The Burger Court Opinion Writing Database

Ford v. Wainwright

477 U.S. 399 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1986

RE: No. 85-5542 - Ford v. Wainwright

Dear Bill:

I join your dissenting opinion in this case.

Regards,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 22, 1985

No. 85-5542

Ford v. Wainwright

Dear Thurgood,

Please join me in your dissent.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1986

No. 85-5542

Ford, etc. v. Wainwright

Dear Thurgood,

I agree.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

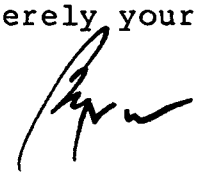
June 4, 1986

85-5542 - Ford v. Wainwright

Dear Thurgood,

I shall await further writing.

Sincerely yours,



Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 17, 1986

85-5542 - Ford v. Wainwright

Dear Sandra,

Please join me in your separate opinion in this case.

Sincerely yours,

Justice O'Connor

cc: The Conference

Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: NOV 22 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

ALVIN BERNARD FORD, ETC. *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–5542. Decided November ——, 1985

JUSTICE MARSHALL, dissenting from denial of certiorari.

Petitioner Alvin Ford is a prisoner on Florida's death row. He has been diagnosed, by four of the five psychiatrists to have examined him in the last few years, as suffering from "severe paranoid schizophrenia," "paranoid schizophrenia with suicidal potential," "psychosis with paranoia," and "psycho[sis]." Even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari to determine whether the Constitution bars Ford's execution in his current mental state.

I

Alvin Ford was convicted of murder in December 1974. It is uncontested that he was mentally competent at the time of his offense and at the time of trial. His mental disorder, however, began to manifest itself in late 1981 or early 1982. By August 1982 Ford was apparently suffering from auditory and visual hallucinations, had become "unable to distinguish fantasy from reality," and had developed "complex, yet logical paranoid and delusional systems." Pet. App. 153a–155a.

Ford's letters written in 1982 and 1983 manifest increasingly severe delusions. He came to believe that the Ku Klux Klan and prison personnel were threatening him "24 hours a day" and holding prominent national political figures, as well as members of his family, hostage "inside the walls, of Florida State Prison." *Id.*, 72a–77a, 87a–88a. Ultimately he saw himself as having sufficient power to resolve the crisis.

STYLISTIC CHANGES THROUGHOUT

+ pp. 1, 6

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: DEC 2 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

ALVIN BERNARD FORD, ETC. *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–5542. Decided November ——, 1985

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner Alvin Ford is a prisoner on Florida's death row. He has been diagnosed, by four of the five psychiatrists to have examined him in the last few years, as suffering from "severe paranoid schizophrenia," "paranoid schizophrenia with suicidal potential," "psychosis with paranoia," and "psycho[sis]." Even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari to determine whether the Constitution bars Ford's execution in his current mental state.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

JUN 3 - 1986

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE MARSHALL delivered the opinion of the Court.

For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never declared whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.

I

Alvin Bernard Ford was convicted of murder in 1974 and sentenced to death. There is no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing. In early 1982, however, Ford began to manifest gradual changes in behavior. They began as an occasional peculiar idea or confused perception, but became more serious over time. After reading in the newspaper that the Ku Klux Klan had held a rally in nearby Jacksonville, Florida, Ford developed an obsession focused upon the Klan. His letters to various people reveal endless brooding about his "Klan work," and an increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit suicide. He believed that the prison guards, part of the conspiracy, had been "killing people, and putting the bodies, in these concrete enclosures, used for beds, on Q-Wing." App. 40. Later, he began to believe that his women relatives

Stylistic Changes
and pp. 3, 4, 6, 8, 9, 10, 11, 13, 14, 15, 16, 17

Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: ___

Recirculated: JUN 16 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 16, 1986

Re: 85-5542, Ford v. Wainwright

Dear Lewis:

Thank you for your letter. After thinking about your comments, I believe we are simply not in accord on the fundamental question involved in the procedural sections of the opinion: whether the prisoner claiming insanity is entitled to only minimal due process, or whether he must be accorded an especially reliable proceeding that will protect against arbitrariness or error. Offhand, I do not know of any interest that this Court has held to be significant enough to enjoy constitutional protection, yet deserving of only a paper hearing. Indeed, in Goldberg v. Kelly, the Court stated that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. 254, 269 (1970). In any event, I cannot agree that such a limited proceeding would adequately protect the longstanding interest of the State in avoiding execution of the insane or protect the obvious interest of the prisoner in being spared from execution while insane. Thus, on this point, I think I must stand firm.

Nevertheless, the discussion of procedures in the opinion is not necessary to the disposition of this case, and I have provided my thoughts primarily as a guide to those who must decide what will be deemed "adequate" in the future. Thus, I hope that you will be able to join the portions of the draft, circulating today, upon which we find common ground in recognizing the Eighth Amendment right and in concluding that Florida's current procedures fall short of minimal requirements.

