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Governor could end capital cases by executive order

By David A. Carrillo,
David Belcher
and Michael Belcher

California constitutional and statutory provisions, judicial precedent, and attorney general opinions show that a governor can order state prosecutors to stop pursuing capital cases. California's constitution gives its governor superior executive power over an attorney general. If the two conflict, the governor controls executive branch policy. And an attorney general has constitutional power to supervise county prosecutors, and to assume control over local criminal cases. This means that a governor could effectively end capital punishment in California by ordering the attorney general to stop defending current capital appeals and to bar local prosecutors from seeking new capital sentences.

Governors Rule over Subordinate State Executive Officers

California's constitutional hierarchy places governors above attorneys general, which permits a governor to direct an attorney general to stop defending capital appeals. Article V, Section 1 vests the "supreme executive power of this State" in a governor, who "supervise[s] the official conduct of all executive and ministerial officers." Gov. Code Sections 11090, 12010, 12011. Article V, Section 1 also provides that a governor "shall see that the law is faithfully executed." To provide for carrying out executive tasks, a governor may direct another elected executive official to act. *Spear v. Reeves* (1906) 148 Cal. 501, 504-05. Governors have expansive executive-order authority, which "need not be predicated upon some express statutory provision, but may properly be employed to effectuate a right, duty, or obligation which emanates or may be implied from the Constitution or to enforce public policy embodied within the Constitution and laws." 63 Ops. Cal. Atty. Gen. 583, 584-85 (1980).

California's constitution gives governors primary and superior au-

thority over the other eight independently elected officers, including the attorney general. The constitution "follows a minimalist approach" with the other elected executive officers: "it provides for the office but primarily leaves it to the Legislature to define the duties and functions" of each office. *Brown v. Chiang* (2010) 198 Cal. App. 4th 1203, 1230. While the state executive branch is divided "in the sense that the officers are independently elected, and therefore cannot be removed by the Governor, the Governor is charged with supervising the official conduct of these officers." *Id.* The California Supreme Court held that a governor's judgment prevails over an attorney general's, and if "a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the 'supreme executive power' to determine the public interest; the Attorney General may act only 'subject to the powers' of the Governor." People ex rel. *Deukmejian v. Brown* (1981) 29 Cal. 3d 150, 158.

Doubtless an order ending all capital cases would be challenged as violating a governor's duty to see that the law is faithfully executed, since capital punishment is currently lawful in California. An attorney general might argue that the office has a constitutional mandate to evaluate an executive action's legality in the public interest. And county prosecutors could challenge the order as exceeding an attorney general's supervisory powers.

Yet the specter of a judicial challenge does not detract from the governor's power to make the order. Government officials frequently litigate disagreements in court. Barring some constitutional or statutory restriction, within the state executive branch a governor has no checks. A governor has the call on state executive policy; subordinate officers must either comply or seek judicial protection. And the courts may intervene. California's governor is not a



DAVID CARRILLO

David A. Carrillo is executive director of the California Constitution Center.



DAVID BELCHER

David Belcher is a senior research fellow at the California Constitution Center.



MICHAEL BELCHER

Michael Belcher is a senior research fellow at the California Constitution Center.

king. The courts have the final say on how the law should be enforced. The Legislature can remove a governor's statutory powers. And the voters can recall or vote out a governor for non-performance. But between a governor and an attorney general, the governor gives the orders.

An Attorney General Has Supervisory Power Over Local Prosecutors

Every district attorney "is supervised by the Attorney General." *Pitts v. County of Kern* (1998) 17 Cal. 4th 340, 345. Article V, section 13, Government Code Section 12550, and Penal Code Section 923 give attorneys general "direct supervision" over local prosecutors. These provisions confer "broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case." *People v. Honig* (1996) 48 Cal. App. 4th 289, 354-55. And this supervisory power goes beyond merely overseeing a district attorney's actions in prosecuting a particular case: it includes charging policy. *Pitts* at 363. Appellate decisions have consistently upheld the attorney general's authority over statewide policy decisions. *See, e.g., People v. Hy-Lond Enterprises, Inc.* (1979) 93 Cal. App. 3d 734; *Abbott Laboratories v. Superior Court* (2018) 24 Cal. App. 5th 1.

Based on the office's constitutional powers and the long-standing respect for those powers shown by the courts,

an attorney general could end capital cases statewide. An attorney general has the prosecutorial discretion to decide that defending capital appeals is not in the state's interest. And judicial deference towards an attorney general's constitutional supervisory power over local prosecutors supports the conclusion that an attorney general can enforce a policy decision to bar new capital prosecutions.

Conclusion

An attorney general could make a legal and political decision to follow a governor's order, and local prosecutors could accept the state's direction. Or they could refuse. Either choice bears two risks: lawsuits and punishment at the ballot box. Complying means being sued by stakeholders; refusing means the governor may sue the attorney general, or the attorney general may sue the county prosecutor. Complying has the better legal foundation: in conflicts between higher and lower executive officers the higher officer generally wins.

The courts may uphold this kind of executive action, or not. But doing nothing is untenable. The current pause on executions eventually will draw a legal challenge for failure to faithfully execute the law and to exercise the ministerial duty of imposing lawful death sentences. It also risks judicial ire for failing to respect final court judgments. Some further action is surely required.