

Vindicating the Right to Be Heard: Due Process Safeguards Against Government Interference in the Clemency Process

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In Ohio Adult Parole Authority v. Woodard, the Supreme Court held that death row prisoners are entitled to some minimal due process protections in petitioning for clemency—most commonly, a commutation to a sentence of life in prison—from a state governor. This conclusion reflects a tension between the recognition that the Due Process Clause applies after conviction and a historical reluctance to involve the courts in the business of reviewing executive clemency decisions. Yet the Court has never clarified what those protections must look like, or what conduct on the part of government officials violates a prisoner’s due process rights.

At the turn of the century, several courts of appeals held that when government officials interfere with a death row prisoner’s application for clemency—for example, by threatening employees who offer to submit testimony on that prisoner’s behalf—they violate the Due Process Clause. More recently, however, at least one circuit has held otherwise and concluded that such interference is permissible.

This Comment looks beyond the language of the Supreme Court’s opinion, which the circuits have fought over for more than twenty years, to the Court’s historical conception of post-conviction constitutional rights. This jurisprudence reveals a clear dividing line between demands that a state change its procedures for seeking post-conviction relief and allegations that a state has denied a prisoner access to existing procedures for seeking relief. It is this denial of access that offends the Due Process Clause’s requirement that prisoners have a right to be heard. Armed with this conceptual distinction, this Comment argues that government interference in the clemency process is best viewed as an impermissible denial of the right to be heard, and that prohibiting such interference will vindicate, rather than undermine, the discretion of the executive to extend mercy as it sees fit.

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INTRODUCTION

In 2020, the U.S. federal government carried out ten executions, more than in any year since 1896.¹ In a single week in January 2021, it carried out three more.² Amidst public interest in and outcry over these executions, however, there has been virtually no discussion of the more than 2,500 prisoners currently on state and federal death rows in the United States.³ For many, the

¹ Francesca Giuliani-Hoffman, *The US Government Has Executed 10 People This Year—the Most Since 1896*, CNN (Dec. 17, 2020), <https://perma.cc/R2VZ-KYJ3>.

² *Execution List 2021*, DEATH PENALTY INFO. CTR., <https://perma.cc/29NT-8AN2> (last updated Jan. 16, 2020).

³ *Death Row*, DEATH PENALTY INFO. CTR., <https://perma.cc/L4NY-VS3K> (last updated Oct. 1, 2020).

only thing standing between them and death is the prospect of clemency from the president or a state governor—an official pardon or, more likely, a commutation of sentence to life in prison. This is a faint hope: from 1977 to 2020, fewer than 300 death row prisoners have been granted clemency.⁴

No provision of the Constitution mandates that a given capital clemency application be granted, and the federal judiciary has been reluctant to intervene in the clemency process.⁵ Despite this, the Supreme Court has held that death row prisoners have some protections during the clemency process under the Constitution's due process guarantees.⁶ A death row prisoner denied clemency can, under certain circumstances, bring a claim in federal court alleging that the government's clemency application or review process was procedurally flawed in a way that denied the prisoner an opportunity to be heard. This right stems from *Ohio Adult Parole Authority v. Woodard*,⁷ in which five Justices, across two opinions, concluded that the Fourteenth Amendment's Due Process Clause applies to state capital clemency procedures. Justice Sandra Day O'Connor's opinion concurring in part and concurring in the judgment—joined by four Justices—concluded that “some *minimal* procedural safeguards apply to clemency proceedings.”⁸ But Justice O'Connor did not elaborate on what these safeguards must look like, and the Court has never revisited this vague decision.

Due process challenges to clemency proceedings can come in many forms, and the lower courts have largely rejected various challenges to the sufficiency of state statutes and regulations that outline the procedures for capital clemency. This Comment is primarily concerned with a different type of due process challenge to state clemency proceedings: allegations that state government officials have actively interfered to prevent a prisoner from submitting evidence to the individuals tasked with granting or denying clemency. Usually, this type of challenge arises when prison officials or prosecutors block clemency applicants' access to witnesses who have offered to testify in their support at clemency hearings. Lacking guidance from the Court, the circuits have split on this

⁴ *Clemency*, DEATH PENALTY INFO. CTR., <https://perma.cc/87CP-AD7F>.

⁵ See, e.g., *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (“[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”).

⁶ See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

⁷ 523 U.S. 272 (1998).

⁸ *Id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original).

issue. The Ninth Circuit has held that such interference violates the Due Process Clause,⁹ while the Eleventh Circuit has held that it does not.¹⁰ Most confusingly, the Eighth Circuit, which once agreed with the Ninth, has hinted that it has now flipped sides.¹¹

The courts of appeals have struggled to interpret *Woodard*, which in turn has left district courts without guidance to determine when due process in clemency proceedings is satisfied.¹² Determining what due process protections *Woodard* provides is of critical importance. Not only would it provide clarity to the law, but the stakes could hardly be higher for death row prisoners. For these prisoners, which circuit has the correct interpretation of *Woodard* is truly a matter of life or death. The stakes of this issue are made even greater by the importance of these circuits to the death penalty apparatus as a whole: more than one in every five death row prisoners in the entire United States are in the states within the Eleventh Circuit.¹³ Grants of clemency, already exceedingly rare, will become even more difficult to obtain if government officials can interfere with clemency applications. If the Constitution forbids such interference, then it is essential that the courts are able to intervene.

This Comment aims to settle this question by demonstrating that government interference with a death row prisoner's clemency application violates the Due Process Clause. It proceeds in three parts. Part I provides a background on the structure of various state and federal clemency procedures in the United States, the Supreme Court's traditional reluctance to permit judicial oversight of clemency processes, and the Court's fractured decision in *Woodard*.

⁹ See *Wilson v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 161 F.3d 1185, 1187 (9th Cir. 1998).

¹⁰ See *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1331 (11th Cir. 2015).

¹¹ Compare *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (finding that a claim of government interference stated a due process violation), with *Winfield v. Steele (Winfield II)*, 755 F.3d 629, 631 (8th Cir. 2014) (en banc) (per curiam) (holding that alleged government interference "may not have been ideal" but did not constitute a due process violation).

¹² In addition to claims brought in the Eighth, Ninth, and Eleventh Circuits, the recent resumption of federal executions has led death row prisoners to bring claims in a wider variety of federal district courts. For example, Daniel Lewis Lee, the first federal prisoner executed since 2003, see *Giuliani-Hoffman*, *supra* note 1, brought a claim under *Woodard* in the U.S. District Court for the District of Columbia. See Amended Complaint at 23–26, *Lee v. Barr*, No. 19-cv-3611 (D.D.C. Feb. 12, 2020), ECF No. 17. His claim against federal government officials was brought under the Due Process Clause of the Fifth Amendment, not the Fourteenth, but was otherwise identical.

¹³ *Death Row*, *supra* note 3.

Part II analyzes the circuit courts' responses to *Woodard*. Although they do disagree on when a clemency applicant's due process rights have been violated, the split is more nuanced and more recent than commonly believed. Circuit courts have consistently and unanimously rejected challenges to the procedures governing state clemency proceedings. But the Eighth and Ninth Circuits have also held that government officials' frustration of a death row prisoner's clemency application can establish a due process violation. It is only in the last decade that the Eleventh Circuit has held that the Due Process Clause does not forbid government interference in the clemency process, and the Eighth Circuit's potential reversal has likewise come in recent years. The circuits therefore disagree only on whether a particular type of due process challenge—those against active government interference in clemency proceedings—can establish a due process right.

Finally, Part III argues that *Woodard* should be read as prohibiting such interference. Government interference in the clemency process is not like other procedural flaws that the courts have rejected. Claims challenging such interference do not demand specific clemency procedures, but rather simply ask for the opportunity to have their petitions heard and considered by the executive decision maker. They seek the chance at grace that each prisoner is supposed to have under the law. This reading better aligns with the language of the opinions in *Woodard*, the Court's historical conception of the role of executive clemency, and substantial case law regarding post-conviction due process rights and the need to protect prisoners from government misconduct.

I. CLEMENCY AND DUE PROCESS

The Supreme Court's decision in *Woodard* is the product of two competing strands of jurisprudence. On the one hand, the Court has emphasized the breadth of executive discretion in the clemency process and has been skeptical of judicial review. In this sense, *Woodard* represents a narrow exception. On the other hand, the Court has held that prisoners retain certain due process protections after conviction. *Woodard* is thus also in keeping with extensive jurisprudence emphasizing a prisoner's fundamental right to be heard.

This Part highlights these competing forces. First, it summarizes the different forms of executive clemency in the United States and the different procedures states employ for submitting and reviewing clemency applications. It then briefly explains the

Supreme Court's prior jurisprudence regarding post-conviction due process rights and its traditional skepticism of judicial intervention in the clemency process. Finally, this Part describes *Woodard*, which struck a compromise of sorts by indicating that some due process protections apply in capital clemency proceedings.

A. Executive Clemency in the United States

The concept of clemency long predates the Constitution and exists in some form in most common law countries. In England, for example, the monarch's power to grant clemency was called the royal prerogative of mercy, and it primarily served to replace a sentence of death with a lesser punishment.¹⁴ This power still exists in the United Kingdom and other Commonwealth countries (including Canada, Australia, and New Zealand), although in practice it is now delegated to government ministers.¹⁵ It also includes a broad range of actions, including temporary reprieves of punishments, commutations to lesser sentences, and full pardons.¹⁶

In the United States, the president's power to grant pardons and commutations is enshrined in the Constitution.¹⁷ Similarly, state constitutions generally vest this power in the sitting governor.¹⁸ For the purposes of this Comment, I use the umbrella term "clemency" to refer to all executive acts mitigating or eliminating a criminal sentence.

Statutes and regulations outlining clemency procedures vary by jurisdiction. Some are rather simple. The Office of the Pardon Attorney within the Department of Justice, for example, allows a person convicted of a federal offense to file a petition for commutation of sentence (or, if the sentence has already been served, a pardon).¹⁹ Then the attorney general reviews and investigates the application and ultimately makes a recommendation to the president.²⁰ But state clemency procedures tend to be more complex and regulated. Many delegate part of the governor's decision-making authority to another body—usually, a state pardon board

¹⁴ See Andrew Novak, *Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States*, 49 U. MICH. J.L. REFORM 817, 819–21 (2016).

¹⁵ See *id.* at 820, 823; see also Kent Roach, *Wrongful Convictions in Canada*, 80 U. CIN. L. REV. 1465, 1495–97 (2012) (discussing the origins of clemency in Canada's criminal justice system).

¹⁶ See Novak, *supra* note 14, at 819.

¹⁷ U.S. CONST. art. II, § 2, cl. 1.

¹⁸ See, e.g., TEX. CONST. art. IV, § 11; CAL. CONST. art. V, § 8.

¹⁹ 28 C.F.R. §§ 1.1–.11 (2020); 28 C.F.R. §§ 0.35–.36 (2020).

