



1-1990

Habeas Corpus Committee - Correspondence

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/habeascorpus>



Part of the [Constitutional Law Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

Lewis F. Powell Jr. Papers, Box 775/Folder 4-6

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Habeas Corpus Committee by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

January 3, 1990

CHARLES CLARK
CHIEF JUDGE
245 EAST CAPITOL STREET, ROOM 302
JACKSON, MISSISSIPPI 39201

(601) 353-0911

Ad Hoc Committee
Filer
Hester

TO FORMER MEMBERS OF THE POWELL COMMITTEE

Re: Comment to Judicial Conference

Dear Judges:

Since our report was submitted to the Conference, the "Biden bill" has been developed and introduced, the ABA report has been finalized and published, the Federal Courts Study Committee has circulated a draft report for comment which includes a section on habeas corpus, and the Administrative Office has brought to our attention a 1974 committee report and Conference action on habeas corpus.

The Executive Committee felt it would be helpful in focusing the Conference's March debate on our report if we were to consider subsequent developments and make a written comment on their effect. I spoke with Justice Powell and he thinks well of the idea. Judges Hodges and Sanders have similarly indicated agreement to this procedure. I also spoke with Senior Judge Roney and found him not only agreeable but also willing to come out of retirement long enough to draft a comment. I will circulate Judge Roney's draft for your consideration.

Charles is on the Committee

Happy New Year,

Charles

cc: Bill Burchill

NORTHWESTERN UNIVERSITY
SCHOOL OF LAW LIBRARY
357 East Chicago Avenue
Chicago, Illinois 60611

*sent 1/29/90
br*

January 25, 1990

The Honorable Lewis J. Powell, Jr., Chairman
Judicial Conference Ad Hoc Committee
on Federal Habeas Corpus in Capitol Cases
o/o Supreme Court of the United States
U.S. Supreme Court Building
1 First Street N.E.
Washington, D.C. 20543

Dear Chairman Powell:

We would like to request a report released by the Ad Hoc Committee of the U.S. Judicial Conference, recommending federal legislation to change the habeas corpus review procedures. We would appreciate your sending a copy of the report to us.

If there is a charge for this material, please notify us before sending it.

Enclosed is a mailing label for your convenience.

(SEE ATTACHED PAGE)

Sincerely,

Pegeen Bassett

Pegeen Bassett
Government Documents
Librarian

Legislation

Compiled and edited by *Barbara G. James*
Georgia State University
College of Law Library University Plaza
Atlanta, GA 30303-3092; 404/651-2479

Death Penalty

Senator Strom Thurmond (R-SC) has sponsored S 32, which would authorize the death penalty for more than twenty federal crimes and spell out the procedures for its imposition. The legislation calls for a two-stage trial with the sentencing portion held separately. The Senate Judiciary Committee subsequently adopted several amendments to the measure: the death penalty may not be imposed upon persons under the age of eighteen or upon the mentally retarded; it is also barred if it furthers a "racially discriminatory pattern." Judges must instruct juries of the following: that they must consider certain mitigating factors, that the jury has the option of finding the death penalty inappropriate, and that juries must certify that the sentence is not based on race or prejudice; and juries must be unanimous in finding at least one aggravating factor. The Committee then voted to send the measure to the Senate floor without recommendation. See *42 Cong. Q. Weekly Report* 2805 (Oct. 21, 1989).

Illiteracy

The Illiteracy Elimination Act, S 1310, was introduced by Sen. Paul Simon (D-IL) on July 13. The act seeks to eliminate illiteracy by the year 2000. It not only coordinates all federal legislation regarding illiteracy but also adds a number of new programs. Under the proposed legislation, the Reading is Fundamental (RIF) program would be expanded and a Model Literacy Demonstration Program would be established. Sen. Simon views libraries as central to dealing with the illiteracy crisis. According to Simon, most people are not intimidated about walking into a library and seeking help. See *114 Lib. J.* (no. 14) 17 (Sept. 15, 1989).

LSCA

The Senate passed amendments to HR 2742, an act to extend and amend the Library Services and Construction Act. The differences between the House and Senate versions are reportedly slight. Members of both chambers have declined to make major renovations to the long-standing library-aid programs in deference to the White House Conference on Library and Information Services, which will be held from July 9-13, 1991. Members hope that the entire package can be reexamined at that time. Major proposed changes in the existing law would allow federal funds to be used to purchase technological equipment and for book preservation, would permit mobile library services to day care centers, and would authorize \$500,000 to study the effectiveness of the federally funded library programs. See *47 Cong. Q. Weekly Report* 2807 (Oct. 21, 1989).

Habeas Corpus Reform

Language included in the comprehensive drug legislation of 1988 mandated the formation of a committee to study the current habeas corpus review procedures. The legislation further provided that the committee's recommendations would be placed on an accelerated track for congressional action. Retired Justice Lewis Powell, chairman of the ad hoc committee of the U.S. Judicial Conference, released a report on September 21 recommending federal legislation to change the habeas corpus review procedures. On September 20, the full Judicial Conference voted to study the report and to defer action until March 1990. Chief Justice Rehnquist subsequently forwarded the Powell Committee report to Congress without the Conference's approval. A majority of the Judicial Conference has requested that their input be considered on the matter. The Director of the Administrative Office of the U.S. Courts forwarded a request to Senator Biden, chair of the Senate Judiciary Committee, that hearings be held to consider the March 1990 recommendations. However, in Biden's opinion, Rehnquist's action triggered the fast track status. The Senate Judiciary Committee held a public hearing on habeas corpus reform on November 8. See *Nat'l Law J.*, Oct. 16, 1989, p. 5; *47 Cong. Q. Weekly Report* 2718 (Oct. 14, 1989).

GPO and the Congressional Record

House Report 101-179, which accompanied the legislative appropriations for FY 1990 (HR 3014), denied GPO's request to use the unexpended balances for printing and reproduction costs of documents to depository libraries. As a cost-cutting measure, GPO decided not to print or bind paper copies of the final *Congressional Record* for the years 1986 to 1990. Although GPO met its financial target and still has the funds, the Appropriations Committee decided to return the \$250,000 per year to the Treasury where the funds will not be used for a depository purpose. Funds have been allocated for microfiche distribution of the 1986-1990 *Congressional Record*.

The Joint Committee on Printing has prohibited GPO from seeking a microfiche conversion contract for the *Congressional Record*. Unless this prohibition is rescinded, depositories selecting the final bound *Congressional Record* in microfiche will receive nothing after vol. 128 (1982) is filmed and those selecting the final bound *Congressional Record* in paper will receive neither microfiche nor paper after the distribution of vol. 131 (1985). The JCP has directed GPO to focus on the CD-ROM version of the *Congressional Record*. All depositories will receive a test disk of vol. 131. See *10 Admin. Notes* (no. 21) 14 (Oct. 16, 1989).

