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Department of Justice

STATEMENT

OF

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CONCERNING HABEAS CORPUS

AND CAPITAL PUNISHMENT LITIGATION

BEFORE

THE SUBCOMMITTEE ON GOVERNMENT

INFORMATION, JUSTICE, AND ARGRICULTURE

OF THE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

February 26, 1988

Held in Madison, Florida

Mr. Chairman, I am pleased to appear before this committee to present the views of the Department of Justice on the need for reform of federal habeas corpus, and on the particularly acute problems of obstruction and delay that have arisen from the abuse of habeas corpus in capital cases. Before turning to a specific discussion of these issues, let me direct your attention briefly to two general assessments. The first is an observation of Justice Lewis F. Powell, delivered at an American Bar Association meeting in 1982. In commenting on the major contemporary problems of the federal judicial system, Justice Powell observed:

> Another cause of overload of the federal system is [28 U.S.C.] § 2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of federal review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy. 1/

The second observation I wish to bring to your attention was made by Attorney General William French Smith in 1983. In the course of a general critique of the current federal habeas corpus jurisdiction, Attorney General Smith stated:

1/ Address of Justice Lewis F. Powell before the American Bar Association Division of Judicial Administration, Aug. 9, 1982.

> A . . . final criticism is that the present system of habeas corpus review creates particularly acute problems in capital cases . . . . The "public interest" organizations that routinely involve themselves . . . in capital cases have fully exploited the system's potential for obstruction. Delay is maximized by deferring collateral attack until the eve of execution. Once a stay of execution has been obtained, the possibility of carrying out the sentence is foreclosed for additional years as the case works its way through the multiple layers of appeal and review in the state and federal courts.
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> The solution to this problem lies in part in the reform of state court procedures . . . . The efficacy of state reforms is severely limited, however, by the availability of federal habeas corpus, which cannot be limited by the state legislatures . . . . It . . . prevents correction of the practical nullification of all capital punishment legislation that has resulted from litigational delay and obstruction. 2/

In my testimony today, I will discuss how we have come to have a system that "assures no end to the litigation of a criminal conviction" -- a system that is "viewed with disbelief by lawyers and judges in other countries," and that results in the "practical nullification" of the judgment of the vast majority of Americans that capital punishment is the appropriate penalty for the most egregious crimes. I will also discuss the means of correcting these anomalies.

2/ Proposals for Habeas Corpus Reform in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 137, 145-46 (1983) [hereafter cited as "Proposals for Habeas Corpus Reform"].

The initial portion of my testimony will address the historical development of the federal habeas corpus jurisdiction. A review of the relevant history shows clearly that the current statutory "habeas corpus" remedy by which the lower federal courts review state judgments has no relationship to the traditional writ of habeas corpus whose suspension is prohibited by the Constitution. Whether state prisoners should have a post-conviction remedy in the lower federal courts, and if so, how broadly, is entirely within Congress's discretion.

Second, I will discuss the contemporary problems of abuse arising from expansive habeas corpus review, and respond to the argument that the interests of justice require the endless second-guessing of state judgments it produces.

Third, I will review the history of congressional action aimed at curbing excessive habeas corpus review. This history shows that there is ample precedent for Congress's exercise of its authority to regulate the scope of federal habeas corpus in order to deal with the general problem of habeas corpus abuse and the specific problem of abuse in capital cases.

Finally, I will discuss pending habeas corpus reform legislation -- title II of the proposed Criminal Justice Reform Act (H.R. 3777 and S. 1970) -- which would provide effective responses to many of the current problems of abuse and delay.

I. The History of Habeas Corpus

Federal review of the judgments of state courts has traditionally been limited to direct review in the Supreme Court. Under contemporary practice, however, a state prisoner who has exhausted his avenues of appeal in the state court system may continue to litigate the validity of his conviction or sentence by applying for habeas corpus in a federal district court. In the habeas corpus proceeding, the prisoner may raise and secure a redetermination of the same claims of federal right that have already been fully litigated and rejected at multiple levels of the state court system. In practical effect, this procedure places federal trial judges in the position of reviewing courts, with authority to overturn the considered judgments of state courts of appeals and state supreme courts in criminal cases.

A review of the relevant history shows that Congress never decided to give the lower federal courts this extraordinary power, and that it has no basis in the Constitution or the common law tradition. At common law, habeas corpus was essentially a means of securing judicial review of the existence of grounds for executive detention. If a person was taken into custody by executive authorities, he could petition a court to issue a writ of habeas corpus, which would order the custodian to produce the

prisoner and state the cause of his commitment. If the government made an adequate return stating that the petitioner was being held on a criminal charge, the court would set bail for the petitioner, or allow him to remain in detention pending trial, depending on whether the offense charged was bailable or non-bailable. If the government could state no charge against the petitioner, the court would order his release. 3/

The importance of habeas corpus in this character -- as a safeguard against indefinite detention without charges or trial -- was recognized by the Framers, who included in the Constitution a prohibition of suspending the writ of habeas corpus, "unless when in Cases of Rebellion or Invasion the public safety may require it." The writ of habeas corpus referred to in the Suspension Clause of the Constitution, however, differed in two fundamental respects from the contemporary statutory writ by which the lower federal courts review state criminal judgments.

