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Brian S. Clarke

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In Search of Clemency Procedures We Can Live With: What Process is Due in Capital Clemency Proceedings After *Ohio Adult Parole Authority v. Woodard*?

Brian S. Clarke*

I. Introduction

The United States Supreme Court has denied certiorari for the final time. All state and federal appeals have been exhausted. The execution date has been set. There is only one thing that can save the death row inmate from the ultimate punishment: the proverbial call from the governor and a grant of executive clemency.

This scene, although a veritable Hollywood cliché, is being played out in prisons across America with increasing frequency. As of July 1, 1998, there were 3,474 men and women on death row in America.¹ In 1996, with the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996² ("AEDPA") Congress sought to "streamline" the federal habeas process and expedite executions.³ In the words of one commentator, AEDPA has "eviscerated . . . the once great Writ [of Habeas Corpus]."⁴ The changes wrought by AEDPA have created a federal habeas system in which "results are more important than process, [] finality is more important than fairness, [and] it is more important to get on with executions than [to] determin[e] whether convictions and sentences were fairly and reliably obtained."⁵ The current system "facilitates executions, but it does

* J.D. Candidate, May 1999, Washington & Lee University School of Law; B.A., University of North Carolina at Chapel Hill. Thank you to Professor Penny J. White for her inspirational leadership. Also, many thanks to Karen Fredenburg, Business Manager of the Washington & Lee Law Review, for her assistance in getting this issue of the CAPITAL DEFENSE JOURNAL to press.

1. DEATH PENALTY INFORMATION CENTER, "Facts About the Death Penalty," <<http://www.essential.org/dpic/dpic5.htm>> (citing NAACP Legal Defense Fund, *Death Row U.S.A.*, July 1, 1998). As of October 21, 1998, 54 men and women have been executed in 1998 and a total of 486 have been executed since 1976. *Id.*

2. Pub.L.No.104-132, 110 Stat. 1214 (amending 28 U.S.C. Title 153).

3. See 28 U.S.C. Title 153, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No.104-132, 110 Stat. 1214.

4. Stephen B. Bright, *Death Penalty Moratorium: Fairness, Integrity at Stake: Speaking Out in Favor of the ABA's Position*, 13-SUM CRIM. JUST. 28, 34 (1998).

5. *Id.* at 35. See also Jeanne-Marie S. Raymond, *The Incredible Shrinking Writ: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, CAP. DEF. J., vol. 9, no. 1, p. 52 (1996)

so only at the price of being powerless to correct injustice in many instances.”⁶

In this environment, the role that executive clemency must play in the realm of capital punishment is becoming increasingly important. Initially, this article will briefly examine the statutory clemency schemes currently in use in states that have the death penalty. Next, it will discuss the applicability of the Due Process Clause to capital clemency proceedings. Finally, it will seek to determine exactly what process is due in capital clemency proceedings.

II. *The Lay of the Land: Current Statutory Clemency Schemes*

All of the thirty-eight states⁷ that authorize capital punishment also have constitutional or statutory provisions for clemency.⁸ In the vast majority of

(discussing the changes made to the federal habeas process by AEDPA); Mary E. Eade, *The Incredible Shrinking Writ, Part II: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, CAP. DEF. J., vol. 9, no. 2, p. 55 (1997) (examining four early judicial interpretations of various provisions of AEDPA); & Kimberly Woolley, *Constitutional Interpretations of the Anti-Terrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414 (1998) (discussing changes made by AEDPA from a constitutional perspective).

6. Bright, *supra* note 4, at 35.

7. Currently, 38 states, the Federal Government, and the United States Military have the death penalty with the total number of people on death row in each jurisdiction as of July 1, 1998: Arizona (119), Alabama (167), Arkansas (41), California (503), Connecticut (5), Colorado (3), Delaware (17), Florida (388), Georgia (121), Idaho (21), Indiana (44), Illinois (159), Kansas (2), Kentucky (33), Louisiana (80), Maryland (18), Mississippi (64), Missouri (86), Montana (6), Nebraska (11), New Hampshire (0), New Jersey (15), New Mexico (4), New York (1), Nevada (89), North Carolina (205), Ohio (183), Oklahoma (141), Oregon (24), Pennsylvania (220), South Carolina (70), South Dakota (2), Tennessee (101), Texas (431), Utah (11), Virginia (44), Washington (17), Wyoming (1), United States Government (19), & United States Military (8). DEATH PENALTY INFORMATION CENTER, “Facts About the Death Penalty,” <<http://www.essential.org/dpic/dpic5.htm>> (citing NAACP Legal Defense Fund, *Death Row USA*, July 1, 1998).

8. ALA. CONST., AMDT. 38, ALA. CODE §§ 15-18-100 (1995); ARIZ. CONST., art. V, § 5, ARIZ. REV. STAT. §§ 31-443, 31-445 (1996), *McGee v. Arizona State Board of Pardons and Paroles*, 376 P.2d 779 (Ariz. 1962) (holding that due process requires full hearings of all clemency applications); ARK. CONST., art. VI, § 18, ARK. CODE ANN. §§ 5-4-607, 16-93-204 (1997); CAL. CONST., art. V, § 8, CAL. PENAL CODE ANN. §§ 4800-4807, CAL. GOVT. CODE ANN. § 12030(a) (West 1992); COLO. CONST., art. IV, § 7, COLO. REV. STAT. §§ 16-17-101, 16-17-102 (1997); CONN. CONST., art. IV, § 13, CONN. GEN. STAT. § 18-26 (1997); DEL. CONST., art. VII, § 1, DEL. CODE ANN., Tit. 29, § 2103 (1997); FLA. CONST., art. IV, § 8, FLA. STAT. § 940.01 (1997), FLA. ADMIN. CODE ANN. r. 1I. 27, App. (1997); GA. CONST., art. IV, § 2, ¶ 2, GA. CODE ANN. §§ 42-9-20, 42-9-42 (1997); IDAHO CONST., art. IV, § 7, IDAHO CODE §§ 20-240 (1997); ILL. CONST., art. V, § 12, 730 ILL. COMP. STAT. 5/3-3-13 (1997); IND. CONST., art. V, § 17, IND. CODE §§ 11-9-2-1 to 11-9-2-4, 35-38-6-8 (1993); KAN. CONST., art. I, § 7, KAN. STAT. ANN. § 22-3701 (1995); KY. CONST., § 77; LA. CONST., art. IV, § 5(E), LA. REV. STAT. ANN. § 15:572 (WEST 1992), LA. ADMIN. CODE tit 22, §§ 101 to 113; MD. CONST., art. II, § 20, MD. CODE ANN., art. 27, § 77 (1996), and art. 41, § 4-513 (1997); MISS. CONST., art. V, § 124, MISS. CODE ANN. § 47-5-115 (1981); MO. CONST., art. IV, § 7, MO. REV. STAT. §§ 217.220, 217.800, 552.070 (1994); MONT. CONST., art. VI, § 12, MONT. CODE ANN. §§ 46-23-301 to 46-23-316 (1994); NEB. CONST., art. IV, § 13, NEB. REV. STAT. §§ 83-1, 127 to 83-1, 132 (1994); NEV. CONST., art. V, § 13, NEV. REV. STAT. § 213.080 (1995), NEV. ADMIN. CODE ch. 213, §§ 213.010 to 213.210 (1998); N.H. CONST., PT. 2, art. 52, N.H. REV. STAT. ANN. § 4:23 (1988); N.J. CONST., art. V, § 2, ¶ 1, N.J. STAT. ANN. §§ 2A:167-4, 2A:167-12 (West 1985); N.M. CONST., art. V,