26 JAN 1990

Ed Hoc Committee
File
0661 NAF 92

Justice Lewis Powell
U.S. Supreme Court
Washington D.C. 20543

January 25, 1990

Dear Justice Powell:

My colleague Mark Phillips and I are working on a piece for the CBS Evening News about the death penalty. A part of our story will include your recommendations for reform in the death penalty appeals process.

We would appreciate it if you would be willing to spend about 15 or 20 minutes with us, for a television interview to be aired as a part of our story. We would like to do this on February 1st or February 5th. If there is another day that would be more convenient for you, we could work that out as well.

I can be reached at (202) 457-4385. If I am not available one of my colleagues, Paige Parisi, can make the arrangements. We would be happy to come to Richmond if you are not able to be interviewed in Washington D.C.

Thank you.
Sincerely,

Jill Rosenbaum

Jill Rosenbaum
Producer
CBS Evening News
2020 M St., N.W.
Washington, D.C.
20036

January 26, 1990

Dear Ms. Rosenbaum:

Thank you for your letter of January 25, in which you invite me to take part in an evening news program on the death penalty.

I served as Chairman of a Committee appointed by the Chief Justice pursuant to authorization of the Judicial Conference of the United States. I enclose a copy of the report we submitted at the September meeting of the Conference. As requested by the Chief Justice I met with the press on the day after my report was submitted.

I think it best, in view of this history, for me not to appear again at this time as an advocate. My understanding is that the Judicial Conference may consider several proposals, including that of my Committee when it meets again in March.

I have a high opinion of CBS Evening News, and send best wishes.

Sincerely

Ms. Jill Rosenbaum
Producer
CBS Evening News
2020 M Street, N.W.
Washington, D. C. 20036

lfp/ss

BC: The Chief Justice
BBC: Hew

January 29, 1990

Habeas Corpus Reform

Dear Paul:

Here are some materials on the current status of federal habeas reform that you may find useful in preparing our comments on developments since our Report issued.

Most important is Biden's current "reform" package, which includes a provision that would overrule by statute McCleskey v. Kemp and Teague v. Lane, among other cases.

I enclose also some testimony from the Justice Department on the probable effects of these proposals, and some news accounts of President Bush's recent statements. It is my understanding that alternative legislative packages may be introduced by Senator Thurmond, and that the Administration will also propose an alternative.

Sincerely,

Hon. Paul H. Roney
U.S. Court of Appeals for
the Eleventh Circuit
601 Federal Office Building
St. Petersburg, Florida 33701

lfp/ss

cc: The Chief Justice
Members of the Committee
Professor Albert M. Pearson
William R. Burchill, Jr., Esquire

United States District Court

NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET
DALLAS, TEXAS 75242

CHAMBERS OF
JUDGE BAREFOOT SANDERS

5 FEB 1990

Ad Hoc Committee

January 29, 1990

Honorable Levin H. Campbell
Chief Judge
United States Court of Appeals for the
First Circuit
1618 John W. McCormack Post Office & Courthouse
Boston, Massachusetts 02109

Re: Federal Courts Study Committee: Habeas Corpus Reform

Dear Lee:

At the January 22 hearing of the Federal Courts Study Committee in Dallas you mentioned that the Committee would like some statement from the Powell Ad Hoc Committee on Federal Habeas Corpus in Capital Cases.

You will recall that in my presentation I had addressed the habeas corpus section of the Study Committee's December 22, 1989 draft. I urged recognition of the essential distinction between capital habeas and other habeas cases and recommended that your Committee favorably consider the Powell report.

You will remember from the September 1989 Judicial Conference proceedings that the Powell Committee has been discharged. Consideration of its report by the Judicial Conference was postponed until March 1990.

I am enclosing for you, and for Judge Weis, Mr. Harrell and Mr. Slate, a copy of the Powell report. Please note the explanation after each section of the proposed statute. The reporter for the Powell Committee was Professor Albert M. Pearson; his address is The University of Georgia, Athens, Georgia 30602 (Ph: 404/542-5187 or 542-4241). However, I feel certain that any member of the Powell Committee would be glad to discuss the report if asked.

As I pointed out at the January 22 hearing the American Bar Association funded a Task Force on Capital Habeas which made recommendations which will be considered by the ABA House of Delegates at the mid-winter meeting in February 1990 in Los Angeles. The ABA report differs in important respects from the Powell report. I served on both the ABA Task Force and the Powell Committee; I support the recommendations of the Powell Committee.

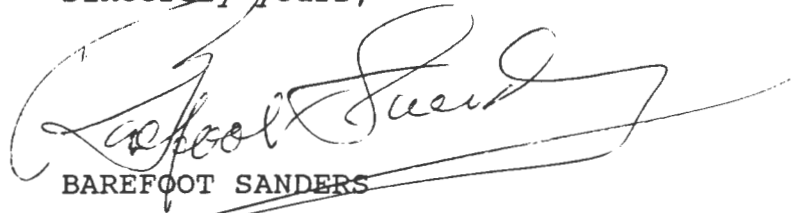
I will not abbreviate what is already well summarized in the Powell report but I respectfully suggest that the Study Committee needs to at least recognize the following principles regarding habeas corpus:

- (1) there is a fundamental difference in the dynamics of death penalty habeas and other habeas;
- (2) there is currently a gap at the state habeas level in providing competent counsel for death penalty defendants. Competent and reasonably compensated counsel at every stage of death penalty proceedings is fundamental.
- (3) the need for an automatic stay of execution upon the filing of a capital habeas application in federal district court and an automatic appeal without a certificate of probable cause in such cases.
- (4) the need for a reasonable statute of limitations on capital habeas proceedings provided that limitations will run only when a death penalty defendant is represented by counsel.
- (5) that a capital defendant is entitled to one, but only one, full and unhurried consideration of his federal habeas claim by the federal courts, except in extraordinary situations relating to last minute evidence of factual innocence.

Paraphrasing the Powell Committee, the current chaos in death penalty litigation -- periodic inactivity and last minute frenzied activity, scheduling and rescheduling of execution dates -- diminishes public confidence in the criminal justice system. I believe the Study Committee should take note of this situation even if it does not deem it appropriate to endorse the Powell Committee Report.

Thank you for the opportunity to comment.

