UIC Law Review

Volume 30 | Issue 2 Article 9

Winter 1997

Intruders at the Death House: Limiting Third-Party Intervention in Executive Clemency, 30 J. Marshall L. Rev. 567 (1997)

Daryl M. Schumacher

INTRUDERS AT THE DEATH HOUSE: LIMITING THIRD-PARTY INTERVENTION IN EXECUTIVE CLEMENCY

DARYL M. SCHUMACHER*

It is my opinion that a man who would willingly sit in a small cell for 24 hours a day year after year, merely postponing the inevitable execution, is the irrational man.

Lloyd Wayne Hampton[1]

INTRODUCTION

Jennifer is a woman who has endured a physically abusive husband for the last five years. After a night out with her friends, Jennifer comes home to her drunk husband, who is in a violent mood. Knowing the price of another confrontation, Jennifer grabs a gun. He begins to beat her, but she cannot endure the beating, and shoots and kills her husband at point blank range. The police promptly arrest Jennifer and take her to the police station. After confessing to the killing of her husband, the jury convicts Jennifer of first degree murder and sentences her to death.

Jennifer knows she must pay for her crime and wants the state to execute her as soon as possible because she cannot endure a life behind bars. She writes to the state supreme court, the governor, and the United States Supreme Court, and asks that no further appeals be filed on her behalf. Subsequently, the state holds a hearing to determine whether Jennifer is competent to waive her appeals.[2] The state supreme court finds Jennifer competent to waive her appeals, and schedules her execution.

In response, members of an anti-capital punishment group in-

* J.D. Candidate 1998.

1. *Killer Fighting to Die*, ST. LOUIS POST-DISPATCH, Sept. 19, 1992, at 4A [hereinafter *Killer Fighting*].

2. *See* Whitmore v. Arkansas, 495 U.S. 149, 152 (1990) (stating that a competent decision to waive further appeals must be "knowing and intelligent"). In certain situations one or more psychiatric experts administer tests and conduct psychiatric evaluations of the detainee. People's Response in Opposition to Third-Party Petition for Executive Clemency at 3, People v. Garcia, 651 N.E.2d 100 (Ill. 1995) (No. 21411) [hereinafter People's Response]. The court then makes a decision based on the opinions of the mental health experts, and the prisoner herself, as to whether the decision was "knowing and intelligent." People v. Garcia, 651 N.E.2d 100, 113 (Ill. 1995).

tervene on Jennifer's behalf without her consent. Members of this group petition the State Prisoner Review Board to recommend executive clemency[3] to the governor. After considering the Board's affirmative recommendation, the Governor commutes Jennifer's sentence from death to natural life in prison.[4]

Currently thirty-six states have enacted statutes that impose the death penalty for certain crimes.[5] For example in Illinois, fifteen crimes are punishable by death.[6] As of March, 1996, 155 people in Illinois were on death row awaiting execution by lethal injection.[7] Illinois requires prisoners to file mandatory appeals of their death sentences.[8] However, certain appeals are waivable at the prisoner's discretion.[9] In addition to the possibility of a detainee's judicial appeals, state governors typically have discretion

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3. *See* Henry Pietrkowski, Note, *The Diffusion of Due Process in Capital Cases of Actual Innocence After* Herrera, 70 CHI.-KENT L. REV. 1391, 1402 (1995) (discussing various forms of executive clemency). Executive clemency is a power vested in the Governor by most state constitutions and in the President by the U.S. Constitution. *Id.*; U.S. CONST. art. II, § 2. This power gives the President or a Governor the ability to pardon or commute a detainee's sentence, or grant a reprieve. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991). Pardons are the broadest form of clemency and releases the offender from any and all punishment for a particular crime. *Id.* at 576. Executives commonly grant pardons to restore the reputation and civil rights of an individual. *Id.* Commutation of a sentence is a more limited form of clemency and is merely a reduction in the severity of a punishment. *Id.* Governors grant commutations to shorten a prisoner's sentence or to make a prisoner eligible for parole. *Id.* A reprieve is nothing more than a postponement of punishment. *Id.* at 578. Often this is done to give an offender an opportunity to complete his or her appeals. *Id.*

4. This hypothetical situation closely corresponds to the turn of events in *People v. Garcia*, 651 N.E.2d 100 (Ill. 1995).

5. THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES 536-37 (1994). As of December 1992, 36 states allow the death penalty. *Id.* A number of states carry out execution by electrocution: Alabama, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Nebraska, Ohio, South Carolina, Tennessee, and Virginia. *Id.* Other states implement death by lethal injection or gas: Arkansas, California, Colorado, Delaware, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Wyoming and Texas. *Id.* Other states use more unusual means of execution: Idaho and Utah cause death by lethal injection or firing squad, and Montana and New Hampshire allow execution by lethal injection or hanging. *Id.*

6. 720 ILCS 5/9-1(b)(1) - (15) (West 1995). For example, Illinois imposes the death penalty for murder committed along with at least one of fifteen aggravating factors, such as when the victim is a police officer, firefighter, or prison guard, or when the murder is committed during a highjacking or the course of another felony. *Id.*

7. Telephone Interview with representative of Office of Public Information, Illinois Department of Corrections, Springfield, IL (Mar. 11, 1996).

8. People's Response, *supra* note 2, at 3.

9. *Id.*

to intervene in capital cases.[10]

Prisoners and state governors do not alone possess the right to influence or change a judicially imposed sentence of death. In some circumstances, third parties can intervene in capital cases seeking either executive[11] or judicial relief on behalf of the prisoner.[12] For example, third parties may intervene when the prisoner is incompetent and cannot make a rational decision for himself.[13] Third parties, however, have intervened against a prisoner's will even when the prisoner is competent.[14]

Since the reinstatement of the death penalty in Illinois in 1977,[15] three highly publicized cases involved third-party intervention in the judicial and executive clemency contexts.[16] In all three cases, the prisoners opposed such interference.[17] Despite prisoner opposition, the third party had some impact in each case.[18] Such third-party intervention is problematic because it allows anyone to assert his or her own interest under the guise of aid to the detainee.

The danger of allowing improper third parties access to the

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10. *See, e.g.*, ILL. ADMIN. CODE tit. 20, § 1610.180 (1994) (vesting in the governor of the State of Illinois the discretionary authority to grant reprieves (a delay in carrying out the sentence), pardons (a complete release from custody), or commutations (a reduction of the severity of the sentence) of a death sentence).

11. *Id.* The executive relief available is clemency. *Id.*; *See generally* Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-1991) (providing a detailed discussion of recent executive clemency review of death sentence cases). See also *infra* notes 26-43 and accompanying text for a discussion of executive clemency.

12. *See* Whitmore v. Arkansas, 495 U.S. 149, 153 (1990) (demonstrating that third parties may become involved in federal habeas corpus proceedings). The judicial form of relief is federal habeas corpus relief. *See also infra* notes 63-84 and accompanying text for a discussion of habeas corpus relief.

13. *Whitmore*, 495 U.S. at 163. A third party may gain "next-friend" standing when there is an adequate explanation for the detainee's inability to petition on his or her own behalf. *Id.*

14. People's Response, *supra* note 2, at 1, 3.

15. 720 ILCS 5/9-1(a)-(b) (West 1994); *Edgar Defends His Decision to Grant Garcia Clemency*, STATE J. REG., Jan. 20, 1996, at 3.

16. Bill O'Connell, *Bill Would Limit Third-Party Appeals House OK's Banning Most Unwanted Petitions on Behalf of Death-Row Inmates*, PEORIA J. STAR, Feb. 22, 1996, at A11. The three individuals who wanted to die are: Charles Walker, a convicted murder whose death was delayed by the Coalition Against Capital Punishment; Lloyd Wayne Hampton, a convicted murderer whose death wish was interfered with by the Illinois Coalition Against the Death Penalty; and Guinevere Garcia whose death sentence was commuted in part as a result of efforts by Amnesty International. *Id.* Rob Karwath & William Grady, *Hampton Asks, Gets Delay in His Execution*, CHI. TRIB., Nov. 11, 1992, at 1; *Killer Fighting*, *supra* note 1, at 1.