states, the ultimate power to grant or deny clemency is vested in the executive. Several states, however, have split the clemency power between the Governor and an advisory board, often a parole board.

Twenty-five states require some sort of mandatory action by either the Governor, the parole board or both. Typically, these states require either an investigation by the parole board, a hearing before the parole board, or both: thirteen states require an investigation;⁹ eleven states require a hearing;¹⁰ and three states require both.¹¹ Four of the twenty-five states that require some mandatory action require only that the Governor or the board "consider"¹² or "review"¹³ the application.

Included in the group of states that require mandatory action on petitions for clemency are Florida, Georgia, and Texas, states which, like Virginia, are very active capital punishers.¹⁴ Many of the landmark Supreme Court decisions in this realm have originated in these three states.¹⁵ In fact, Virginia's capital sentencing

§ 6, N.M. STAT. ANN. § 31-21-17 (1994); N.Y. CONST., art. IV, § 4, N.Y. EXEC. LAW §§ 15 to 19 (McKinney 1993); N.C. CONST., art. III, § 5(6), N.C. GEN. STAT. §§ 147-23 to 147-25 (1993); OHIO CONST., art. III, § 11, OHIO REV. CODE ANN. §§ 2967.01 to 2967.12 (1996); OKLA. CONST., art. VI, § 10, OKLA. STAT., Tit. 21, § 701.11A (Supp. 1998); ORE. CONST., art. V, § 14, ORE. REV. STAT. §§ 144.640 to 144.670 (1991); PA. CONST., art. IV, § 9, PA. STAT. ANN., Tit. 61, § 2130 (Purdon Supp. 1992); S.C. CONST., art. IV, § 14, S.C. CODE ANN. §§ 24-21-910 to 24-21-1000 (1977 and Supp. 1997); S.D. CONST., art. IV, § 3, S.D. CODIFIED LAWS §§ 23A-27A-20 to 23A-27A-21, 24-14-1 to 24-14-7 (1988); TENN. CONST., art. III, § 6, TENN. CODE ANN. §§ 40-27-101 to 40-27-109 (1997), TENN. COMP. R. & REGS. § 1100-1-1-.15 (1995); TEX. CONST., art. IV, § 11, TEX. CRIM. P. CODE ANN., art. 48.01 (Supp. 1997), 37 TEX. ADMIN. CODE §§ 143.57 to 143.59 (West 1998); UTAH CONST., art. VII, § 12, UTAH CODE ANN. § 77-27-5.5 (Supp. 1992), UTAH ADMIN. CODE §§ R671-312-1 to R671-312-3 (1998); VA. CONST., art. V, § 12, VA. CODE ANN. §§ 53.1-229 to 53.1-231 (1994); WASH. CONST., art. III, § 9, WASH. REV. CODE § 10.01.120 (1994); WYO. CONST., art. IV, § 5, WYO. STAT. § 7-13-801 (1995).

9. This group of states includes Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Missouri, Montana, New Hampshire, New York, Ohio, and Oklahoma. It is especially interesting that both Florida and Georgia require mandatory investigations by their respective clemency boards before the application is considered.

10. This group includes Arizona, Delaware, Idaho, Illinois, Indiana, Louisiana, Nevada, Ohio, Pennsylvania, South Dakota and Utah. The type of hearing that the inmate is entitled to differs from state to state. For example, Pennsylvania and Delaware require full public hearings. PA. CONST., art. IV, § 9, PA. STAT. ANN., Tit. 61, § 2130 (Purdon Supp. 1992); & DEL. CONST., art. VII, § 1, DEL. CODE ANN., Tit. 29, § 2103 (1997).

11. Arizona, Indiana and Ohio require both a hearing and an investigation. Arizona, which requires both an investigation and a full adversarial hearing, provides inmates with the greatest degree of procedural protection. *See* ARIZ. REV. STAT. §§ 31-443, 31-445 (1996) & *McGee v. Arizona State Board of Pardons and Paroles*, 376 P.2d 779 (Ariz. 1962) (holding that due process requires full hearings of all clemency applications). The Arizona Supreme Court was the first court to recognize that the Due Process Clause applies in clemency proceedings.

12. Texas, Nebraska, and Wyoming require that the board or the governor "consider" the application. Wyoming also requires that the Governor give notice to the district attorney in the county where the inmate was convicted.

13. Maryland requires that the board "review" the application for clemency.

14. Texas, Virginia and Florida are the leaders in the number of executions per year.

15. The trio of cases that declared the death penalty unconstitutional in 1972 were from

scheme was largely adopted from those of Georgia and Texas. The language of Virginia's "future dangerousness" aggravator was modeled on that of Texas following the Supreme Court's decision in *Jurek v. Texas*.¹⁶ Similarly, the language of Virginia's "vileness" aggravator was copied verbatim from that of Georgia following the Supreme Court's decision in *Gregg v. Georgia*.¹⁷

In Florida, one of the top three capital punishers in the United States, the Florida Parole Commission is *required* to "conduct a thorough and detailed investigation into all factors relevant to the issue of clemency" in every clemency application.¹⁸ The investigation must include, among other things, "an interview with the inmate (who may have legal counsel present) by at least three members of the Commission."¹⁹ The Commissioners who personally interviewed the inmate are then required to issue a report that includes their findings and conclusions.²⁰ Following the issuance of this report, any Commission member or the Governor may request a hearing to be held at the Commission's next meeting.²¹

Georgia and Texas. See *Furman v. Georgia*, *Jackson v. Georgia*, & *Branch v. Texas*, 408 U.S. 238, 92 S.Ct. 2726 (1972). Conversely, three of the four decisions that essentially brought back the death penalty in 1976 were from these three states. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976); & *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976). Additionally, in the last three years, the United States Supreme Court's capital jurisprudence has focused in very large part on Virginia. See *Buchanan v. Angelone*, 118 S.Ct. 757 (1998); *O'Dell v. Netherland*, 117 S.Ct. 1969 (1997); *Gray v. Netherland*, 116 S.Ct. 2074 (1996); & *Tuggle v. Netherland*, 116 S.Ct. 283 (1995). For the October 1998 term, the Supreme Court has granted *certiorari* in two Virginia cases. See *Strickler v. Pruett*, Nos. 97-29, 97-30, 1998 WL 340420 (4th Cir.) (unpublished disposition), *cert. granted sub nom*, *Strickler v. Greene*, 119 S.Ct. 40 (1998); & *Lilly v. Commonwealth*, 499 S.E.2d 522 (Va.), *cert. granted sub nom*, *Lilly v. Virginia*, No. 98-5881, 1998 WL 596783 (U.S. Nov. 9, 1998).