²⁰ 28 C.F.R. § 1.6 (2020).

that is established and regulated by the legislature. In Texas, for example, the governor may grant clemency only if the Texas Board of Pardons and Paroles recommends it.²¹ Some other states mandate a multimember pardon board but give the governor the power to appoint its members or give the governor a seat on the board.²²

Capital clemency poses unique problems. The process by which a death row prisoner applies for clemency can be different than the application process for other prisoners.²³ Some states also change the amount of authority the governor has to grant clemency in capital cases, usually by granting them more discretion than in noncapital cases.²⁴ Importantly, the high profile of most death penalty cases complicates the political calculus involved in weighing whether to grant clemency. In addition to their personal beliefs, governors often consider the political mood of their constituents. Some governors proudly proclaim to the electorate that they will never grant clemency to persons convicted of murder.²⁵ Others wait until political pressure has lifted—after losing an election or being term limited—and then grant clemency to a number of prisoners on death row immediately prior to leaving office.²⁶ Politics aside, governors might weigh factors unique to each case, like if new evidence has emerged casting doubt on a prisoner's guilt or if the prisoner suffers from some mental illness. Typically, however, clemency for prisoners on death row is exceedingly rare, even more so than for clemency as a whole.²⁷

²¹ TEX. CONST. art. IV, § 11.

²² See Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 105 & n.191 (2019) (listing restrictions on the gubernatorial clemency power in various state constitutions and statutes).

²³ See, e.g., 37 TEX. ADMIN. CODE §§ 143.43, 143.57 (2020) (outlining specific procedures for applications for reprieve from execution and commutation of a death sentence).

²⁴ See, e.g., ALA. CONST. art. V, § 124 (granting the governor absolute power to reprieve and commute sentences of death but vesting regulatory power for clemency in other cases to the legislature). *But see*, e.g., KAN. STAT. ANN. § 22-3705 (2019) (limiting the governor's power to commute sentences of death to life imprisonment without the possibility of parole but allowing broader discretion in commutation of other sentences).

²⁵ See, e.g., *Duvall v. Keating*, 162 F.3d 1058, 1060 (10th Cir. 1998) (referencing “numerous occasions” when then-Oklahoma Governor Frank Keating proclaimed that “he will not grant clemency for murderers”).

²⁶ See, e.g., Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), <https://perma.cc/JYN7-3VR8> (describing then-Illinois Governor George Ryan's commutation of all death row prisoners just two days before leaving office).

²⁷ Although scholars have employed different methods of calculation, they generally agree that grants of capital clemency have been far rarer since the Supreme Court effectively reinstated the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), than they

B. Balancing Post-Conviction Rights and Judicial Nonintervention in Clemency Proceedings

The Supreme Court has emphasized that prisoners, once convicted and sentenced, have limited ability to allege a violation of their due process rights. The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”²⁸ The Court has long held that one “fundamental requisite” of this due process is “the opportunity to be heard.”²⁹ This, however, initially referred to rights at trial, or perhaps another adjudicative proceeding.³⁰ In other words, a criminal defendant’s interest in life or liberty is an interest in not being convicted and sentenced in the first place. Accordingly, the Due Process Clause protects against procedural unfairness occurring before or during trial, but not against being incarcerated—or executed—following a valid conviction and sentence.³¹

Notwithstanding this principle, the Court has held that where a state creates certain post-conviction proceedings, those proceedings must comply with the Due Process Clause. A convicted and sentenced prisoner may have no inherent interest in having a conviction or sentence overturned on appeal³² or in obtaining parole.³³ But a state’s own processes for hearing criminal appeals³⁴ or revoking parole³⁵ create a constitutionally recognized

were before the de facto moratorium on capital punishment imposed by *Furman v. Georgia*, 408 U.S. 238 (1972). See, e.g., Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1, 50 (2014) (finding that significantly more death sentences were commuted between 1900 and 1968 in only twelve states than in all states from 1976 to 2013); Michael A.G. Korengold, Todd A. Noteboom & Sara Gurwitch, *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 357 (1996) (finding a ratio of roughly one grant of capital clemency for every five executions that have taken place from 1976 to 1996, in comparison with a ratio of roughly four grants for every five executions between 1960 and 1970).

²⁸ U.S. CONST. amend. XIV, § 1.

²⁹ *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

³⁰ See generally Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (discussing types of proceedings that require due process).

³¹ See *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

³² *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that the Constitution does not require states to provide appellate review).

³³ See *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 9–10 (1979) (holding that prisoners have no due process right to have parole granted).

³⁴ See *Griffin*, 351 U.S. at 18 (holding that appellate court procedures, once established, must comply with the Due Process Clause); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (holding that criminal defendants have a due process right to effective assistance of counsel on first appeal).

³⁵ See *Morrissey v. Brewer*, 408 U.S. 471, 480–82 (1972) (holding that parolees have a due process right to a hearing prior to revocation of their parole).

interest in those procedures being fundamentally fair. These post-conviction due process rights, however, are less stringent than at trial.³⁶ The fundamental right to be heard still exists after conviction, but the specific requirements of what that right must look like are lessened.

This tension in the Court's jurisprudence is exacerbated by its historical skepticism of judicial intervention in executive clemency. As early as 1833, Chief Justice John Marshall wrote that clemency is "an act of grace, proceeding from the power intrusted with the execution of the laws. . . . It is the private, though official, act of the executive magistrate."³⁷ Particularly as applied to the president, the Court has emphasized that legislative intervention would offend the Constitution.³⁸ Unsurprisingly, the Court has also expressed reluctance toward judicial review of clemency processes: "Seldom, if ever, has this power of executive clemency been subjected to review by the courts."³⁹ Some scholars have even argued that the pardon power could be considered a nonjusticiable political question.⁴⁰

Given that clemency is often the last recourse available to a prisoner facing continued loss of liberty or loss of life, it makes sense that prisoners should be able to allege that the state or federal clemency processes they relied on violated their due process rights. But the Court has largely rejected this argument by framing denials of clemency as "not getting what one wants" rather than "losing what one has."⁴¹ In *Connecticut Board of Pardons v.*

³⁶ See *Pennsylvania v. Finley*, 481 U.S. 551, 555–57 (1987); see also *Dist. Att'y's Off. for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68 (2009) (holding that Alaska state law created a liberty interest in demonstrating innocence using new DNA evidence, but rejecting the claim that due process mandated specific procedures).

³⁷ *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).

³⁸ See, e.g., *Schick v. Reed*, 419 U.S. 256, 266 (1974) (concluding that the pardon power "flows from the Constitution alone, not from any legislative enactments, and [] it cannot be modified, abridged, or diminished by the Congress"); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) ("The power thus conferred is unlimited, with the exception [of cases of impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.").

³⁹ *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950), *abrogated on other grounds by Ford v. Wainwright*, 477 U.S. 399 (1986); see also *Cavazos v. Smith*, 565 U.S. 1, 9 (2011) ("It is not for the Judicial Branch to determine the standards for this discretion [to grant or deny clemency]. If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention.").

⁴⁰ See, e.g., Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 *BRANDEIS L.J.* 85, 138–43 (2002) (considering arguments against judicial review of clemency).

⁴¹ Friendly, *supra* note 30, at 1296.

Dumschat,⁴² the Court held that the existence of a state clemency process does not create a liberty interest in obtaining clemency, and so a prisoner denied clemency for a valid life sentence without explanation had not suffered a due process violation.⁴³ The Court emphasized that “pardon and commutation decisions have not traditionally been the business of courts.”⁴⁴ The mere existence of a state clemency procedure did not create an expectation that this process would be procedurally fair but rather simply affirmed the Board’s traditional discretion to grant or deny mercy.⁴⁵ The Court in *Dumschat* thus took the definitive position that noncapital prisoners not only have no liberty interest in obtaining clemency but also lack any due process right to challenge a state’s clemency procedures.

C. Some Minimal Procedural Safeguards: *Ohio Adult Parole Authority v. Woodard*

Onto this stage stepped Eugene Woodard. In 1993, Woodard was convicted of murder, a crime that occurred when he was just nineteen years old, and sentenced to death.⁴⁶ In Ohio, as in many other states, the bulk of the clemency review process is delegated to an administrative body, the Ohio Adult Parole Authority.⁴⁷ On September 6, 1994, just over a month before Woodard’s scheduled execution date of October 7, the Adult Parole Authority informed Woodard that his clemency hearing would occur on September 16. It also informed him that, if he wanted, he could have a prehearing interview on September 9—in just three days.⁴⁸ Woodard objected to the short notice of the interview and asked for assurances that his counsel would be permitted to attend and participate in both the interview and the hearing.⁴⁹ When no response came, Woodard filed suit in federal court, alleging a violation of his due process rights.⁵⁰

The district court rejected Woodard’s arguments, finding that he lacked a liberty interest both in obtaining executive clemency

⁴² 452 U.S. 458 (1981).

⁴³ *Id.* at 467.

⁴⁴ *Id.* at 464.

⁴⁵ *Id.* at 466–67.

⁴⁶ *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1181 (6th Cir. 1997), *rev’d*, 523 U.S. 272 (1998).

⁴⁷ *Woodard*, 523 U.S. at 276.

⁴⁸ *Woodard*, 107 F.3d at 1181–82.

⁴⁹ *Woodard*, 523 U.S. at 277.

⁵⁰ *Id.*

and in ensuring Ohio's specific clemency procedures complied with due process.⁵¹ It thus granted the Adult Parole Authority's motion for judgment on the pleadings.⁵² On appeal, however, the Sixth Circuit took a different approach. Although the court rejected the claim that Woodard possessed a life or liberty interest in the clemency procedures themselves, it held that the clemency process must comply with the Due Process Clause because the process forms "an integral part of the overall adjudicative system."⁵³ Woodard had "original life and liberty interests" in not being imprisoned and executed, and the clemency process that Ohio had created formed a part of that system for determining whether he would be imprisoned and executed.⁵⁴ However, the court also explained that due process protections during the clemency process are "minimal, perhaps even barely perceptible."⁵⁵ It thus remanded the case to the district court to determine whether, under these principles, any of the Adult Parole Authority's procedures violated Woodard's due process rights.⁵⁶

In 1998, the Supreme Court reversed, determining that Ohio's clemency procedures did not violate the Due Process Clause.⁵⁷ Although eight Justices voted to reverse the lower court,⁵⁸ the decision itself was splintered, with no opinion gaining a majority with respect to due process.⁵⁹ Writing for four Justices, Chief Justice William Rehnquist reiterated the Court's holding in *Dumschat* and concluded that clemency procedures, even in capital cases, are not subject to traditional judicial review.⁶⁰ This opinion reasoned that clemency would "cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that [Woodard] urges."⁶¹

In separate opinions, however, five Justices concluded that some level of procedural due process protection applies to capital

⁵¹ *Woodard*, 107 F.3d at 1182.

⁵² *Id.*

⁵³ *Id.* at 1186–87 (quotation marks omitted).

⁵⁴ *Id.* (quotation marks omitted).

⁵⁵ *Id.* at 1187.

⁵⁶ *Woodard*, 107 F.3d at 1187–88.

⁵⁷ *Woodard*, 523 U.S. at 288.