Sincerely yours,



BAREFOOT SANDERS

Encl.

cc w/Encl.: Honorable Joseph F. Weis, Jr. (3rd Cir/Philad)
Mr. Morris Harrell
Mr. William K. Slate, II (FCSC)

cc w/o Encl.: Members, Powell Ad Hoc Committee

~~Jan~~ Jan 30, 1990 (tentative) Bill Slate, Reporter

1 review of the disposition of grievances . . . by a person or entity not under the
2 direct supervisions or direct control of the institution" (emphases added).
3

4 Under the committee proposal, the prisoner would be required to
5 exhaust state administrative remedies as long as a federal court decided that
6 the remedies provided by the state were both "fair and effective" without
7 resort to any minimum standards. From a legal and pragmatic perspective,
8 the failure of a state administrative remedy to contain any one of the minimal
9 standards delineated in 42 U.S.C. Sec. 1997e would appear to be fatal to a
10 judicial finding that the remedy in question is fair and effective," when the
11 administrative litigation must occur with context and confines of an adult
12 correctional facility. The absence of any one of the present statutory
13 minimum standards or its substantial equivalent would undoubtedly deprive
14 the state prisoner of an "opportunity to fully and fairly litigate" his claim in
15 the state's administrative process.
16

17 In the event that any change in 42 U.S.C. Sec. 1997e is warranted, the
18 committee should recommend only that, where the state administrative
19 remedy is not "in substantial compliance" with the minimum standards of 42
20 U.S.C. Sec. 1997e (b), there will be a rebuttable presumption that the
21 administrative remedy is not "plain, speedy, and effective." To overcome this
22 presumption, the state will be allowed to persuade either a federal court or the
23 Attorney General that its remedy contains alternate procedures which
24 accomplish the same objectives as those addressed by the minimum standards
25 and is, in fact, a "plain, speedy, and effective" administrative remedy which
26 the prisoner must exhaust prior to federal resolution of the Section 1983 claim.

27 D. State Prisoner Habeas Corpus Petitions in Federal Courts
28 54-59

29 *Habeas corpus* petitions, particularly those from state prisoners,
30 constitute a substantial portion of the federal courts' caseload. The 537 habeas
31 corpus petitions filed in 1945 grew to 9,867 in 1988 -- an increase of 1,840
32 percent. The Committee, however, does not propose any major changes in
33 the law or procedure of *habeas corpus*, in part because Congress is currently
34 considering the recommendations of the Judicial Conference's Ad Hoc
35 Committee on Habeas Corpus Review of Capital Sentences and the American
36 Bar Association's Task Force on Death Penalty Habeas Corpus. (THE ABA HOUSE

NO
major
change

1 OF DELEGATES WILL CONSIDER THE REPORT FEB. 12-13.) Congress's response to those
2 recommendations may have an effect beyond death penalty cases.

3
4 DOES THE COMMITTEE WANT TO HIGHLIGHT ANY THINGS FOR CONGRESS TO CONSIDER--e.g.,
5 ELIMINATING TIME-CONSUMING PROCEDURAL HURDLES, REQUIRING RIGHT TO COUNSEL IN NON-DEATH
6 PENALTY CASES?

7 While eschewing major proposals, the Committee has three
8 recommendations of a less sweeping nature:

9 1. Congress should make no change regarding the standards for hearing
10 state prisoners' successive habeas corpus petitions under 28 U.S.C. § 2244.

11 *Sanders v. United States* (1963) established the present rules governing
12 the hearing of successive petitions. Under Sanders, federal courts may give
13 controlling weight to the denial of a prior *habeas corpus* application only if (1)
14 the same ground was presented and decided adversely to the petitioner, (2)
15 the prior decision was on the merits, and (3) reaching the merits of the
16 subsequent application would not serve "the ends of justice." When grounds
17 could have been but were not raised in an earlier petition, the court must
18 reach the merits unless the petitioner has deliberately abused the writ or
19 motion remedy. These rules have been controversial from their inception.
20 Legislative efforts to overrule *Sanders* failed in 1966. Instead Congress
21 codified *Sanders's* holding in 28 U.S.C. § 2244. A later effort to overrule
22 *Sanders* by rule was similarly unsuccessful, and the Court has rejected
23 suggestions to change the decisional law.

24 The Committee believes that no change is needed. Efforts to change
25 the rules reflect an unfounded concern that they have created a flood of
26 successive petitions that needlessly undermine state interests in the finality
27 of convictions. It is true that many prisoners file more than one petition, but

1 it does not appear that the federal courts have great difficulty disposing of
2 them. They usually dispose of successive petitions summarily and without
3 reported opinion, apparently applying the rules as if they incorporated a *res*
4 *judicata* principle. Courts thus turn aside successive unmeritorious petitions
5 routinely without significant expenditure of judicial effort. At the same time,
6 the broad formulation in terms of "abuse of the writ" and "the ends of
7 justice" provides judges with sufficient flexibility to reach the merits in those
8 cases that do appear to warrant further examination. Finally, the Supreme
9 Court last year eliminated the main grounds for these successive petitions --
10 changes in law that give rise to new claims or strengthen or revive old ones
11 (*Teague v. Lane* and *Penry v. Lynaugh*). In §3, below, we propose that
12 Congress codify and clarify these decisions.

13 **2. Congress should make no change in the law respecting fact-finding**
14 **procedures in *habeas corpus* cases.**

15 The Committee also examined proposals to restrict further district
16 courts' authority to hold evidentiary hearings in *habeas* cases. *Townsend v.*
17 *Sain* (1963) established when courts must hold evidentiary hearings to make
18 independent fact findings in *habeas corpus* cases. In 1966, Congress amended
19 28 U.S.C. § 2254 to establish new guidelines for when state court findings
20 should be presumed correct. Opponents of the current law believe that
21 federal courts are wasting valuable time holding hearings to find facts that
22 the state courts have already found. They have proposed restricting federal
23 evidentiary hearings to those few cases in which the state court hearing was
24 not "full and fair," or abolishing federal fact-finding altogether and making
25 *habeas corpus* review a purely appellate procedure.

1 Such changes are unnecessary because, as a factual matter, federal
2 courts hold evidentiary hearings in very few *habeas corpus* cases. In both
3 1987 and 1988, only 1.1 percent of the petitions filed were terminated after a
4 trial. *Habeas corpus* cases are less likely than other civil cases to go to trial
5 because most judges grant a hearing only if the state court proceedings were
6 not full and fair. The data suggest that this is a direct result of the 1966
7 amendments. Accordingly, we see little need for congressional intervention.

8 **3. Congress should codify IN §2254(D)(1)? and clarify recent Supreme Court**
9 **decisions involving the retroactive use of new federal law in *habeas corpus***
10 **petitions.**

11 Retroactivity has been particularly sensitive in *habeas corpus*: If the
12 state provided procedures that protected a defendant's constitutional rights as
13 then understood, but a federal court later decides that the Constitution
14 requires new or different procedures, should the state be required to release
15 the prisoner and hold a second trial that complies with the new law?

Law
changed
16 In 1989, the Supreme Court dramatically changed the law, holding that
17 prisoners may not seek *habeas corpus* relief based on changes in law
18 occurring after their convictions. (*Teague v. Lane* and *Penry v. Lynaugh*).
19 More specifically, the court held that:

- 20 • "new constitutional rules of criminal procedure will not be
21 applicable to those cases which have become final before the
22 new rules are announced."
23 • a rule is "new" if it was not "dictated by prior precedent" -- even
24 if the rule was already followed in every state. (A "new rule,"
25 apparently, is any rule that has not been expressly ratified by the

1 Supreme Court at the time the petitioner's conviction becomes
2 final.)

3 • retroactivity is a threshold inquiry that the court must address
4 before it considers the merits;

5 • there are two exceptions to the general prohibition: a petitioner
6 may base a claim on "new law" if the claim is (1) that certain
7 conduct or a certain kind of punishment is beyond the authority
8 of the criminal law to proscribe, or (2) that the absence of a
9 particular procedure substantially diminishes the likelihood of
10 an accurate verdict.

