup>400</sup> Iowa would not be the first to adopt such a requirement. Connecticut requires that each parole board member have an education or experience in “community corrections, parole or pardons, criminal justice, criminology, the evaluation or supervision of offenders or

---

<sup>395</sup> *Meet the Board Members*, STATE OF IOWA BD. OF PAROLE, <https://web.archive.org/web/20230521043928/https://bop.iowa.gov/about/meet-board-members> [https://perma.cc/9KT9-8UME].

<sup>396</sup> *Id.* Nick Davis, the Chair of the Board, served previously as the executive director of the Board, and graduated from the University of Iowa College of Law. *Id.* Meredith Lamberti, the Vice Chair of the Board, is a lawyer who served as an Assistant Attorney General where she represented the Department of Human Services in child and adult abuse appeals. *Id.* She also clerked for the Iowa Supreme Court. *Id.*

<sup>397</sup> *Id.* Sue Weinacht, layperson Board member, has worked in her community for years fighting for racial equality and has numerous awards for these efforts. *Id.*

<sup>398</sup> IOWA ADMIN. CODE r. 205-13.6(3)(a) (2023).

<sup>399</sup> *See* BARKOW, *supra* note 21.

<sup>400</sup> MEHTA, *supra* note 171 (“Many states do not have statutory qualifications for parole board members (although six states have recently passed bills to include minimum qualifications such as a bachelor’s degree), let alone require that members have any experience with the criminal justice system.”).

the provision of mental health services to offenders.”<sup>401</sup> New York requires that each of its board members have, at least, a Bachelor’s degree and at least five years of experience in criminology, criminal justice administration, law enforcement, social work, corrections, psychology, psychiatry, or medicine.<sup>402</sup> Similarly, although Tennessee does not require its members to have expertise, the governor is required by law to give preference to those with a professional background in criminal justice, law, medicine, education, social work, or a behavioral science before appointing them to the parole board.<sup>403</sup>

Others have argued that a professional background requirement may not be needed quite yet because of two reasons. The first is that there is an increasingly bipartisan willingness to embrace criminal justice reform.<sup>404</sup> The second is that the younger parts of the electorate are less punitive because they did not live through the 1990s crime wave and are not the target audience for “tough on crime” rhetoric.<sup>405</sup> This argument seems to be premised on the fact that crime rates will not notably increase, nor will there be a resurgence of broad “tough on crime” rhetoric. Recent events show that gap in the premise could be appearing. For example, the COVID-19 pandemic, and the summer of 2020, in the wake of George Floyd’s murder sparked an increase in conversations about criminal justice reform. They also became a political lightning rod during the 2020 and 2022 election cycle.<sup>406</sup>

---

<sup>401</sup> CONN. GEN. STAT. § 54-124 (2021).

<sup>402</sup> N.Y. EXEC. LAW § 259-b (2022).

<sup>403</sup> TENN. CODE ANN. § 40-28-103 (2017).

<sup>404</sup> Goldstein, *supra* note 161 (“[W]e might be at the dawn of a new era of electorally motivated criminal-justice reform. In the past decade, reform has become orthodoxy in the Democratic Party and has been embraced by significant parts of the Republican Party.”).

<sup>405</sup> *Id.* at 475–76, 478–79.

<sup>406</sup> See, e.g., John Gramlich, *Violent Crime Is a Key Midterm Voting Issue, but What Does the Data Say?*, PEW RSCH. CTR. (Oct. 31, 2022), <https://www.pewresearch.org/fact-tank/2022/10/31/violent-crime-is-a-key-midterm-voting-issue-but-what-does-the-data-say> [<https://perma.cc/Y3HF-YM2X>] (reporting on how 61% of voters considered violent crime to be an important issue during the 2022 election); Dan Merica et al., *Crime Comes to the Forefront of Republican Messaging Ahead of Election Day*, CNN (Oct. 11, 2022, 8:01 PM), <https://www.cnn.com/2022/10/11/politics/crime-republican-messaging/index.html> [<https://perma.cc/2MXS-HU5J>] (reporting on at the end of the 2022 election season the GOP made crime a central issue, which aligned with recent surveys that showed a majority of Americans were unhappy with the Biden Administration’s effort to reduce or control crime); Brennan Maynard, *The History of ‘Law and Order’ Politics & What It Means in the 2020 Election*, CAROLINA POL. REV. (Nov. 1, 2022), <https://www.carolinapoliticalreview.org/editorial-content/2020/11/1/the-history-of-law-and-order-politics-amp-what-it-means-in-the-2020-election> [<https://perma.cc/9N1X-5SHR>] (reporting on how during the 2020 election,