First, the right to habeas corpus set out in the Constitution was only intended as a check on abuses of authority by the federal government, and was not meant to provide a

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3/ See, e.g., Oaks, Habeas Corpus in the States -- 1776-1865, 32 U. Chi. L. Rev. 243, 243-45, 262 (1965); Oaks, Legal History in the High Court -- Habeas Corpus, 64 Mich. L. Rev. 451, 451, 460-61, 468 (1966); Hart & Wechsler's The Federal Courts and the Federal System 1513 (2d ed. 1973); R. Rader, Bailing Out a Failed Law: The Constitution and Pre-Trial Detention in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 91, 94-96 (1983).

judicial remedy for unlawful detention by state authorities. This point is evident, to begin with, from the placement of the Suspension Clause in Section 9 of Article I of the Constitution, which is an enumeration of limitations on the power of the federal government. The corresponding enumeration of restrictions on state authority in Section 10 of Article I contains no right to habeas corpus. 4/ Shortly after the ratification of the Constitution, the First Congress in 1789 made the limitation of the federal habeas corpus right to federal prisoners explicit, providing in the First Judiciary Act (ch. 14, § 20, 1 Stat. 81-82):

> [T]he justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, That writs of habeas corpus shall in no case extend to prisoners in gaol [i.e., jail], unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same . . . .

Second, the writ referred to in the Constitution, as noted above, was the common law writ of habeas corpus, a pre-trial remedy whose essential function was to serve as a check on arbitrary executive detention. Recognition of the common law scope of the writ is reflected in the Constitution's

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4/ See generally 2 M. Farrand, The Records of the Federal Convention of 1787, at 438 (1966); 3 id. at 157, 213, 290 (assumption in debate at the Constitutional Convention that the states would retain the authority to suspend the writ).

authorization of the suspension of the writ in cases of rebellion or invasion, whose obvious purpose is to permit in such circumstances executive detention unconstrained by normal legal processes and standards. 5/ Similarly, the First Judiciary Act described the function of the writ as "inquiry into the cause of commitment" and referred to its availability to federal prisoners "committed for trial."

The restriction of federal habeas corpus to federal prisoners was qualified by the enactment of the Habeas Corpus Act of 1867, which extended the availability of the writ to persons "retrained of . . . liberty" in violation of federal law, without any requirement of federal custody. The legislative history of the Act indicates that it was meant to provide a federal remedy for former slaves who were being held in involuntary servitude in the states in violation of the wartime emancipation decrees and the recently enacted Thirteenth Amendment. Thus, Congress acted with a narrow purpose in extending the availability of federal habeas corpus beyond persons in federal custody, and the initial judicial applications of the enlarged jurisdiction were also quite narrow. 6/ The courts continued to follow the common law rule that a prisoner could not challenge his detention pursuant

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5/ See generally id.; 1 Blackstone, Commentaries on the Laws of England 131-32 (1765).

6/ See Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965).

to the judgment of a court by applying for habeas corpus unless the judgment was void because the court lacked jurisdiction. 7/

Following the decision of Moore v. Dempsey, 261 U.S. 86 (1923), a somewhat broader approach emerged under which a claimed violation of a federal right could be asserted on federal habeas corpus if no meaningful process for considering such a claim was provided in the state courts. However, federal habeas review in this period generally depended on the absence of meaningful state remedies, and the habeas corpus jurisdiction of the federal courts did not become a general means for reviewing the substantive accuracy of state court determinations of federal claims. 8/

The final stage in the expansion of the federal habeas corpus jurisdiction came in innovative judicial decisions of the 1950's and 1960's which abrogated the traditional limitations on the habeas corpus remedy. 9/ In conjunction with the expansion of substantive federal rights by decisions of the 1960's, this effectively created a general reviewing jurisdiction of the lower

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7/ See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 465-84 (1963).

8/ See id. at 463-65, 488-99.

9/ See Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953); Bator, supra note 7, at 499-507.

federal courts over the judgments of state courts in criminal cases. 10/

II. Assessment of the Current System of Review

Defenders of the current system of broad habeas corpus review often advance confused arguments that proposed reforms would interfere with the Great Writ of the common law, whose suspension is prohibited by the Constitution outside of extreme situations of public emergency. On the basis of the foregoing discussion, it is clear that such arguments are without merit.

The traditional reverence for the Great Writ provides no support for the continuation of federal habeas corpus in its present character as a post-conviction remedy providing additional levels of review on claims that have been repeatedly adjudicated and rejected in state proceedings. As noted earlier, this use of habeas corpus would have appeared totally alien to the Framers, and to common law jurists generally prior to the middle of the twentieth century. The common law has revered habeas corpus as a safeguard against executive oppression, not as a mechanism by which one set of courts second-guesses the judgments of another set of courts.

10/ See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 154-57 (1970).