11 The Committee recommends that Congress codify these decisions but
12 clarify certain ambiguities in the law they made, and add a third exception to
13 the two recognized by the Court. Congress successfully codified several then-
14 recent Supreme Court *habeas* decisions in 1966; congressional action will be
15 equally helpful now.

16 Specifically, the Committee recommends that Congress:

17 a. authorize federal courts to hear a *habeas corpus* petition only if it presents a
18 claim that was either controlled or "clearly foreshadowed" by existing
19 Supreme Court precedent.

20 *Teague* and *Penry* rest on the premise that the interests of the prisoner
21 are at their weakest, and those of the state at their strongest, when the state
22 courts correctly applied law that was good at the time, even if it is good no
23 longer. The state courts did all that could fairly be asked of them by properly
24 applying the law as it stood during the trial and appeal. According to this
25 premise, there is no possibility, furthermore, that the threat of a subsequent

1 federal *habeas* proceeding will deter state courts from ignoring federal
2 constitutional rights; to expect otherwise is to assume that the threat of a
3 *habeas* proceeding will prompt courts to foresee a change in the law.

4 It may be sensible in principle to limit *habeas corpus* to claims that the
5 state courts had incorrectly applied existing law. But it is not easy in practice
6 to distinguish between "misreading existing law" and "making new law."
7 The Committee believes the "clearly foreshadowed" standard will encourage
8 state courts to attend to case law developments as part of their duty to
9 interpret the Constitution faithfully. On the other hand, it will not penalize
10 them in *habeas* proceedings for failing to be prescient. We are confident that
11 the courts will be able to administer this standard, even though its precise
12 contours will require further development through adjudication.

13 **b. leave to the court's discretion whether to address the merits of the claim,**
14 **depending on whether they can be separated from the retroactivity question.**
15 It will often be difficult to separate the retroactivity issue from the merits. In
16 addition, the issues in *habeas* petitions are often not clearly formulated
17 because the pleadings are usually prepared by the inmate. Issues that have
18 been formulated clearly by the time the case reaches the Supreme Court are
19 seldom so in the lower courts.

20 **c. in addition to the two exceptions announced by the Court, also except from**
21 **the general prohibition the kind of claim that is not feasible to raise in an**
22 **appeal from the judgment under which the applicant is in custody. Some**
23 **claims are unlikely to be raised on direct appeal, for example, claims of**
24 **ineffective assistance of counsel and claims that turn on facts that are**
25 **discovered after appeal, such as claims that the government improperly**

1 withheld evidence before trial. After *Teague* and *Penry*, however, such
2 claims can no longer be raised in *habeas corpus* proceedings if they argue for a
3 change in the law. An exception to the rule of retroactivity is thus needed
4 here for the same reason the Supreme Court has recognized an exception to
5 the mootness doctrine for claims that are "capable of repetition yet evading
6 review."

7 **REFERENCES:**

8 *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989)

9 *Sanders v. U.S.*, 373 U.S. 1 (1963)

10 *Teague v. Lane*, 109 S. Ct. 1060 (1989)

11 *Townsend v. Sain*, 372 U.S. 293 (1963)

12 *In Part II, see also:*

13

14 *For further analysis, see Part III at*

15

16 **E The Chief Justice and the Chair of the Conference of Chief Justices**
17 **should create a National State-Federal Judicial Council.**

18

136-137

19 The Committee endorses the suggestion of the Chair of the Conference
20 of Chief Justices for the creation of a national State-Federal Council, composed
21 of an equal number of state and federal judges, to study and submit
22 recommendations to ease friction and promote cooperative action between
23 the two court systems. Areas in which it might offer recommendations are
24 readily apparent. Our proposals above, for example, hardly exhausted the
25 problems created by complex litigation that presents claims concurrently in
26 several federal and state courts. Problems of trial scheduling often create
27 friction. Attorney discipline in state and federal courts is often uncoordinated.
28 These are but a few of the areas in which the proposed council might offer

1 recommendations in the interests of healthy judicial federalism.
2 Implementation of such projects might be of interest to the State Justice
3 Institute in keeping with the Congressional intention in establishing the
4 Institute.

5
6 ORIGINAL TEXT FEATURE A HABEAS EXAMPLE, SUMMARIZED BELOW. I SUGGEST USING THOSE ABOVE
7 INSTEAD, GIVEN THE NATURE OF THE HABEAS DISCUSSION AND RECOMMENDATIONS IMMEDIATELY
8 PRIOR.

9
10 For example, the council might recommend that Congress
11 provide for review of state prisoners' *habeas corpus* petitions by
12 the appropriate United States Court of Appeals immediately
13 after completion of the state appellate process, rather than
14 requiring the petitioner to first seek *certiorari* in the United
15 States Supreme Court, or to submit the legal issues to the district
16 court. Or it might recommend that state legislatures or supreme
17 courts impose a form of post-conviction review immediately
18 following the conclusion of the trial and sentencing to create a
19 program of unitary review in the trial court.

20 Obviously, the Committee takes no position on either of
21 these proposals

22
23 **REFERENCES:**
24

25 *In Part II, see also:*

26
27 *For further analysis, see Part III at*

28
29
30 **ADDITIONAL REFERENCES:**

31
32 See Chapter III, §C. (38-40), which proposes to shift railway workers'
33 injury cases from the federal courts to state administrative
34 workers compensation systems.

35

February 5, 1990

Ad Hoc Committee on Federal Habeas

Dear Chief:

Although our Committee was discharged (happily), I understand that the report of the ABA Committee will be considered by the Judicial Conference in March.

I enclose a copy of Judge Barefoot Sanders' letter of January 29, to Levin Campbell. It is a helpful letter, and I am glad that copies were sent to the members of the Campbell Committee.

Sincerely,

The Chief Justice

lfp/ss
Enc.

February 6, 1990

Ad Hoc Committee on Federal Habeas Corpus

Dear Barefoot:

Thank you for the copy of your letter of January 29, to Chief Judge Campbell. You were thoughtful to write him and send copies of our Report to the members of his committee.

The ABA report differs in important respects from our Report. I would not have joined it, and am glad that you share my view.

I repeat that you have been a thoughtful and helpful member of the Ad Hoc Committee that has now been discharged. I have enjoyed the opportunity to know you.

Sincerely,

Hon. Barefoot Sanders
United States District Court
Northern District of Texas
1100 Commerce Street
Dallas, Texas 75242

lfp/ss

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

POST OFFICE BOX 1767
OKLAHOMA CITY, OKLAHOMA 73101

12 FEB 1990

WILLIAM J. HOLLOWAY, JR.
CHIEF JUDGE

February 9, 1990

TELEPHONE
405 / 231-4866
FTS 736-5576

Honorable Lewis F. Powell, Jr.
Associate Justice, Retired
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Dear Justice Powell:

Several of us on the Conference have further studied the habeas corpus reform proposals since the September Conference. We have drafted a proposed Resolution stating views we have formed as to suggested modifications on the statutory proposals. We have tried to express this with deference and respect to you and your distinguished Committee, and with full realization of the diligent efforts you devoted to your important Committee work. We trust that we have expressed these suggestions in respectful and reasonable terms.