⁵⁸ Justice John Paul Stevens would have affirmed the Sixth Circuit's decision to remand the case. *Id.* at 295 (Stevens, J., concurring in part and dissenting in part).

⁵⁹ The Court unanimously held that prohibiting Woodard's counsel from attending his voluntary clemency interview did not violate his right against self-incrimination. *Id.* at 285–86 (majority opinion).

⁶⁰ *Id.* at 284–85 (Rehnquist, C.J.) (plurality opinion).

⁶¹ *Id.*

clemency proceedings. Justice O'Connor, joined by three others, wrote that, while she agreed that Ohio's clemency procedures were constitutionally valid, she did not agree with Chief Justice Rehnquist's suggestion that, "because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards."⁶² Although a convicted and sentenced prisoner has no liberty interest in release through clemency, a prisoner does have a life interest in not being executed.⁶³

Justice O'Connor reasoned, therefore, that "some *minimal* procedural safeguards apply to clemency proceedings."⁶⁴ For example, deciding whether to grant clemency by flipping a coin, or "arbitrarily den[ying] a prisoner any access to [the] clemency process" could warrant judicial intervention.⁶⁵ Writing separately, Justice John Paul Stevens agreed that Woodard "possesses a life interest protected by the Due Process Clause," and argued that "if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause."⁶⁶

The Court has never clarified its fractured decision in *Woodard*, and its more recent jurisprudence has merely reiterated *Dumschat's* conclusion that noncapital defendants have no liberty interest in executive clemency.⁶⁷ Early scholarship on both sides of the issue expressed dissatisfaction with the Court's failure to provide a clear statement of the role that federal courts should play in the clemency process.⁶⁸ As the next Part demonstrates, these warnings that *Woodard* would be difficult for the lower courts to apply have proved prescient.

⁶² *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment).

⁶³ *Id.* at 289.

⁶⁴ *Id.* (emphasis in original).

⁶⁵ *Id.*

⁶⁶ *Id.* at 292 (Stevens, J., concurring in part and dissenting in part).

⁶⁷ *Osborne*, 557 U.S. at 67–68.

⁶⁸ See, e.g., Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 235–36 (2003) (lamenting "[e]arly indications" that *Woodard* was not likely to have any meaningful impact); David S. Olson, *Second-Guessing the Quality of Mercy: Due Process in State Executive Clemency Proceedings*, Ohio Adult Parole Authority v. Woodard, 118 S. Ct. 1244 (1998), 22 HARV. J.L. & PUB. POL'Y 1009, 1017–18 (1999) (finding *Woodard* "logically inconsistent with prior case law" and expressing worry that it would result in significant costs and delays).

II. THE CIRCUIT SPLIT

Justice O'Connor's opinion regarding the scope of due process protections in clemency is generally considered to be controlling based on the rule set out in *Marks v. United States*.⁶⁹ There, the Supreme Court held that when "no single rationale explaining the result [of a case] enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."⁷⁰ Justice O'Connor's concurrence in *Woodard* both agreed with the plurality that *Woodard* had not suffered a constitutional violation and agreed with Justice Stevens's dissent that capital clemency is subject to judicial review for alleged due process violations. The lower courts have accepted that her concurrence represents the narrowest grounds according to *Marks*, and thus that some minimal level of procedural due process applies to capital clemency proceedings.⁷¹ Yet courts have struggled to apply this guidance, and they have not consistently determined what circumstances fall below this bar.

There are multiple layers to the circuit split, making it more complicated than the courts and scholarship have generally acknowledged. At the surface level, courts have struggled to compare various state capital clemency procedures to the procedures upheld in *Woodard*. If Ohio's procedures were constitutional, then other procedures that provide "at least equal" levels of due process surely must also be constitutional.⁷² But comparing capital clemency procedures is not so simple. The differences in state laws and regulations governing capital clemency procedures cannot always be categorized as providing more due process or less. For example, does a prisoner have more procedural protection if clemency applications are reviewed by a clemency board in addition to the state governor, or less? The clemency board could serve to dismiss the vast majority of applications before they can be reviewed by the governor. But the board could also act to dilute the political pressures that a governor might face in reviewing clemency applications.

Another layer to the split arises because not every challenge to a capital clemency process is a challenge to the constitutionality

⁶⁹ 430 U.S. 188 (1977).

⁷⁰ *Id.* at 193 (quotation marks omitted).

⁷¹ See, e.g., *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998).

⁷² *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1331 (11th Cir. 2015).

of the statutes or regulations establishing that process. Death row prisoners might instead challenge other aspects of their personal clemency proceedings, including potentially biased decision makers,⁷³ deviations from the exact text of the clemency statutes,⁷⁴ and—most importantly for this Comment—allegations that government officials obstructed their ability to present evidence as part of their clemency application.⁷⁵

Finally, the lower courts have frequently opined on the scope of due process protections in clemency by comparing a death row prisoner's current due process claim to other, hypothetical situations that would violate the Due Process Clause.⁷⁶ Whether a reader concludes that a court has interpreted *Woodard* narrowly or expansively can turn on whether that reader emphasizes its result or its reasoning. This has only exacerbated the confusion over the circuit split.⁷⁷ The scholarship has also fallen victim to this confusion, often grouping the circuit court cases by outcome: those that found a due process violation and those that did not.⁷⁸

This Part seeks to clarify the circuit split in two ways. First, it distinguishes between cases addressing challenges to the constitutionality of capital clemency procedures, discussed in Part II.A, and cases alleging active government interference with a death row prisoner's clemency application, discussed in Part II.B. When grouped in this manner, it becomes clear that

⁷³ See, e.g., *Roll v. Carnahan*, 225 F.3d 1016, 1017 (8th Cir. 2000) (rejecting a claim that the governor, who was then a candidate for other political office, could not evaluate clemency applications objectively).

⁷⁴ See, e.g., *Faulder v. Tex. Bd. of Pardons & Paroles*, 178 F.3d 343, 343 (5th Cir. 1999) (holding that violations of state law or a pardon board's own regulations do not, by themselves, violate a prisoner's due process rights).

⁷⁵ See, e.g., *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (holding that the Due Process Clause forbids government officials from threatening retaliation against a potential witness in a clemency proceeding).

⁷⁶ See, e.g., *Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) (listing potentially unconstitutional clemency procedures that the plaintiff did not allege had occurred).

⁷⁷ For example, different judges on the Eighth Circuit have disagreed over how to interpret the other circuits' approaches. Compare *Winfield v. Steele (Winfield II)*, 755 F.3d 629, 632 (8th Cir. 2014) (en banc) (Gruender, J., concurring) (calling *Young* "an outlier when compared to the narrower approaches adopted by" the Fifth, Ninth, and Tenth Circuits), with *Lee v. Hutchinson*, 854 F.3d 978, 984 (8th Cir. 2017) (Kelly, J., dissenting) (arguing that cases from the Fifth and Tenth Circuits are in accordance with the Eighth Circuit's prior jurisprudence, including *Young*).

⁷⁸ See, e.g., Kobil, *supra* note 68, at 236 (listing the Ninth Circuit's jurisprudence as an example of courts "reject[ing] allegations of bias by a clemency decision-maker"); Paul J. Larkin, Jr., *The Demise of Capital Clemency*, 73 WASH. & LEE L. REV. 1295, 1309 n.57 (2016) (describing the Ninth Circuit's jurisprudence as "reject[ing] post-*Woodard* attempts to regulate clemency proceedings under the Due Process Clause").

there is no circuit split regarding challenges to clemency procedures themselves: the courts of appeals are in agreement that *Woodard's* minimal procedural safeguards prohibit only procedures so arbitrary as to resemble flipping a coin. Second, with respect to cases alleging active interference, this Part groups cases according to reasoning rather than outcome. Applying this test reveals that it is only in the past few years that a circuit split has emerged, as the Eleventh Circuit (and perhaps the Eighth Circuit as well) has held that such interference does not violate the Due Process Clause.

A. Universal Rejection of Challenges to the Sufficiency of Clemency Procedures

The Fifth,⁷⁹ Eighth,⁸⁰ Tenth,⁸¹ and Eleventh⁸² Circuits have all emphasized the low bar that state capital clemency procedures must clear in order to pass constitutional muster, and they have uniformly rejected challenges to the sufficiency of those procedures.⁸³ These circuits have based their holdings primarily on two aspects of Justice O'Connor's concurrence in *Woodard*: first, her emphasis placed on the "minimal procedural safeguards" required by the Due Process Clause,⁸⁴ and second, her example of "a scheme whereby a state official flipped a coin to determine whether to grant clemency" as a situation in which judicial intervention might be warranted.⁸⁵ Clemency procedures that do not approach such an extreme example are not "wholly arbitrary, capricious or based upon whim" and thus do not justify judicial intervention in the clemency process.⁸⁶

These due process challenges reviewed by the circuit courts can be sorted into three general categories. The first concerns allegations that a decision-making body—a governor or, more often,

⁷⁹ See *Faulder*, 178 F.3d at 343.

⁸⁰ See *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003).

⁸¹ See *Duwall*, 162 F.3d at 1061.

⁸² See *Parker v. State Bd. of Pardons and Paroles*, 275 F.3d 1032, 1036–37 (11th Cir. 2001).

⁸³ The Sixth and Ninth Circuits have hinted at similar interpretations of *Woodard*. See *Workman v. Bell*, 245 F.3d 849, 852–53 (6th Cir. 2001) (citing *Faulder* and *Duwall* while rejecting a challenge to "the substantive merits of a clemency proceeding"); *Ander-son*, 279 F.3d at 676–77 (rejecting a claim based on the governor's alleged blanket policy of denying all applications for clemency by persons convicted of murder, but noting reasons to doubt that such a policy even existed).

⁸⁴ *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis omitted).

⁸⁵ *Id.*

⁸⁶ *Duwall*, 162 F.3d at 1061; *Parker*, 275 F.3d at 1036–37.

a state pardon board—is insufficiently objective to evaluate a death row prisoner’s application fairly. All have been rejected. For example, the Eighth Circuit held that the Missouri governor could evaluate clemency applications, notwithstanding any political pressures caused by his candidacy for the U.S. Senate.⁸⁷ The courts have likewise rejected claims alleging that the composition of a state’s pardon board is unrepresentative of the general public,⁸⁸ or that the board allegedly conferred with state prosecutors about a prisoner’s clemency application.⁸⁹

The second form of challenge to state capital clemency procedures involves allegations that those procedures violate state laws or regulations.⁹⁰ These claims contend that a violation of the state laws governing clemency procedures itself gives rise to a due process violation. But most circuits to consider these types of challenges have rejected them. The Fifth Circuit, for example, has consistently held that such allegations do not state a due process violation so long as the pardon board permits a prisoner to submit information as part of a clemency application and considers the information before making a recommendation.⁹¹ The Eleventh Circuit⁹² and, most recently, the Eighth Circuit⁹³ have reasoned similarly.

Only the Tenth Circuit takes a different position with respect to this type of challenge, in theory if not in practice. In *Duwall v. Keating*,⁹⁴ the court held that the Due Process Clause requires that a death row prisoner “receive the clemency procedures

⁸⁷ *Roll*, 225 F.3d at 1018.

