

**RESOLUTION 09-16-06**

**DIGEST**

Death Penalty: Moratorium

Adds Penal Code section 190.07 to establish a commission to review and publish findings on the administration of the death penalty.

**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

Similar to 5-08-00, which was approved in principle. and 6-14-01 which was disapproved.

Reasons:

This resolution adds Penal Code section 190.07 to establish a commission to review and publish findings on the administration of the death penalty. This resolution should be approved in principle because there is strong public support for thoughtful and comprehensive research into the application/use of the death penalty in California and serious concerns about its administration.

The findings of such a commission could have significant value for understanding the application of capital punishment in this State, aiding in the fair and equitable administration of justice. The establishment of such a commission would, by the terms of the resolution, automatically result in a moratorium on the death penalty in California until the Legislature can review the commission’s recommendations and enact legislation repealing the to-be-created Penal Code section contemplated by this resolution.

**TEXT OF RESOLUTION**

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Section 190.02 to the California Penal Code to read as follows:

- 1    § 190.02
- 2    SECTION 1. SHORT TITLE.
- 3    This Act may be cited as the “California Death Penalty Fairness and Fiscal Responsibility
- 4    Study Commission Act”
- 5
- 6    TITLE I--MORATORIUM ON THE DEATH PENALTY
- 7    SEC. 101. FINDINGS
- 8        The Legislature makes the following findings:
- 9        (1) GENERAL FINDINGS-
- 10       (A) The administration of the death penalty in California should be
- 11    consistent with fundamental principles of fairness, justice, equality, and due process
- 12    under state and federal law.

13 (B) Now, more than ever, Californians are questioning the use of the death  
14 penalty and calling for assurances that it be fairly applied.

15 (C) The administration of the death penalty is expensive to taxpayers,  
16 and, particularly in light of the extraordinary fiscal challenges Californians currently  
17 face, careful scrutiny should be given to whether the death penalty is cost-justified.

18 (2) WHETHER THE DEATH PENALTY CAN BE APPLIED IN A  
19 FAIR AND EVEN-HANDED MANNER, CONSISTENT WITH DUE PROCESS,  
20 HAS BEEN DRAWN INTO QUESTION NATIONWIDE-

21 (A) The United States Supreme Court has held that a heightened level of  
22 due process applies in capital cases. There is significant evidence that states are not  
23 providing this heightened level of due process. In a comprehensive, nationwide review  
24 of modern death penalty sentencing, Professor James Liebman and researchers at  
25 Columbia University found that, during the period 1973 to 1995, 68 percent of all  
26 death penalty cases reviewed were overturned due to serious constitutional error.  
27 Forty percent of the cases overturned were reversed in federal court after having been  
28 upheld in state court.

29 (B) The high rate of error throughout all death penalty jurisdictions suggests  
30 that there is a grave risk that innocent persons may have been, or will likely be,  
31 wrongfully executed. Since 1973, over 100 innocent persons sitting on death rows  
32 across the country have been exonerated, most after serving lengthy sentences. Four  
33 of those cases occurred in San Francisco. Although the United States Supreme Court  
34 has never conclusively addressed the issue of whether executing an innocent person  
35 would in and of itself violate the Constitution, in Herrera v. Collins, 506 U.S. 390  
36 (1993), a majority of the Court expressed the view that a persuasive demonstration of  
37 actual innocence will violate substantive due process, rendering imposition of a death  
38 sentence unconstitutional.

39 (C) There are many systemic problems that result in innocent people being  
40 convicted such as mistaken identification, reliance on jailhouse informants, reliance on  
41 faulty forensic testing and no access to reliable DNA testing:

42 (i) For example, a study of cases of innocent people who were later  
43 exonerated, conducted by attorneys Barry Scheck and Peter Neufeld with “The  
44 Innocence Project” at Cardozo Law School, showed that mistaken identifications of  
45 eyewitnesses or victims contributed to 84 percent of the wrongful convictions.