17. O'Connell, *supra* note 16, at 1; Karwath & Grady, *supra*, note 16, at 1-2.

18. O'Connell, *supra* note 16, at 1.

executive clemency forum is that it exposes the forum to abuses.[19] Third parties can attempt to achieve their own political, social or moral agendas by turning a clemency proceeding into a political controversy or media event.[20] Although third parties may have relevant arguments on the validity of the death penalty in general, the proper arena for the presentation of such arguments is the legislature, not the executive clemency forum.

Instead of recognizing the executive clemency process as a socially sanctioned method of dispensing mercy or enhancing justice based exclusively on the particular circumstances of each case, third parties have in recent years abused the executive clemency process. This abuse has resulted from the third-parties' attempt to make the process a visible forum for their own political, social or moral beliefs.

The purpose of this Comment is to suggest ways to diminish such third-party abuse of executive clemency. Specifically, this Comment focuses on the disparity of the standing requirements between habeas corpus and executive clemency petitions. It also examines the impact on the rights of the detainee when a third party attempts to intervene against the detainee's wishes. One primary focus of any death penalty intervention issue should be whether a third party has proper standing to interfere, either in the judicial or executive clemency context. Ordinarily, the purpose of standing is to ensure that the party seeking relief has alleged a strong enough personal stake to assure that all issues involved in a detainee's death sentence are presented clearly.[21] Moreover, a standing requirement also alleviates the political abuse by third parties.

There are two specific situations where third parties may intervene in death penalty cases: 1) under the doctrine of federal habeas corpus,[22] and 2) under executive clemency.[23] Federal habeas

19. Illinois State Representative James Durkin characterized a recent high profile executive clemency hearing involving a celebrity as a "sideshow." *Bill Limits Third-Party Death Appeals*, CHI. DAILY L. BULL., Feb. 8, 1996, at 1 [hereinafter *Bill Limits*].

20. Sometimes third-party organizations exploit celebrities to plead on behalf of the detainee. For example, during the clemency proceedings of Guinevere Garcia, Bianca Jagger, former wife of rock star Mick Jagger, and Amnesty International had filed a third-party petition on behalf of Garcia. *See id.* Jagger's participation drew widespread interest and attention to Mrs. Garcia's clemency action. *Id.*

21. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

22. *Id.* at 154. The writ of habeas corpus is a procedure for obtaining a judicial determination of whether a detainee's confinement or death sentence is legal. *Id.* Often habeas relief is sought to determine whether a state criminal conviction or sentence is constitutional. *Id.* One consideration in this determination is whether the confinement is consistent with constitutionally mandated due process of law. *Id.*

23. See *infra* notes 26-43 and accompanying text for a discussion of execu-

corpus relief requires that a third-party meet certain well-established standing requirements, while most state rules involving executive clemency generally do not impose any standing requirements on third party petitioners.[24] As a result, the detainee's right to oppose a third-party's interference with his or her death sentence varies depending on the context in which it arises. Because of this disparity in standing requirements, the detainee's right to oppose intervention in the clemency context is weaker than with habeas relief.[25]

Part I of this Comment examines the history of executive clemency and explores its purposes. Part II discusses the origins of habeas corpus relief and examines the differences between executive clemency and habeas corpus petitions. Part III addresses the need to set limitations on third-party petitioners in the executive clemency context. Part IV examines corrective measures in the area of executive clemency, including newly enacted legislation in Illinois. Part IV also proposes model requirements for executive clemency petitions that would place significant limitations on third-party intervention.

I. EXECUTIVE CLEMENCY

Executive clemency is often the last available form of relief for a death row inmate. Once a prisoner has exhausted all of his judicial appeals, the prisoner has one final tribunal to address for relief: the executive branch of the state government.[26] Most state constitutions place the clemency power in the governor.[27] Some states, however, have created advisory pardon boards to aid the governor in this decision.[28] Section A provides a brief history of executive clemency. Section B examines the purpose of executive clemency. Section C discusses recent intervening third-party abuses of executive clemency. Finally, Section D examines the effects of third-party abuses of executive clemency.

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tive clemency.

24. *See, e.g.*, ILL. ADMIN. CODE. tit. 20, § 1610.180 (1994) (requiring merely that a petition "shall be signed by the applicant or other person in his behalf"). The Illinois code does not specify that a third party meet any kind of standing requirements. *Id.*

25. *Compare* ILL. ADMIN. CODE. tit. 20, § 1610.180 (1994) (requiring no standing requirements for intervention into executive clemency proceedings) *with Whitmore*, 495 U.S. at 149 (discussing the judically derived standing requirements for intervention in federal habeas corpus proceedings).

26. Pietrkowski, *supra* note 3, at 1402.

27. Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 141 (1965); Pietrkowski, *supra* note 3, at 1402.

28. Pietrkowski, *supra* note 3, at 1402. Some states require joint approval between the governor and the board before clemency can be granted. Id.; Kobil, *supra* note 3, at 586.

A. History

Clemency power originated centuries ago when a monarch had the authority to reduce punishment as an act of mercy.[29] In England, the King administered executive clemency.[30] Executive clemency in the United States stems from the concept of clemency used in England.[31] In the United States, clemency regulations typically do not bind executive officials to any formal standards for their decisions.[32] Therefore, state governors generally have few formal guidelines when making decisions involving clemency.[33] Historically, state legislatures have given executives a wide latitude of discretion in making clemency determinations.[34] While state governments have rarely adopted stringent standards to guide executives when deciding clemency issues, traditionally, executives base clemency upon two grounds: mercy and the desire to correct judicial error.[35]

B. Purpose of Executive Clemency

The first basis of clemency involves a "mercy-based" process.[36] Clemency, as a mercy -based process, is essentially arbitrary.[37] For instance, governors sometimes grant clemency when a death row

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29. Pietrkowski, *supra* note 3, at 1401. Clemency is the oldest type of leniency and is alive in one form or another in every state in the United States. Kobil, *supra* note 3, at 575. All forms of clemency derive from the sovereign's power to extend mercy. *Id.* Although mercy is a common basis for clemency, almost any reason will suffice. *Id.*

30. Kobil, *supra* note 3, at 586; Pietrkowski *supra* note 3, at 1402-03. Historically, the purpose of clemency was to make sure that justice was administered with mercy. *Id.* at 1401. However, through the ages, the political process has controlled the decision to grant mercy through clemency. *Id.*

31. Abramowitz & Paget, *supra* note 27, at 140; Pietrkowski, *supra* note 3, at 1402.

32. Pietrkowski *supra* note 3, at 1402. Traditionally the power to grant clemency rested within the sole discretion of state governors. *Id. See also* Bedau, *supra* note 11, at 259-61 (discussing various rationales that governors use in commuting death sentences to prison sentences).

33. Pietrkowski, *supra* note 3, at 1402.

34. *Id.*

35. *Id.* at 1404. Pietrkowski lists three grounds for clemency, the third being a due process entitlement. Few courts, however, have held clemency to be an interest which the Due Process Clause protects. *Id.* at 1411.

36. *Id.* at 1404. Reasons for basing clemency on mercy vary depending on the "particular moral circumstances of the case." *Id.* at 1405. For example, Battered Woman Syndrome has been at issue in clemency proceedings when a woman strikes back at her abusive husband. *Id.* The argument in that situation is that moral circumstances, i.e. the severe abuse, justifies an executive's grant of mercy to the detainee. *Id.* An example outside the capital context is when a mother steals food for the necessity of feeding her children. *Id.* There, the moral obligation to feed the children should allow the executive to extend mercy through clemency. *Id.*

37. *Id.* at 1405 (citing United States v. Wilson, 32 U.S. (1 Pet.) 150, 160-61 (1833)) (setting forth various factors to be considered in granting clemency).

inmate displays signs of rehabilitation.[38] Other times governors simply act out of a sense of pity for a detainee's rough circumstances in life. Factors also affecting the clemency decision may be other types of mitigating circumstances such as the physical or mental condition of the detainee.[39]

In addition, executive clemency enhances the justice process.[40] Under this theory of relief, executive clemency seeks to correct any wrongs that may have occurred in the judicial process.[41] The consideration of important evidence or other information excluded at trial is one way clemency protects against judicial error.[42] Under either of these theories, the executive need not provide an explanation for his or her use of power because the decision is entirely discretionary.[43] The doctrine of executive clemency entails a specific evaluation of the equities of a particular punishment. It is not a forum to seek changes in the law or societal value system. The sole purpose of executive clemency is to either extend mercy or correct judicial error based on the circumstances of each case.