The same consideration is a sufficient response to the objection that proposed reforms would run afoul of the Constitution's prohibition of the suspension of habeas corpus. As discussed above, the statutory "habeas corpus" remedy that is currently available to state prisoners in the lower federal courts -- a quasi-appellate mechanism for reviewing state judgments -- is simply not the writ of habeas corpus referred to in the Constitution. These two writs have fundamentally different functions and are directed against the actions of different governments. They have nothing in common but a name. 11/

The existing system of federal habeas corpus review also cannot be justified as a necessary safeguard against injustices that would otherwise result from violations of federal rights by the state courts. The essential function of maintaining the supremacy and uniformity of federal law is carried out through direct review of the judgments of state courts and lower federal courts by the Supreme Court. State courts and federal courts are equally bound to uphold the Constitution and follow Supreme Court precedent in their decisions, and every state prisoner has the right to apply for

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11/ It is also clear that no subsequent amendment to the Constitution requires review of state judgments by the lower federal courts. State prisoners have no constitutional right of access to a federal forum. See Allen v. McCurry, 449 U.S. 90, 102-03 (1980); Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 627-28 (1981).

direct review by the Supreme Court following the affirmance of his conviction by the state courts. There is no adequate basis for believing that there is currently any general insensitivity to claims of federal right in the state courts, or that broad habeas corpus review by the lower federal courts -- provided in addition to the Supreme Court's traditional oversight through direct review -- has any value in protecting defendants' rights that outweighs its very substantial costs. 12/

As a practical matter, a state prisoner who properly presents an application for federal habeas corpus has typically been tried and convicted of a serious offense in state court, has already had the conviction affirmed by a state appellate court on appeal, and has had an application for review denied or decided adversely by a state supreme court. Many habeas petitioners have also had additional review in state collateral proceedings. 13/

12/ See Bator, supra note 11, at 630-34 (disputing, in relation to habeas corpus review, alleged superiority of federal judges in sensitivity and competence under contemporary conditions); Friendly, supra note 10, at 165 n. 125 (similar); O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary L. Rev. 801, 812-14 (1981) (similar); Proposals for Habeas Corpus Reform, supra note 2, at 149 (unlikelihood under contemporary circumstances of state court misapplication or resistance to Supreme Court precedent); see also Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1119 (1977) ("We are not faced today with widespread state judicial refusal to enforce clear federal rights.").

13/ An extensive empirical study of habeas corpus litigation carried out for the Department of Justice found that most petitioners had been convicted of serious, violent offenses.

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The incremental benefits of affording even more levels of mandatory review in the lower federal courts through habeas corpus are difficult to discern. In most habeas cases the federal courts agree with the conclusion of the state courts, though considerable time and effort at both the district court and circuit court levels is often expended in reaching this result. In the relatively few cases in which relief is granted, it is likely to reflect disagreement with the state courts on arguable or unsettled issues in the interpretation or application of federal law on which the lower federal courts may disagree among themselves. 14/

The questionable value of this type of review is emphasized by the experience in the District of Columbia. In

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13/(...continued)
Over 80% had been convicted after trial, and practically the same proportion had had, or were having, direct appellate review of their cases in the state system. Moreover, about 45% of petitioners had pursued collateral remedies in the state courts, including over 20% who had filed two or more previous state petitions. Over 30% had filed one or more previous federal petitions. See P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 4(a), 7, 15, 20 (Federal Justice Research Program 1979). Even where a petitioner has not had prior state court review of his claims, this does not imply that means for raising such claims are unavailable in the state courts, since prisoners frequently by-pass state remedies and file procedurally defective habeas corpus petitions. See id. at 13.

14/ See Friendly, supra note 10, at 144 n. 10, 148 n. 25, 165 n. 125; Habeas Corpus Reform: Hearing on S. 238 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 44 (1985); The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 42-44 (1982).

establishing a separate court system for the District of Columbia in 1970, Congress barred D.C. prisoners from applying for habeas corpus in the federal courts, limiting them instead to a collateral remedy in the D.C. courts. No adverse effect on the quality or fairness of criminal proceedings in the District of Columbia has been observed to result from this restriction. 15/ When the preclusion of federal habeas corpus review in one major jurisdiction has caused no evident problems over a period of nearly twenty years, it becomes difficult to believe that reasonable limitations on such review would adversely affect the quality of justice in the substantially similar judicial systems of the states.

While the benefits of the current system of federal habeas corpus are, to say the least, nebulous, its costs are substantial and obvious. The exercise by individual federal trial judges of the authority to review and overturn the considered judgments of state supreme courts is a perennial source of tension in the relationship of the federal and state judiciaries. While most habeas corpus applications are wholly lacking in merit, they continue to impose substantial burdens on judges and prosecutors in carrying out a review function that is essentially redundant in relation to state review processes.

15/ See Proposals for Habeas Corpus Reform, supra note 2, at 148-49; McGowan, The View From an Inferior Court, 19 San Diego L. Rev. 659, 667-69 (1982). The Supreme Court upheld the constitutionality of this reform in Swain v. Pressley, 430 U.S. 372 (1977).

This burden is increasing. The number of habeas corpus petitions filed by state prisoners in the federal district courts over the past ten years is as follows: 16/

1978	1979	1980	1981	1982	1983
7,033	7,123	7,031	7,790	8,059	8,532

1984	1985	1986	1987
8,349	8,534	9,040	9,524

Habeas corpus petitions, in common with other prisoners suits, are all too frequently filed as a type of recreational activity, which provides prisoners with a cost-free means of striking out at the system and passing time in prison. 17/ The implicit message of permitting endless challenges to convictions and sentences is that the system never really regards the prisoner's guilt as an established fact, and that he need never accept and deal with it. Judges and writers have frequently expressed the view that the exaggerated lack of confidence in the possibility of just conviction and punishment which this open-

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16/ These figures are drawn from the Annual Reports of the Director of the Administrative Office of the U.S. Courts. In addition to reporting 9,524 habeas corpus petitions by state prisoners, the most recent report (1987) noted 1,808 habeas corpus petitions and 1,664 "motions to vacate sentence" by federal prisoners (Table C2).