46 (ii) Many persons on death row were convicted prior to 1994 and did not  
47 receive the benefit of modern DNA testing. At least 10 individuals sentenced to death  
48 have been exonerated through post-conviction DNA testing, some within days of  
49 execution. Yet in spite of the current widespread prevalence and availability of DNA  
50 testing, many States have procedural barriers blocking introduction of post-conviction  
51 DNA testing. More than 30 States have laws that require a motion for a new trial  
52 based on newly discovered evidence to be filed within 6 months or less.

53 (iii) The widespread use of jailhouse snitches who earn reduced charges or  
54 sentences by fabricating “admissions” by fellow inmates to unsolved crimes can lead  
55 to wrongful convictions.

56 (D) The sixth amendment to the United States Constitution guarantees all  
57 accused persons access to competent counsel. The Supreme Court set out standards

58 for determining competency in the case of Strickland v. Washington, 466 U.S. 668  
59 (1984). Unfortunately, there is unequal access to competent counsel throughout death  
60 penalty States. For example, ninety percent of capital defendants cannot afford to hire  
61 their own attorney. Thirty-seven percent of capital cases were reversed because of  
62 ineffective assistance of counsel, according to the Columbia study.

63 (E) The Supreme Court has held that it is a violation of the eighth  
64 amendment of the United States Constitution to impose the death penalty in a manner  
65 that is arbitrary, capricious, or discriminatory. McKlesky v. Kemp, 481 U.S. 279  
66 (1987). Studies consistently indicate racial disparity in the application of the death  
67 penalty both for the defendants and the victims. The death penalty is disparately  
68 applied in various regions throughout the country, suggesting arbitrary administration  
69 of the death penalty based on where the prosecution takes place.

70 (i) For example, since 1976, 45 percent of death row inmates were white, 43  
71 percent were black, 9 percent were Hispanic, and 2 percent were of other racial groups.  
72 Of the victims in the underlying murder, 81 percent were white, 14 percent were black,  
73 and 4 percent were Hispanic. While over 80 percent of completed capital cases involve  
74 white victims, nationally only 50 percent of murder victims are white. These figures  
75 show a continuing trend since reinstatement of the modern death penalty of a  
76 predominance of white victims' cases and imply that white victims are considered more  
77 valuable in the criminal justice system.

78 (ii) Executions are conducted predominately in southern States. Ninety  
79 percent of all executions in 2000 were conducted in the south. Only 3 States outside the  
80 south, Arizona, California, and Missouri, conducted an execution in 2000. Texas  
81 accounted for almost as many executions as all the remaining States combined. A  
82 recently published book by Boalt Hall School of Law Professor Franklin Zimring, The  
83 Contradictions of American Capital Punishment (2003), concludes that there is strong  
84 empirical evidence of a correlation between those states in which lynching and other  
85 modes of vigilante violence were once most prevalent, and those states in which  
86 executions are most frequent today. The vigilante tradition lives on through the death  
87 penalty, according to Professor Zimring

88 (F) After 13 innocent people were released from Illinois death row in the  
89 same period that Illinois had executed 12 people, on January 31, 2000, Governor  
90 George Ryan of Illinois imposed a moratorium on executions in that state until he  
91 could be "sure with moral certainty that no innocent man or woman is facing a lethal  
92 injection, no one will meet that fate." Governor Ryan subsequently appointed a  
93 Governor's Commission on Capital Punishment in Illinois.

94 (i) The Illinois Governor's Commission on the Death Penalty released a  
95 report on April 15, 2002, finding that the death penalty had been sought in Illinois too  
96 frequently to ensure public confidence in the capital sentences imposed; that  
97 fundamental change in the Illinois capital punishment system was necessary in order to  
98 enhance the level of judicial scrutiny at all junctures in the process; and that, if the  
99 death penalty were to continue to be available in Illinois, the state would need to adopt  
100 85 specific procedural reforms.