⁸⁸ *See, e.g.*, *Garcia v. Jones*, 910 F.3d 188, 189–91 (5th Cir. 2018).

⁸⁹ *See, e.g.*, *Gardner v. Garner*, 383 F. App’x 722, 726–28 (10th Cir. 2010) (per curiam).

⁹⁰ Such challenges can overlap significantly with the previous type, such as when a state establishes standards of impartiality for its pardon board. *See, e.g.*, *Garcia*, 910 F.3d at 189 (dismissing a complaint when state law required the pardon board to be representative of the general public); *Gardner*, 383 F. App’x at 726 (dismissing a complaint when state law entitled prisoners to an impartial hearing before the pardon board).

⁹¹ *See Faulder*, 178 F.3d at 344–45; *see also Garcia*, 910 F.3d at 191 (reaffirming *Faulder* and concluding that a mere state law violation “does not assert an arbitrary clemency proceeding akin to the flip of a coin or a complete denial of access to the clemency process”).

⁹² *See Gissendaner*, 794 F.3d at 1333 (“Nothing in Justice O’Connor’s concurring opinion suggests that a clemency board’s compliance with state laws or procedures is part of the ‘minimal procedural safeguards’ protected by the Due Process Clause.” (quoting *Woodard*, 523 U.S. at 289 (O’Connor, J., concurring in part and concurring in the judgment) (emphasis in original))).

⁹³ *See Lee*, 854 F.3d at 981–82 (expressly agreeing with *Gissendaner* that “procedural irregularities” do not rise to the level of a constitutional violation).

⁹⁴ 162 F.3d 1058 (10th Cir. 1998).

explicitly set forth by state law.”⁹⁵ It has since clarified that this includes a pardon board’s own regulations.⁹⁶ But that court also found that allegations of *ex parte* communications between the board and the state attorney general’s office did not state a violation, because the prisoner could not prove that these communications had actually influenced the board’s position in a way that materially disadvantaged him.⁹⁷ It is difficult to envision a situation in which a prisoner would be able to provide such evidence. Thus, in practice, it is likely that the Tenth Circuit’s approach does not differ from those of other circuits.

Finally, many challenges to state capital clemency procedures simply argue that the state laws or regulations establishing those procedures are constitutionally deficient. Such challenges bear the strongest resemblance to the circumstances in *Woodard*—there, the plaintiff objected to the short notice of his clemency hearing and argued that he was entitled to have counsel present at the hearing.⁹⁸ Unsurprisingly, these challenges have also been uniformly rejected by the circuit courts.⁹⁹ The courts have stressed that *Woodard* and their own prior jurisprudence “do not establish specific requirements States must follow.”¹⁰⁰

The Eighth Circuit has expressed the most hesitation about rejecting this sort of challenge, although it, too, has declined to find a due process violation. In *Noel v. Norris*,¹⁰¹ the court considered a death row prisoner’s challenge to the fact that Arkansas state officials denied his request to undergo a specific brain-scan procedure as part of his clemency application.¹⁰² Emphasizing that the prisoner was able to present “a four-hundred page record to the state authority,” and that these materials “included some evidence, though not the particular evidence that Mr. Noel sought

⁹⁵ *Id.* at 1061.

⁹⁶ *See Gardner*, 383 F. App’x at 726.

⁹⁷ *Id.* at 727.

⁹⁸ *See Woodard*, 523 U.S. at 276–77.

⁹⁹ *See, e.g., Dwall*, 162 F.3d at 1060–61 (finding no constitutional violation where the pardon board deadlocked on whether to recommend clemency due to one member abstaining and so did not forward the application to the governor for review); *Faulder*, 178 F.3d at 344 (rejecting a challenge to the pardon board’s practice of meeting in secret and not providing explanations for its decisions); *Sepulvado v. La. Bd. of Pardons and Parole*, 171 F. App’x 470, 472–73 (5th Cir. 2006) (per curiam) (rejecting a challenge to a state law requiring decision makers to consider only evidence of “actual innocence” in clemency applications); *Tamayo v. Perry*, 553 F. App’x 395, 402 (5th Cir. 2014) (per curiam) (rejecting a challenge to a pardon board’s refusal to provide a prisoner a copy of his clemency file).

¹⁰⁰ *Sepulvado*, 171 F. App’x at 472 (emphasis in original).

¹⁰¹ 336 F.3d 648 (8th Cir. 2003).

¹⁰² *Id.* at 649.

to produce, of his brain damage,” the court concluded that the process was insufficiently arbitrary to violate the Due Process Clause.¹⁰³ In doing so, however, the court noted that the claim was “a kind of amalgam” between two distinct types of due process challenges to a denial of clemency: challenges to the constitutional sufficiency of existing clemency procedures, which generally do not state a due process violation, and allegations of government interference with a prisoner’s access to the existing process for considering clemency petitions, which do.¹⁰⁴

In sum, although the nature of the due process challenge has varied from case to case, the circuits have uniformly rejected claims that existing clemency procedures are constitutionally inadequate. However, as the Eighth Circuit recognized, active government interference in these proceedings is qualitatively distinct, and can still raise due process issues. The next Section considers cases examining this type of challenge.

B. Courts Examining Active Government Interference

Only a few circuits have considered claims alleging that government officials interfered with a death row prisoner’s ability to present evidence as part of a clemency application. Of these, the Ninth Circuit has squarely held that such allegations state a due process violation,¹⁰⁵ and the Eleventh Circuit has found that they do not.¹⁰⁶ The Eighth Circuit, meanwhile, has hinted that it has changed its stance after previously holding that such allegations state a due process violation. Although that circuit’s cases initially followed the Ninth Circuit’s approach,¹⁰⁷ its more recent jurisprudence has resembled that of the Eleventh Circuit.¹⁰⁸ Given the importance of the specific language used by each of these three courts of appeals, as well as the limited number of cases in which each circuit has elaborated on its standard, this Section examines each court’s jurisprudence individually.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *Wilson v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 161 F.3d 1185, 1187 (9th Cir. 1998).

¹⁰⁶ See *Gissendaner*, 794 F.3d at 1331.

¹⁰⁷ See *Young*, 218 F.3d at 853.

¹⁰⁸ See *Winfield II*, 755 F.3d at 631.

1. The Ninth Circuit finds a due process right not to be misled by the state.

The Ninth Circuit was the first circuit to examine allegations that government officials had interfered with a death row prisoner's ability to participate fully in the clemency process. In *Wilson v. United States District Court for the Northern District of California*,¹⁰⁹ a divided panel declined to overturn the district court's temporary stay of Jaturun Siripongs's execution. The district court had found substantial evidence that state officials had provided inaccurate information about the issues to be considered at Siripongs's clemency hearing to his counsel.¹¹⁰ The Ninth Circuit found that Siripongs's assertion "that the state's communications misled his counsel" stated a due process claim under *Woodard*.¹¹¹

The remedy Siripongs sought included not just a temporary stay of execution, but also a new clemency hearing.¹¹² Indeed, virtually all due process claims alleging government interference in the clemency process request the same remedy: a temporary stay of execution for purposes of a new clemency hearing, at which the prisoner will—hopefully—have the opportunity to be heard that was previously denied. This is a double-edged sword. On the one hand, such a small remedy can hardly be said to undermine clemency's role as "a matter of grace committed to the executive authority."¹¹³ On the other hand, the odds of being granted clemency still remain miniscule. So it was with Siripongs: at his new clemency hearing, his application was again denied.¹¹⁴ He was executed on February 9, 1999.¹¹⁵

In *Anderson v. Davis*,¹¹⁶ the Ninth Circuit further clarified its interpretation of *Woodard*. Rejecting a prisoner's claim that the governor had a blanket policy of denying all applications for clemency by persons convicted of murder, the court listed four types of potentially unconstitutional actions that the prisoner had *not* alleged. First, that his denial of clemency was rooted in "race, religion, political affiliation, gender, [or] nationality."¹¹⁷ Second, that the state's clemency procedures were "infected by bribery,

¹⁰⁹ 161 F.3d 1185 (9th Cir. 1998).

¹¹⁰ *Id.* at 1186–87.

¹¹¹ *Id.* at 1187.

¹¹² *Id.* at 1186.

¹¹³ *Woodard*, 523 U.S. at 285 (Rehnquist, C.J.) (plurality opinion).

¹¹⁴ See *Siripongs v. Calderon*, 167 F.3d 1225, 1226 (9th Cir. 1999).

¹¹⁵ *Execution Database*, DEATH PENALTY INFO. CTR., <https://perma.cc/NG4N-K6B3>.

¹¹⁶ 279 F.3d 674 (9th Cir. 2002).

¹¹⁷ *Id.* at 676.

personal or political animosity, or the deliberate fabrication of false evidence.”¹¹⁸ Third, that the state’s clemency decision-making process was “capricious” akin to flipping a coin.¹¹⁹ Finally, in contrast to *Wilson*, Anderson had not alleged that he had been “misled in any way” by the governor.¹²⁰

This interpretation of *Woodard* is instructive for several reasons. First, the court distinguished between challenges to a clemency process and allegations of government interference. This suggests that a claim of government interference is different from the claim of arbitrary procedures in *Woodard*. Second, the reference to clemency procedures “infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence” stems not from Justice O’Connor’s concurrence in *Woodard*, but from Justice Stevens’s dissent, which other circuits have largely ignored.¹²¹ This Comment discusses the proper consideration to give Justice Stevens’s dissent in Part III.A.2.

2. The Eleventh Circuit holds that the Due Process Clause does not prohibit government interference in clemency procedures.

In contrast to the Ninth Circuit, the Eleventh Circuit has treated claims of government interference in the clemency process with much more skepticism. Indeed, the Eleventh Circuit is the only federal court of appeals to hold explicitly that government interference with a death row prisoner’s clemency application does not violate the Due Process Clause. In *Gissendan v. Commissioner, Georgia Department of Corrections*,¹²² Kelly Gissendan, a death row inmate, sought written statements and testimony in support of her clemency hearing from officials employed at her current and former prisons.¹²³ Four prison staff members

¹¹⁸ *Id.* (quotation marks omitted).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Woodard*, 523 U.S. at 290–91 (Stevens, J., concurring in part and dissenting in part). The Tenth and Eleventh Circuits may have adopted some of Justice Stevens’s language without attribution. Compare *Duwall*, 162 F.3d at 1061 (barring “capricious” clemency decisions), and *Parker*, 275 F.3d at 1036–37 (same), with *Woodard*, 523 U.S. at 294 (Stevens, J., concurring in part and dissenting in part) (emphasizing that the imposition of the death penalty must not be based on “caprice or emotion” (quotation marks omitted)).

¹²² 794 F.3d 1327 (11th Cir. 2015).