We want to submit this Resolution for your information, and I therefore am enclosing a copy.

Respectfully,



William J. Holloway, Jr.

WJH:bp

*Have we sent cc of this to Committee members?
Pearson
C.G.*

RESOLUTION

IN RE: POWELL AD HOC COMMITTEE ON HABEAS CORPUS INVOLVING CAPITAL CASES

The Judicial Conference of the United States endorses the essential objectives of the Powell Committee Ad Hoc Report on federal habeas corpus review of capital cases:

- (1) to eliminate piecemeal appeals;
- (2) to provide an automatic stay in capital cases in order to obviate successive petitions for stay; and
- (3) to provide competent counsel on state post-conviction cases.

The Judicial Conference endorses the recommendations of the Powell Committee Report subject to the following modifications:

A. Because many of the delays in habeas corpus procedures are related to the fact that the defendant was not represented by competent counsel at the trial level (as well as in the state post-conviction proceedings), specific mandatory standards similar to those set forth in the Anti-Drug Abuse Act of 1988 should be required with respect to the appointment and compensation of counsel for capital defendants at all stages of the state and federal capital punishment litigation.

Upon the filing of a petition for a writ of habeas corpus in the federal court the court should first determine whether the specific guidelines for competent counsel were followed in the state proceedings. If the court determines that competent counsel was appointed in the state proceedings, the same counsel should be appointed in the federal court, wherever possible. If the court determines that competent counsel was not appointed in the state proceedings, the federal district court should appoint new counsel under the governing guidelines. In the latter case, the federal court should not require dismissal of non-exhausted state claims, or apply any procedural default rules or the rule governing the presumption of correctness of state court findings of fact.

COMMENTARY

The present proposal of the Powell Committee provides states with the option to set standards of competency for the appointment of counsel in state post-conviction cases. This proposal has serious drawbacks. Providing states the option to set and comply with the standards will lead to the creation of different and inconsistent standards among the states and will result in two sets of procedures in federal post-conviction cases: one for petitioners from states that have opted to adopt standards and another for petitioners from states that do not. The result would be confusion and a proliferation of litigation. We thus endorse the ABA Task Force recommendation of one mandatory national standard governing competent counsel.

B. The Conference endorses the following recommendation of the ABA Task Force, except substituting the language at the conclusion of this paragraph for the phrase "result in a miscarriage of justice."

Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance of the prisoner, or the neglect or ignorance of counsel, or if the failure to consider such a claim would undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or in the appropriateness of the sentence of death.

C. The conference supports the essential features of the ABA Task Force recommendation concerning second or successive petitions for habeas relief. The Conference does, however, favor and endorse a change in that recommendation so that it be clear that it supports a federal court entertaining a second or successive petition on the grounds stated in the ABA Task Force recommendation, but in addition stating that any statutory revision would include a proviso that such a successive or second petition be entertained where the facts, if proven, would undermine the court's confidence also in "the appropriateness of the sentence of death." In order to make this clear within the context of the ABA Task Force recommendation, the Conference supports the following modified recommendation:

A federal court should entertain a second or successive petition for habeas corpus relief if: the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or in the appropriateness of the sentence of death.

} open ended

D. The federal statute of limitations should commence upon the conclusion of all direct state appeals and state post-conviction proceedings, and after the date of judgment on petitions for certiorari timely filed after the final state court decision on post-conviction relief. The federal statute of limitations should be one year following the conclusion of proceedings as specified herein.

E. The Judicial Conference adopts the following recommendation of the ABA Task Force:

The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or in the appropriateness of the sentence of death.

Respectfully Proposed,

- Hon. Patricia M. Wald — *no capital cases*
- Hon. James L. Oakes — "
- Hon. A. Leon Higginbotham, Jr. (CA3)
- Hon. Sam J. Ervin, III (CA4)
- Hon. Donald P. Lay (CA8)
- Hon. Alfred T. Goodwin (CA9 — *many cases*)
- Hon. William J. Holloway, Jr.
- Hon. Frank A. Kaufman (DC — *Baltimore*)



Ad Hoc

13 FEB 1990

Committee File

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

February 12, 1990

MEMORANDUM TO THE MEMBERS OF THE FORMER AD HOC
COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES

In order to keep you continuously informed on developments in the wake of the Committee's report last fall, Judge Clark has asked me to transmit the following materials reflecting recent events:

1. A resolution adopted by the Conference of Chief Justices at their meeting earlier this month, supporting the proposal of the Ad Hoc Committee, urging enactment of the pending bill embodying it (S. 1760), and opposing the majority report of the American Bar Association Criminal Justice Section on the basis that it "would effectively increase rather than reduce delay in capital cases."
2. A proposed resolution transmitted to the Chief Justice last week by Judge Lay with the signatures of seven other Judicial Conference members, which states that it "endorses the essential objectives of the Powell Committee Report" but with certain modifications as enumerated in the proposed resolution.

The Ad Hoc Committee's report remains on the agenda of the Judicial Conference for its next scheduled meeting on March 13.

William R. Burchill, Jr.

Attachments

RESOLUTION XVIII.

HABEAS CORPUS IN CAPITAL CASES

WHEREAS, the Conference of Chief Justices has long supported legislation that would place reasonable limits on federal habeas corpus review of state convictions, including capital cases; and,

WHEREAS, abuse of the writ encouraged by present practices places heavy burdens on the resources of both state and federal courts and has effectively negated the law of the 37 states that impose the death penalty; and,

WHEREAS, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases of the Judicial Conference of the United States (the Powell Committee) has proposed amendments to federal habeas procedures that would promote finality in capital cases without jeopardizing the rights of persons with a colorable claim of factual innocence; and,

WHEREAS, legislation to implement the report of the Ad Hoc Committee has been introduced in the U.S. Senate as S.1760,

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports enactment of S.1760 and opposes proposals such as S.1757 and the majority report of the American Bar Association Criminal Justice Section that would effectively increase rather than reduce delay in capital cases.

Proposed by the Conference of Chief Justices State-Federal Relations Committee at the 13th Midyear Meeting in San Juan, Puerto Rico on February 1, 1990.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

DONALD P. LAY
CHIEF JUDGE
P. O. BOX 78908
ST. PAUL, MINNESOTA 55178

February 8, 1990

The Honorable William H. Rehnquist, Chief Justice
The Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Re: Powell Committee Report - Habeas Corpus Reform Act

Dear Mr. Chief Justice:

Several weeks ago, a cross-sectional steering committee was organized among members of the Judicial Conference to attempt to work out some type of resolution which would endorse the essential aspects of the Powell Committee Report with slight modifications. The steering committee respectfully requests that this resolution be placed on the agenda of the Judicial Conference for discussion and vote. The resolution is being circularized to all members of the Conference. The primary goal of the steering committee is to see if we can reach agreement on adequate language which could be basically endorsed by the Conference as a whole. The purpose in circularizing this in advance is to see if we can avoid any debate or controversy over any of the provisions. We have not attempted to work out specific language but simply address certain area subject matters.