101 (ii) The Illinois Governor's Commission found that, to carry out its  
102 recommended reforms, a significant boost in public funding would be required. In

103 addition, a majority of the Illinois Governor's Commission -- including some members  
104 who had favored the death penalty prior to studying its actual administration -- found  
105 that the death penalty should be abolished.

106 (iii) After considering this report, Governor Ryan commuted the death  
107 sentences of more than 160 inmates who had been on Illinois' death row at the time the  
108 moratorium went into effect. To date, only a handful of the reforms recommended by  
109 the Illinois Governor's Commission have been adopted by the Illinois Legislature, and  
110 there has been no increase in funding for administration of the death penalty. The  
111 Illinois death penalty moratorium remains in effect, having been adopted by Governor  
112 Ryan's successor.

113 (H) We find that it would be an important and useful exercise to use the  
114 recommendations of the Illinois Governor's Commission as a benchmark for similar  
115 study of the death penalty in California. California has the largest death row  
116 population of any state in the United States with over 650 people now condemned to  
117 die - three times the number on Illinois' death row - so any flaws which exist in  
118 California's system of administering the death penalty would have a far greater impact  
119 than the flaws found in Illinois. According to Robert M. Sanger, in a recently  
120 published article entitled "Comparison of the Illinois Commission Report on Capital  
121 Punishment With The Capital Punishment System in California," 44 Santa Clara Law  
122 Review 101 (2003), California complies with just 6.17% of the Illinois Governors'  
123 Commission recommended procedural reforms.

## 124 125 SEC. 102. CALIFORNIA DEATH PENALTY MORATORIUM

126 The state of California shall not carry out any sentence of death until this Legislature  
127 considers the final findings and recommendations of the California Commission on the  
128 Death Penalty (the "Commission") in the report submitted under section 202(c)(2) and  
129 enacts legislation repealing this section; implementing or rejecting all guidelines and  
130 procedures recommended by the Commission; or, if warranted based on the findings and  
131 recommendations of the Commission, abolishing the death penalty in California.

## 132 TITLE II--CALIFORNIA COMMISSION ON THE DEATH PENALTY

### 133 SEC. 201. ESTABLISHMENT OF COMMISSION

134 (a) ESTABLISHMENT- There is established a commission to be known as the  
135 California Commission on the Death Penalty.

#### 136 (b) MEMBERSHIP-

137 (1) APPOINTMENT- Members of the Commission shall be appointed by  
138 the Chief Justice of the Supreme Court of California in consultation with the Governor,  
139 the Attorney General, the President of the Senate, and the Speaker of the Assembly.

140 (2) COMPOSITION- The Commission shall be composed of 13 members, of  
141 whom--

142 (A) 2 members shall be current or former prosecutors;

143 (B) 2 members shall be criminal defense attorneys experienced in capital  
144 litigation;

145 (C) 2 members shall be current or former judges;

146 (D) 2 members shall be economists, budget officers, financial analysts of other  
147 professionals skilled in analyzing the fiscal impact of law enforcement and penal policies,