16. 428 U.S. 262, 96 S.Ct. 2950 (1976). Virginia's "future dangerousness" aggravator reads as follows: "a sentence of death shall not be imposed unless the court or jury shall (1) . . . find [beyond a reasonable doubt] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society . . ." VA. CODE § 19.2-264.2 (1997). The Court in *Jurek* approved one of Texas's aggravating factors that read as follows: "whether [the evidence established beyond a reasonable doubt that] there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Jurek v. Texas*, 428 U.S. 262, 269, 96 S.Ct. 2950, 2955 (1976) (quoting TEX. CRIM. P. CODE art. 37.071(b)(2) (Supp. 1975-1976)).

17. 428 U.S. 153, 96 S.Ct. 2909 (1976). Virginia's "vileness" aggravator reads as follows: "a sentence of death shall not be imposed unless the court or jury shall (1) . . . find [beyond a reasonable doubt] . . . that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim . . ." VA. CODE § 19.2-264.2 (1997). The Court in *Gregg* approved one of Georgia's aggravating factors that read as follows: "The offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Gregg v. Georgia*, 428 U.S. 153, 165 n.9, 96 S.Ct. 2909, 2921 n.9 (1976) (quoting GA. CODE § 27-2534.1(b)(7) (Supp. 1975)).

18. FLA. ADMIN. CODE ANN. r. T. 27, App. r. 15 (1997) (Rules of Executive Clemency, Rule 15).

19. *Id.*

20. *Id.*

21. *Id.*

At the hearing, "the attorneys for the state and the inmate may present oral argument each not to exceed 15 minutes."²² Florida's clemency scheme provides inmates with several important procedural protections: namely the right to have their applications thoroughly investigated and the right to speak directly with a members of the Commission. Both Georgia and Texas require consideration and some investigation of clemency requests.²³ While not nearly as protective as the procedures used in Florida, these clemency schemes ensure that, at a minimum, the application is reviewed and considered.

Eleven states, including Virginia, require no mandatory action by the governor or board.²⁴ These states afford inmates absolutely no "process" and give the executive virtually unfettered discretion. In all but two of these eleven states, investigations into applications for clemency may be undertaken *only* at the direction of the governor.²⁵ There is no guaranty in any of these states that the Governor will even look at the petition for clemency. The remainder of this article will focus on the what process is due in clemency proceedings and whether Virginia's clemency statute comports with these minimum requirements.

III. Does the Due Process Clause Apply to Capital Clemency Proceedings?

The Supreme Court has recognized that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."²⁶ Despite this recognition, however, the Court held in *Connecticut Board of Pardons v. Dumschat*²⁷ that the Due Process Clause²⁸ did not apply in non-capital clemency proceedings because there is no constitutionally protected interest in such proceedings.²⁹ The Court reasoned that because an inmate's "liberty" interest was obviated when a valid conviction was obtained,³⁰ any interest the inmate had in clemency was

22. *Id.*

23. GA. CODE §§ 42-9-20 & 42-9-42 (1997), GA. COMP. R. & REGS. § 475.3-.10(2)(b) (1998); & TEX. CRIM. P. CODE ANN., art. 48.01 (Supp. 1997), 37 TEX. ADMIN. CODE §§ 143.43 to 143.59 (West 1998).

24. These states are Alabama, Kentucky, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Virginia, and Washington.

25. In Virginia, the Virginia Parole Board may investigate an application for clemency either at the Governor's request or of its own accord if "it believes action on the part of the Governor is in the best interest of the Commonwealth." VA. CODE § 53.1-231 (1998). Oregon allows its parole board to send information about the application to the Governor if it so desires. ORE. REV. STAT. §§ 144.640 to 144.670 (1991).

26. *Herrera v. Collins*, 506 U.S. 390, 411-12, 113 S.Ct. 853, 866 (1993) (footnotes omitted).

27. 452 U.S. 458, 101 S.Ct. 2460 (1981).

28. The "Due Process Clause" of the Fourteenth Amendment provides that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

29. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S.Ct. 2460, 2465 (1981).

30. *Dumschat*, 452 U.S. at 464, 101 S.Ct. at 2464.

"simply a unilateral hope."³¹ On its facts, *Dumschat* did not address the issue of whether due process protections were required in capital clemency proceedings.³² The majority of the lower courts that considered this issue, however, have held that, based on *Dumschat*, the Due Process Clause does not apply to capital clemency proceedings.³³

In *Ohio Adult Parole Authority v. Woodard*,³⁴ the Supreme Court finally addressed this issue.³⁵ However, there was no majority opinion on the issue of whether due process protection applies to capital clemency proceedings.³⁶ Chief Justice Rehnquist delivered the judgment of the Court and wrote an opinion in which Justices Scalia, Thomas, and Kennedy joined.³⁷ The Chief Justice believed that *Dumschat* applied to capital clemency proceedings and characterized a death row inmate's clemency petition as a "unilateral hope" which was not subject to Due Process protection.³⁸ He reasoned that the "Due Process Clause is not

31. *Id.* at 465, 101 S.Ct. at 2465.

32. *Dumschat* dealt specifically with an inmate who was serving a sentence of life imprisonment. Mr. Dumschat was seeking to have his life sentence commuted by reducing the minimum sentence he was required to serve prior to becoming eligible for parole. The Connecticut Board of Pardons repeatedly turned down his applications for commutation without explanation. Mr. Dumschat argued that the Board's failure to give him a written explanation for its actions violated his rights under the Due Process Clause of the Fourteenth Amendment. There was evidence that the Board commuted the sentences of at least 75% of the "lifers" that applied for commutation.