17/ See Habeas Corpus Reform: Hearing on S. 238 before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 14-15 (1985).

ended review system reflects is in conflict with the corrective and deterrent functions of the criminal justice system. 18/

The difficulty of dealing with these cases is increased by the absence of any definite time limit on habeas corpus applications, which can result in the need to reconstruct events after a lapse of years or decades. Data collected in an extensive study conducted for the Department of Justice showed that about 40 percent of habeas corpus petitions were filed more than five years after the state conviction, and nearly one-third were filed more than a decade after the state conviction. Still longer delays were noted in some cases in the study, up to more than fifty years from the time of conviction. 19/

There is no need for me to inform the members of this committee that the problem of delay is particularly acute in capital cases. 20/ In such cases, the continuation of litigation prevents the sentence from being carried out. Thirty-seven states now authorize capital punishment, and about 2,000

18/ See Bator, supra note 7, at 452; Mackey v. United States, 401 U.S. 667, 690-91 (1971) (separate opinion of Harlan, J.); Friendly, supra note 10, at 146; Spalding v. Aiken, 460 U.S. 1093, 1096-97 (1983) (statement of Burger, C.J.).

19/ See Allen, Schachtman & Wilson, Federal Habeas Corpus and its Reform: An Empirical Analysis, 13 Rutgers L. J. 675, 703-04 (1982).

20/ See, e.g., Address of Justice Lewis F. Powell before the Eleventh Circuit Conference, Savannah, Georgia, May 8-10, 1983, at 9-14; Bureau of Justice Statistics, Capital Punishment, 1986 (Dept. of Justice, Sept. 1987).

prisoners are currently under sentence of death, but the typical capital case is characterized by interminable litigation and re-litigation, and fewer than a hundred executions have been carried out in the past twenty years. 21/ While the constitutionality of capital punishment under appropriate standards and procedures has now been settled for many years, and the popular and legislative judgment overwhelmingly supports the death penalty for the most serious crimes, the open-ended system of review has largely nullified this judgment as a practical matter. The federal habeas corpus jurisdiction, in particular, provides an avenue for obstruction and delay in these cases which the states are powerless to address. 22/ The general problem was cogently described by Justice Lewis F. Powell in an address in 1983 before the Eleventh Circuit Conference:

> As capital cases accumulate, they add a new dimension to the problem of repetitive litigation. . . . Gregg v. Georgia decided that capital punishment is constitutional. Some 37 states have authorized it. Murders continue, many of incredible cruelty and barbarity, as mindless killings increase in much of the world. We now have more than 1,000 convicted persons on death row, an intolerable situation.
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> Many of these persons were convicted five and six years ago. Their cases of repetitive review move sluggishly through our dual system. We have found no effective way

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21/ NAACP Legal Defense and Educational Fund, Death Row, U.S.A. (Nov. 1, 1987).

22/ See Proposals for Habeas Corpus Reform, supra note 2, at 145-46.

> to assure careful and fair and yet expeditious and final review.
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> So far this Term, we have granted and heard arguments in four capital cases, and have agreed to hear a fifth next Term. We have received 28 applications for stays of execution, about half of which have come at the eleventh hour . . . .
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> Perhaps counsel should not be criticized for taking every advantage of a system that irrationally permits the now familiar abuse of process. The primary fault lies with our permissive system, that both Congress and the courts tolerate . . . . [There is] need for legislation that would inhibit unlimited [habeas corpus] filings 23/

In the few years since Justice Powell's remarks, the "intolerable" figure of 1,000 prisoners awaiting execution has roughly doubled, and the need for remedial legislation remains unmet.

III. Legislative Restrictions of Habeas Corpus

The Supreme Court, in its current habeas corpus jurisprudence, has given weight to considerations of finality and federalism that were ignored or shrugged off in the expansive decisions of the 1960's. A number of the Justices have been openly critical of excessive habeas corpus review, and recent decisions have effected several limitations on its scope and

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23/ Citation in note 20 supra.

availability. 24/ However, the Court's ability to make changes in this area is constrained by precedent and existing statutory provisions, by the need to proceed on a piecemeal basis in deciding particular cases, and by the absence of unanimity among the Justices concerning the particular reforms that should be adopted. An adequate response to the current problems of abuse and delay will require legislative action.

Congress has in fact repeatedly expressed concerns about the expansion of the habeas corpus jurisdiction, and has endorsed corrective measures on a number of occasions. As early as 1884, a House Judiciary Committee Report strongly criticized the practice that had emerged in some lower federal courts of entertaining challenges to state convictions under the Habeas Corpus Act of 1867. The Report stated that the Act had been adopted as a response to the unique problems of Reconstruction, and was not meant to empower the inferior federal courts to overturn the judgments of state courts. 25/

24/ See, e.g., Tollett v. Henderson, 411 U.S. 258 (1973); Stone v. Powell, 428 U.S. 465 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977); Sumner v. Mata, 449 U.S. 539 (1981); Barefoot v. Estelle, 463 U.S. 880 (1983); S. Rep. No. 226, 98th Cong., 1st Sess. 5-6 & nn. 13-16 (1983) (citation to critical statements by Justices).