¹²³ See *Gissendan*, 794 F.3d at 1328–29. The court in *Gissendan* claimed that its holding stemmed from an earlier case, *Wellons v. Commissioner, Georgia Department of Corrections*, 754 F.3d 1268 (11th Cir. 2014) (per curiam), which involved similar

provided written statements of support, and eight others expressed a willingness to do so as well.¹²⁴ The prison warden then issued a memo to all staff, reading, “[b]e advised that if ANYONE calls you with questions regarding [Gissendaner’s execution], you are to refer them to the DOC Public Affairs office. . . . Under no circumstances are you to discuss this with people outside this institution. Staff should also be careful what is said to other inmates.”¹²⁵ Following this memo, the eight other prison staff members withdrew their statements of support, allegedly telling Gissendaner’s investigator that they feared that if they testified, then “their jobs would be at stake.”¹²⁶

In its opinion the Eleventh Circuit emphasized that “[t]he key word [] is ‘minimal.’”¹²⁷ Gissendaner, the court insisted, received due process “at least equal to the process that passed constitutional muster in *Woodard*.”¹²⁸ After rejecting Gissendaner’s argument that the warden’s memo violated state law and thus the Due Process Clause,¹²⁹ the court explicitly held that nothing in Justice O’Connor’s concurrence in *Woodard* could reasonably be read as prohibiting active government interference with a death row prisoner’s clemency application, even “threatening the job of a witness.”¹³⁰ Gissendaner was executed two months after the court ruled that she had no due process protections against government interference. Since then, thirty-nine others have, like Gissendaner, been executed in the states within the Eleventh Circuit.¹³¹

The Eleventh Circuit concluded by criticizing several Eighth Circuit cases that had held that the Due Process Clause prohibits government interference in the clemency process. Such a holding, the court explained, “cannot be squared with what Justice O’Connor’s

allegations. The court’s one-paragraph, per curiam opinion in *Wellons*, however, did not explain its reasoning. *Id.* at 1269.

¹²⁴ *Gissendaner*, 794 F.3d at 1328–29.

¹²⁵ *Id.* at 1329 (third alteration in original).

¹²⁶ *Id.*

¹²⁷ *Id.* at 1331.

¹²⁸ *Id.*

¹²⁹ The court expressed doubt that the warden’s memo truly did violate state law, but nonetheless followed the Fifth Circuit in holding that a statutory violation does not give rise to a due process violation. *Gissendaner*, 794 F.3d at 1332–33, 1332 n.6. The Eighth Circuit would later adopt this exact holding in *Lee*, 854 F.3d at 981–82.

¹³⁰ *Gissendaner*, 794 F.3d at 1333 (quotation marks omitted) (quoting *Young*, 218 F.3d at 853).

¹³¹ *Execution Database*, *supra* note 115.

opinion actually says.”¹³² As the next Section explores, even the Eighth Circuit itself may be losing faith in its prior jurisprudence.

3. The Eighth Circuit begins to question its own standard.

For more than fifteen years after *Woodard*, the Eighth Circuit’s approach had stood as the most comprehensive and consistent analysis of due process rights in capital clemency proceedings. Its recent jurisprudence, however, has been much more mixed.

The Eighth Circuit’s early approach is characterized by the 2000 case *Young v. Hayes*.¹³³ In that case, Jane Geiler, a lawyer employed in the office of the Circuit Attorney for the City of St. Louis, offered to submit a statement to the governor in support of Mose Young’s capital clemency application.¹³⁴ Dee Joyce-Hayes, the Circuit Attorney, threatened to fire Geiler if she submitted her statement, which Young alleged constituted a due process violation.¹³⁵ The Eighth Circuit agreed, explaining that “[n]o claim is advanced here that the petitioner has a ‘liberty interest’ in the grant of clemency or the right to any particular outcome when he seeks it. . . . The claim here is that the State . . . has deliberately interfered with the efforts of petitioner to present evidence to the Governor.”¹³⁶ The court concluded by comparing the alleged state behavior to witness tampering:

Such conduct on the part of a state official is fundamentally unfair. It unconscionably interferes with a process that the State itself has created. The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state’s own officials refrain from frustrating it by threatening the job of a witness.¹³⁷

¹³² *Gissendaner*, 794 F.3d at 1333.

¹³³ 218 F.3d 850 (8th Cir. 2000).

¹³⁴ *Id.* at 851.

¹³⁵ *Id.* The proposed statement included information supporting Young’s contention that he received inadequate representation during his trial. It also alleged that Hayes had exercised her peremptory challenges to improperly remove Black jurors at trial. *Id.* at 852.

¹³⁶ *Id.* at 853. Judge C. Arlen Beam dissented from the decision but did not explain his reasoning. *Id.* at 854.

¹³⁷ *Id.* at 853. Young’s stay of execution was later dissolved after Geiler left the Circuit Attorney’s office and obtained new employment. *Young v. Hayes*, 266 F.3d 791, 792 (8th Cir. 2001). Young was executed on April 25, 2001. *Execution Database*, *supra* note 115.

Young is the most comprehensive opinion from any court that distinguishes between claims alleging a due process right to receive clemency and claims alleging that government officials have interfered with the existing process for applying for clemency. Indeed, in subsequent cases, the Eighth Circuit elaborated on this dichotomy and specifically contrasted challenges to the sufficiency of specific clemency procedures and challenges to government interference.¹³⁸ And although the court did not dig deep into *Woodard* to justify its decision, its emphasis on fundamental principles of fairness and its comparison of the state's behavior to witness tampering is particularly evocative of other types of impermissible state action.

In the 2014 case *Winfield v. Steele*¹³⁹ (*Winfield II*), however, the Eighth Circuit began to question *Young*'s holding. John Winfield, a death row prisoner in Missouri, had alleged that the state Department of Corrections had interfered with his clemency application by launching an investigation into a prison laundry manager who had offered to submit a declaration in support of Winfield's clemency application.¹⁴⁰ The prison employee later attempted to rescind his declaration, and the next day, the investigation ended; however, the declaration was eventually submitted to the governor's office.¹⁴¹ A district court judge, citing *Young*, issued a stay of execution.¹⁴² An Eighth Circuit panel declined to vacate the stay, although one judge dissented, arguing that, because the governor had ultimately received the statement of support, "[t]he situation is different from *Young*."¹⁴³

The next day, the Eighth Circuit, sitting en banc, vacated the stay of execution.¹⁴⁴ Emphasizing that the governor had now received the declaration, the court held that "[t]he procedures

¹³⁸ See, e.g., *Roll*, 225 F.3d at 1018 (rejecting a claim where the prisoner "does not contend the state has deliberately interfered with his efforts to present evidence to the governor"); *Noel*, 336 F.3d at 649 ("[I]t is a rare case that presents a successful due process challenge to clemency procedures themselves. On the other hand, if the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated." (citations omitted)).

¹³⁹ 755 F.3d 629 (8th Cir. 2014) (en banc) (per curiam).

¹⁴⁰ *Id.* at 630.

¹⁴¹ *Id.* The declaration was submitted on the same day that the district court stayed Winfield's execution; it is unclear which event took place first.

¹⁴² See *Winfield v. Steele*, 26 F. Supp. 3d 890, 894 (E.D. Mo. 2014), *vacated*, 755 F.3d 629 (8th Cir. 2014).

¹⁴³ *Winfield v. Steele (Winfield I)*, 756 F.3d 582, 583–84 (8th Cir. 2014) (Colloton, J., dissenting), *vacated on reh'g en banc*, 755 F.3d 629 (8th Cir. 2014).

¹⁴⁴ See *Winfield II*, 755 F.3d at 631. Four judges dissented. Several sections appear to be lifted verbatim from Judge Steven Colloton's earlier dissent.

employed by the state actors in this case may not have been ideal, but they do not approach the arbitrariness contemplated by Justice O'Connor in *Woodard*: a coin flip or an arbitrary denial of access to any clemency process."¹⁴⁵ The court additionally insisted that *Young* was "distinguishable on its facts" and "express[ed] no view . . . on the merits of *Young*."¹⁴⁶ In a separate concurrence, however, Judge Raymond Gruender argued against *Young*. He explained that *Young* "misapplied Justice O'Connor's concurring opinion in" *Woodard*, was "an outlier when compared to the narrower approaches adopted by our sister circuits," and thus should be formally overruled.¹⁴⁷

The continuing validity of *Young* in the Eighth Circuit is of enormous importance. The factual differences between *Young* and *Winfield*, and the fact that no other member of the court joined Judge Gruender's concurrence, suggest that *Young* remains good law. On the other hand, when the Eleventh Circuit reached the opposite conclusion, it explicitly cited Judge Gruender's opinion in *Winfield* in support of its reasoning.¹⁴⁸ This by itself does not indicate that *Winfield* overruled *Young*, but two years later, the Eighth Circuit favorably cited the Eleventh Circuit's approach and did not mention *Young* at all.¹⁴⁹ While that case concerned a different type of due process challenge, it may indicate that the Eighth Circuit has aligned itself with the Eleventh Circuit.¹⁵⁰ Although far from settled, it is at least plausible that the Eighth Circuit has practically abandoned *Young*.¹⁵¹

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 631–32 (Gruender, J., concurring).

¹⁴⁸ See *Gissendaner*, 794 F.3d at 1333.

¹⁴⁹ See *Lee*, 854 F.3d at 981 (agreeing with the Eleventh Circuit that "a violation of state procedural law does not itself give rise to a due process claim" (quoting *Gissendaner*, 794 F.3d at 1333)).

¹⁵⁰ District courts in the Eighth Circuit have simply noted the tension between the two cases. But they have uniformly rejected post-*Winfield II* due process challenges to clemency proceedings. See, e.g., *Goff v. Rousey*, No. 16-CV-00807, 2017 WL 4295257, at *5 (E.D. Ark. Aug. 31, 2017).

¹⁵¹ Most commentary on this topic was published before *Winfield II* and has argued that the facts of *Young* were so extreme that other circuits would have ruled similarly. See, e.g., Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37, 50 (2009) ("Only where the State was viewed as interfering with the inmate's ability to present information to the Governor in clemency have we found courts amenable to due process challenges."); Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698, 727 (2013) (arguing that courts have rejected post-*Woodard* challenges absent "blatant interference" akin to that alleged in *Young*); Novak, *supra* note 14, at 831 (arguing that *Woodard*'s protections have been interpreted as limited to "the most obvious conflicts of interest"). What little commentary

III. WHY COURTS SHOULD PROHIBIT GOVERNMENT INTERFERENCE IN THE CLEMENCY PROCESS

Even the circuits that have interpreted *Woodard* as prohibiting government interference with a death row prisoner's clemency application have done little to ground their reasoning in the language of *Woodard*, the historical justifications for judicial non-intervention in clemency, or other Supreme Court precedent. But with the Eleventh Circuit's broadside on due process challenges to government interference in the clemency process, and the Eighth Circuit's possible agreement, it becomes all the more important to explain why that conclusion is unconvincing.