We hope everyone will review our proposal with the understanding that the committee is simply trying in good faith to reach an agreement that will basically endorse the original Powell Committee Report with slight modifications. We would appreciate any further suggestions or amendments.

If you have any questions concerning the report, I hope you will feel free to write to me or any member of the steering committee.

Sincerely yours,

DONALD P. LAY

DPL/ja

cc: Hon. Patricia M. Wald
cc: Hon. James L. Oakes
cc: Hon. A Leon Higginbotham, Jr.
cc: Hon. Alfred T. Goodwin
cc: Hon. William J. Holloway, Jr.
cc: Hon. Frank A. Kaufman

RESOLUTION

IN RE: POWELL AD HOC COMMITTEE ON HABEAS CORPUS
INVOLVING CAPITAL CASES

The Judicial Conference of the United States endorses the essential objectives of the Powell Committee Ad Hoc Report on federal habeas corpus review of capital cases:

- (1) to eliminate piecemeal appeals;
- (2) to provide an automatic stay in capital cases in order to obviate successive petitions for stay; and
- (3) to provide competent counsel on state post-conviction cases.

The Judicial Conference endorses the recommendations of the Powell Committee Report subject to the following modifications:

A. Because many of the delays in habeas corpus procedures are related to the fact that the defendant was not represented by competent counsel at the trial level (as well as in the state post-conviction proceedings), specific mandatory standards similar to those set forth in the Anti-Drug Abuse Act of 1988 should be required with respect to the appointment and compensation of counsel for capital defendants at all stages of the state and federal capital punishment litigation.

Upon the filing of a petition for a writ of habeas corpus in the federal court the court should first determine whether the specific guidelines for competent counsel were followed in the

state proceedings. If the court determines that competent counsel was appointed in the state proceedings, the same counsel should be appointed in the federal court, wherever possible. If the court determines that competent counsel was not appointed in the state proceedings, the federal district court should appoint new counsel under the governing guidelines. In the latter case, the federal court should not require dismissal of non-exhausted state claims, or apply any procedural default rules or the rule governing the presumption of correctness of state court findings of fact.

COMMENTARY

The present proposal of the Powell Committee provides states with the option to set standards of competency for the appointment of counsel in state post-conviction cases. This proposal has serious drawbacks. Providing states the option to set and comply with the standards will lead to the creation of different and inconsistent standards among the states and will result in two sets of procedures in federal post-conviction cases: one for petitioners from states that have opted to adopt standards and another for petitioners from states that do not. The result would be confusion and a proliferation of litigation. We thus endorse the ABA Task Force recommendation of one mandatory national standard governing competent counsel.

B. The Conference endorses the following recommendation of the ABA Task Force, except substituting the language at the conclusion of this paragraph for the phrase "result in a miscarriage of justice."

Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance of the prisoner, or the neglect or ignorance of counsel, or if the failure to consider such a claim would undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or in the appropriateness of the sentence of death.

C. The Conference supports the essential features of the ABA Task Force recommendation concerning second or successive petitions for habeas relief. The Conference does, however, favor and endorse a change in that recommendation so that it be clear that it supports a federal court entertaining a second or successive petition on the grounds stated in the ABA Task Force recommendation, but in addition stating that any statutory revision would include a proviso that such a successive or second petition be entertained where the facts, if proven, would undermine the court's confidence also in "the appropriateness of the sentence of death." In order to make this clear within the context of the ABA Task Force recommendation, the Conference supports the following modified recommendation:

A federal court should entertain a second or successive petition for habeas corpus relief if: the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the

failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or in the appropriateness of the sentence of death.

D. The federal statute of limitations should commence upon the conclusion of all direct state appeals and state post-conviction proceedings, and after the date of judgment on petitions for certiorari timely filed after the final state court decision on post-conviction relief. The federal statute of limitations should be one year following the conclusion of proceedings as specified herein.

E. The Judicial Conference adopts the following recommendation of the ABA Task Force:

The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or in the appropriateness of the sentence of death.

Respectfully proposed,

Hon. Patricia M. Wald
Hon. James L. Oakes
Hon. A. Leon Higginbotham, Jr.
Hon. Sam J. Ervin, III
Hon. Donald P. Lay
Hon. Alfred T. Goodwin
Hon. William J. Holloway, Jr.
Hon. Frank A. Kaufman

February 13, 1990

PERSONAL

Dear Andrew:

I have read with interest a draft (I think a final draft) of the letter from the Attorney General's office to Senator Biden on the subject of the pending bills proposing changes in federal habeas corpus review.

My understanding is that you had a hand in preparing the letter. The letter was extremely well written, and it pleases me to see such high quality in support of the recommendations of the Ad Hoc Committee appointed by the Chief Justice. In the event you may not have seen it, I enclose a copy of a draft report by a committee of judges chaired by Judge Holloway. Perhaps you have seen the memo that Hew wrote me about the alternative bill of Senator Biden.

We miss you here at the Court. Justice O'Connor speaks of you as one of the best law clerks she has ever had.

Sincerely,

Andrew McBride, Esquire
101 North Carolina Avenue, S.E.
Apartment 202
Washington, D. C. 20003

lfp/ss

cc: The Chief Justice
R. Hewitt Pate, Esquire

February 13, 1990

Ad Hoc Committee on Federal Habeas

Dear Chief:

I enclose a copy of Judge Holloway's letter to me of February 9, and a copy of a resolution to be submitted to the Judicial Conference in March with respect to federal habeas corpus.

The resolution would endorse the "objectives" of our Committee, and proposes modifications of several of the recommendations of the Ad Hoc Committee.

I also enclose, in the event you may not have it, a copy of a letter (possibly a draft) from the Attorney General's office to Senator Biden. The letter strongly supports approval of our Committee's recommendations.

Sincerely,

The Chief Justice

lfp/ss
Enc.

cc: R. Hewitt Pate, Esquire

lfp/ss 02/13/90 HM SALLY-POW

MEMO TO MICHAEL AND HEW:

I will give to Mike with this memo a copy of a letter from the President of the American College of Trial Lawyers enclosing the Report of the Federal Court's Study Committee chaired by Judge Weis of CA3.

Apparently the Report contains "some far-reaching and controversial recommendations". Please look at the subjects of the recommendations and let me know whether I should take a close look at any of them. If recommendations are made with respect to federal habeas corpus, I would like to see these.

L.F.P., Jr.

ss

February 14, 1990

Ad Hoc Committee on Habeas Corpus

Dear Bill:

It was thoughtful of you to send to me and members of the Ad Hoc Committee copies of the two resolutions that will be before the Judicial Conference on March 13.