C. *Third-party Abuse of Executive Clemency*

There are groups who oppose the death penalty because of their moral, social, or philosophical beliefs. These groups often intervene into the executive clemency process solely based upon their opposition to the death penalty.[44] Sometimes these groups interfere against the detainee's will and without his or her consent.[45]

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38. Abramowitz & Paget, *supra* note 27, at 168; Pietrkowski, *supra* note 3, at 1405-06.

39. Abramowitz & Paget, *supra* note 27, at 159-77; Pietrkowski, *supra* note 3, at 1406 n.122. Factors that frequently play a part in an executive's decision to grant clemency include: 1) the nature of the crime; 2) doubt as to guilt; 3) fairness of the trial; 4) relative guilt and disparity of sentences; 5) rehabilitation; 6) dissents and inferences drawn from the courts; 7) recommendations of the prosecution and the trial judge; 8) political pressure and publicity; 9) the clemency authorities' view on capital punishment; and 10) the role of precedent. *Id.*

40. Pietrkowski, *supra* note 3, at 1408-9.

41. *Id.*

42. Deborah Leavy, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 905 (1981); Pietrkowski, *supra* note 3, at 1409. Some claim that the admission of evidence that might otherwise be excluded at trial, benefits the death-row inmate. *Id.* at 1407.

43. Pietrkowski, *supra* note 3, at 1406.

44. *Id.* at 327. The modern trend for opponents of the death penalty is to forgoe attempts at national prohibition of the death penalty. *Id.* Instead, abolitionists concentrate their efforts on a case-by-case system and attempt to halt executions based upon the mitigating factors of each individual situation. *Id. See also Latest Death Penalty Case Not Getting Much Interest*, STATE J. REG., Sept. 16, 1996, at 5 (discussing how organizations that oppose the death penalty attempt to raise public awareness of the issue).

45. Anthony v. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of*

For example, in *People v. Garcia*,[46] an Illinois court sentenced Guinevere Garcia to death for the murder of her husband.[47] After filing the mandatory appeals, Garcia expressed her desire to waive her discretionary appeals.[48] The court then put Garcia through a competency hearing where experts determined that she was capable of making a "knowing and intelligent" waiver of her rights.[49] Thereafter, third parties, including members of Amnesty International such as Bianca Jagger, intervened and urged the Illinois Prisoner Review Board [hereinafter "IPRB"] to recommend clemency to the Governor.[50] After his review of Garcia's case, the Governor then commuted Garcia's sentence from death to natural life in prison.[51]

Death Penalty Abolitionists, 31 HARV. C.R.-C.L. L. REV. 325, 328 (1996) [hereinafter Alfieri]. Alfieri discusses a concept called purposivism which he defines as the "normative autonomy of lawyers from clients and society." *Id.* Thus, he asserts that purposivism allows lawyers to make decisions outside of the client's will. *Id.*

46. 651 N.E.2d 100 (Ill. 1995). After the court sentenced the defendant to death, third-party petitioners intervened and asked the Illinois Prisoner Review Board to recommend executive clemency to Illinois Governor James Edgar. People's Response, *supra* note 2, at 11. Subsequently, Governor Edgar commuted the defendant's sentence from death to natural life in prison. James Edgar, *News from the Office of the Governor* at 3, Jan. 16, 1996.

47. *Garcia*, 651 N.E.2d at 105. It should be noted that the defendant in this case was previously tried and convicted of the murder of her daughter, and four aggravated arsons. *Id.* at 103. Originally the defendant had stated that her daughter's death was accidental due to suffocation. *Id.* at 105. It was not until four years later that the defendant confessed to both the murder of her 11-month-old daughter and the four aggravated arsons. *Id.*

48. People's Response, *supra* note 2, at 3. Mrs. Garcia drafted letters to the Illinois Supreme Court, the United States Supreme Court, and to Governor Jim Edgar, expressing her wish to withdraw all appeals for relief, both judicial and executive. *Id.*

49. *Id.* A total of three psychiatric experts evaluated the defendant for this hearing. *Id.* Her guardian *ad litem*, who was contesting her decision, hired two of the experts. *Id.* All experts concluded that her decision was knowing and intelligent. *Id.*

50. *Id.* at 11.

51. Edgar, *supra* note 46, at 3. Governor Edgar's press release stated in relevant part the follows:

> Indeed, this action on my part should not be construed in any way as a commentary on the victim, Mr. Garcia, or as demeaning in any way the value of his life. Guinevere Garcia should never be free again. But I have concluded the punishment decreed for her was not typical. Horrible as was her crime, it is an offense comparable to those that judges and jurors have determined over and over again should not be punishable by death. So, I am commuting her sentence to natural life in prison without parole. My decision is contrary to Guinevere Garcia's expressed wish to let the execution go forward—a wish she repeated several times forcefully. But it is not the state's responsibility to carry out the wishes of a defendant. It is the state's responsibility to assure that the death penalty continues to be administered properly.

Id.

One defense that the intervenors pursued was Battered Woman Syndrome, yet the Governor conceded that the defendant did not suffer from Battered Woman Syndrome.[52] The Governor stated that he based his decision on other factors.[53] It appears from the press release that the Governor's decision was not based on the theory the third party asserted.[54] Rather, the Governor based his decision on the relevant facts of the case.[55]

The judicial doctrine of standing would have barred the third-party petition because the third party could not meet the requirements of any theory of standing.[56] Had the IPRB barred Bianca Jagger's petition, the Governor would nevertheless have the authority to grant clemency. Presumably a *sua sponte* clemency review by Governor Edgar would have resulted in a similar decision because his decision was based on the specific acts of the case and not the theory asserted in the third-party petition.[57] However, had the IPRB barred the third-party petition, the third-party could not have abused the system and made such a media event of the IPRB hearing.[58] The only significant effect of Bianca Jagger's petition was attracting the public's attention to the moral questionability of the death penalty. Implementing certain standing requirements in the executive clemency context would correct the improprieties of third-party intervention on behalf of detainees against their wills.

D. Effects of Abuse

In most states there are few limitations on third-party intervention in the clemency context.[59] Therefore third-party organizations can intervene in capital cases at will. In addition, liberal clemency regulations may unduly burden capital prisoners when

52. *Id.* at 2. Governor Edgar explained that "[s]ome who have sought clemency on her behalf have raised the possibility that she was a victim herself—a victim of Battered Woman Syndrome. However, the evidence does not support that assertion." *Id.* *See generally* Christine Noelle Becker, Note, *Clemency For Killers? Pardoning Battered Women Who Strike Back*, 29 LOY. L.A. L. REV. 297 (1995) (suggesting that states be more liberal in granting executive clemency to victims of domestic violence). Numerous organizations have organized specifically in order to prepare and file clemency petitions on behalf of battered women. *Id.* at 335-36.

53. Edgar, *supra* note 46, at 3.

54. *Id.*

55. *Id.*

56. See *infra* notes 75-106 and accompanying text for a discussion of the theories of standing.

57. Edgar, *supra* note 46, at 1-3.

58. *Bill Limits*, *supra* note 19, at 1. Representative James Durkin labeled the IPRB hearing a "sideshow" where celebrity Bianca Jagger of Amnesty International pled for relief on behalf of Garcia. *Id.* Durkin added that law was necessary to avoid this from occurring again. *Id.*

59. *See, e.g.*, ILL. ADMIN. CODE tit. 20, § 1610.180 (1994).

third parties intervene against the prisoners' will.[60] When third-parties petition for executive clemency, they may attempt to assert their own political, philosophical, or social agendas in an effort to change the law. Because the executive branch of government is the wrong forum to assert legislative grievances, such third-party intervention is an abuse of the system. Making matters worse is the fact that executive clemency is judicially unreviewable.[61] In the judicial context, constitutional standing requirements eradicate much of the abuse that third parties freely get away with in the executive clemency context.[62]

II. DISPARITY BETWEEN HABEAS CORPUS AND EXECUTIVE CLEMENCY RELIEF

This Part discusses habeas corpus relief in general and explores three specific types of third-party standing which the courts recognize. Section A provides a brief outline of the history and policies underlying habeas corpus relief. Section A also provides detailed analysis of *jus tertii*, citizen, and next-friend types of standing. Section B compares habeas corpus relief to executive clemency.