As crime rose nationwide, progressive prosecutors came under fire as well.<sup>407</sup> As a result, some of those progressive prosecutors, who were elected on promises of reforming the criminal legal system, are now taking a more “tough on crime” approach.<sup>408</sup>

These events may not be the “end” for progressive prosecution, but the events since 2020 suggest that criminal justice reform cannot be achieved solely by electing individuals who promise to reform the system from the inside. Therefore, now is the time for pro-reform interest groups to encourage the Iowa legislature to pass a statute which amends the qualifications for membership to the Board. Each member must be required to have a level of expertise which will enable them to better understand what clemency applicants experience and can, therefore, sufficiently evaluate whether they are deserving of a second chance.

2. Adopt the H.F. 377 Factors with H.F. 2191’s Residual Factor as a “Guidepost”

Currently, the Iowa clemency factors are vague, giving the Board too much latitude in what they can consider. For example, in a class A felon’s commutation request, the Board can consider the “applicant’s conduct while confined.”<sup>409</sup> Although this is obviously a pertinent factor in assessing a clemency application, the factor’s language itself is too broad. This has allowed the Board to ask questions which range from minute disciplinary infractions to previous attempts to commit suicide.<sup>410</sup> These events were likely well in the applicant’s past, and no longer relevant to whether they are deserving of a commutation. That is why the factors that the Board uses should have more specific language, making the scope of the questions narrower.

Although vague factors may on one hand benefit applicants by affording them flexibility in crafting their applications, it also gives the Board broad latitude in what to consider as part of those factors. This makes its application of the factors unpredictable. As the factors currently stand, it is easy for the Board to consider each in a “vacuum.” For example, under the “nature and

---

President Trump claimed to be the “law and order” while candidate while then former Vice President Joe Biden touted his previous criminal justice reform efforts); Michael Lind, *The Law and Order Election*, TABLET (Nov. 9, 2020), <https://www.tabletmag.com/sections/news/articles/law-and-order-election> [https://perma.cc/2YFY-WRYY] (reporting on how early exit polls from the 2020 election showed that most voters who voted for Republicans cited the Democrat’s lack of crime control measures made heavily influenced which candidate they chose).

<sup>407</sup> Herndon, *supra* note 158.

<sup>408</sup> *Id.*

<sup>409</sup> IOWA ADMIN. CODE r. 205-13.6(3)(b) (2023).

<sup>410</sup> Jon August Commutation Hearing, Iowa Dep’t of Corr. Bd. of Parole, in Des Moines, Iowa (Jan. 5, 2023).

circumstances of the crime”<sup>411</sup> factor, often the Board and the governor will make a decision based on a discrepancy between the applicant’s recollection of the facts and the record establishing those facts, reasoning that this discrepancy indicates the applicant has not taken full responsibility for their actions despite other actions or statements indicating otherwise.<sup>412</sup> Assuming that is even a correct inference to make, here, the Board has lost sight of the need to balance any factor against the applicant’s rehabilitation. This balance is meant to guide the Board in deciding whether it would be in society’s interest to continue to incarcerate the individual. This is the heart of granting clemency and all effective clemency systems should reflect that purpose.<sup>413</sup>

To ensure that the factors reflect that purpose, the Iowa Legislature should adopt the residual factor in H.F. 2191 as the ultimate question that the Board must answer. The factors in H.F. 377 are unambiguous, which leaves little room for the Board to either misconstrue them or interpret them in a way that is inconsistent with the purpose of executive clemency. For example, the current “applicant’s conduct while confined”<sup>414</sup> factor has essentially been broken down into separate factors in H.F. 377.<sup>415</sup> These separate, distinct factors direct the Board’s attention to specific behavior and indicate how they should construe those factors, discouraging them from asking whether the applicant’s conduct was in accordance with their own “notions of right and wrong and morality.”<sup>416</sup>

Both H.F. 377 and 2191 were designed to reemphasize that clemency is meant to reflect the balance between rehabilitation and society’s interest to continue to punish the applicant. H.F. 377’s sponsor, Rep. Terry Baxter told the House Judiciary Committee that “[t]here are many people who in the process of being incarcerated go through such a change in their life, rehabilitation and transformation, they are no longer the same people . . . that committed that crime.”<sup>417</sup> Opponents to H.F. 377 argued that class A

---

<sup>411</sup> IOWA ADMIN. CODE r. 205-13.6(3)(b) (2023).