I regret that Judge Lay's resolution has been endorsed by a number of Chief Judges. Judge Roney has been giving the subject further study, and may have a proposal.

Sincerely,

William R. Burchill, Jr., Esquire
General Counsel
Administrative Office of the
United States Courts
Washington, D. C. 20544

lfp/ss

cc: R. Hewitt Pate, Esquire

Ad Hoc Committee
File

MEMORANDUM

TO: Justice Powell February 14, 1990

FROM: Hew

RE: Holloway Group Letter

*The Resolution would
enlarge rather than limit
the present abuse of Fed.
H/C.*

I have reviewed the proposed "Resolution" sent to you by Judge Holloway on behalf of a group of judges. The Resolution is misleading in its presentation, and represents total rejection of the Ad Hoc Committee approach. In short, the Resolution adopts much of the Biden Bill, but goes beyond it in certain areas to embrace the ABA proposal: It leaves in place all of the benefits to capital litigants, such as counsel and an automatic stay of execution. It removes all of the benefits of finality that might make the Ad Hoc Committee proposal attractive to the States. Specifically:

1. Standards for Counsel. The Resolution abandons your approach of letting States "opt in" to the new system. Rather, there would be one uniform, mandatory requirement of appointment of counsel on state habeas in all cases. The Resolution adopts the standards for counsel in the Anti-Drug Abuse Act of 1988, as does the Biden Bill. These will prevent the States from setting standards according to local needs, and will impose great expense. The Resolution also creates a right to effective assistance of counsel in state habeas. This would mean a whole new round of litigation on attorney competence after the state post-conviction stage. If the state habeas counsel is found ineffective, then no

*Save
Congress
doq. this?*

*Fed
Standards
would
apply to
all
state
habeas*

state procedural bars would apply, non-exhausted claims would not be dismissed as required under Rose v. Lundy, 455 U.S. 509 (1982), and state court fact findings would not be presumed correct as presently required by 28 U.S.C. §2254(d). This provision in itself would create enormous new expense, piecemeal litigation, and delay.

2. Procedural Bars. Like the Biden Bill, the Resolution would do away with state procedural bars in any case where the failure to make an objection was due to the "ignorance of the prisoner" or the "neglect or ignorance" of counsel, or if the failure to consider the merits would "undermine confidence" in guilt or the sentence. This provision essentially overrules Wainwright v. Sykes, 433 U.S. 72 (1977), and adopts Justice Brennan's old Fay v. Noia, 372 U.S. 391 (1963) "deliberate bypass" standard. The Fay standard gives no recognition to finality. Indeed, if the prisoner's ignorance is a ground for avoiding the bar, it is hard to see when a procedural bar could ever be applied. This provision again makes the situation far worse, not better. It gives prisoners every incentive to "sandbag" and withhold claims for later last-minute presentation. It makes the trial -- which should be the most important stage -- a mere side-show on the way to federal habeas.

would excuse any failure to object at trial due to "ignorance of the prisoner" or his counsel

3. Successive Petitions. Here the Resolution adopts the Biden and ABA proposals to encourage more successive petitions. Petitions could be brought for (1) any claim based on new facts or law; (2) any claim going to guilt or

sentence, even if not new. This standard is so open-ended that there will be no limit whatever on successive petitions. It assures numerous filings in every case.

4. Statute of Limitations. The Resolution would start the statute of limitations only after exhaustion of state remedies at the conclusion of state collateral review. And the limitations period would be expanded to one year, compared to 180 days under the Ad Hoc Committee approach. This change abandons the Ad Hoc Committee approach of having the limitations period run from the end of state direct appeal, but then remain tolled during state post-conviction proceedings. The effect of the Ad Hoc Committee approach (devised by Judge Hodges) was to give an incentive to the prisoner to move into the state process, yet not impose any limit on the time for actual litigation. The Holloway Resolution would eliminate any incentive for the prisoner to move into state court -- his incentive would be to delay. In fact, given the presence of an automatic stay of execution, and no statute of limitations during the state habeas proceedings, a prisoner under the Holloway Resolution could retain a stay forever by refusing to file a state habeas petition. Whether this effect is intentional or an instance of sloppy lawyering is not clear.

5. Retroactivity. The Resolution predictably would overrule Teague v. Lane, 109 S. Ct. 1060 (1989). But the Holloway Resolution would go beyond the Biden Bill and adopt the extreme ABA approach. Any new decision that goes to the

accuracy of sentence must be applied retroactively. In the capital context, of course, this means that all new decisions would probably apply retroactively on habeas. This not only rejects Justice Harlan's (and your) approach, it demands the opposite. This rule is an affront to federal-state relations, and a subversion of the proper purposes of habeas corpus, as discussed in your opinion concurring in the judgment in Solem v. Stumes, 465 U.S. 638, 653 (1984).

Conclusion. The Resolution is not a responsible contribution to the problems of capital habeas, but an attempt to abolish capital punishment. I doubt that a majority of the lower court judges support this resolution, or even know that their Chief Judges are participating in this Resolution campaign. If you think that a response is needed, I recommend that you consider the following: (1) transmit copies of the Resolution to the Ad Hoc Committee members; (2) discuss the Resolution with the Chief; (3) ensure that the Circuit and District judges know about this Resolution before the Judicial Conference votes on it. This last recommendation seems only fair in that the signers of the Resolution demanded time to consult with other judges before voting on the Ad Hoc Committee Report.

R.H.P.

February 15, 1990

Ad Hoc Committee on Habeas Corpus in Capital Cases

Gentlemen:

I received this week the letters and "Resolution" from Judge Holloway, Judge Lay, and a number of other federal judges. These judges represent a majority of the Circuit Chief Judges. Bill Burchill has sent these materials to the Ad Hoc Committee members.

In my view, the Holloway Resolution represents a substantial rejection of our Committee's work. Judge Lay's statement that he proposes "slight modifications" that will avoid controversy, suggests that he has not read carefully the Ad Hoc Committee Report. I enclose a memo concerning the Resolution prepared for me by Hewitt Pate.

I note in contrast that the Conference of State Chief Justices has endorsed our Committee's Report and proposal.

Federal habeas corpus has become the subject of pending bills in the Senate (Biden and Thurmond) and other proposals. The Biden Bill would expand the use (and abuse) of federal habeas. I understand that the Federal Court Study Committee, chaired by Judge Weis, also is considering this subject. His Committee meets next week.

In view of all that is now pending I would guess that the Judicial Conference, at its meeting in March, will defer action pending further study. I am not unhappy that our Committee has been discharged.

Sincerely,

The Chief Justice
Chief Judge Clark
Judge Roney
Judge Hodges
Judge Sanders
Professor Pearson
Mr. Burchill
Mr. Pate

lfp/ss
Enc.

*Ad Hoc Committee
File*

Office of the Assistant Attorney General

Washington, D.C. 20530

*(Received in
mid-Feb. I
believe it has
been sent to
Sen. Biden.
Should it also
go to Judicial
Conference)*

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Biden:

This letter presents the views of the Department of Justice on S. 1757, the "Habeas Corpus Reform Act of 1989." The Department of Justice strongly opposes enactment of S. 1757 and urges the Congress to consider in its stead the Administration's habeas corpus reform proposals.