A. Habeas Corpus Relief

In the judicial realm, individuals use the writ of habeas corpus to seek relief on the basis that the detention of a prisoner is unconstitutional.[63] Third parties, however, must meet specific requirements before they can petition on behalf of a prisoner.[64] Section 1 explores the origins of habeas corpus relief. Section 2 discusses the three theories of standing that third parties may advance when seeking habeas relief.

1. Habeas Corpus Origins

The writ of habeas corpus originates from English common law.[65] The United States Constitution incorporates this concept.[66]

60. A death-row inmate should have a fundamental right over his fate without undesired interference from third-parties. The injury in fact is to the death-row inmate, and he or she should be the only party making crucial decisions regarding his or her death sentence.

61. Leavy, *supra* note 42, at 894. The executive is accountable to the people of his or her state through the electoral system. *Id.*

62. Singleton v. Wulff, 428 U.S. 106, 112 (1976).

63. Whitmore v. Arkansas, 495 U.S. 149, 154 (1990). Reasons that a detention may be unconstitutional include that the trial was unfair, or the defendant had ineffective assistance of counsel. *Id.*

64. *See* Wilson v. Lane, 697 F. Supp. 1489, 1494-99 (S.D. Ill. 1988) (explaining the three types of standing: citizen, next friend, and *jus tertii*).

65. Michele M. Jochner, *Till Habeas Do Us Part: Recent Supreme Court* Habeas Corpus *Rulings*, 81 ILL. B.J. 250, 250 (1993).

66. U.S. CONST. art. I, § 9, cl. 2.

Several federal statutory enactments have defined the writ of habeas corpus relief.[67] One enactment, the Judiciary Act of 1867,[68] extended habeas corpus relief to state prisoners.[69] In 1966, Congress gave federal habeas courts the right to make rulings on questions of law and on applications of law to fact.[70]

In the context of capital cases,[71] petitioners can use habeas corpus relief to challenge the constitutionality of a death sentence.[72] Habeas relief is available to the prisoner himself, or to a third-party acting on the prisoner's behalf.[73] When a third party attempts to seek habeas corpus relief, he or she must first demonstrate proper standing to address the court.[74]

2. *Types of Judicial Standing*

Courts will not consider the merits of a claim until a third-party petitioner establishes the requisite standing to bring his or her claim.[75] The doctrine of standing determines whether a dispute is properly resolvable through the judicial system,[76] rather

67. Jochner, *supra* note 65, at 250.

68. Act of Feb. 5, 1867, 39th Cong. , Sess. II., ch. 28, par. 1, 14 Stat. 385.

69. *Id.*

70. *Id.* Federal courts must defer to state court findings of fact in habeas cases. *Id.*

71. For the purposes of this Comment, "capital cases" are cases in which the defendant has been sentenced to death.

72. Whitmore v. Arkansas, 459 U.S. 149, 154 (1990). Basis for the claim of an unconstitutional death sentence include ineffective assistance of counsel, and an unfair trial. *Id.*

73. *In re* Cockrum, 867 F. Supp. 494, 496 (E.D. Tex. 1994).

74. *Whitmore*, 459 U.S. at 154.

75. *Id.*; *see* Brewer v. Lewis, 989 F.2d 1021, 1032 (9th Cir. 1993) (dismissing a next-friend petition by the mother of a detainee because she failed to establish standing since no genuine obstacle prevented the detainee from filing himself); *see also* Lonchar v. Zant, 978 F.2d 637, 643 (11th Cir. 1992) (finding that the sister of detainee lacked standing as detainee's next-friend because the detainee was competent to waive his federal habeas corpus right); Franz v. Lockhart, 700 F. Supp. 1005, 1025 (E.D. Ark. 1988) (holding that petitioner lacked standing as next-friend of detainee because detainee was competent to waive his federal habeas corpus rights); *But cf. In re* Cockrum, 867 F. Supp. at 495 (appointing defendant's counsel as next-friend to petition for habeas relief on detainee's behalf after habeas petitioner was declared incompetent to waive further habeas petitions).

76. *Whitmore*, 459 U.S. at 155. In this case, the lower court sentenced the defendant to death for murder. *Id.* at 152. The defendant made a plea for expedited review of his waiver of direct appeal of his death sentence. *Id.* The lower court held that the detainee was competent to make rational decisions. *Id.* Whitmore attempted to intervene as a third party and petitioned for habeas corpus relief on behalf of both the detainee and himself as an individual. *Id.* at 160. The Supreme Court rejected petitioner's claim based on next-friend standing because detainee was capable of making rational choices. *Id.* at 165. The Court also rejected the petitioner's claim as an individual because there was no injury in fact. *Id.* at 157.

than through another tribunal.[77]

Article III of the United States Constitution requires that two elements be met before a federal court has jurisdiction over a habeas corpus action.[78] The first element requires a "case or controversy."[79] A "case or controversy" ensures that an adversarial relationship between the parties exists.[80] The second element requires "injury in fact."[81] This element ensures that the party to the suit has a sufficient interest in the outcome of the suit.[82] When a third-party petitioner satisfies these two elements, he or she can invoke specific theories of standing.[83] Thus, when petitioning the court for habeas corpus relief, third-party petitioners may use three different theories of standing: *jus tertii*, citizen, and next-friend.[84] The appropriate theory depends largely on the circumstances of each case.

a. *Jus Tertii* Standing

Under the theory of *jus tertii*, a third party may claim individual standing to assert the detainee's rights[85] "in pursuit of [his] own interests."[86] *Jus tertii* standing has three requirements. First,

77. For the purposes of this Comment, "other tribunals" refers to the executive or legislative branches of government.

78. U.S. CONST. art. III, § 2.

79. *Id.* Article III of the U.S. Constitution limits the power of federal courts to "cases" and "controversies." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). A petitioner does not comply with Article III simply because he or she asks a court for an advisory opinion. *Id.* The judicial power of the United States "is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Id.*

80. *Id.*

81. Singleton v. Wulff, 428 U.S. 106, 112 (1976). "[I]njury in fact is a sufficiently concrete interest in the outcome of [a] suit to make it a case or controversy subject to a federal courts Article III jurisdiction." *Id.* at 112. In *Singleton*, two physicians brought an action challenging the constitutionality of a state statute excluding certain abortions from Medicaid coverage. *Id.* at 109. The district court dismissed the plaintiff's case, since they did not have adequate standing because there was no "injury in fact." *Id.* at 111. Injury in fact is a necessary component of Article III to establish a "case or controversy." *Id.* at 112. The Supreme Court held that the plaintiffs had standing because, if they won the suit, they would benefit by receiving payment for the abortions. *Id.* at 113.

82. *Id.* at 112.

83. Wilson v. Lane, 697 F. Supp. 1489, 1494-95 (S.D. Ill. 1988).

84. *Id.* at 1494.

85. *Id.* There are two types of individual standing, *jus tertii*, and citizen standing. *Id.* Under either of these theories, the petitioner asserts the detainee's rights to further the petitioner's own interest. *Id.* Next-friend standing is not a type of "individual standing" because the petitioner asserts the detainee's interest, not his own. *Id.* at 1497.

86. *Id.*

as with all types of standing, an injury in fact must exist.[87] Second, the interest the petitioner asserts must be intertwined with the right of the original party in interest, the detainee.[88] For example, the interests of two parties are intertwined when a physician asserts the rights of his patients to have abortions.[89] The physician is an effective proponent of the patient's rights because each party's right is intertwined with the other. The third requirement of *jus tertii* standing is that some "genuine obstacle" to the detainee's assertion of his or her own right must exist.[90] For instance, a genuine obstacle exists when an issue becomes moot due to timing factors that the real party in interest cannot control.[91]

b. Citizen Standing

Citizen standing allows a petitioner to invoke the public interest in order to prevent the state from executing a person in violation of the Constitution.[92] Essentially, citizen standing occurs only when a petitioner asserts the public interest.[93] For example, when a citizen asserts his status as a taxpayer he is essentially asserting citizen standing.[94]

In addition to injury in fact, there are two other requirements for this general type of standing. The first requirement is that there must be a link between the status that the petitioner claims

87. *Singleton* , 428 U.S. at 112.