<sup>412</sup> Payne, *supra* note 1.

<sup>413</sup> See BARKOW, *supra* note 21.

<sup>414</sup> IOWA ADMIN. CODE r. 205-13.6(3)(b) (2023).

<sup>415</sup> Those three factors are first, “whether the applicant has performed acts that tend to indicate rehabilitation, including but not limited to whether the applicant participated in rehabilitative, educational, or vocational programs, [if available at their facility].” H.F. 377, 89th Gen. Assemb., Reg. Sess. § 2(6)(a) (Iowa 2019). Second, “whether the applicant’s case file demonstrates that the applicant shows respect for authority and has been deemed a positive influence on others.” *Id.* § 2(6)(b). Third, “the applicant’s disciplinary record in prison.” *Id.* § 2(6)(c).

<sup>416</sup> BARKOW, *supra* note 21, at 167.

<sup>417</sup> Payne, *supra* note 317.

felonies in Iowa were recognized as an “alternative to the death penalty,” and that the bill would “‘undo justice’ for the victims of crimes.”<sup>418</sup> What this argument ignores is that clemency has always taken into account the impact on victims, and one of the factors in H.F. 377 does just that.<sup>419</sup> Also, just because a clemency system is made more effective, does not necessarily mean that there will be an extraordinary number of commutations granted. A former correctional officer and public commenter at the House Judiciary Committee stated what many forget: that “[n]othing in the bill releases anyone . . . [b]ut it does give those important decision-makers a tool, a layer to ensure that we’re releasing the right people.”<sup>420</sup>

Despite the preciseness of the H.F. 377 factors, it seems likely that even with them the Board would tend to stray from the purpose of executive clemency. It may be beneficial to explicitly state the purpose of executive clemency. The Iowa legislature should use H.F. 2191’s residual factor as a model for this language. The factor states the Board should consider “the impact of the crime on the community including evidence that circumstances have changed since the applicant’s original sentencing indicating the applicant’s continued incarceration is no longer in the interest of justice due to sufficient punishment and rehabilitation.”<sup>421</sup> This language reflects the three core pieces of the purpose of executive clemency: (1) that the Board should take into account that the circumstances could have changed since original sentencing, (2) those circumstances can also include sufficient rehabilitation, (3) these changed circumstances are balanced against society’s interest, and (4) if the circumstances are sufficiently changed, then it may no longer be in society’s interest to continue the individual’s term of incarceration.

#### IV. CONCLUSION

Executive clemency is an extraordinary act of mercy and grace. It should be rare, but that does not mean that it should *never* happen. Clyde Johnson, Judy White, and Denise Rhode are not the only three people whom the Iowa executive clemency system has failed. Surely there has been more than a single deserving applicant since 2013.

Change will not happen unless Iowa governors’ lack of mercy is put in the spotlight. It will only be put in the spotlight if more favorable recommendations are put on their desk. To put more favorable recommendations on the governor’s desk, the Iowa Legislature must do two

---

<sup>418</sup> *Id.*

<sup>419</sup> H.F. 377, 89th Gen. Assemb., Reg. Sess. § 2 (6)(q) (Iowa 2019) (“The impact of the crime on each victim through the use of a victim’s impact statement, as defined in Section 915.10. The victim impact statement may include information relating to the applicant’s crime.”).

<sup>420</sup> Payne, *supra* note 317.

<sup>421</sup> H.F. 2191, 89th Gen. Assemb., Reg. Sess. §1(3)(j) (Iowa 2022).

things. First, it needs to pass a statute that requires Board members to have a level of expertise that is at least tangential to the criminal legal system or prisoner rehabilitation. This will allow the Board to use its background to be able to better evaluate the applicant's accomplishments relative to the obstacles in prison. Secondly, it needs to pass a statute that adjusts the factors upon which the Board and governor make their decisions. These factors should be unambiguous, and it should be clear on how the Board is meant to apply these factors. It should also include a legislative directive that defines what executive clemency really means: that it is a balance between the crime and rehabilitative efforts to determine whether it would be in society's interest to release the applicant.

Until these changes are made, stories like Clyde Johnson's and Judy White's will continue to be the headline for Iowa executive clemency. Unfortunately for these two applicants, they may not have another application in their lifetime. Their stories deserve to be told, and their accomplishments valued. Although newspaper articles or law review notes can achieve that, there is nothing that can recognize their accomplishments more than a second chance.