33. *See Otey v. Stenberg*, 34 F.3d 635 (8th Cir. 1994) (holding that, based on *Dumschat*, Due Process Clause does not apply to capital clemency proceedings under Nebraska clemency scheme because the inmate lacked a constitutionally protected interest); *Joubert v. Nebraska Board of Pardons*, 87 F.3d 966 (8th Cir. 1996) (same); *In re Sapp*, 118 F.3d 460 (6th Cir. 1997) (holding that Due Process Clause does not apply to capital clemency proceedings under Kentucky clemency scheme because the inmate lacked a constitutionally protected interest); *Bundy v. Dugger*, 850 F.2d 1402 (11th Cir. 1988) (holding that Due Process Clause does not apply to capital clemency proceedings under Florida clemency scheme because the inmate lacked a constitutionally protected interest); & *Pickens v. Tucker*, 851 F. Supp. 363 (E.D. Ark.), *aff'd*, 23 F.3d 1477 (8th Cir. 1994) (holding that Due Process Clause does not apply to capital clemency proceedings under Arkansas clemency scheme because the inmate lacked a constitutionally protected interest). *But see Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997) (holding that some minimal due process standards should apply in capital clemency proceedings based on the inmate's interest in "life").

34. 118 S.Ct. 1244 (1998).

35. For a summary of the facts and procedural history of *Woodard*, see Case Note on *Ohio Adult Parole Authority v. Woodard*, CAP. DEF. J., vol. 10, no. 2, p. 10 (1998).

36. Justice O'Connor wrote an opinion on the due process issue in which Justices Breyer, Ginsburg, and Souter joined. Justice Stevens wrote a separate opinion on the due process issue. Therefore, Justices O'Connor, Breyer, Souter, Ginsburg, and Stevens make-up the majority of the Court on the due process issue. The Chief Justice's opinion on the due process issue was joined only by Justice Scalia, Justice Kennedy, and Justice Thomas. It does *not* constitute the opinion of the Court.

37. All members of the Court joined Part III of the Chief Justice's opinion which held that Ohio's procedure of offering an inmate an informal interview without his counsel present prior to the clemency hearing did not violate the inmate's Fifth Amendment rights.

38. *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244, 1250 (1998) (opinion of Rehnquist, C.J.).

violated where, as here, the procedures in question do no more than confirm that the clemency . . . power is committed, as is our tradition, to the authority of the executive."³⁹

Justice O'Connor, on the other hand, in an opinion which was joined by Justices Breyer, Souter and Ginsberg, concluded that "some minimal procedural safeguards apply to clemency proceedings."⁴⁰ Similarly, Justice Stevens concluded that the Due Process Clause requires some "minimal requirements" in clemency proceedings.⁴¹ Thus, a majority of the Court agreed on two critical points. First, the majority recognized that a "prisoner under a death sentence remains a living person and consequently has [a constitutionally protected] interest in his life."⁴² Second, the majority held "that some minimal procedural safeguards apply to clemency proceedings."⁴³

These two conclusions will fundamentally alter clemency proceedings in many states. This is the first time since the death penalty was re-instituted in 1976⁴⁴ that the Court has recognized the existence of a "life" interest in *any* capital proceeding.⁴⁵ Virtually all of the Court's due process cases have focused on the "liberty"⁴⁶ and "property"⁴⁷ interests. Thus, the Court's re-recognition of the "life" interest represents a major shift for the Court. Further, the Court's conclusion that "some minimal procedural due process safeguards are required in clemency proceedings" will force many states, including Virginia, to reexamine

39. *Woodard*, 118 S.Ct. at 1247 (opinion of Rehnquist, C.J.).

40. *Id.* at 1253-1254 (O'Connor, J., concurring in part & concurring in the judgment). Justice O'Connor concluded that Ohio's clemency procedures, which *require* a clemency investigation by the State and guaranty the inmate notice and an opportunity to be heard, were sufficient to meet the "minimal" requirements of Due Process. *Id.* at 1254 (O'Connor, J., concurring in part & concurring in the judgment).

41. *Id.* at 1254 (Stevens, J., concurring in part & dissenting in part). Justice Stevens concluded that the case should be remanded to the district court to consider whether Ohio's procedures meet the minimum standards of Due Process.

42. *Id.* at 1253 (O'Connor, J., concurring in part & concurring in the judgment). *See also Woodard*, 118 S.Ct. at 1255 (Stevens, J., concurring in part & dissenting in part).

43. *Id.* at 1254 (O'Connor, J., concurring in part & concurring in the judgment). *See also id.* at 1254-55 (Stevens, J., concurring in part & dissenting in part).

44. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976); & *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976).

45. Over the years, several commentators have suggested re-recognition of the "life" interest. *See* Coleen E. Klasmeier, Note, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. Rev. 1507 (1995); & Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. Rich. L. Rev. 201 (1993).

46. *See Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S.Ct. 2460, 2465 (1981) (discussing "liberty" interest of an inmate serving a sentence of life imprisonment).

47. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) (discussing the applicability of the Due Process Clause in welfare benefit termination proceedings based on the recipient's "property" interest in the benefits); & *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976) (discussing the applicability of the Due Process Clause in social security benefit termination proceedings based on the recipient's "property" interest in the benefits).

their capital clemency procedures.⁴⁸ This is particularly true in states like Virginia whose clemency provisions guaranty absolutely no “process” whatsoever.

IV. *What Process Is Due in Clemency Proceedings?*

In *Woodard*, the Court held only that “minimal procedural safeguards” applied in capital clemency proceedings.⁴⁹ The Court, however, did not discuss exactly what procedures were required.⁵⁰ There are two sources to which one can turn in order to determine what process must be afforded an inmate in clemency proceedings: the Ohio clemency scheme that the Court tacitly approved in *Woodard* and the way in which the Court has defined “the most basic elements of fair procedure” in other contexts.⁵¹

A. *Ohio’s Clemency Scheme*

The Ohio clemency scheme “approved” in *Woodard* consisted of several important steps. First, the Ohio Adult Parole Authority (“OAPA”) must conduct a “thorough investigation.”⁵² Second, “if a stay has not yet been issued, [OAPA] must schedule a clemency hearing 45 days before an execution for a date approximately 21 days in advance of the execution.”⁵³ Third, “[OAPA] must also

48. *Woodard v. Ohio Adult Parole Authority*, No. 95-4099, 1998 WL 279363 (6th Cir. May 20, 1998) (on remand from *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244 (1998)).

49. *Woodard*, 118 S.Ct. at 1254 (O’Connor, J., concurring in part & concurring in the judgment). *See also Id.* at 1255 (Stevens, J., concurring in part & dissenting in part).