This Part proceeds in three sections. Part III.A examines the language of *Woodard* and demonstrates that permitting government interference with a death row prisoner's clemency application would be at odds with both Justice O'Connor's and Justice Stevens's opinions. Part III.B bolsters this interpretation by explaining that the very reason courts have traditionally steered clear of intervening in the clemency process—deference to the executive's discretion—is undermined if government officials are permitted to obstruct a death row prisoner's ability to participate fully in that process. Finally, Part III.C explores other Supreme Court precedent that emphasizes a due process right to be heard in post-conviction proceedings. A special emphasis is placed on habeas corpus law, which shows that the Court has long endeavored to protect prisoners from government misconduct. All told, *Woodard* was not a narrow exception to a well-established principle that the courts should not review challenges to the clemency process at all. Rather, it extended to clemency a powerful tradition of preventing government officials from denying prisoners access to existing processes for obtaining relief.

A. Deciphering *Woodard*

The courts of appeals have generally argued over whether Justice O'Connor's two examples of impermissible clemency proceedings—"a scheme whereby a state official flipped a coin to determine whether to grant clemency, or [] a case where the State arbitrarily denied a prisoner any access to its clemency

has been published since *Winfield II* has cited it as evidence that the Eighth Circuit is uncomfortable with the decision in *Young*, even as it declines to formally overrule it. See, e.g., Sarah Lucy Cooper, *The State Clemency Power and Innocence Claims: The Influence of Finality and Its Implications for Innocents*, 7 CHARLOTTE L. REV. 51, 80–81, 81 n.209 (2015).

process”¹⁵²—should be read as simply providing examples or rather as describing the only two types of clemency proceedings that could ever violate the Due Process Clause.¹⁵³ This Section proceeds differently and argues that Justice O’Connor’s two examples reasonably describe two qualitatively distinct types of clemency processes that are both unconstitutionally arbitrary: flawed procedures and denials of participation. Moreover, the two examples are mutually reinforcing. Permitting active interference by government officials, even if it falls short of a total denial of an applicant’s ability to participate in the clemency process, could undermine Justice O’Connor’s prohibition on determining clemency at random. This Section also argues that key passages of Justice Stevens’s dissent persuasively point toward the same conception of post-conviction due process rights. Although this opinion is not binding precedent, its most powerful arguments are not foreclosed by Justice O’Connor’s concurrence. As a result, the opinions of both Justices are best read as prohibiting government officials from deliberately limiting certain clemency applicants’ access to existing processes for seeking relief.

1. Justice O’Connor’s concurrence hints at a prohibition on government interference in capital clemency proceedings.

Justice O’Connor’s emphasis in *Woodard* that only “some *minimal* procedural safeguards apply to clemency proceedings” understandably conveys that those proceedings must clear a very low bar in order to pass constitutional muster.¹⁵⁴ And yet one of her two examples of impermissible clemency proceedings is logically read as prohibiting at least some forms of government interference with a death row prisoner’s clemency application. Additionally, to permit such interference would undermine her broader argument.

Most circuit courts interpreting *Woodard* narrowly have cited to Justice O’Connor’s first example of a clemency procedure that

¹⁵² *Woodard*, 523 U.S. at 289 (O’Connor, J., concurring in part and concurring in the judgment).

¹⁵³ *Compare, e.g., Winfield*, 755 F.3d at 631 (Gruender, J., concurring) (noting that the situation in *Young* did not fall under either of Justice O’Connor’s examples), *with id.* at 633 (Murphy, J., dissenting) (“Justice O’Connor’s hypothetical should not be read to set a firm boundary delineating the only two cognizable claims of clemency procedures which violate due process.”).

¹⁵⁴ *Woodard*, 523 U.S. at 289 (O’Connor, J., concurring in part and concurring in the judgment) (emphasis in original).

would violate the Due Process Clause: “[A] scheme whereby a state official flipped a coin to determine whether to grant clemency.”¹⁵⁵ This example almost certainly stems from the Sixth Circuit’s opinion below, which posited that flipping a coin or pulling “names out of a lottery bin” would violate the Due Process Clause.¹⁵⁶ Flipping a coin evokes randomness or chance, and it makes sense that a procedure would have to be almost entirely arbitrary in order to reach this high bar.

But this example must be read in tandem with Justice O’Connor’s second example envisioning “a case where the State arbitrarily denied a prisoner any access to its clemency process.”¹⁵⁷ This example is different. It is nowhere to be found in the Sixth Circuit’s opinion and has received only cursory mention in the circuit court cases. More importantly, it evokes different concepts: First, a due process right to participate in an existing clemency process rather than a due process right to improve that process. Second, a due process right not to be excluded as a result of deliberate government action. To return to the distinction between “losing what one has and not getting what one wants,”¹⁵⁸ this is the former. The state has created a clemency application process and extended it to death row prisoners, and then excluded an individual prisoner from that process.

It is true that Justice O’Connor described a total denial of participation, rather than a partial one, by, say, obstructing a clemency applicant’s access to certain witnesses. But the relevant distinction is not the amount of access an applicant ultimately has; instead, what matters is whether government officials have placed additional restrictions beyond those already described in the established clemency procedures. While this may seem like an arbitrary line to draw, it is the same distinction that exists throughout the Supreme Court’s post-conviction jurisprudence: that there is a difference between not getting what one wants and losing what one has. Nor is this purely abstract: unlike government interference, existing limitations give adequate notice to prisoners that only some information will be considered, and they

¹⁵⁵ *Id.*

¹⁵⁶ *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1188 (6th Cir. 1997), *rev’d*, 523 U.S. 272 (1998).

¹⁵⁷ *Woodard*, 523 U.S. at 289 (O’Connor, J., concurring in part and concurring in the judgment).

¹⁵⁸ *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 10 (1979) (quoting *Friendly*, *supra* note 30, at 1296).

do not disadvantage one prisoner's clemency application relative to another's.

Courts may find it difficult or time-consuming to distinguish between formal, preexisting limits on the submission of evidence and active government interference.¹⁵⁹ But permitting government interference in the clemency process will not save the courts from having to make difficult decisions. For example, the Eleventh Circuit, the only circuit to hold definitively that government interference in the clemency process does not state a due process violation, prefers to distinguish based on the amount of access a clemency applicant ultimately has to the clemency process. It must therefore determine, for each challenge, whether the alleged government interference rises to the level of a total denial of participation.¹⁶⁰

Given the choice between two approaches, each of which requires difficult fact-finding, the courts should adopt the approach that is more consistent with Justice O'Connor's opinion and other jurisprudence regarding post-conviction due process rights. And the logic underlying Justice O'Connor's second example more reasonably points toward a distinction not rooted in the amount of access an applicant ultimately has to the clemency process, but in whether government officials actively interfered to prevent that applicant from making use of the procedures already established.

The Eleventh Circuit's holding that government interference in the clemency process does not violate the Due Process Clause also undermines the rest of Justice O'Connor's opinion. Government interference puts a thumb on the scale, preventing the governor or pardon board from considering all the evidence presented. The game, in other words, is rigged. But recall Justice O'Connor's first example, that deciding whether to grant or deny clemency by chance would also violate the Due Process Clause.¹⁶¹ It would be an implausible conception of due process indeed to

¹⁵⁹ See, e.g., *Noel*, 336 F.3d at 649 (calling the refusal to permit an applicant to undergo a specific brain-scan procedure an "amalgam" between a claim of inadequate clemency procedures and a claim of government interference).

¹⁶⁰ See *Gissendaner*, 794 F.3d at 1331 (explaining that an applicant was able to participate because she was still able to submit testimony from a number of other witnesses, notwithstanding state officials' obstruction of her access to certain additional witnesses).

¹⁶¹ See *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment).

forbid determining clemency by flipping a coin or rolling a die but permit determining clemency with a weighted coin or loaded die.¹⁶²

2. Justice Stevens's dissent is not foreclosed by Justice O'Connor's concurrence and further highlights the need to prohibit government interference in the clemency process.

Justice Stevens's separate opinion in *Woodard* further supports this conception of the Due Process Clause and makes a particularly persuasive argument against permitting government interference in the clemency process. It does this by evoking situations in which government officials make active decisions that disadvantage one prisoner's clemency application relative to others. In doing so, his opinion goes into greater detail than Justice O'Connor's concurrence and lists more specific examples of clemency processes that would violate the Due Process Clause. For example, he objects to the proposition that clemency procedures "infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence would be constitutionally acceptable."¹⁶³ These examples all involve some government official who makes the deliberate choice to treat one prisoner's clemency application better or worse than others. They do not invoke procedural deficiencies, like making decisions by flipping a coin. This emphasis on the deliberate choices of government officials, particularly his reference to a clemency decision based on personal or political animosity, bears strong resemblance to the sort of government interference permitted by the Eleventh Circuit.

Justice Stevens's opinion also raises interesting comparisons between clemency decisions that violate due process and those that violate equal protection, by using "race, religion, or political affiliation as a standard for granting or denying clemency."¹⁶⁴ One implication of this comparison is straightforward: if clemency proceedings can be reviewed for equal protection violations, then evidently there is no deep-seated tradition against judicial review of clemency in general. In fact, multiple Justices raised this point during oral argument. Justices Stevens, O'Connor, and Ruth Bader Ginsburg—who joined Justice O'Connor's concurrence—all

¹⁶² Cf. Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 633 (2020) (observing, in the context of racial disparities in executions, that "it cannot be seriously doubted that a rigged or patterned lottery is also unconstitutional").

¹⁶³ *Woodard*, 523 U.S. at 290–91 (Stevens, J., concurring in part and dissenting in part).

¹⁶⁴ *Id.* at 292.

questioned William Klatt, who represented Ohio, about whether the state's theory of due process would necessarily permit equal protection violations in clemency proceedings as well.¹⁶⁵ The very first question came from Justice O'Connor, who asked Klatt whether it would be unconstitutional for a governor to consider clemency applications only from White defendants.¹⁶⁶ He conceded that it would.¹⁶⁷ But when the Justices pressed him on why due process violations were different, he stumbled, at one point conceding that certain clemency decisions would be so egregious as to raise due process concerns,¹⁶⁸ but at another indicating that his argument was that there is no "due process check" in clemency at all.¹⁶⁹ While it is important not to speculate as to the motives of the Justices in asking questions at oral argument, the opinions of both Justices O'Connor and Stevens explicitly reject the idea that executive discretion in clemency is so broad as to preclude judicial review.

Government interference in the clemency process blends elements of both due process and equal protection. When government officials obstruct a prisoner's ability to submit evidence as part of a clemency petition, they deny that prisoner the level of participation that they extend to others. To use the language of the Eighth Circuit, the state has excluded a prisoner from "the very system that it has itself established for considering clemency petitions."¹⁷⁰ Justice Stevens's opinion does not discuss government interference directly. But by analogizing between due process and equal protection violations in the clemency process, he further demonstrates his deep concern not only with arbitrary clemency procedures but also with active decisions by government officials to disadvantage certain clemency applicants. Permitting government interference in the clemency process is at odds with this conception of due process.

¹⁶⁵ See Official Transcript Proceedings Before the Supreme Court of the United States at 15–16, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (No. 97-1769) (Justice Ginsburg challenging Klatt's reasoning that clemency is purely a matter for the executive given his concession to Justice O'Connor that the Equal Protection Clause applies to clemency proceedings); see also *id.* at 18–20 (Justices Stevens and O'Connor pressing Klatt on whether the Court could review the pardoning power of a governor who pardoned "all women and no men").