88. *Id.* at 114. The relationship between the inmate and the petitioner must be such that "enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue." *Id.*

89. *Id.* at 115. The physician's own right, which is intertwined with the patient's right, is the right to perform the abortions. *Id.* at 113. Another example is a licensed beer vendor asserting the rights of his male customers between the ages of eighteen and twenty because he lost the business of these men as a result of the illegalization of the sale of beer to this group of people. Craig v. Boren, 429 U.S. 190, 192 (1976). In this case, a licensed beer vendor brought suit for injunctive relief against enforcement of a law which made the sale of alcohol to males between eighteen and twenty years of age, illegal. *Id.* The United States Supreme Court held that the petitioner had standing under the *jus tertii* theory because the petitioner's interests in selling beer to men between the ages of eighteen and twenty were so intertwined with the rights of the purchasers, that the petitioner was just as effective a proponent of the right as an eighteen to twenty year-old. *Id.* at 196.

90. Wilson v. Lane, 697 F. Supp. 1489, 1495 (S.D. Ill. 1988).

91. *Craig*, 429 U.S. at 194. The court found that a male between eighteen and twenty years of age could have a timing problem because he may reach twenty-one years of age before the litigation would be complete. *Id.* at 192. After the litigant reached twenty-one years of age, the court could dismiss the case for having no justiciable issue. *Id.* at 194.

92. *Wilson*, 697 F. Supp. at 1496.

93. *Id.* The theory behind citizen standing in capital cases is that even though the inmate does not wish to pursue his federal habeas remedy, there is "a matter involving public interests of the highest degree." *Id.*

94. Flast v. Cohen, 392 U.S. 83, 85 (1968).

and the type of legislation attacked.[95] Taxpayers, for example, must challenge the expenditure of federal tax funds.[96] The second requirement is that the petitioner must establish a link between his or her status as a taxpayer and the type of "constitutional infringement alleged."[97] *Jus tertii* standing and citizen standing involve petitioners asserting a detainee's rights for the petitioner's own interest, unlike next-friend standing which requires a third-party to assert a detainee's rights for the detainee's own best interests.[98]

c. Next-friend Standing

Next-friend standing is the final theory available to third parties who seek to intervene in capital cases. Under this theory, a petitioner may act on behalf of a detainee when the detainee cannot act on his own behalf.[99] Next-friend standing, unlike *jus tertii* and citizen standing, requires the petitioner to assert the detainee's rights rather than the petitioner's rights.[100] A next-friend petitioner must be solely dedicated to the best interests of the detainee.[101] In most instances, courts have required a significant relationship between the petitioner and the detainee.[102] Moreover, next-friend standing can be used only if the detainee himself could not file a petition.[103] For example, courts have held that mental incapacity is sufficient to allow next-friend standing.[104]

The three types of standing requirements are important because they place significant limitations on third-party interference with the legal process. The standing requirements ensure an adverse relationship between the parties by mandating an "injury in fact."[105] This adverse relationship is vital to the judicial system be-

95. *Id.* at 102. "[T]he taxpayer must establish a logical link between that status and the type of legislative enactment attacked." *Id.*

96. *Id.* at 103.

97. *Id.* at 102. "[T]he taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.*

98. *In re* Cockrum, 867 F. Supp. 494, 494-95 (E.D. Tex. 1994).

99. Wilson v. Lane, 697 F. Supp. 1489, 1497 (S.D. Ill. 1988). There are limitations on gaining standing under the next-friend theory. *Id.* at 1494. For example, the petitioner must show that the detainee could not sue on his or her own behalf. *Id.* at 1498. One common reason that a detainee cannot sue on his or her own behalf is lack of competency. *Id.*

100. *In re* Cockrum, 867 F. Supp. at 494-95.

101. *Id.*

102. *Id.* at 495. In *Cockrum*, the court found that the detainee's appointed counsel had a significant relationship with the detainee. *Id.*

103. *Wilson*, 697 F. Supp. at 1497. The petitioner may show that the detainee cannot make a rational choice with respect to continuing or abandoning further litigation. *In re* Cockrum, 867 F. Supp. at 495.

104. *In re* Cockrum, 867 F. Supp. at 495.

105. Craig v. Boren, 429 U.S. 190, 194 (1976); Baker v. Carr, 369 U.S. 186, 204 (1962).

cause it sharpens the presentation of the issues.[106]

B. Comparison of Habeas Corpus Relief and Executive Clemency

The interests asserted in executive clemency petitions are similar to the interests asserted in habeas corpus petitions. In both situations the petitioner requests relief from a sentence of death for himself or on behalf of another.[107] However, a significant disparity exists between the standing requirements for federal habeas petitions and the requirements for executive clemency petitions. Third parties face more significant limitations when seeking the writ of habeas corpus than when seeking executive clemency.[108] For this reason, improper third-party intervention occurs more frequently in habeas corpus situations.

By adopting stringent standing requirements for third parties, the courts have wisely limited third-party abuse of the judicial system.[109] Recognizing that the courts are not interested in political, social and moral questions of general inquiry, the courts have wisely kept third parties who seek to improperly present such questions in the judicial context at bay. On the other hand, because state governments have not imposed any type of standing requirements for third-party intervention into executive clemency decisions, third parties can still abuse the executive clemency system by using it as a forum to address issues important to them.

Although third-party issues and agendas may be important, the executive clemency process is not the appropriate forum to address such issues.[110] General political, social and moral questions are the proper subject matter for the legislative branch of government and third parties wishing to make changes in the law should be required to take those issues to the legislature.[111] Executive clemency, on the other hand, is a process solely designed to extend mercy or to correct judicial error.[112] The doctrine of executive

106. *Craig*, 429 U.S. at 194; Holden v. Hardy, 169 U.S. 366, 397 (1898).

107. See *supra* notes 26-43 and 63-84 and accompanying text for a discussion of executive clemency and habeas corpus relief, respectively.

108. See *supra* notes 63-84 and accompanying text for a discussion of the need to establish certain constitutionally mandated requirements, such as standing and injury in fact, in order to qualify to petition for habeas corpus.

109. *See generally* Whitmore v. Arkansas, 495 U.S. 149 (1990) (denying third party intervention).

110. See *supra* notes 44-62 and accompanying text for a discussion of the effects of third-party abuse of the executive clemency system.

111. *But Cf.*, Alfieri, *supra* note 45 (explaining that modern abolitionist strategy is to engage in a case by case attempt). *See also* Kurt Erickson, *Outisders May be Banned by Clemency Process*, THE PANTAGRAPH, May 8, 1996, at A7. Representative Durksen's bill banning third party clemency petitions passed the house by a vote of 99-17 and the Senate by a vote of 46-5. *Id.*

112. Pietrkowski, *supra* note 3, at 1405-09. Pietrkowski also lists clemency as an entitlement under the Due Process Clause, but notes that this argument frequently fails. *Id.* at 1411.

clemency calls for a case specific evaluation of the equities of a particular punishment under the specific circumstances.[113]

In addition to the use of the executive clemency process as a political tool, third parties may actually hamper a detainee's chance to obtain clemency. In the clemency process, executives base their decisions on all of the relevant facts of a particular case. Often, third parties collect these facts and present them to the executive. Instead of focusing solely on the facts and issues of a particular case that would create a reasonable basis for clemency, third parties may attempt to assert their own political, social or moral agenda, and in so doing may fail to provide adequate representation of the detainee's interest.[114] For these reasons, the doctrine of executive clemency should not remain vulnerable to third-party abuse. Therefore, state governors and legislatures should impose strict standing requirements in order to limit inappropriate third-party access to executive clemency.

III. STATES SHOULD ADOPT STANDING FOR EXECUTIVE CLEMENCY

In most states, under the lenient requirements of executive clemency, almost anyone can petition on behalf of a detainee.[115] This may be detrimental because third-party petitioners can abuse the system by using executive clemency as a public forum to assert their own political and social beliefs and to pursue their own interest under the guise of aiding the detainee.[116] Conversely, third parties supporting an execution order can intervene in an attempt to make the executive deny clemency on the basis of the intervenors' social, moral, or political views rather than the relevant facts of the case. Section A demonstrates why third-parties may be deficient petitioners in capital cases. Section B explains how standing requirements would prevent third-party abuses of the executive clemency process.