50. The Court also left another important question unanswered in *Woodard*. What is the appropriate standard of judicial review of the process afforded inmates in clemency proceedings? To date only one court, the Ninth Circuit, has discussed this issue. *See Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997). As a preliminary matter in *Woratzeck*, the Ninth Circuit determined that minimal due process protections apply in clemency proceedings. *Woratzeck*, 117 F.3d at 404 (citing favorably *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997), *rev’d*, 118 S.Ct. 1244 (1998)). The court of appeals then turned to the question of whether the clemency proceeding at issue violated procedural due process. In its discussion of this issue, the court stated that “a procedural due process violation exists only if the Board’s procedures ‘shock the conscience.’” *Id.* Similarly, the dissenting judge in *Otey v. Stenberg* also advocated a “shocks the conscience” standard of review for clemency procedures. *Otey v. Stenberg*, 34 F.3d 635, 640 (8th Cir. 1994) (Gibson, J., dissenting) (quoting *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205 (1952), and reasoning that *substantive* due process applied to clemency proceedings). Utilization of this standard for reviewing clemency procedures is appropriate under the Supreme Court’s decision in *Woodard*. This standard strikes the appropriate balance between preservation of the executive power to grant or deny clemency and the protection of the inmate’s constitutional right to due process of law in clemency proceedings. Obviously, the “shocks the conscience” standard, as articulated in *Woratzeck*, presupposes that *some* process is being afforded. A total lack of process would surely “shock the conscience.” This is precisely the problem with the clemency schemes in the eleven states, including Virginia, that guaranty no process whatsoever. *See supra* notes 24-25 and accompanying text. Due to the fact that these states offer absolutely no process, their clemency schemes undoubtedly “shock the conscience.”

51. *Woodard*, 118 S.Ct. at 1255 (Stevens, J., concurring in part & dissenting in part).

52. OHIO REV. CODE § 2967.07 (1998).

53. *Woodard*, 118 S.Ct. at 1254 (O’Connor J., concurring in part & concurring in the judgment).

advise the prisoner that he is entitled to a pre-hearing interview with one or more parole board members."⁵⁴ Thus, every death row inmate in Ohio who seeks executive clemency is guaranteed an investigation of his or her case for clemency, a hearing before OAPA, and a personal interview with one or more OAPA members.

The guarantees of notice and a hearing to Ohio inmates were especially important to Justice O'Connor's determination of the case in *Woodard*. She reasoned that the "process [Woodard] received, *including notice of the hearing and an opportunity to participate in an interview*, comports with . . . whatever limitations the Due Process Clause may impose on clemency proceedings."⁵⁵ It is not at all clear that Justice O'Connor would have found the requirements of due process satisfied in the absence of notice and an opportunity to be heard. It is arguable, therefore, that any clemency scheme that fails to guaranty inmates notice and an opportunity to be heard, in the form of some type of hearing, violates due process. This conclusion is supported by the decisions of the Supreme Court in other contexts.

B. *The Fundamentals of Due Process: An Opportunity to be Heard and an Impartial Decision Maker*

Several Supreme Court decisions regarding the requirements of procedural due process in other contexts also provide some very important insight into what process is due in clemency proceedings. The most complete discussion of what procedures comprise the "fundamentals of due process" can be found in *Goldberg v. Kelly*⁵⁶ and *Mathews v. Eldridge*.⁵⁷ These two cases discussed the process required when the government desired to terminate an individual's welfare or social security benefits, respectively.

In *Goldberg*, the Court considered the narrow issue of "whether the Due Process Clause requires that the recipient [of welfare benefits] be afforded an evidentiary hearing before the termination of benefit" and, if so, what procedures did due process require.⁵⁸ After determining that a pre-termination evidentiary hearing was required, the Court considered what "minimum procedural safeguards"⁵⁹ were required in these proceedings. According to the *Goldberg* Court,

54. *Id.* (O'Connor J., concurring in part & concurring in the judgment). At this voluntary interview, the inmate is not entitled to have his attorney present. The Court unanimously held that this arrangement did not violate the inmate's Fifth Amendment right to remain silent. *Id.* at 1252-1253 (opinion of Rehnquist, C.J.).

55. *Woodard*, 118 S.Ct. at 1254 (O'Connor, J., concurring in part & concurring in the judgment) (emphasis added).

56. 397 U.S. 254, 90 S.Ct. 1011 (1970).

57. 424 U.S. 319, 96 S.Ct. 893 (1976).

58. *Goldberg v. Kelly*, 397 U.S. 254, 260, 90 S.Ct. 1011, 1016 (1970).

59. *Goldberg*, 397 U.S. at 267, 90 S.Ct. at 1020. The term used by Justice Brennan in *Goldberg*, "minimal procedural safeguards," is the *exact* same term employed by Justice O'Connor in *Woodard* to describe what due process requires in clemency proceedings. See *Woodard*, 118 S.Ct. at 1254 (O'Connor, J., concurring in part & concurring in the judgment).

the Due Process Clause required, at a minimum, an opportunity to be heard⁶⁰ and an impartial decision maker.⁶¹ The Court's decision in *Mathews*, regarding what process was due in a post-termination hearing on social security disability benefits, echoed its holding in *Goldberg*.⁶² Each of these requirements is discussed in detail below.

60. *Goldberg*, 397 U.S. at 267, 90 S.Ct. at 1020 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914)).

61. *Id.* at 271, 90 S.Ct. at 1022 (citing *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955) & *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-46, 70 S.Ct. 445, 451-452 (1950)).

62. *Mathews v. Eldridge*, 424 U.S. 319, 325 n.4 and 348-349, 96 S.Ct. 893, 898 n.4 and 909 (1976) (quoting *Goldberg*, 397 U.S. at 266-71, 90 S.Ct. at 1019-22, stating that due process required an "impartial decisionmaker," and stating that the "essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" (quoting *Joint Anti-Facist Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646 (1951) (Frankfurter, J., concurring)). In *Mathews*, the Court also established a three-part balancing test for determining whether additional or substitute procedural safeguards are required in a given situation. The three factors to consider are as follows: (1) "The private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirement would entail." *Id.* at 335, 96 S.Ct. at 903. Based upon the Supreme Court's decision in *Woodard*, it is not necessary to conduct a *Mathews* balancing to determine what process is due. The Court held that the Due Process Clause applies to clemency proceedings and approved the Ohio clemency scheme as satisfying due process requirements. In so doing, the Court arguably established Ohio's procedures as the base-line model for clemency procedures and did so without any consideration of a cost-benefit analysis such as that in *Mathews*. Even if a *Mathews* balancing were required, however, the scales would tip in favor of more process rather than less. First, the private interest affected, the deprivation of the inmate's life, is extraordinarily important and substantial. Second, in light of the need for "individualized decisions in capital cases," there is a risk that, without proper clemency procedures, inmates who are either factually not guilty, or at least not guilty of the death penalty, will be executed. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."). *See also Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976) ("This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.") *Cf. Herrera v. Collins*, 506 U.S. 390, 411-12, 113 S.Ct. 853, 866 (1993) (describing executive clemency as the "fail safe" of the capital punishment process which is used to hear claims of, among other things, actual innocence after judicial avenues have been exhausted). Further, requiring some "procedure" in clemency proceedings, be it additional procedure or substitute procedure, would have value. It would help ensure, for one final time, that the inmate actually deserves to die at the hands of the state. Finally, the state's interest in preserving state fiscal and administrative resources is insufficient to overcome the inmate's substantial private interest in continued life. *See Goldberg*, 397 U.S. at 265-66, 90 S.Ct. at 1019-20 (holding that state's interest in preserving fiscal and administrative resources is insufficient to overcome the private interest in continuing to receive welfare benefits [a substantially lesser private interest than the interest in life itself]). Most states will only have to conduct clemency proceedings a few times a year. In 1997, for example there were 74 executions in the 40 jurisdictions with the death penalty, an average of 1.85 executions per jurisdiction. In the vast majority of jurisdictions, the fiscal and administrative burdens, if any, will be fairly slight. Thus, the *Mathews* balancing,