148           (E) 5 members shall be individuals from the public or private sector who have  
149 knowledge or expertise, whether by experience or training, in matters to be studied by the  
150 Commission, which may include —  
151           (i) officers or employees of county or local governments;  
152           (ii) leaders of the state bar association, of metropolitan bar associations or  
153 of specialized bar associations;  
154           (iii) members of academia, nonprofit organizations, the religious community, or  
155 industry; and  
156           (iv) other interested individuals.  
157           (3) BALANCED VIEWPOINTS- In appointing the members of the  
158 Commission, the Chief Justice shall, to the maximum extent practicable, ensure that  
159 the membership of the Commission is fairly balanced with respect to the opinions of  
160 the members of the Commission regarding support for or opposition to the use of the  
161 death penalty.  
162           (4) DATE- The appointments of the initial members of the Commission  
163 shall be made not later than 30 days after the date of enactment of this Act.  
164           (c) PERIOD OF APPOINTMENT- Each member shall be appointed for  
165 the life of the Commission.  
166           (i) VACANCIES- A vacancy in the Commission shall not affect the  
167 powers of the Commission, but shall be filled in the same manner as the original  
168 appointment.  
169           (ii) INITIAL MEETING- Not later than 30 days after all initial members of the  
170 Commission have been appointed, the Commission shall hold the first meeting.  
171           (d) MEETINGS- The Commission shall meet at the call of the Chairperson.  
172           (e) QUORUM- A majority of the members of the Commission shall constitute a  
173 quorum for conducting business, but a lesser number of members may hold hearings.  
174           (f) CHAIR- The President shall designate 1 member appointed under  
175 subsection (a) to serve as the Chair of the Commission.  
176           (g) RULES AND PROCEDURES- The Commission shall adopt rules and  
177 procedures to govern the proceedings of the Commission.  
178  
179 SEC. 202. DUTIES OF THE COMMISSION.  
180           (a) STUDY-  
181           (1) IN GENERAL- The Commission shall conduct a thorough study of all  
182 matters relating to the administration of the death penalty to determine (i) whether the  
183 administration of the death penalty in California comports with constitutional  
184 principles and requirements of fairness, justice, equality, and due process, (ii) whether  
185 the administration of the death penalty in California is cost-justified, and (iii) whether  
186 the death penalty should be abolished as too costly or for any other reason.  
187           (2) MATTERS STUDIED - The matters studied by the Commission shall  
188 include the following:  
189           (A) The fiscal and budgetary consequences to the state government and to  
190 county and city governments of administering the death penalty and the cost savings  
191 that would be realized if the death penalty were abolished

192 (B) How the costs and burdens of adjudicating capital cases at the trial and  
193 appellate levels impacts the adjudication of other cases and whether abolition of the  
194 death penalty would improve the smooth and efficient operation of our justice system

195 (C) Racial disparities in capital charging prosecuting and sentencing  
196 decisions

197 (D) Disproportionality in capital charging prosecuting and sentencing  
198 decisions based on geographic location and income status of defendants or any other  
199 factor resulting in such disproportionality.

200 (E) Adequacy of representation of capital defendants.

201 (F) Whether innocent persons have been sentenced to death and the reasons  
202 these wrongful convictions have occurred.

203 (G) Whether the rules and conventions for selection of juries in capital  
204 cases bias the outcome of those cases.

205 (H) Procedures to ensure that persons sentenced to death have access to  
206 forensic evidence and modern testing of forensic evidence including DNA testing  
207 when modern testing could result in new evidence of innocence.

208 (I) Any other law or procedure to ensure that death penalty cases are  
209 administered fairly and impartially, in accordance with the state or federal  
210 Constitutions

211 (b) RECOMMENDATIONS-

212 (1) IN GENERAL- Based on the study conducted under subsection (a) the  
213 Commission shall make recommendations for reform of the death penalty in California  
214 which recommendations may include abolition of the death penalty in California or  
215 adoption of new guidelines and procedures for the administration of the death penalty.

216 (2) INTENT OF NEW GUIDELINES AND PROCEDURES- If the  
217 Commission opts to recommend new guidelines and procedures for administration of  
218 the death penalty, the guidelines and procedures shall--

219 (A) ensure that the death penalty cases are administered fairly and  
220 impartially, in accordance with due process;

221 (B) minimize the risk that innocent persons may be executed;

222 (C) ensure that the death penalty is not administered in a racially  
223 discriminatory manner; and

224 (D) ensure that the taxpayers of this state are fully informed as to the true  
225 costs of having a death penalty so that informed choices can be made about whether it  
226 should be abolished at some point in the future.

227 (c) REPORT—

228 (1) PRELIMINARY REPORT- Not later than 1 year after the date of  
229 enactment of this Act, the Commission shall submit to the Governor, the Attorney  
230 General and the Legislature a preliminary report, which shall contain a preliminary  
231 statement of findings and conclusions.