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113. Michael S. Serrill, *Cathy and Gary in Medialand*, TIME, May 27, 1985, at 66. After rape victim Cathleen Crowell Webb recanted her accusation of Gary Dotson as her rapist, Illinois Governor James Thompson granted executive clemency to Dotson. *Id.* At the time of Webb's recantation, Dotson had spent six years in prison for the rape. *Id.* Although Thompson granted clemency, he did not grant a pardon because there was confusion as to what really happened. *Id.* Thompson's decision turned on the specific circumstances of the case: 1) Dotson served six years; 2) the circumstances left a "cloud over the Illinois justice system"; and 3) Webb recanted soon after becoming a born again Christian. *Id.*

114. See *infra* notes 122-150 and accompanying text for a discussion of the deficiencies of third party petitioners.

115. *See, e.g.*, ILL. ADMIN. CODE tit. 20, § 1610.180 (1994).

116. See *infra* notes 117-50 and accompanying text for a discussion of the detrimental effects of third-party intervention.

A. Third Parties May Be Deficient Petitioners

Courts recognize that third parties asserting the detainee's rights may not be the best proponents of those rights.[117] Improper intervention in the habeas context would occur if courts permitted third parties to intervene without injury in fact.[118] The courts acknowledge that without injury in fact a third party may not be the best proponent of the detainee's rights. Ordinarily, the detainee is the best proponent of his own rights. Similarly, in an executive clemency petition, the detainee himself is probably the best proponent of his own rights.[119]

A third-party petitioner may be a deficient proponent of a detainee's rights for four reasons: (1) the third party's petition acts as an obstacle for the detainee to file his own petition;[120] (2) the third party does not have the same base of information as the detainee; (3) the third party has a different interest at stake than the detainee which may make the third party a less effective advocate of the detainee's interest because the third-party does not adequately assert the detainee's interest; and (4) the third party may put pressure on the executive through the use of the media which may cause the executive to base his or her decision on something other than the relevant facts of the case. In all of these situations, the third party simply may not represent the detainee's interests in the best possible manner since the petitioner would likely pursue his or her own agenda over that of the detainee.[121]

1. Third-Party Petitions May Bar the Detainee

A third party may hamper the executive clemency process by preventing a governor or reviewing board from hearing other petitions.[122] A third-party petition may in fact bar other petitions, including a subsequent petition filed by the detainee himself.[123] For

117. *See* Singleton v. Wulff, 428 U.S. 106, 114 (1976) (explaining that the real party in interest is the best proponent of his own rights).

118. *See generally* Whitmore v. Arkansas, 495 U.S. 149 (1990).

119. *See id.* (explaining that the policy behind requiring adversarial relationships is to sharpen the presentation of the issues).

120. ILL. PRISONER REV. BD., GUIDELINES FOR EXECUTIVE CLEMENCY 1 (1993) [hereinafter ILL. PRISONER REV. BD.]. The IPRB's Guidelines for Executive Clemency state "[n]o petition will be accepted for review within one year of the date of the denial of a prior petition on behalf of the same individual. The Chairman of the Board may permit an exception to this limitation for compelling reasons." *Id.* Thus, a detainee may be barred for one year from filing his own petition, and that time period may prove to be a complete bar to the detainee ever filing his own petition.

121. See *supra* notes 79 and 80 and accompanying text for a discussion of how the doctrine of standing ensures an adversarial relationship between the parties.

122. *See* ILL. PRISONER REV. BD., *supra* note 120, at 1 (allowing only one petition for executive clemency within a one-year time period).

123. *Id.*

example, in Illinois, after denying a petition for executive clemency, the IPRB will not consider another petition until one year has passed.[124] The IPRB does allow, at the Chairperson's discretion, an exception to this rule.[125] The exception requires the subsequent petitioner to demonstrate "compelling reasons" as to why the IPRB should hear the petition.[126] Therefore the detainee must demonstrate compelling reasons before he can make a plea for his life to the IPRB.[127] This situation may occur when the detainee originally opposed executive clemency on his behalf, but then changed his mind.[128] Not only is it inefficient to consider both petitions, it is unjust to require the detainee to show compelling circumstances.

In an extreme case, the detainee may purposely hinder the petitioner in his efforts.[129] This actually occurred in *People v. Walker*.[130] Charles Walker was convicted of killing a man and a woman in a robbery involving forty dollars.[131] After his conviction, Walker wanted to die and opposed further discretionary appeals.[132] Walker refused to aid the intervening third party in their attempt at appeals on his behalf.[133] The third-party petition could impair a detainee in this situation if the detainee later decides to petition.[134]

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124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. Karwath & Grady, *supra* note 16, at 1. Lloyd Wayne Hampton, a death-row inmate who wanted to be executed, changed his mind on the evening before his execution. *Id.* The change was the result of an emotional plea from Hampton's sister. *Id.* Another example of a death row inmate changing his mind is John Louis Evans. Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 855 (1987). Evans was convicted of murder, and demanded a death sentence and threatened to kill again if a death sentence was not imposed. *Id.* However, Evans changed his mind and sought to have his conviction overturned. *Id.*
129. Toby Eckert, *Death Penalty Debate Moves To Spotlight Upcoming Gacy Execution Focuses New Attention On Lengthy Appeals*, PEORIA J. STAR, Jan. 17, 1994, at A1; White, *supra* note 128, at 853. A Utah court sentenced Gary Gilmore to death for the murders of a service station attendant and a motel clerk. *Id.* Gilmore wanted to die and resisted efforts by his attorneys to save his life. *Id.* He went as far as firing his attorneys for appealing the case to the Utah Supreme Court. *Id.*
130. 628 N.E.2d 1111, 1112 (Ill. App. Ct. 1993).
131. Charles Bosworth Jr., *Groups Ask Edgar to Stop Execution*, ST. LOUIS POST-DISPATCH, Nov. 7, 1992, at 4A.
132. *Id.* Charles Walker, the first man executed in Illinois since 1974, was executed in September of 1990. David Heckelman, *Second Death-Row Inmate Asks Supreme Court To Drop Appeals*, CHI. DAILY L. BULL., Nov. 10, 1992, at 1.
133. Eckert, *supra* note 129, at A1.
134. Karwath & Grady, *supra* note 16, at 1. Lloyd Wayne Hampton, who was sentenced to death for the torture-murder of an Illinois widower, had just this type of change of heart concerning his execution. *Id.* About five hours

If had Walker later decided to petition on his own behalf, he would have faced an obstacle. The third party drafted its original petition against the detainee's will, without his cooperation and possibly lacking significant information. The detainee may be precluded from petitioning for one year.[135]

2. Different Knowledge Bases

Subtle but important facts relevant to the petition may not come to light because the third-party petitioner, and not the detainee, produces the facts. The problem intensifies when the detainee opposes intervention,[136] because the detainee may not cooperate and may refuse to release information that could help the petitioner.[137] For example, where a husband/victim regularly beat his wife (now on death row for the husband's murder) during the course of the marriage, the petitioner should attempt to advance the beatings as a foundation for mercy based clemency.[138] However, many of the relevant details which would establish the beatings may not come to light because the detainee does not cooperate with the third-party petitioner.[139] Another problem arises when the petitioner has a separate interest apart from the detainee's.

3. Separate Interests

Executive clemency is particularly vulnerable to abuse when the third party is an interest group seeking clemency for the de-

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before his execution, after an emotional discussion with his sister, Hampton decided that he wanted to pursue further appeals. *Id.*

135. *See* ILL. ADMIN. CODE. tit. 20, § 1610.180 (1994).