1. Opportunity to be Heard

According to the Supreme Court in *Goldberg*, “[t]he fundamental requisite of due process is the opportunity to be heard.”⁶³ The “hearing must be ‘at a meaningful time and [conducted] in a meaningful manner.’”⁶⁴ Further, the “opportunity to be heard must be tailored to the capacities of those who are to be heard.”⁶⁵ The Court stated that “[i]t is not enough that [one] may present his position to the decision maker in writing.”⁶⁶ It reasoned that “written submissions do not afford the flexibility of oral presentations; they do not permit [one] to mold his argument to the issues the decision maker appears to regard as important.”⁶⁷ Additionally, the Court stated that “where credibility and veracity are at issue [] written submissions are a wholly unsatisfactory basis for decision.”⁶⁸ The Court went on to state that “where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses,”⁶⁹ and that the individual must be allowed to present his case through retained counsel if he so desires.⁷⁰

The various “minimal procedural safeguards”⁷¹ discussed by the Court in *Goldberg* in the context of welfare termination hearings apply with equal force to clemency hearings. First, the private interest that is at stake in clemency proceedings, the life of the inmate, is much more substantial than the property “right” at issue in *Goldberg*. It is very important in clemency proceedings to allow the inmate every opportunity to convince the Governor or the board that he or she does not deserve to die, for whatever reason. In many clemency proceedings, the credibility and veracity of the inmate will undoubtedly be critical. If, for example, the inmate is asserting that he or she has undergone a complete religious “re-birth,” the question of his or her veracity may very well constitute the entire basis of decision. If there are adverse witnesses, the inmate should be allowed to cross examine them in order to best present his or her case for clemency. And cer-

even if it were necessary, tips in favor of additional procedural safeguards in clemency proceedings.

63. *Goldberg*, 397 U.S. at 267, 90 S.Ct. at 1020 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914)) (emphasis added). See also *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975) (holding that students facing temporary suspension from public school were entitled to protection under the Due Process Clause and that due process required, in connection with suspensions of up to ten days, that such a student be given notice of charges and an opportunity to present his version to authorities, face-to-face, preferably prior to removal from school).

64. *Goldberg*, 397 U.S. at 267, 90 S.Ct. at 1020 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The Court’s use of the word “hearing” indicates that some sort of face-to-face meeting is required. Simply being allowed to submit the application for clemency is wholly insufficient to satisfy the constitutional requirement of an “opportunity to be heard.”

65. *Id.* at 268-69, 90 S.Ct. at 1021.

66. *Id.* at 269, 90 S.Ct. at 1021.

67. *Id.*

68. *Goldberg*, 397 U.S. at 269, 90 S.Ct. at 1021.

69. *Id.*

70. *Id.* at 270, 90 S.Ct. at 1022.

71. *Id.* at 267, 90 S.Ct. at 1020.

tainly, the inmate should be allowed to retain counsel at his last opportunity to avoid execution. Under the rationale of *Goldberg*, it is apparent that clemency proceedings *must* include a personal "hearing" of some sort. Clemency procedures that only guaranty an inmate's ability to submit a written request are "wholly unsatisfactory" and violative of due process.⁷²

As previously discussed, the Ohio clemency scheme approved in *Woodard* guaranteed applicants three things: an investigation, an informal interview, and a hearing before OAPA.⁷³ The guarantees of notice and hearing to Ohio inmates were especially important to Justice O'Connor's determination of the case in *Woodard*. She reasoned that the "process [Woodard] received, including notice of the hearing and an opportunity to participate in an interview, comports with . . . whatever limitations the Due Process Clause may impose on clemency proceedings."⁷⁴ It is not at all clear that Justice O'Connor would have found the requirements of due process satisfied in the absence of notice and an opportunity to participate in a hearing and an interview.

The clemency scheme used by the Commonwealth of Virginia is constitutionally infirm on its face because it does not guaranty those who apply for executive clemency an opportunity to be heard in any meaningful way.⁷⁵ Not only does it fail to require a hearing on the merits of every application for clemency as required by *Goldberg*, it requires absolutely no action by anyone on the application. Virginia's clemency scheme does not even guaranty that anyone will look at the application and consider its merit. In short, Virginia's clemency scheme guarantees inmates absolutely no process whatsoever. In light of the Supreme Court's decision in *Woodard* and the description of the minimum requirements of due process in *Goldberg*, Virginia's clemency scheme, on its face, fails to meet the minimum requirements of due process of law under the Fourteenth Amendment.

2. Impartial Decision Maker

The Court stated in both *Goldberg* and *Mathews* that "an impartial decision maker is essential" under the Due Process Clause.⁷⁶ The Court made a similar observation in *Morrissey v. Brewer*⁷⁷ wherein it stated that one of the "minimum

72. *Id.* at 269, 90 S.Ct. at 1021.

73. *See supra* notes 52-55 and accompanying text.

74. *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244, 1254 (1998) (O'Connor, J., concurring in part & concurring in the judgment) (emphasis added).

75. *See* VA. CODE § 53.1-231 (1998). In Virginia, the Virginia Parole Board may investigate an application for clemency either at the Governor's request or of its own accord if "it believes action on the part of the Governor is in the best interest of the Commonwealth." However, the Governor may *not* delegate the actual clemency decision to the Virginia Parole Board.