232 (2) FINAL REPORT- Not later than 2 years after the date of enactment of  
233 this Act, the Commission shall submit a report to the Governor, the Attorney General  
234 and the Legislature which shall contain a detailed statement of the findings and  
235 conclusions of the Commission, together with the recommendations of the Commission  
236 for legislation.

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SEC. 203. POWERS OF THE COMMISSION.

(a) INFORMATION FROM STATE, COUNTY AND LOCAL AGENCIES-

(1) IN GENERAL- The Commission may secure directly from any state department or county or local agency information that the Commission considers necessary to carry out the provisions of this title.

(2) FURNISHING OF INFORMATION- Upon a request of the Chairperson of the Commission, the head of any state department or county or local agency shall furnish the information requested by the Chairperson to the Commission

(b) GIFTS- The Commission may accept use and dispose of gifts or donations of services or property.

(c) HEARINGS- The Commission or, at the direction of the Commission any subcommittee or member of the Commission may, for the purpose of carrying out the provisions of this title--

(1) hold hearings, sit and act at times and places take testimony, receive evidence, and administer oaths that the Commission subcommittee or member considers advisable; and

(2) require, by subpoena or otherwise the attendance and testimony of witnesses and the production of books records correspondence memoranda papers documents, tapes, and materials that the Commission subcommittee or member considers advisable.

(d) ISSUANCE AND ENFORCEMENT OF SUBPOENAS—

(1) ISSUANCE- Subpoenas issued pursuant to subsection (d)--

(A) shall bear the signature of the Chairperson of the Commission and

(B) shall be served by any person or class of persons designated by the Chairperson for that purpose.

(2) ENFORCEMENT—

(A) IN GENERAL- In the case of contumacy or failure to obey a subpoena issued under subsection (d) the any Superior Court of this state in any county in which the subpoenaed person resides, is served or may be found may issue an order requiring that person to appear at any designated place to testify or to produce documentary or other evidence.

(B) CONTEMPT- Any failure to obey a court order issued under subparagraph (A) may be punished by the court as a contempt

(3) TESTIMONY OF PERSONS IN CUSTODY- Any Superior Court of this state in any county in which testimony of a person held in custody is sought by the Commission or within any county of which such person is held in custody, may, upon application by the Attorney General issue a writ of habeas corpus ad testificandum requiring the custodian to produce such person before the Commission or before a member of the Commission or a member of the staff of the Commission designated by the Commission for such purpose.

SEC. 204. COMMISSION PERSONNEL MATTERS.

(a) COMPENSATION OF MEMBERS- Members of the Commission shall serve without compensation for the services of the member to the Commission.

282           (b) TRAVEL EXPENSES- The members of the Commission shall be  
283 allowed travel expenses, including per diem in lieu of subsistence, at rates authorized  
284 for employees of state agencies.

285           (c) STAFF—

286           (1) IN GENERAL- The Chairperson of the Commission may, without  
287 regard to the civil service laws and regulations, appoint and terminate an executive  
288 director and such other additional personnel as may be necessary to enable the  
289 Commission to perform the duties of the Commission.

290           (2) EXECUTIVE DIRECTOR- The employment of an executive director  
291 shall be subject to confirmation by the Commission.

292           (d) DETAIL OF STATE EMPLOYEES- Any employee of any agency of  
293 the state Government employee, upon authorization of the head of said agency, may  
294 be detailed to the Commission without reimbursement, and the detail shall be  
295 without interruption or loss of civil service status or privilege.

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297 SEC. 205. TERMINATION OF THE COMMISSION.

298 The Commission shall terminate 90 days after the date on which the Commission  
299 submits its report under section 202.

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(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

#### STATEMENT OF REASONS

Existing Law: Current law allows persons convicted of certain specified crimes (“capital crimes”) to be executed at the hands of the law.