¹⁶⁶ *Id.* at 3–4.

¹⁶⁷ *Id.* at 4–5.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 6.

¹⁷⁰ *Noel*, 336 F.3d at 649.

While none of this would matter if Justice Stevens's opinion were completely foreclosed by Justice O'Connor's narrower concurrence, the two are entirely compatible on the issue of government interference in the clemency process. At no point does either Justice's opinion express criticism of or disagreement with the other; indeed, each specifically praises the other's reasoning.¹⁷¹ In praising Justice Stevens's opinion, Justice O'Connor does cite directly to the sections of his opinion that discuss examples of clemency proceedings that violate due process or equal protection.¹⁷² But her citation is so broad that it is difficult to infer approval for any specific analogy.

The reluctance to credit Justice Stevens's opinion may stem entirely from the fact that he dissented, whereas Justice O'Connor concurred in the Court's judgment. While their disagreement mattered immensely to Eugene Woodard, it was limited to a very narrow question: whether to affirm the lower court's decision to remand the case to the district court to determine if Ohio's clemency procedures complied with the Due Process Clause. Justice Stevens simply noted that "[b]ecause this case comes to us in an interlocutory posture, I agree with the Court of Appeals that the case should be remanded."¹⁷³ The fact that Justice O'Connor was willing to explain that the procedures were constitutional, while Justice Stevens preferred that the district court decide the issue, does not suggest a fundamental disagreement over whether death row prisoners have due process protections against government interference with their clemency applications.

In sum, Justice Stevens's opinion in *Woodard* is in conflict with Justice O'Connor's concurrence only to the narrow extent that it would have remanded the case rather than reversed outright. With respect to due process protections in capital clemency, his opinion provides persuasive examples of unconstitutional behaviors that are easily analogized to government interference in the clemency process. The opinions of both Justice O'Connor and Justice Stevens thus reflect a conviction that states cannot

¹⁷¹ See, e.g., *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment) ("But it is incorrect, as Justice Stevens' dissent notes, to say that a prisoner has been deprived of all interest in his life before his execution."); *id.* at 290–91 (Stevens, J., concurring in part and dissenting in part) (noting that "[l]ike Justice O'Connor, I respectfully disagree with [the] conclusion" that clemency "procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence would be constitutionally acceptable").

¹⁷² *Id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁷³ *Id.* at 295 (Stevens, J., concurring in part and dissenting in part).

establish capital clemency processes and then obstruct certain applicants from participating fully in those processes.

B. Clemency as a Matter of Executive Grace

The plurality opinion in *Woodard* repeatedly emphasized that judicial review of the clemency process would undermine clemency's role as "a matter of grace committed to the executive authority."¹⁷⁴ Scholars criticizing *Woodard*, as well as courts interpreting the case narrowly, have likewise pointed to the negative practical consequences of applying due process protections to capital clemency.¹⁷⁵ In their conception, *Woodard* was a narrow exception to this general principle. But permitting government interference in the clemency process actually undermines this traditional role for executive clemency.

Skepticism of judicial intervention in the clemency process makes some sense where the primary actor involved is a governor or the president. The clemency power is specifically vested in those individuals, and judicial review of their decisions could raise concerns about the separation of powers.¹⁷⁶ But the cases in which death row prisoners brought due process claims alleging government interference have not concerned governors or even state pardon boards. In those cases, individual actors further down the chain of command—prison wardens¹⁷⁷ and prosecutors¹⁷⁸—unilaterally chose to obstruct prisoners' ability to present evidence as part of their clemency applications. These officials are members of the executive branch, but unlike a pardon board, they have not been delegated part of the governor's power of grace.

By preventing a death row prisoner from presenting evidence as part of a clemency application, these officials also prevent governors and pardon boards from reviewing that evidence. In a

¹⁷⁴ *Id.* at 285 (plurality opinion).

¹⁷⁵ *See, e.g.*, Olson, *supra* note 68, at 1017 (arguing against permitting "courts to encroach upon areas traditionally left to the states and their governors"); *Faulder v. Tex. Bd. of Pardons & Paroles*, 178 F.3d 343, 343 (5th Cir. 1999) (per curiam) ("The low threshold of judicial reviewability is based on the facts that pardon and commutation decisions are not traditionally the business of courts and that they are subject to the ultimate discretion of the executive power."); *Lee v. Hutchinson*, 854 F.3d 978, 981 (8th Cir. 2017) (en banc) (per curiam) ("[C]lemency is extended mainly as a matter of grace, and the power to grant it is vested in the executive prerogative." (quotation marks omitted) (quoting *Noel*, 336 F.3d at 649)).

¹⁷⁶ *See, e.g.*, Strasser, *supra* note 40, at 138–43 (questioning whether pardon decisions are justiciable).

¹⁷⁷ *See, e.g.*, *Gissendaner*, 794 F.3d at 1329.

¹⁷⁸ *See, e.g.*, *Young*, 218 F.3d at 853.

sense, prosecutors and prison officials are obstructing the ability of the executive to perform their traditional duty to extend—or deny—grace. These government officials usurp the authority of the executive; clemency remains a matter of grace, but the grace of the prison warden, or circuit attorney, rather than the figures given that authority by state constitutions and statutes.¹⁷⁹ This shifts the power to commute a sentence or pardon a prisoner from those actually entrusted with the pardon power to state actors who are much less accountable to the public. The traditional justifications for judicial restraint in capital clemency are a poor fit for cases in which prisoners allege government officials have obstructed their ability to participate fully in the clemency process.

C. A Broad Conception of a Post-Conviction Right to Be Heard

The Supreme Court has repeatedly affirmed that, if a state creates post-conviction proceedings, then those proceedings must satisfy due process. This same jurisprudence has conceived of post-conviction due process rights in terms of “fundamental fairness”¹⁸⁰ and “the opportunity to be heard.”¹⁸¹ Additionally, beyond the realm of due process itself, the Court has emphasized judges’ equitable powers to protect prisoners’ ability to file petitions for habeas corpus against government obstruction. This analogy is inevitably imperfect: these are existing judicial proceedings, rather than executive clemency proceedings. But they provide a valuable comparison to the type of government misconduct the courts have found so egregious as to warrant intervention. *Woodard* is thus best understood as prohibiting government interference with access to the clemency process. That understanding is consistent with the Court’s other due process and habeas jurisprudence, both before and after *Woodard* was handed down. In this sense, *Woodard* fits comfortably into a tradition of jurisprudence aimed at ensuring that government officials cannot deny prisoners access to existing processes for obtaining relief.

¹⁷⁹ Practical considerations abound as well. Prison officials, unlike state pardon boards or governors, are uniquely positioned to take advantage of prisoners seeking clemency by, for example, extorting prisoners for bribes or coercing them into sex. See Alysia Santo, *Preying on Prisoners*, MARSHALL PROJECT (June 17, 2015), <https://perma.cc/H83T-GR7> (describing widespread sexual abuse of prisoners by prison officials); Serge F. Kovaleski & Dan Barry, “*Or I Will Stab You Right Now*”: A Family’s Prison Extortion Nightmare, N.Y. TIMES (Sept. 8, 2020), <https://perma.cc/3JFW-2RFS> (describing an extortion scheme perpetuated by inmates and guards).

¹⁸⁰ *Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987).

¹⁸¹ *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

1. The Supreme Court's conception of post-conviction due process rights centers on prisoners' right to be heard.

The Supreme Court's other forays into post-conviction relief have adopted a conception of due process that intuitively prohibits government officials from obstructing a death row prisoner's ability to collect and present evidence as part of a clemency application. As discussed in Part I.B, the Court has held that, if states establish certain post-conviction proceedings, then those proceedings must comport with the demands of due process.¹⁸² These cases have generally involved neither allegations of active government interference nor clemency specifically. But in these rulings, the Court has repeatedly emphasized two key ideas: First, that prisoners have a due process right to submit evidence and have that evidence considered by the appropriate decision maker. And second, that post-conviction proceedings' compliance with this due process guarantee should be evaluated according to a standard of fundamental fairness—a vague and abstract term, but one that helps guide our sense of whether certain government actions are appropriate. These cases are thus distinct from cases in which prisoners demanded a specific set of procedures for post-conviction relief. Instead, they emphasize that those procedures, once created, must allow a prisoner to submit evidence that will be considered.

Take, for example, *Ford v. Wainwright*,¹⁸³ which was cited by Justice O'Connor in *Woodard*.¹⁸⁴ That case principally held that the Eighth Amendment prohibits executing a person who is insane.¹⁸⁵ But it also found that Florida's process for determining whether a prisoner was competent to be executed violated the Due Process Clause's "fundamental requisite" of "the opportunity to be heard."¹⁸⁶ The Court emphasized that Florida's proceedings failed "to include the prisoner in the truth-seeking process," by prohibiting prisoners from submitting evidence on their behalf or,

¹⁸² See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 480–82 (1972) (holding that parolees have a due process right to a hearing prior to revocation of their parole); *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82 (1973) (holding that probationers have a due process right to a hearing prior to revocation of their probation); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (holding that criminal defendants have a due process right to effective assistance of counsel on first appeal).

¹⁸³ 477 U.S. 399 (1986).

¹⁸⁴ *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁸⁵ See *Ford*, 477 U.S. at 401.

¹⁸⁶ *Id.* at 413–14 (quoting *Grannis*, 234 U.S. at 394).

relatedly, from challenging the state's psychiatric evidence.¹⁸⁷ Justice O'Connor wrote separately to highlight the due process deficiencies in the case in more detail. She observed that Florida's procedures permitted the prisoner to attend the competency hearing but did not permit the prisoner to participate in any way, and did not guarantee that the governor's office would review any evidence submitted by the prisoner.¹⁸⁸ Justice O'Connor concluded that "due process at the very least requires that the decision maker consider the prisoner's written submissions."¹⁸⁹

The parallels between the competency hearings at issue in *Ford* and clemency hearings in capital clemency cases are striking. Both occur after conviction, both are a potential barrier to a prisoner's execution, and both—most significantly—can require procedural protections under the Due Process Clause even as prisoners lack an independent entitlement in the substantive outcome of the proceedings. *Woodard* was vague on precisely what due process safeguards capital clemency applicants are entitled to. *Ford* provides the missing piece: *Woodard* had the opportunity to be heard and for the decision maker to consider his submitted evidence,¹⁹⁰ while *Ford* was denied that opportunity.

This conception also helps draw the line between active government interference and the violations of state law described in Part II.A. If a clemency board fails to follow state law or its own regulations, that, too, could be considered a form of interference with a prisoner's clemency application. If nothing else, it denies prisoners notice of precisely what their proceedings will look like. The Tenth Circuit's nominal holding that a death row prisoner must receive "the clemency procedures explicitly set forth by state law"¹⁹¹ is therefore the most consistent with the spirit of *Woodard* and the Court's post-conviction jurisprudence. While it requires more judicial fact-finding, however, the Fifth Circuit's approach is also tenable. That court found that a violation of state law did not give rise to a constitutional claim where each member of the pardon board received and reviewed the prisoner's submitted

¹⁸⁷ *Id.* at 413–15.