Sincerely,

T.M.

Justice Powell
Copies to the Conference

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: JUN 2 3 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE MARSHALL delivered the opinion of the Court.

For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.

I

Alvin Bernard Ford was convicted of murder in 1974 and sentenced to death. There is no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing. In early 1982, however, Ford began to manifest gradual changes in behavior. They began as an occasional peculiar idea or confused perception, but became more serious over time. After reading in the newspaper that the Ku Klux Klan had held a rally in nearby Jacksonville, Florida, Ford developed an obsession focused upon the Klan. His letters to various people reveal endless brooding about his "Klan work," and an increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit suicide. He believed that the prison guards, part of the conspiracy, had been killing people and putting the bodies in the concrete enclosures used for beds. Later, he began to believe that his women relatives were being tortured and sexu-

Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: JUN 24 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 26, 1986]

JUSTICE MARSHALL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II and an opinion in Parts III, IV and V, in which JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.

I

Alvin Bernard Ford was convicted of murder in 1974 and sentenced to death. There is no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing. In early 1982, however, Ford began to manifest gradual changes in behavior. They began as an occasional peculiar idea or confused perception, but became more serious over time. After reading in the newspaper that the Ku Klux Klan had held a rally in nearby Jacksonville, Florida, Ford developed an obsession focused upon the Klan. His letters to various people reveal endless brooding about his "Klan work," and an increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1986

Re: No. 85-5542, Ford v. Wainwright

Dear Thurgood:

Please join me.

Sincerely,

Harry

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1986

85-5542 Ford v. Wainwright

Dear Thurgood:

Parts I and II of your opinion are excellent, and I expect to join them. I do have some minor suggestions. On page 4, you state that we granted certiorari in order to determine the constitutionality of Florida's procedures for determining sanity. As I view this case, we granted cert to decide (i) whether the Eighth Amendment forbids execution of the insane, and (ii) if so, whether the DC should have held an evidentiary hearing on petitioner's claim. In answering these questions, we need not decide what procedures are constitutionally required, since Florida's procedures clearly do not satisfy §2254(d), and therefore no presumption of correctness attaches to the Governor's "finding" of sanity in this case.

On page 6, you discuss the manner in which "standards of decency" have evolved. I agree that, in addition to relevant legislation, we look to state law, and to the common law that the Eighth Amendment presumably adopted. Decisions in other common law countries also are sources. I would prefer not to refer to "international opinion" or to our "own best judgment," especially when more certain sources of authority are available. Cf. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, POWELL, and STEVENS, J.) (assessment of contemporary standards "does not call for a subjective judgment" by courts). This Court is often criticized by those who say that we base our decisions on such factors rather than on the Constitution and the law itself.

Similarly, on p. 9 your draft refers to an international study prepared at the request of the United Nations Secretary General. I would not cite this study without considering which nations have replied and what they said. Capital punishment is still extensively carried out in many sections of the world, and I doubt that the suspect's sanity receives much attention in a number of countries. I do not recall whether the Soviet Union has retained capital punishment as such, but few people doubt that in effect the sending of offenders to Siberia may result in their death.

Also on p. 9, the beautifully written paragraph that begins on that page refers to views "shared . . . around the

world," and to "evidence of global restriction." I have the same negative reaction to relying on speculative "sources" such as these when we have the common law, adopted by the Eighth Amendment of the Constitution, and the numerous decisions of state courts and legislatures.

I am not comfortable with parts III and IV. Your draft apparently would require states to provide for hearings at which live testimony is taken with full cross-examination. Pp. 13, 14-15, 16. Moreover, you would require essentially "unrestricted" admission of arguably relevant evidence at such hearings, along the lines of the Court's recent decision in Skipper v. South Carolina, No. 84-6859. Pp. 13, 16. Finally, you specifically disapprove group psychiatric examinations on the ground that they are likely to be unreliable. P. 15, n. 3. I am not prepared to agree on these points, and indeed we need not decide them in this case.

States may be able to structure fair procedures where the decision-maker determines sanity based on written reports, as long as the defendant has an opportunity to submit such a report. Also, in my view it is important as a general matter to give States a fair measure of flexibility in designing appropriate procedures for conducting psychiatric examinations as well as for making the final determination of sanity.

In sum, I expect to join parts I and II of your opinion, and I may write separately on the issues discussed in parts III and IV.

Sincerely

L ewis

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 17, 1986

85-5542 Ford v. Wainwright

Dear Thurgood:

Please join me in Parts I and II of your second draft.

I do not agree that §2254 or the Constitution requires a "second trial" on insanity, I will write separately on the procedure issue.