76. *Goldberg*, 397 U.S. at 271, 90 S.Ct. at 1022 (citing *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955) & *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-46, 70 S.Ct. 445, 451-452 (1950)); & *Mathews v. Eldridge*, 424 U.S. 319, 325 n.4, 96 S.Ct. 893, 898 n.4 (1976) (quoting *Goldberg*, 397 U.S. at 266-71, 90 S.Ct. at 1019-22, and stating that due process required an "impartial decisionmaker").

77. 408 U.S. 471 (1972).

requirements of due process” in a parole revocation hearing was “a ‘neutral and detached’ hearing body.”⁷⁸ This requirement is rooted in the basic tenet that a “fair trial in a fair tribunal is a basic requirement of due process.”⁷⁹ As the Court stated in *In re Murchison*,⁸⁰ “our system of law has always endeavored to prevent even the probability of unfairness”⁸¹ and that in order “to perform its high function in the best way ‘justice must satisfy the appearance of justice.’”⁸² It is therefore beyond dispute that an “impartial decision maker” is a basic and fundamental requirement of due process.

Prior to the Supreme Court’s decision in *Woodard*, several death row inmates seeking executive clemency claimed that they were denied due process because they were denied an impartial decision maker.⁸³ These claims were based on the fact that at least one of the persons who had the ultimate power to grant or deny clemency acted as the Attorney General of the state during the pendency of many of the inmates’ appeals. In deciding these cases, each of which is discussed below, the courts determined at the outset that due process protection did not apply to capital clemency proceedings under *Dumschat*.⁸⁴

The first court to discuss this issue was the United States District Court for the District of Arkansas in *Pickens v. Tucker*.⁸⁵ In *Pickens*, the inmate, Edward Charles Pickens, brought a complaint for relief under 42 U.S.C. § 1983 alleging that his “federal constitutional rights [were] abrogated because Governor [Jim

78. *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972).

79. *In re Murchison*, 349 U.S. 133, 136 (1955) (holding that in a contempt proceeding arising out of testimony before a “one-man grand jury,” the judge who “served as the ‘one-man grand jury’ out of which the contempt charges arose” could not, consistent with “the due process requirement of an impartial tribunal,” sit as the trial judge in the contempt trial).

80. 349 U.S. 133 (1955).

81. *In re Murchison*, 349 U.S. at 136.

82. *Id.* (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (emphasis added). The Court also stated that “[e]very procedure which would offer a possible temptation to the average man as a judge [] not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.” *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

83. *See Buchanan v. Gilmore*, 139 F.3d 982 (4th Cir. 1998) (holding that, in light of the fact that the Due Process Clause does not apply to clemency proceedings, inmate was not deprived of any constitutionally protected right by the fact that the Governor of Virginia, the person with the ultimate power to grant or deny clemency, served as Attorney General of Virginia during the pendency of most of the inmate’s appeals); *Otey v. Stenberg*, 34 F.3d 635 (8th Cir. 1994) (holding that in light of the fact that the Due Process Clause does not apply to clemency proceedings, inmate was not deprived of any constitutionally protected right by the fact that the acting Attorney General of Nebraska, who represented the state in majority of the inmate’s appeals, is one of three members of the Nebraska Board of Pardons, the body with the ultimate power to grant or deny clemency); *Pickens v. Tucker*, 851 F. Supp. 363 (E.D. Ark.), *aff’d*, 23 F.3d 1477 (8th Cir. 1994) (holding that, in light of the fact that the Due Process Clause does not apply to clemency proceedings, inmate was not deprived of any constitutionally protected right by the fact that the Governor of Arkansas, the person with the ultimate power to grant or deny clemency, served as Attorney General of Arkansas during the pendency of most of the inmate’s appeals).

84. *See supra* notes 29-33 and accompanying text.

85. 851 F. Supp. 363 (E.D. Ark.), *aff’d*, 23 F.3d 1477 (8th Cir. 1994).

Guy] Tucker [could] not be impartial or objective” in ruling on his clemency application. Tucker was formerly the Attorney General of Arkansas and “participated in the early appellate review of [Pickens’s] conviction.”⁸⁶ The court quickly disposed of Pickens’s due process claim by invoking *Dumschat* and stating that “the [Arkansas clemency] statute [did] not create a protected interest in clemency” and thus, the Due Process Clause was not triggered. The court also invoked the “Rule of Necessity” saying that, under Amendment 6, § 4 of the Arkansas Constitution, if the Governor is in the state of Arkansas and “in full possession of his faculties” then the Lieutenant Governor cannot make clemency decisions.⁸⁷

Following its affirmation of the district court in *Pickens*,⁸⁸ the Eighth Circuit again addressed whether or not an impartial decisionmaker is required in clemency proceedings in *Otey v. Stenberg*.⁸⁹ In this case, Otey asserted that his constitutional rights under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment were violated by the presence of the Attorney General of Nebraska on the Nebraska Board of Pardons, the body with the authority to grant or deny clemency.⁹⁰ Again, the Eighth Circuit simply invoked the Supreme Court’s decision in *Dumschat* and stated that “[d]ue process never attached to the Nebraska clemency proceedings.”⁹¹ Thus, the court held that Otey was not deprived of any constitutionally protected interest by the Attorney General’s inclusion on the Board of Pardons.⁹²

86. *Pickens v. Tucker*, 851 F. Supp. 363, 364 (E.D. Ark. 1994). Under Arkansas law, “the sole pardoning power is vested in the Governor under Article 6, § 18, of the Arkansas Constitution.” *Pickens*, 851 F. Supp. at 365. Arkansas law also requires the Post Prison Transfer Board to investigate every application for clemency. ARK. CODE § 16-93-204 (1997).

87. *Pickens*, 851 F. Supp. at 365-66.

88. A panel of the United States Court of Appeals for the Eighth Circuit reversed the judgment of the district court in *Pickens* and remanded for a determination of Governor Tucker’s ability to be impartial. *Pickens v. Tucker*, No. 94-2103EA, 1994 WL 248207 (8th Cir. May 10, 1994). The Eighth Circuit, however, sitting *en banc* reversed the panel’s decision and affirmed the district court.

89. 34 F.3d 635 (8th Cir. 1994).

90. *Otey v. Stenberg*, 34 F.3d 635, 637 (8th Cir. 1994). Under Nebraska law, the clemency power is vested in the Nebraska Board of Pardons. The Board has three members: the Governor, the Secretary of State and the Attorney General. NEB. CONST. art. IV, § 13. The clemency procedures used in Nebraska merely require “consideration” of the application by the board. There is no right to a hearing or to any personal appearance by the inmate. *Otey*, 34 F.3d at 638.