¹⁸⁸ *Id.* at 430 (O'Connor, J., concurring in the result in part and dissenting in part). Justice O'Connor dissented from the majority's Eighth Amendment holding. *Id.* at 427.

¹⁸⁹ *Id.*

¹⁹⁰ See Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967, 971 n.14 (2001) (emphasizing that the minimal procedural safeguards met in *Woodard* were precisely notice and opportunity to be heard).

¹⁹¹ *Duwall*, 162 F.3d at 1061.

materials, “his family’s submissions and [] such other information as was relevant or useful.”¹⁹² Even though the Fifth Circuit has never directly addressed a claim of active government interference, its approach has the potential to adequately distinguish between violations of law that impinge on a prisoner’s right to be heard, and those that do not. Only the Eleventh Circuit explicitly rejects the idea that a state law violation that interferes with a prisoner’s ability to submit evidence can violate the Due Process Clause.¹⁹³

More recent case law also supports this conception of due process as a bulwark against government actions that are fundamentally unfair.¹⁹⁴ Most recently, in *District Attorney’s Office for the Third Judicial District v. Osborne*,¹⁹⁵ the Court held that “the question is whether . . . the framework of the State’s procedures for postconviction relief ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ or ‘transgresses any recognized principle of fundamental fairness in operation.’”¹⁹⁶ That there exists a bare minimum level of procedural fairness does not elaborate on *Woodard’s* splintered holding, nor does it contradict the lower courts that have refused to entertain challenges to the sufficiency of state clemency procedures. Osborne’s claim, however, was that his right to be heard—here, to present newly available DNA evidence—necessarily implied that states must adopt specific procedures for post-conviction review.¹⁹⁷ The Court rejected his claim.¹⁹⁸ In context, *Osborne* clarifies that whether a prisoner has had the opportunity to be heard—the standard mandated by *Ford*—is judged not according to any specific requirements but by whether the process adopted by the government has been fundamentally fair.

¹⁹² *Faulder*, 178 F.3d at 343.

¹⁹³ See *Gissendaner*, 794 F.3d at 1333. As discussed in Part II.B.3, the Eighth Circuit’s stance on this question is ambiguous. Its most recent ruling on the subject praised the Eleventh Circuit’s ruling in *Gissendaner*, but also noted that the “procedural irregularities” at issue were “less consequential” than in cases involving active government interference. *Lee*, 854 F.3d at 982.

¹⁹⁴ See, e.g., *Finley*, 481 U.S. at 556–57 (emphasizing the “fundamental fairness mandated by the Due Process Clause”); see also *Murray v. Giarratano*, 492 U.S. 1, 14–15 (1989) (Kennedy, J., concurring in the judgment) (writing for himself and Justice O’Connor that the “requirement of meaningful access” had been met).

¹⁹⁵ 557 U.S. 52 (2009).

¹⁹⁶ *Id.* at 69 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)).

¹⁹⁷ *Id.* at 64–65.

¹⁹⁸ *Id.* at 68–69.

Unfairness is ultimately in the eye of the beholder, and what one judge finds fundamentally unfair, another might see as natural. But government interference in the clemency process, as the Eighth Circuit eloquently observed, is akin to “the crime of tampering with a witness.”¹⁹⁹ A more fundamentally unfair action would be hard to find. Even the Eleventh Circuit acknowledged this framing—it simply declined to find that the Due Process Clause protected against such unfairness.²⁰⁰ Cases like *Ford* and *Osborne* demonstrate that the Eleventh Circuit was wrong: the Court’s jurisprudence has consistently recognized that the Due Process Clause does protect against grossly unfair behavior on the part of government officials. And, as the final Section shows, government interference with a prisoner’s petition for relief is precisely the sort of unfair behavior the courts have tasked themselves with preventing.

2. The Supreme Court’s habeas jurisprudence recognizes the need for judicial intervention in the face of government misconduct.

Long before the Court’s first forays into the clemency process, a number of cases held that state prison officials cannot actively interfere with inmates’ attempts to prepare²⁰¹ or file²⁰² habeas petitions. These cases provide a helpful analogy to the sort of government misconduct the Court has traditionally prohibited. Although this line of cases has generally not invoked the Due Process Clause, it strongly points toward an interpretation of *Woodard* that prohibits similar interference.²⁰³ A prisoner may have no specific liberty interest in clemency or habeas relief, but the Constitution nonetheless protects that prisoner’s ability to submit evidence to a decision-making body, free from government interference.

¹⁹⁹ *Young*, 218 F.3d at 853.

²⁰⁰ *See Gissendaner*, 794 F.3d at 1333.

²⁰¹ *See, e.g., Johnson v. Avery*, 393 U.S. 483, 484–87 (1969) (invalidating a prison regulation prohibiting prisoners from assisting one another with the preparation of writs of habeas corpus).

²⁰² *See, e.g., Ex parte Hull*, 312 U.S. 546, 547–49 (1941) (invalidating a prison regulation requiring prisoners to submit writs of habeas corpus to state prison officials rather than directly to the court).

²⁰³ Dissenting Justices, from *Dumschat* to *Osborne*, have cited these cases. That such efforts were fruitless may suggest that they are out of favor with the current Court. Still, no Supreme Court case has considered allegations of government interference in the clemency process.

Additionally, both the Supreme Court and lower courts have repeatedly employed the doctrine of equitable tolling for filing habeas petitions, which exempts a petitioner from the strict requirements of a statute of limitations, to protect prisoners from government interference. Early decisions concluded that equitable tolling is justified where “the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.”²⁰⁴ The Court has also hinted that government interference, in particular, justifies equitable tolling.²⁰⁵ This bears some resemblance to the facts in *Wilson*, where the court found that state officials had misled the prisoner’s counsel about the issues to be considered at his clemency hearing.²⁰⁶

Most recently, in *Holland v. Florida*,²⁰⁷ the Supreme Court followed the approach of all eleven courts of appeals to consider the issue in holding that the Antiterrorism and Effective Death Penalty Act of 1996 permits equitable tolling of its statutory limitations period.²⁰⁸ The Court explained that “serious instances of attorney misconduct” could justify such equitable tolling.²⁰⁹ Such attorney misconduct intuitively represents a less extreme circumstance than instances in which government officials obstruct a death row prisoner’s access to a witness. While the Supreme Court has not revisited the issue since *Holland*, nearly all circuits have considered government interference a specific reason to equitably toll a prisoner’s habeas petition.²¹⁰ Even the Eleventh Circuit specifically held that the “extraordinary remedy” of equitable

²⁰⁴ *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 96 (1990); *see also* *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (applying the same standard in the federal habeas context).

²⁰⁵ *See* *Pliler v. Ford*, 542 U.S. 225, 234 (2004) (remanding case to determine whether the prisoner was “affirmatively misled”); *see also id.* at 235 (O’Connor, J., concurring) (“[I]f the petitioner is affirmatively misled, either by the court or by the State, equitable tolling might well be appropriate.”).

²⁰⁶ *See Wilson*, 161 F.3d at 1187.

²⁰⁷ 560 U.S. 631 (2010).

²⁰⁸ *Id.* at 645.

²⁰⁹ *Id.* at 651–52. The Court did not rule definitively on whether the misconduct of the attorney in this particular case had met this standard.

²¹⁰ *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2(b)(iii), at 304–05 n.83 (7th ed. 2020) (listing cases from the Second, Third, Fifth, Sixth, Eighth, and Ninth Circuits holding that government interference can justify equitable tolling); *see also* BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 9A:108 (2020), Westlaw (also concluding that government misconduct can justify equitable tolling and citing cases from the Tenth and Eleventh Circuits).

tolling is justified where “the State’s conduct prevents the petitioner from timely filing.”²¹¹

The cases in this Section point strongly toward the conclusion that the courts must intervene to prevent government interference in the clemency process. Even if prisoners have reduced due process protections after conviction, the Court’s jurisprudence has emphasized their right to be heard in post-conviction hearings and the need to protect them from actions by government officials that are fundamentally unfair. And the near-universal recognition that government interference is so egregious as to bend the strict requirements of habeas law further demonstrates the need for judicial intervention to ensure prisoners have the right to petition for relief, even if they are not guaranteed that relief. Permitting government officials to interfere with death row prisoners’ clemency applications places precisely those unfair limits on their right to seek relief and be heard.

CONCLUSION

Although *Woodard* is more than twenty years old, the courts of appeals have struggled to interpret its indication that the Due Process Clause guarantees some minimal procedural safeguards in capital clemency proceedings. It is understandable that, faced with challenges to the decisions of governors and state pardon boards, or demands that states change their clemency procedures, the courts have been reluctant to intervene. As those courts have understood, *Woodard* naturally leads to the conclusion that judicial oversight is rarely, if ever, appropriate.

Government officials who interfere with a death row prisoner’s clemency application, however, are a different beast entirely. Although cases alleging such interference likewise claim due process protections in capital clemency proceedings, they do not seek to mandate specific procedures that states must follow. Rather, they ensure that the executive decision makers actually receive and can consider all the materials submitted by prisoners applying for clemency. Absent a rule prohibiting such interference, the power to commute a sentence or pardon a prisoner is shifted from those actually entrusted with the pardon power to prison officials and other state actors who are often entirely unaccountable to the public. Even if this interference is rare,

²¹¹ *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005) (quoting *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)), *aff’d*, 549 U.S. 327 (2007).

obstruction of one otherwise-successful applicant's ability to present evidence can literally be the difference between life and death.

Even those courts that have held that government interference with the clemency process violates the Due Process Clause have failed to explain how their reasoning is grounded in *Woodard* or other Supreme Court jurisprudence. As a result, they have done little to counterbalance courts that have given the stamp of approval to such interference, like the Eleventh Circuit, or to guard against future judges implicitly discarding their precedents, as the Eighth Circuit has potentially done.

This Comment has proposed such an explanation. A careful examination of the opinions in *Woodard* indicates that five Justices were deeply concerned that government officials would actively disadvantage certain capital clemency applicants. More importantly, the Supreme Court's other jurisprudence strongly points to a similar conclusion. In multiple other post-conviction proceedings, the Court has emphasized that the minimal requirements of due process are that the proceedings be fundamentally fair and that prisoners have a right to be heard. Finally, the Court's habeas jurisprudence demonstrates a judicial obligation to ensure that prisoners can petition for relief without government obstruction.

Many death row prisoners are currently at the mercy of not only their governors or pardon boards but also other government officials who may usurp the executive's role to extend or deny grace. By reading *Woodard* narrowly and ignoring other jurisprudence regarding post-conviction rights, the Eleventh Circuit, and possibly the Eighth Circuit, has failed to recognize that the Due Process Clause's protections against government actions that are fundamentally unfair still apply to the clemency process. Ideally, the Supreme Court should return to this issue and explicitly strengthen post-conviction protections against government misconduct. Until then, courts should embrace their obligation to ensure prisoners have a right to be heard.