I will try to have something circulated later this week.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE POWELL, concurring in part and concurring in the judgment.

I join parts I and II of the Court's opinion. As JUSTICE MARSHALL ably demonstrates, execution of the insane was barred at common law precisely because it was considered cruel and unusual. In *Solem* v. *Helm*, 463 U. S. 277 (1983), we explained that while the Framers "may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection." *Id.*, at 286. It follows that the practice of executing the insane is barred by our own Constitution.

That conclusion leaves two issues for our determination: (i) the meaning of insanity in this context, and (ii) the procedures States must follow in order to avoid the necessity of *de novo* review in federal courts under 28 U. S. C. § 2254(d). The Court's opinion does not address the first of these issues, and as to the second, my views differ substantially from JUSTICE MARSHALL's. I therefore write separately.

I

The Court holds today that the Eighth Amendment bars execution of a category of defendants defined by their mental

Stylistic Changes Throughout + p. 5

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: JUN 27 1986

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 26, 1986]

JUSTICE POWELL, concurring in part and concurring in the judgment.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 4, 1986

Re: 85-5542 - Ford v. Wainwright

Dear Thurgood:

In due course, I will circulate a dissent in this case.

Sincerely,

WHR

Justice Marshall

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: JUN 13 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.*
LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE REHNQUIST, dissenting.

The Court today holds that the Eighth Amendment prohibits a State from carrying out a lawfully imposed sentence of death upon a person who is currently insane. This holding is based almost entirely on two unremarkable observations. First, the Court states that it "know[s] of virtually no authority condoning the execution of the insane at English common law." *Ante*, at 8. Second, it notes that "Today, no State in the Union permits the execution of the insane." *Ibid.* Armed with these facts, and shielded by the claim that it is simply "keep[ing] faith with our common-law heritage," *ante*, at 1, the Court proceeds to cast aside settled precedent and to radically restructure both the common-law and current practice of not executing the insane. It manages this feat by carefully ignoring the fact that the Florida scheme it finds unconstitutional, in which the governor is assigned the ultimate responsibility of deciding whether a condemned prisoner is currently insane, is fully consistent with the "common-law heritage" and current practice on which the Court purports to rely.

The Court places great weight on the "impressive historical credentials" of the common-law bar against executing a prisoner who has lost his sanity. *Ante*, at 6–8. What it fails to mention, however, is the equally important and unchal-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: JUN 19 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.*
LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: JUN 20 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.*
LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 17, 1986

Re: 85-5542 - Ford v. Wainwright

Dear Thurgood:

Please join me.

Respectfully,

John

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 3, 1986

Re: 85-5542 Ford, etc. v. Wainwright

Dear Thurgood,

For now I will await further writing.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: JUN 17 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE O'CONNOR, dissenting from the judgment in part and concurring in the result in part.

I am in full agreement with JUSTICE REHNQUIST's conclusion that the Eighth Amendment does not create a substantive right not to be executed while insane. Accordingly, I do not join the Court's reasoning or opinion. Because, however, the conclusion is for me inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent, and because Florida does not provide even those minimal procedural protections required by due process in this area, I would vacate the judgment and remand to the Court of Appeals with directions that the case be returned to the Florida system so that a hearing can be held in a manner consistent with the requirements of the Due Process Clause. I cannot agree, however, that the federal courts should have any role whatever in the substantive determination of a defendant's competency to be executed.

As we explained in *Hewitt* v. *Helms*, 459 U. S. 460, 466 (1982), "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States." See also *Meachum* v. *Fano*, 427 U. S. 215, 223–227 (1976). With JUSTICE REHNQUIST, I agree that the Due Process Clause does not independently create a protected interest in avoiding the exe-

Stylistic Changes Throughout

pp. 1

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: JUN 20 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE O'CONNOR, with whom JUSTICE WHITE joins, concurring in the result in part and dissenting in part.

I am in full agreement with JUSTICE REHNQUIST's conclusion that the Eighth Amendment does not create a substantive right not to be executed while insane. Accordingly, I do not join the Court's reasoning or opinion. Because, however, the conclusion is for me inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent, and because Florida does not provide even those minimal procedural protections required by due process in this area, I would vacate the judgment and remand to the Court of Appeals with directions that the case be returned to the Florida system so that a hearing can be held in a manner consistent with the requirements of the Due Process Clause. I cannot agree, however, that the federal courts should have any role whatever in the substantive determination of a defendant's competency to be executed.

As we explained in *Hewitt* v. *Helms*, 459 U. S. 460, 466 (1983), "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States." See also *Meachum* v. *Fano*, 427 U. S. 215, 223–227 (1976). With JUSTICE REHNQUIST, I agree that the Due Process Clause does not independently create a protected interest in avoiding the exe-