25/ See H.R. Rep. No. 730, 48th Cong., 1st Sess. (1884). The Committee did not recommend direct action against this type of review because it believed that restoring the Supreme Court's jurisdiction to review decisions under the Habeas Corpus Act of 1867 might suffice to secure a satisfactory construction of the Act. Congress had divested the Supreme Court of jurisdiction to hear appeals under the Habeas

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In the course of the present century, Congress has adopted a number of limitations on the federal habeas corpus jurisdiction. Without attempting a complete description of existing legislative restrictions, the following examples may be of interest to the committee:

First, under 28 U.S.C. § 2553 and Fed. R. App. P. 22, a state prisoner is barred from appealing the denial of habeas corpus by a district court unless a circuit or district judge certifies that there is probable cause for the appeal. This requirement currently serves the general purpose of avoiding the need for a full-dress appeal where the petitioner cannot make a substantial showing of a denial of a federal right. It originated in 1908 as a specific response to delay in capital cases which resulted from the pre-existing rule that state proceedings (including execution of a death sentence) were automatically stayed while habeas corpus litigation continued. The remarks of the floor manager in the House of Representatives in support of this reform have a strikingly contemporary ring:

> [T]he occasion for this legislation arises from the fact that . . . there is a large number of groundless appeals . . . in habeas corpus proceedings in capital cases . . . .

25/(...continued)
Corpus Act in 1868 to prevent the Court from interfering with the military governance of the defeated Confederacy. See generally Mayers, supra note 6, at 41 & n. 44, 51 & n. 76.

> [I]t is only necessary in the proceedings to suggest a frivolous or fictitious federal question, have the petition overruled, and then take an appeal . . . which delays the execution . . . from one to two years . . . .
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> And there is no power . . . to prevent the prosecution of these groundless appeals. If a man has been there once he can go right back, start his habeas corpus proceedings again, and go right over the same case . . . . [Attorneys] now wait, until about the last minute, and then . . . prosecute [an] appeal 26/

Second, in the 1948 revision of the Judicial Code, Congress replaced the post-conviction habeas corpus remedy for federal prisoners with a statutory motion remedy (28 U.S.C. § 2255) in the sentencing court. This reform was motivated in part by a desire to redress the litigative disadvantages that resulted to the government when federal prisoners sentenced in one district were permitted to mount collateral attacks on their convictions and sentences in other districts in which they were incarcerated. 27/

Third, in 1966, Congress enacted 28 U.S.C. § 2254(d), which creates a presumption of correctness for state court fact-finding in habeas corpus proceedings if certain conditions are

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26/ 42 Cong. Rec. 608-09 (1908). The certificate of probable cause requirement remains available as a constraint on dilatory habeas corpus appeals in capital cases, see generally Barefoot v. Estelle, 463 U.S. 880 (1983), though it has obviously proven inadequate by itself to prevent gross abuse and interminable litigation in such cases.

27/ See Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 175, 178 (1949); see also United States v. Hayman, 342 U.S. 205 (1952).

satisfied, and provides that the petitioner has the burden of overcoming this presumption by "convincing evidence." This went considerably beyond the pre-existing caselaw standards, which only held that a habeas court could forego an evidentiary hearing in certain circumstances. 28/

Fourth, as noted earlier, Congress in 1970 barred access to federal habeas corpus for prisoners in the District of Columbia. The practical effect of this reform is that convictions and sentences imposed by the D.C. courts are not subject to review in the lower federal courts, but such review remains available in relation to the substantially similar court systems of the states.

In addition to the various legislative reforms that are currently in effect, there have been efforts in Congress on a number of occasions to enact more complete solutions to the problems of the federal habeas corpus jurisdiction, often with the institutional support of the federal judiciary.

For example, a provision enacted in the 1948 revision of the Judicial Code -- now 28 U.S.C. § 2254(c) -- generally bars access to federal habeas corpus by a state prisoner "if he has the right under the law of the State to raise, by any available

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28/ See Townsend v. Sain, 372 U.S. 293 (1963) (prior standard); Sumner v. Mata, 449 U.S. 539 (1981) (strong interpretation of statutory presumption in favor of state fact-finding).

procedure, the question presented." The enactment of this provision was the culmination of efforts by the Judicial Conference in the course of the 1940's to secure the limitation of federal habeas corpus for state prisoners. 29/ Judge Parker, who played the leading role in the Conference's work on this legislation, explained that the provision would generally bar access to federal habeas corpus in any state that permitted repetitive recourse to its collateral remedies, and expressed the view that it would have the practical effect of abolishing federal habeas corpus as a post-conviction remedy for state prisoners. 30/ Notwithstanding the unequivocal language of the provision and Judge Parker's observation concerning its meaning, the Supreme Court in Brown v. Allen, 344 U.S. 443, 447-50 (1953), refused to give it effect, stating that it was unwilling to accept so radical a change from prior habeas corpus practice without "a definite congressional direction."

Shortly after Brown v. Allen, the Judicial Conference tried again. The legislation it proposed this time would have barred raising a claim on federal habeas corpus so long as there had been a fair and adequate opportunity to raise the claim and have it determined in the state courts. The legislation would also have barred raising in federal habeas corpus proceedings any

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29/ See generally Parker, supra note 27; Reports of the Judicial Conference of the United States 22-23 (1943), 22 (1944), 28 (1945), 21 (1946), 46 (April 1947), 17-18 (Sept. 1947).