136. Eckert, *supra* note 129, at A1. This type of interference occurred in the case of Charles Walker. *Id.* Walker was a death row inmate who opposed further appeals and hindered interest groups from the appellate process. *Id.*

137. *See* White, *supra* note 128, at 854. For instance, the court convicted Steven Judy of the rape and murder of a woman and subsequent drowning of her three children. *Id.* During sentencing, Judy instructed his attorneys not to present any mitigating evidence and not to oppose the death penalty. *Id.*

138. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1193 (1993). Battered Woman Syndrome can be used for mitigation in both the criminal prosecution of a battered woman, and executive clemency hearings of a woman who has been convicted of a crime. *Id.* When Battered Woman Syndrome becomes an issue in a legal action, it is important for an expert witness to conduct an analysis of the battered woman's experiences. *Id.* at 1201-02. There are four categories that the expert should be aware of: (1) the history and extent of violence between the victim and aggressor; (2) the battered woman's psychological reactions to the violence; (3) the victim's responses to the violence and the consequences of those responses; and (4) the context that induced battered woman's responses and reactions. *Id.* at 1202. An expert witness can then aid the trier of fact in understanding the information pertaining to the battered woman. *Id.*

139. *See id.* (discussing what an expert should be aware of).

tainee because the third party opposes the death penalty based on its members' philosophical, social, or moral views.[140] Consider the following hypothetical situation. A group decides to petition on behalf of the detainee to advance its own political or moral interest by opposing all executions. The purpose behind the group's petition is to gain greater acceptance of Battered Woman Syndrome[141] as a basis for executive clemency.[142] Moreover, the group wants to use the detainee's case as an arena to advance its own cause, the prevention of executions. However, the interest the third party asserts is not necessarily in the best interest of the detainee. The detainee might have made a better case for herself had she pursued theories other than Battered Woman Syndrome.[143] The problem results in the wrong interest being represented. The interest group wants its interest addressed rather than the best in-

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140. Wilson v. Lane, 697 F. Supp. 1489, 1497 (S.D. Ill. 1988). The court addressed the issue of interest groups who seek intervention in the form of habeas corpus relief on behalf of a prisoner condemned to death. *Id.* Specifically, the court addressed the use of the next-friend theory of standing by these interest groups. *Id.* The court cited *Webber v. Garza*, 570 F.2d 511, 514 (5th Cir. 1978), stating "The 'next-friend' expedient . . . may not be so abused as to unleash on the courts a quasi-professional group of lay writers who seek to right all wrongs." *Wilson*, 697 F. Supp. at 1497.

141. Dutton, *supra* note 138, at 1194-95. Battered Woman Syndrome is defined as a battered woman's reasonable belief that she is in danger when it is not otherwise apparent to the outside observer. *Id.* This concept developed because it is essential to understand a victimized woman's response to the violence when domestic violence is an issue in the legal context. *Id.* at 1193. Courts use Battered Woman Syndrome in several specific legal contexts, including: criminal proceedings against a domestic violence defendant; executive clemency hearings for a battered woman who struck back against her aggressor; a battered woman's claims of personal injury; divorce proceedings and child custody hearings. *Id.* Developments of the concept of Battered Woman Syndrome include the expansion into the area of expert testimony. *Id.* at 1194. However, forensic evidence is not limited to testimony of the psychological reactions. *Id.* at 1195. Some relevant elements of a battered woman's experiences include her prior responses to violence, the outcome of her responses, and the type of surrounding context. *Id.* at 1196. Battered Woman Syndrome now includes psychological reactions to violence as well as cognitive, emotional, and behavioral reactions. *Id.* at 1197.

142. *Id.* at 1193. Courts are now applying scientific knowledge pertaining to violence and the responses of women who are victims of chronic domestic abuse to situations where battered women have been convicted of a crime. *Id.*

143. Edgar, *supra* note 46, at 2. Governor Edgar, in his press release, stated:

> The fact that Guinevere Garcia is a woman has not influenced my decision. As I said, hundreds of men in comparable circumstances have been spared the ultimate punishment by their fellow citizens, and I am fully prepared to reject clemency for a woman under other circumstances. Some who have sought clemency in her behalf have raised the possibility that she was a victim herself—a victim of battered woman syndrome. However, the evidence does not support that assertion.

Id.

terest of the detainee.[144]

Under next-friend standing, a third party must be truly dedicated to the best interest of the detainee.[145] Although interest groups may claim that they seek intervention in the best interests of the detainee, asserting a third-party interest does not always achieve this goal.[146] Unless the group's interest is identical to the detainee's, the group may not be acting in the best interest of the detainee.[147] The detainee has her life at stake, and anyone advancing an interest other than the detainee's may be less effective.

4. Media Pressure

Third parties can intervene in the clemency process to either support or oppose the granting of clemency. Some third parties attract media attention simply by getting involved.[148] Although this media attention should not affect the executive's decision, it makes the executive clemency system vulnerable to abuse.[149] A third party who wishes to create pressure on an executive might be able to do so through media coverage of clemency hearings.[150] Although

144. *Cf. In re* Cockrum, 867 F. Supp. 494, 494-95 (E.D. Tex. 1994) (stating that "the 'next-friend' must be truly dedicated to the best interests of the person whose behalf he seeks to litigate and must have some significant relationship with the real party in interest.").

145. *Id.*

146. *Killer Fighting*, *supra* note 1, at 4A. Lloyd Wayne Hampton, in his letter addressing his competency, said:

> I'm sure that the general consensus, especially among those opposed to capital punishment, is that a man who would willingly go to his death is incapable of making a rational choice. . . . It is my opinion that a man who would willingly sit in a small cell for 24 hours a day year after year, merely postponing the inevitable execution, is the irrational man.

Id.

147. *In re* Cockrum, 867 F. Supp. at 494-95. The next-friend must be "truly dedicated to the best interests" of the detainee. *Id.*

148. At Guinivere Garcia's clemency hearing celebrity Bianca Jagger of Amnesty International spoke on behalf of Garcia and attracted widespread media attention. O'Connell, *supra* note 16, at 1.

149. *See* Kobil, *supra* note 3, at 607-08 (highlighting the dangers of granting or denying clemency to a governor's political career). In 1893, Governor John Peter Altgeld of Illinois courageously granted clemency to three surviving anarchists convicted in connection with the infamous Haymarket bombing in Chicago. *Id.* at 607. The Governor's grant of clemency drew nationwide attention and created a "firestorm" of criticism. *Id.* Altgeld became "one of the most reviled men in the country" and subsequently rejected by the voters in his bid for re-election. *Id.* Similarly, former Governors Pat Brown of California and Michael DiSalle of Ohio suffered political problems because of media and public reaction to clemency decisions. *Id.* at 608. Moreover, some governors have been accused of luring votes by granting clemency to particularly sympathetic criminals. *See* Becker, *supra* note 52, at 337 (discussing Illinois Jim Edgar's decision to grant clemency to four battered women).

150. Illinois Representative James Durkin referred to the Illinois Prisoner Review Board hearing over Guinivere Garcia's clemency decision as a

in an ideal system, the media coverage would not affect the clemency process, in reality it exposes the system to potential abuse.

B. Standing Prevents Third-Party Abuse

Whitmore v. Arkansas[151] illustrates how the doctrine of standing effectively curtails abuse of the judicial system. In *Whitmore*, the Court barred a third party from petitioning the Court for habeas corpus relief.[152] The third party attempted to intervene as an individual[153] and as the detainee's next-friend.[154] The third party was a fellow death row inmate who had exhausted his own state court appellate review, but had not sought federal habeas corpus relief.[155] After the detainee waived his right to a direct appeal,[156] the petitioner attempted to intervene and seek habeas corpus relief on behalf of his fellow death row inmate.[157] In essence, the third-party petitioner was asserting his fellow death row inmate's habeas corpus petition even though the petitioner had not yet filed his own habeas corpus petition.

The Supreme Court rejected the petitioner's attempt to intervene as an individual because his claim of injury in fact was too speculative to invoke Article III jurisdiction.[158] The Court also rejected the petitioner's claim that the Eighth Amendment[159] protected him[160] under citizen standing.[161] Finally, the Court rejected petitioner's claim under the next-friend theory of standing.[162]

"sideshow." Becker, *supra* note 52, at 337.

151. 495 U.S. 149, 151-54 (1990).

152. *Id.* at 166.

153. *Id.* To petition a court as an individual, "the complainant must allege an injury to himself that is 'distinct and palpable.'" *Id.* at 155.

154. *Id.* at 153. The petitioner invoked both *jus tertii* and citizen standing as an individual. *Id.*

155. *Id.* at 156.