91. *Otey*, 34 F.3d at 637. The court of appeals rejected Otey’s equal protection claim as well. Its discussion of this issue is beyond the scope of this paper. Suffice it to say, however, that there may be a viable equal protection claim involved in future cases on this issue. The dissenting judge in *Pickens* framed the equal protection issue as follows: “The petitioner is asserting that he does not, as a practical matter, have the same access to a state-created process as people with respect to whom the governor has no bias.” *Pickens v. Tucker*, 23 F.3d 1477, 1478 (8th Cir. 1994) (*en banc*) (Arnold, J., dissenting). In *Woodard*, Justice Stevens also acknowledged that an Equal Protection claim could exist in some situations. *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244, 1255 (1998) (Stevens, J., concurring in part & dissenting in part).

92. *Otey*, 34 F.3d at 637. Thus, the Eighth Circuit rejected Otey’s procedural due process argument. It also went on to reject Otey’s substantive due process argument as well.

Just one week before the Supreme Court issued its opinion in *Woodard*, the Fourth Circuit decided *Buchanan v. Gilmore*.⁹³ Five days before his scheduled execution, Douglas McArthur Buchanan filed an action pursuant to 42 U.S.C. § 1983 against Governor James S. Gilmore, III.⁹⁴ In this action, Buchanan alleged that “inasmuch as the Governor served as Attorney General of Virginia in prior proceedings concerning his case, he is disqualified by a conflict of interest from considering his clemency application.”⁹⁵ Without any reasoning of its own or any explanation for its decision, the Fourth Circuit cited *Pickens v. Tucker* and dismissed the action.⁹⁶ Thus, it can only be assumed that the Fourth Circuit believed that no due process protections apply in capital clemency proceedings.⁹⁷

The holdings in all of these cases rested on the basic premise that no due process protections apply in clemency proceedings. This view is no longer valid in light of the Court’s decision in *Woodard*. The Court made clear “that some minimal procedural safeguards apply to clemency proceedings.”⁹⁸ One of the “minimal procedural safeguards” required by the Due Process Clause is an impartial decision maker.⁹⁹

In Virginia the requirement of an impartial decision maker is especially important. The current governor, James S. Gilmore, III, served previously as Attorney General of Virginia. As Attorney General, Governor Gilmore repre-

93. 139 F.3d 982 (4th Cir. 1998). See also Case Note on *Buchanan v. Gilmore*, 11 CAP. DEF. J. 73 (1998).

94. *Buchanan v. Gilmore*, 139 F.3d 982, 983 (4th Cir. 1998).

95. *Buchanan*, 139 F.3d at 983.

96. *Id.* at 984.

97. The Fourth Circuit apparently cited *Pickens* for the proposition that the “Rule of Necessity” applies when the clemency authority is vested solely in the Governor. Presumably, the court concluded that Governor Gilmore was not “unable to discharge the power[] and dut[y] of his office” in considering Buchanan’s clemency application because no due process protections attach to clemency proceedings under *Dumschat*. VA. CONST. art. 5, § 16. This conclusion is not accurate after the Supreme Court’s decision in *Woodard*. Now that the Court has stated that the Due Process Clause does apply, an impartial decision maker is required. Thus, Governor Gilmore would be “unable to discharge the power[] and dut[y] of his office” in clemency proceedings and the Lieutenant Governor should consider clemency applications pursuant to Article V, section 16 of the Constitution of Virginia.

98. *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244, 1254 (1998) (O’Connor, J., concurring in part & concurring in the judgment). See also *Woodard*, 118 S.Ct. at 1255 (Stevens, J., concurring in part & dissenting in part).

99. See *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022 (1970) (stating that under the Due Process Clause, “an impartial decision maker is essential”). The judge who dissented from the panel’s decision in *Pickens* admitted as much when he stated that if procedural due process applied to clemency proceedings, then “*Mathews v. Eldridge* sets forth procedural due process requirements [which] include: ‘an impartial decisionmaker.’” *Pickens v. Tucker*, No. 94-2103EA, 1994 WL 248207 (8th Cir. May 10, 1994) (Beam, J., dissenting) (citation omitted). See also *Pickens v. Tucker*, 23 F.3d 1477, 1478 (8th Cir. 1994) (*en banc*) (Arnold, J., dissenting) (stating that “an impartial decision-maker is a fundamental requirement of due process and citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)); & *Otey v. Stenberg*, 34 F.3d 635, 640-42 (8th Cir. 1994) (Gibson, S.J., dissenting) (stating that Attorney General’s presence on Board of Pardons renders the clemency proceeding fundamentally unfair).

sented the Commonwealth in opposing the appeals and habeas petitions of many of the inmates who will be seeking clemency in the next two years. Additionally, Gilmore served as Commonwealth's Attorney for Henrico County from 1987 until 1993.

It may be possible for the Commonwealth to argue in rebuttal that there is no evidence that Governor Gilmore would not decide any application for clemency in a fair and impartial manner. Senior Judge Gibson of the Eighth Circuit countered this argument very effectively in his dissent in *Otey v. Stenberg*:

The attorney general, having successfully obtained affirmance of Otey's death sentence in the Nebraska Supreme Court, and successfully represented the State in Otey's habeas case, can hardly be expected to oppose the execution of this sentence. As prosecutor, the attorney general determined that it served the public welfare to seek the death penalty as the appropriate punishment for Otey. It is unreasonable to assume that the attorney general would freely consider the same sentence inappropriate at a clemency hearing. . . .¹⁰⁰

Judge Gibson's analysis applies with equal force to situations such as the one in Virginia. Based on the due process requirement of an impartial decision maker, the Governor should be deemed unable to consider the clemency applications of those inmates whose trials or appeals were conducted during his term as Attorney General. The Lieutenant Governor should make these determinations in light of the Governor's inability to do so.¹⁰¹

V. Conclusions

The Supreme Court's decision in *Ohio Adult Parole Authority v. Woodard* was long overdue. For far too long, death row inmates in Virginia and elsewhere have been denied basic procedural safeguards in their final attempt to avoid the execution chamber. Hopefully, *Woodard* will force states to adopt procedures similar to those used in Ohio – procedures that adequately protect the rights of death row inmates.

Even if more "process" in clemency proceedings does not result in a single additional grant of clemency, the system as a whole will benefit. In our legal system "justice must satisfy the appearance of justice."¹⁰² By requiring states to guaranty inmates a hearing and an impartial decision maker in clemency proceedings, courts and legislatures will help ensure that the appearance of justice is satisfied and that only the worst of the worst are put to death. The Constitution requires it and justice demands it.

100. *Otey v. Stenberg*, 34 F.3d 635, 640 (8th Cir. 1994) (Gibson, S.J., dissenting).

101. VA. CONST art V, § 16.

102. *In re Murchison*, 349 U.S. 133, 136 (1955) (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (emphasis added).