30/ See Parker, supra note 27, at 175-78.

claim that had actually been determined by the state courts or that could still be raised and determined in state proceedings. As a further safeguard against prolonged proceedings and dilatory litigation, the legislation provided that review of a denial of a habeas corpus application could only be obtained by applying to the Supreme Court for certiorari within thirty days of the denial. 31/

In addition to the Judicial Conference, the Department of Justice, the Conference of (State) Chief Justices, the National Association of Attorneys General, and the section on judicial administration of the American Bar Association endorsed this proposal. Following hearings and committee consideration, the House of Representatives passed this legislation on Jan. 19, 1956, and passed it a second time on March 18, 1958. 32/

In the course of Congress's consideration of this proposal, its proponents pointed out that the use of habeas corpus as a writ of review was a recent development that was unrelated to the historical function of the habeas corpus remedy. It was argued that the reforms would generally correct the increased caseload burdens, indefinite prolongation of

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31/ See Habeas Corpus: Hearings on H.R. 5649 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 84th Cong., 1st Sess. 1 (1955) [hereafter cited as "Hearings"].

32/ See id.; H.R. Rep. No. 1200, 84th Cong., 1st Sess. (1955); 102 Cong. Rec. 935-40; 104 Cong. Rec. 4668, 4671-75.

litigation, and conflict between the state and federal judiciaries that had resulted from the recent expansions of federal habeas corpus. It was also noted that the proposed reforms were responsive to the particular problem of delay in capital cases:

> Another evil to which the [Judicial Conference] committee addressed itself was the delay in executing State court sentences in capital cases as the result of appeals in habeas corpus proceedings . . . . [A] man could be convicted of a capital offense in a State court and be sentenced to death and his execution stayed while he exhausts State court remedies, then after having his conviction affirmed by the highest court in the State he can seek to have the lower Federal court review the action of the State courts. If the lower Federal court denies the relief sought, he can then make an application to the United States Court of Appeals. If the United States Court of Appeals affirms the action of the lower Federal court . . . and if certiorari is denied by the Supreme Court he can then go to another Federal court and ask for a writ of habeas corpus and go through the same procedure. There are cases where execution has been delayed for years and years by that practice. 33/

A final example of a far-reaching reform proposal that made substantial progress in Congress was the habeas corpus provision of title II of the proposed Omnibus Crime Control and Safe Streets Act of 1968. Title II of that legislation was formulated as a general response to innovative judicial decisions of the 1960's which were thought to pose unwarranted impediments

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33/ Hearings, supra note 31, at 6-7; see also id. at 9-10.

to effective law enforcement. It included a provision that would have limited federal review of state judgments to direct review in the Supreme Court, thereby abolishing federal habeas corpus as a post-conviction remedy for state prisoners. 34/

The Senate Judiciary Committee's Report on the legislation stated that the proposal relating to habeas corpus would correct the problems of delay and abuse resulting from recent Supreme Court decisions that had transformed habeas corpus into a quasi-appellate mechanism. In supporting the constitutionality of the reform, the Report noted that the constitutional writ of habeas corpus was only a means of eliciting a statement of the grounds for detention and could not be used to challenge a conviction by a court with jurisdiction; that the Constitution's preservation of the habeas corpus right only operates against the federal government and not the states; and that the Habeas Corpus Act of 1867 was only enacted as a means of enforcing the abolition of slavery. 35/

The Judiciary Committee sent this proposal to the Senate floor. However, it was ultimately deleted as part of a

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34/ See 114 Cong. Rec. 14182 (1968).

35/ See 1968 U.S. Code Cong. & Admin. News 2150-53.

broader compromise relating to the formulation of title II of the Omnibus Crime Control and Safe Streets Act. 36/

IV. Pending Reform Legislation

Up to this point I have been discussing the historical expansion of the federal habeas corpus jurisdiction and past efforts by congress to curb its excesses. The final portion of my testimony will focus on the most promising vehicle for dealing with its contemporary problems.

The President has recently transmitted to Congress the proposed Criminal Justice Reform Act (H.R. 3777 and S. 1970). In brief, the main provisions of the proposed Act are as follows:

Title I of the legislation would provide for the admission in federal judicial proceedings of evidence obtained under circumstances justifying an objectively reasonable belief that the search or seizure by which it was obtained was in conformity with the Fourth Amendment. Very similar exclusionary rule reform legislation was passed by the Senate as S. 1764 in the 98th Congress and by the House of Representatives as section 673 of H.R. 5484 in the 99th Congress. 37/

36/ See generally Office of Legal Policy, Report on the Law of Pre-Trial Interrogation 62-63 (Feb. 12, 1986).

37/ See generally S. Rep. No. 350, 98th Cong., 2d Sess. (1984) (Senate Judiciary Committee Report on S. 1764).

Title II would effect a variety of reforms in federal habeas corpus for state prisoners and the corresponding collateral remedy for federal prisoners. Very similar habeas corpus reform legislation was passed by the Senate as S. 1763 in the 98th Congress by a vote of 67 to 9. Substantially the same proposals have also been introduced with broad sponsorship in various bills in the House of Representatives (e.g., H.R. 5594 of the 98th Congress). 38/

Title III of the bill would restore an enforceable federal death penalty for the most egregious federal crimes of murder, treason, and espionage. Very similar death penalty legislation was passed by the Senate as S. 1765 in the 98th Congress. In the 99th Congress, the House of Representatives passed as part of H.R. 5484 legislation authorizing capital punishment under similar standards and procedures for killings in the course of a continuing drug enterprise offense. 39/

38/ See generally S. Rep. No. 226, 98th Cong., 1st Sess. (1983) (Senate Judiciary Committee Report on S. 1763); Habeas Corpus Reform: Hearing on S. 238 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 14-59 (1985) (most recent testimony of Department of Justice in support of habeas corpus reform legislation).