156. Id. at 152. Arkansas law did not require a mandatory appeal in every death penalty case. *Id.* at 153. However, to forgoe direct appeal the detainee must have the capacity to understand the choice between life and death and the decision to waive the appeal must be knowing and intelligent. *Id.*

157. *Id.*

158. *Id.* at 157. In holding that the petitioner's injury in fact was "too speculative," the Court noted that there was no factual basis for the contention that the sentence imposed on a mass murderer would be relevant to a future comparative review of the petitioner's robbery-murder sentence. *Id.*

159. U.S. CONST. amend. VIII. The Eighth Amendment states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

160. *Whitmore*, 495 U.S. at 160.

161. *Id.* Petitioner contended that as an Arkansas citizen he was protected under the Eighth Amendment to the U.S. Constitution. *Id.* Petitioner also contended that he had a right to invoke the Court's jurisdiction to make sure that appellate review was carried out. *Id.* The Court held that the petitioner raised only the "generalized interest of all citizens," and held that that is not an adequate basis on which to grant standing. *Id.*

162. *Id.* at 165. The Court noted that a prerequisite for a third party to pe-

Whitmore illustrates how the doctrine of standing can bar a remote third-party petitioner from judicial adjudication. The doctrine of standing also tends to sharpen the presentation of issues and information to the court. The sharpening of the presentation of the issues may be lost in the executive clemency context because of lenient requirements for third-party intervention. The underlying judicial policy of having the best party assert the rights[163] is not served in the executive clemency context because third parties can intervene without any limits on standing. Third parties may intervene against a detainee's will and assert their own agenda. This is not only unfair to the detainee, but the citizens of the state are going to have to finance this type of abuse of the system. As demonstrated above, the judicial imposition of stringent standing requirements effectively protects the integrity of the judicial process itself. Similarly, standing in the executive clemency context would likely diminish third-party abuse of the system.

IV. CORRECTIVE MEASURES

Legislative action can correct the inadequacies of executive clemency. This Comment discusses two corrective measures. Section A examines at newly enacted legislation in Illinois. Section B suggests an alternative that should be implemented nationwide.

A. Newly Enacted Illinois Legislation

Recognizing the need to limit third-party petitions for executive clemency, legislators in Illinois have enacted legislation that changes the procedures for filing executive clemency petitions.[164] The amendment requires third parties to get a detainee's written consent before petitioning for executive clemency on behalf of the detainee.[165] The amendment allows a petitioner to file an application for executive clemency without the written consent of the detainee if the detainee suffers from a mental or physical condition

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tition as a detainee's next-friend is that the detainee must not be able to himself give a knowing, intelligent, and voluntary waiver of his rights. *Id.* The Court further noted that since the Supreme Court of Arkansas found that the detainee was competent, this prerequisite was not met. *Id.* at 166. Consequently, the petitioner lacked standing under the next-friend theory. *Id.*

163. Singleton v. Wulff, 428 U.S. 106, 114 (1976). The rationale is that the real party in interest is the best proponent of his or her own rights. *Id.* This is because any other party may attempt to assert a different interest. *Id.*

164. The proposal would alter 730 ILCS 5/3-13(c).

165. H.R. 2658, 89th Gen. Ass., Reg. Sess. (1996). The bill stated in relevant part that "[a]pplication for executive clemency under this Section may not be commenced on behalf of a person who has been sentenced to death without the written consent of the defendant, unless the defendant, because of a mental or physical condition, is unable to understand the nature and purpose of the proceeding." *Id.*

or cannot understand the nature and purpose of the proceedings.[166] The changes also apply to petitions for post-conviction relief[167] and petitions for habeas corpus relief.[168]

This legislation is a large step toward instituting the judicial standing requirements in the executive clemency context.[169] Specifically, it imposes requirements similar to the requirements under the theory of next-friend standing.[170] However, the new law does not require "injury in fact." Under the new law, as in the case of next-friend standing, the third party cannot petition for relief on behalf of the detainee if a competent detainee opposed intervention and refused to give written permission.[171]

Several issues arose during the Illinois House of Representatives debate on the bill.[172] The debate questioned the impact of barring a third-party petition.[173] The main concern was whether the same information would be available to the Governor if the third party did not intervene.[174] Proponents of the measure responded by stressing that all relevant information would remain available. However, third parties would not have the opportunity to highlight irrelevant information.[175] By precluding third-party petitions, issue-oriented third parties could not abuse the clemency process by asserting their own agendas.[176] The enactment of this law eliminates the problem arising from the separate interests between the detainee and the petitioner.

B. Proposal

The optimal solution to the problem of improper third-party intervention would be to implement the doctrine of standing in the executive clemency process. Executives should require petitioners for executive clemency to have judicial standing because standing prevents abuses of the system. The doctrine of standing is appro-

166. *Id.*

167. *Id.* Similarly, the amendment affecting post-conviction relief would alter the Illinois Code of Criminal Procedure of 1963, 725 ILCS 5/122-1.

168. *Id.* The bill would also affect habeas corpus relief and alters the Illinois Code of Civil Procedure by amending 735 ILCS 5/10-103.

169. Wilson v. Lane, 697 F. Supp. 1489, 1497 (S.D. Ill. 1988). Both the proposed legislation and next-friend standing allows third-party intervention when the detainee is incompetent. *Id.*

170. *Id.*

171. HR 2658.

172. Tape of debate on House Bill 2658, held by the Illinois House of Representatives (Feb. 21, 1996) (on file with author) [hereinafter *Debate*]. During the House debate, Representative Blagojevich posed various hypothetical situations that may be affected if H.R. 2658 was enacted. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. See *supra* notes 117-50 and accompanying text for a discussion of how third-parties can abuse the clemency process.

priate because it blends constitutional limitations with practical policy considerations.[177] The doctrine of standing would limit third-party petitioners for executive clemency to people who have an "injury in fact."[178] This requirement prevents improper third parties from petitioning for habeas corpus relief and imposing their social, political or moral views in the judicial system. The doctrine of standing would impose a stricter limit on third parties than the newly enacted legislation in Illinois. Yet the doctrine of standing allows third parties to intervene when intervention is appropriate and beneficial to the detainee.[179]

CONCLUSION

Third-party intervention renders the executive clemency process extremely vulnerable to abuse, and the doctrine of standing would put an immediate end to such abuses. At present, parties that lack standing can intervene simply to create political pressure on the executive and publicity for the case. Many lawyers disagree over the effect of stirring up publicity before a clemency hearing.[180] Although it is often the case that publicity might benefit the detainee, this is not necessarily true. Without standing requirements, anyone, including law enforcement officials, proponents of the death penalty, and members of the victims' families are free to intervene in the executive clemency process and petition in favor of the execution. The decision to grant executive clemency is of the highest importance. Political pressure, moral, or social beliefs, whether they be in favor of or against clemency generally, should not influence the executive's decision in any way. The judicial standing requirements ensure that courts will only accommodate parties with an injury in fact.

Executive clemency needs limits on third-party intervention. The doctrine of standing has proven an effective limitation on third-party intervention in the habeas corpus context. The combination of policy considerations and constitutional limitations make the doctrine of judicial standing an ideal guideline to limit third-party petitioners seeking executive clemency. Executive clemency is especially suited for the doctrine of standing because it would prevent abuses of executive clemency. The United States Constitution imposes the doctrine of standing in the area of habeas corpus relief, but there is currently a need for legislative action limiting third-party intervention in executive clemency. Executive

177. Flast v. Cohen, 392 U.S. 83, 99 (1968).

178. See *supra* notes 79 and 80 and accompanying text for a discussion of the adversarial relationship.

179. *See, e.g.,* Wilson v. Lane, 697 F. Supp. 1489, 1496 (S.D. Ill 1988) (discussing the advantages of granting next-friend standing to third parties who intervene in court cases on behalf of incompetent defendants).

180. Abramowitz & Paget, *supra* note 27, at 172.

clemency should not be vulnerable in a way that allows intervention to third parties who seek to "right all wrongs."[181] If the executive clemency process used the doctrine of standing to limit third-party intervention, abuses therein would cease to exist.

181. *Wilson*, 697 F. Supp. at 1497.