This Resolution: This resolution calls for a moratorium on the execution of persons convicted of capital crimes; the appointment of a blue-ribbon study Commission to determine whether the death penalty is being administered fairly; to determine whether the death penalty is capable of being administered fairly; to make a comprehensive assessment of the fiscal impact of the death penalty; to assess whether the death penalty is cost-justified given the current budget crisis in this state; and to make recommendations for death penalty reform, which recommendations may include implementation of procedural reforms necessary to ensure fairness and avoid the execution of innocent people, or abolition of the death penalty. The moratorium called for by this resolution would remain in effect until the Legislature enacts legislation lifting it and enacting whatever reforms are recommended by the Commission.

The Problem: There are currently over 650 people waiting to be executed in California. There are growing concerns among Californians, shared by many citizens who once supported capital sentencing, that the death penalty is applied unevenly and freakishly, that it is barbaric, and that it can never be applied fairly. The administration of the death penalty requires the expenditure each year of millions of dollars of public funds. Given the serious questions surrounding administration of the death penalty, and given the significant costs of the death penalty, close and careful study is called for with respect to whether the death penalty is being fairly applied,

whether the death penalty is capable of being fairly applied, and whether the death penalty is cost-justified. There should be a moratorium on the execution of all persons convicted of capital crimes in California until this study is completed and the Legislature acts on recommendations arising out of the study.

In accordance with CDCBA rules, BASF timely offers this resolution for consideration. Consistent with traditional CDCBA practice, the Proponent reserves the right to timely withdraw or amend the resolution.

#### IMPACT STATEMENT

Many statutes and regulations implement the death penalty. Some of these are:

##### **CALIFORNIA PENAL CODE**

3605, 3600, *et seq.*, 3604, 679.03, 3603, 3704, 1193, 1227, 987.9, 3601, 3602, 190, 190.3, 190.2, 190 *et seq.*, 190, 190.3, 190.2, 1193, 1219, 1218, 3700, 1218, 1018, 1286, 987.9, 1193, 1227, 1218, 1193, 190.3, 3701, *et seq.*, 1190.1, 190.4, 859, 190.2, 1903, 1376, 3604, 190.5, 190.4, 3605, 190.3, 128, 799, 3605, 3603, 1192.7, 1050, 3705, 3706, 1018, 190.3, 190.9, 190.3, 190.1, 190.4, 1193, 190.8, 1240.1, 190.7, 1193, 3605, 190.1, 190.4, 3700.5, *et seq.*, 1202a, 1170, 190.2, 190.1, 190.4, 790, 190.2, 190.1, 190.4, 1218, 799, 15, 1243, 1227.5, 3700, *et seq.*, 3705, 3706, 190.9, 1218, 1227, 3600, *et seq.*, 3704, 3605, 3700, 1193, 1227, 3605, 190.2, 3702, 1193, 1243, 190.6, 190.8, 4500, 190.3, 1240, 1239, 1254, 190.6, *et seq.*, 190.4, 1270.5, 1286, 190.1, 190.3, 1240.1, 2625, 3605, 1217, 190.3, 1240, 987, 987.9, 987, *et seq.*, 1018, 686, 686.1, 190.9, 1285, 3607, 3600, *et seq.*, 1376, 1054.9, 3701, *et seq.*, 3604, 1903, 1243, 1193, 1227, 1227.5

##### **GENERAL RULES OF COURT**

34, 36, 36.3, 36.1, 34, 36.2, 35.2, 36.1, 35.1, 34.1, 35.3, 34.2, 34.1, 35-35.2, 36.3, 34.0, 36, 4.117, 76.3, 34.2, 11.7, 36.1, 36.2, 76.6, 36.1, 35.2, 35.1, 35.3, 34.2, 34, 34.2, 35.3, 35, 35.2, 35.1, 36.3, 4.315

The implementation of all of these statutes and regulations will have to be suspended while the proposed moratorium is in effect and eventually may have to be modified or repealed. There may be other statutes or regulations pertaining to or authorizing the death penalty that are not spelled out here for the sake of economy. These additional statutes and regulations will have to be suspended during any moratorium and may have to be modified or repealed as well.

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