39/ See generally S. Rep. No. 251, 98th Cong., 1st Sess. (1983); S. Rep. No. 282, 99th Cong., 2d Sess. (1986) (Senate Judiciary Committee Reports on capital punishment proposals).

The habeas corpus reform proposals of title II of the proposed Criminal Justice Reform Act are obviously most germane to the subject of this hearing. These proposals have the support of the Conference of (State) Chief Justices, the National Association of Attorneys General, the National District Attorneys Association, and the National Governors Association. 40/ As noted above, they have already been passed by the Senate.

Title II comprises a moderate and balanced set of proposed reforms in habeas corpus standards and procedures. It does not go as far as the legislation that was twice passed by the House of Representatives in the 1950's or the legislation approved by the Senate Judiciary Committee in 1968 -- which would have virtually abolished federal habeas corpus for state prisoners -- but it does provide effective responses to the clearest problems of the current system. While it would not foreclose all possibilities of abuse and delay in capital punishment litigation, it would bring about basic improvements in that context, as well as in non-capital cases. The specific reforms proposed in title II are as follows:

40/ See Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 226-27, 235-36, 287-88, 309-11, 1111-12 (1983). The formal resolution of the National Governors Association, id. at 235-36, related to an earlier but generally similar set of reform proposals.

First, there is currently no time limit on habeas corpus applications. This reflects a failure of the procedures associated with federal habeas corpus to keep pace with its expanding scope. By way of comparison, other remedies for reviewing or re-opening judgments in the federal courts are subject to definite time limitations. Federal defendants, for example, generally must decide whether to appeal within ten days (Fed. R. App. P. 4(b)); state convicts seeking direct review of their convictions in the Supreme Court generally must apply within 60 days (Sup. Ct. R. 20); and even a federal prisoner who claims to have new evidence of his innocence discovered after trial is subject to a two-year time limit under Fed. R. Crim. P. 33.

The specific corrective proposed in title II is a one-year limitation period for habeas corpus applications, normally running from exhaustion of state remedies. 41/ State remedies would be exhausted with respect to a claim, and the time limit would begin to run, if the claim had once been taken up to the

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41/ The legislation provides for deferral of the start of the time limitation period in certain extraordinary situations involving claims which could not have been discovered at an earlier point through the exercise of reasonable diligence, retroactively applicable new rights which are subsequently recognized by the Supreme Court, or unlawful state interference with filing. However, these qualifications are narrowly and specifically defined in the legislation and the related legislative materials, and would not undermine the value of the time rule as a safeguard against unjustifiable delay. See generally S. Rep. No. 226, 98th Cong., 1st Sess. 8-10, 16-18 (1983).

highest court of the state on review. State remedies would also be exhausted with respect to a claim in the relevant sense if the direct review process were completed and state law barred raising such a claim in state collateral proceedings, or if the time provided by state law for raising such a claim in state collateral proceedings had expired. 42/ This would provide state convicts with a reasonable period within which to seek federal habeas corpus review, but would provide protection against the delays of years or decades beyond the normal conclusion of state proceedings that now frequently occur in habeas corpus litigation.

A time limitation is obviously of particular importance in capital cases. The incentives of the current system favor dilatory tactics by capital punishment litigants in habeas corpus proceedings. There is generally no particular disadvantage in filing a petition later rather than earlier, and delaying until the last moment makes it more likely that the continuation of litigation will prevent an execution from being

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42/ See id. at 17, 20. Since state rules generally bar raising on collateral attack claims that were raised or that could have been raised on direct review, the time limitation period would begin to run with respect to most types of claims -- i.e., those not allowed on collateral attack -- when direct review of the case was completed or the time for seeking direct review expired. If a state replaced the traditional bifurcated system of direct review and collateral attack with a unitary review system, the completion of unitary review or the expiration of the time for seeking such review would similarly start the running of the time limitation period. See id. at 17 n. 63.

carried out. In contrast, the proposed time rule would provide capital litigants with an incentive to seek federal habeas corpus review promptly, and to present all available claims in initial habeas corpus applications. 43/ A failure to do so would risk having delayed or omitted claims dismissed as time-barred if presented at a later point.

The second major reform proposed in the legislation is a general narrowing and simplification of the standard of review in federal habeas corpus proceedings. Under the current system, state court fact-finding is presumed to be correct if a number of poorly-defined conditions set out in 28 U.S.C. § 2254(d) are satisfied, but the federal habeas court is required to make an independent determination of questions of law and to apply the law independently to the facts. This can result in the overturning of a state judgment -- following the passage of years and affirmance by the appellate courts of the states -- on grounds which the habeas court recognizes as close or unsettled questions on which courts may reasonably differ, and on which the lower federal courts themselves may disagree. The legislation would substitute a relatively simple and uniform standard under which the federal habeas court would generally defer to the state determination of a claim if it was reasonable in its resolution

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43/ Once a claim has been presented in a federal petition and rejected on the merits, it may be dismissed if it is presented again in a subsequent petition. See Habeas Corpus Rule 9(b).

of legal and factual issues and was arrived at by procedures consistent with due process. 44/

Like the other reforms of the legislation, this change in the standard of review would reduce the dilatory potential of habeas corpus litigation in capital cases, as well as curbing excessive review in non-capital habeas cases. A capital sentence predicated on a clear violation of the defendant's federal rights would remain subject to correction on habeas corpus. But the invalidation of a capital sentence would no longer be required or permitted simply because the state courts reasonably resolved a close or unsettled question in a manner different from a lower federal court in the same geographic area.

A third reform in the legislation is a codification of the caselaw standards governing the consideration in federal habeas corpus proceedings of claims that were not properly raised before the state courts (the standard for excusing "procedural defaults"). This would bring greater definiteness and clarity to the law in this area and would help ensure that lower courts consistently resolve this issue in conformity with the properly restrictive standards that have been articulated by the Supreme Court. 45/

44/ See generally S. Rep. No. 226, 98th Cong., 1st Sess. 6-7, 22-28 (1983).

45/ See generally id. at 7-8, 12-16; Murray v. Carrier, 106 S. Ct. 2639, 2644-50 (1986).

A fourth reform is providing that a federal habeas court can deny a petition on the merits, even if state remedies have not been exhausted. In capital cases, as in other cases, this would enable district judges to deny frivolous claims promptly, without the delay and waste of resources involved in sending the petitioner back to state court to pursue state remedies. 46/

A fifth reform proposed in the legislation would vest the authority to issue certificates of probable cause for appeal in habeas corpus proceedings exclusively in the judges of the courts of appeals. This would correct inefficient and wasteful features of current procedure under which a petitioner is given repetitive opportunities to attempt to persuade first a district judge and then a circuit judge to authorize an appeal, and under which a court of appeals is required to hear an appeal on a district judge's certification, though it believes that the certificate was improvidently granted. 47/

Finally, title II of the Criminal Justice Reform Act would institute comparable reforms relating to time limitation, excuse of procedural defaults, and certification of probable

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46/ See generally S. Rep. No. 226, 98th Cong., 1st Sess. 10, 21-22 (1983).

47/ See generally id. at 10, 18-19.

cause for appeal in relation to the collateral remedy for federal prisoners under 28 U.S.C. § 2255. Collateral litigation by federal prisoners, like habeas corpus litigation by state prisoners, frequently involves frivolous and repetitive applications; the enactment of these reforms in the § 2255 remedy would be of comparable value in limiting this abuse. 48/ In conjunction with the proposed restoration of an enforceable federal death penalty by title III of the Criminal Justice Reform Act, it would also guard against efforts to obstruct the execution of federal death sentences through dilatory § 2255 litigation.

CONCLUSION

In closing, I hope that my remarks today have been of use to the committee in its consideration of this important national problem. It is intolerable that the cumbersomeness and redundancy of the process of review have largely thwarted the constitutionally valid judgments of most state legislatures to impose capital punishment for the most atrocious crimes.

Needless to say, no one would countenance a "rush to judgment" in capital cases, or in criminal cases generally. But there is a fundamental difference between reasonable review processes which ensure that a sentence is justly imposed, and

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48/ See generally id. at 19, 30-31.

irrationally excessive processes which ensure that it will never be carried out.

The Constitution only requires that a defendant be given a fair trial. A convicted defendant does not have a constitutional right to appellate review, but we believe, of course, than an appeal should be allowed as a matter of fairness, and the states regularly provide the right to appeal under their procedures. Beyond the initial state appeal, the defendant will at least have the right to seek discretionary review by the highest court of the state, and review by the state supreme court may be mandatory in capital cases.

Beyond the whole process of direct review, state collateral remedies are available for claims which could not be raised on direct review, and these remedies are regularly resorted to in capital cases. In cases where innocence can be proven, and in capital cases generally, the state executive clemency process provides an important, ultimate safeguard against injustice. Finally, beyond all state remedies, a defendant can seek direct review by the Supreme Court at the conclusion of any trip up to the highest state court on review.

Review in the lower federal courts by habeas corpus comes on top of this abundant -- and in capital cases, super-abundant -- panoply of remedies and review mechanisms. If it

were rarely utilized or insignificant in its effects, the provision of a possibly superfluous additional review mechanism would be a lesser concern. In reality, however, it fundamentally distorts the criminal justice system by precluding any definite end to the litigation of a criminal case while the defendant remains in custody, and by multiplying the potential avenues of obstruction in capital punishment litigation.

These problems will continue only if we permit them to. Congress is free to decide whether or not the judgments of the state courts should be reviewed by the lower federal courts, and if so, subject to what conditions and limitations. In the past, Congress has been willing to limit federal habeas corpus review when it ceased to further the interests of justice and became in itself an impediment to justice. Congress should be willing to do so today in response to the extreme problems of abuse and delay that now characterize federal habeas corpus litigation, and the virtually incredible effects of this abuse in capital cases.

The most practical and readily achievable response to these problems would be enactment of the proposed Criminal Justice Reform Act, and particularly the habeas corpus reforms proposed in title II of that legislation. In the words of Attorney General William French Smith, these reforms would "go far toward correcting the major deficiencies of the present system of federal habeas corpus in terms of federalism, proper

regard for the stature of the state courts, and the needs of criminal justice." 49/

49/ Proposals for Habeas corpus Reform, supra note 2, at 153.