S. 1757, sponsored by Senator Biden, is purportedly designed to implement the recommendations of the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases (the "Powell Committee"), as set out in that Committee's Report of August 23, 1989. The Department supports the conclusions and recommendations of the distinguished committee chaired by Justice Powell, and will shortly offer legislation embodying the major elements of the Powell Committee's proposal. In contrast, S. 1757 so far weakens and qualifies the time limitations and finality provisions of the Powell Committee proposal as to ensure that no State would opt into its coverage. The Powell Committee's carefully crafted "quid pro quo" of greater finality in exchange for the provision of counsel and automatic stay provisions is eviscerated by S. 1757. Even more troubling, S. 1757 would affirmatively reach out to preclude the application of Supreme Court precedents in the areas of procedural defaults and retroactivity, thus ensuring further confusion, delay, and injustice in the capital litigation process. Enactment of S. 1757 would either result in increased delay and confusion in the capital context or no change at all in a situation where state laws providing for capital punishment for the most heinous crimes are effectively nullified by the present system of repetitive habeas corpus review.

Delay in the review and execution of capital sentences in this country has reached crisis proportions. In 1988, 296 individuals were convicted of first degree murder and sentenced to death under the careful procedures outlined by the Supreme Court since Furman v. Georgia, 408 U.S. 238 (1972). At the end

of 1988, there were over 2,100 state prisoners under sentence of death. In that same year, only 11 capital sentences were actually carried out. The average delay from time of conviction and sentence to time of execution of sentence in 1988 was six years and eight months. See United States Department of Justice, Bureau of Justice Statistics, Capital Punishment 1988, at 1. Much of this delay is attributable to the successive presentation of claims in repetitive petitions for federal habeas corpus. See Woodward v. Hutchins, 464 U.S. 377, 380 (1984) ("A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented are brought forward--often in piecemeal fashion--only after an execution date is set or becomes imminent."). Obviously, the present system has the effect of substantially undermining the effectiveness of the death penalty as both a deterrent and as a retributive expression of society's moral outrage concerning the most heinous of intentional killings. As Justice Powell put it in his testimony before the Committee, "[t]he hard fact is that the laws of 37 States are not being enforced by the courts." Statement of Justice Lewis F. Powell, Jr. (Retired), November 8, 1989, at 4.

The Powell Committee procedures, represent the fruits of careful study of the problem of delay in capital cases by a distinguished panel of jurists who are thoroughly familiar with the details of capital litigation. It should be emphasized that the Powell Committee proposals afford abundant opportunities for capital litigants to develop and raise claims of federal constitutional error in their convictions and sentences. Beyond trial and direct review, the defendant would typically be accorded full review through state post-conviction proceedings and one full round of federal habeas corpus proceedings, through the district court, the court of appeals, and final review by certiorari before the Supreme Court. Under the Powell Committee proposal, the capital defendant would be provided with competent counsel throughout both federal and state proceedings after his or her conviction and sentence had already been affirmed on direct appeal. Moreover, a mandatory stay of execution would remain in effect throughout this process of collateral review. Thus, contrary to the suggestion made by Senator Biden in introducing S. 1757, see Cong. Rec. S13473 (Oct. 16, 1989), the question is not what procedures will apply to a capital defendant who has only "one bite at the apple," but what procedures will apply where the defendant has already had numerous "bites at the apple," with respect to the same claims, before several different courts.

The provision of counsel and mandatory stay provisions in the Powell Committee proposal are balanced by offering the States greater finality after this careful capital review process is completed. In light of the lengthy review process proposed under the Powell Committee's original recommendations, any changes considered by Congress should be in the direction of

strengthening -- not weakening -- the proposal's time limitation and finality rules. The departures of S. 1757 from the original Powell Committee proposal, however, are consistently in the direction of less finality and less restraint, or in the direction of no real restraint at all. Indeed, as both Justice Powell himself and Chief Judge Clark made clear in their testimony before the Committee, S. 1757 departs in fundamental respects from the approach and recommendations of the Powell Committee, and offers only the illusion of reform in the face of the growing crisis in capital litigation. We detail our concerns with specific provisions of S. 1757 below.

Proposed 28 U.S.C. § 2256 of S. 1757, like the comparable provision in the original Powell Committee proposal, states that the special capital punishment procedures will apply only if the state makes appropriate arrangements for appointment of counsel in capital cases. However, proposed § 2256 differs from the original Powell Committee formulation in its specification of a multi-step procedure in subsection (c)(2) for the unusual case in which a prisoner under sentence of death declines appointment of counsel for collateral proceedings. S. 1757 contemplates a cumbersome procedure in this circumstance, with resolution of the issues of competency and waiver divided between the trial court and the state court of last resort. Competency and waiver are quintessentially factual issues to be determined by a trial judge, and the provisions of S. 1757 would result in a needless shuttling between courts to determine this issue. As Chief Judge Clark indicated in his testimony before the Committee, "[t]his change creates added expense and consumes time and judicial resources."

Proposed 28 U.S.C. § 2257 in S. 1757, like the corresponding provision in the original Powell Committee formulation, provides for an automatic stay of execution while litigation continues through the final disposition of an initial federal habeas corpus petition. However, it departs fundamentally from the Powell Committee's approach by substantially undermining the finality provisions after one round of both state and federal habeas corpus review has been completed.

As noted above, under the Powell Committee's proposal, a capital defendant would be accorded the services of counsel and a mandatory stay of execution through one round of federal habeas corpus review. To obtain further federal review after that point, a defendant would have to show both a clear justification for failure to raise the claim in earlier proceedings and that the facts underlying the claim, if proven, would undermine the court's confidence in the defendant's factual guilt. The specific grounds of justification for an earlier failure to raise the claim would, in essence, be the unavailability of the legal or factual basis for the claim at an earlier point, or state

action in violation of federal law that resulted in the earlier failure to raise the claim.

S. 1757 would effectively nullify the effort reflected in the Powell Committee proposal to achieve reasonable finality at the conclusion of litigation of an initial federal habeas corpus petition. Under proposed § 2257(c) in the bill, newly discovered claims, newly recognized rights, and unlawful state action would continue to be grounds for allowing claims to be raised in successive petitions. However, unlike the Powell Committee's proposal, in S. 1757 none of these grounds for raising a claim for the first time in a successive federal habeas petition need be tied to a colorable claim of factual innocence. Thus, S. 1757 rejects one of the most important conclusions of the Powell Committee. As the Committee's report stated:

Both the prisoner and his counsel have every incentive to ask whether all relevant information in mitigation of punishment was presented and whether the sentencing phase of the trial was otherwise conducted in a constitutionally fair manner. Given the clear incentive to do this, the Committee does not believe that the federal courts should have to consider a second petition under section 2254 which challenges only the sentencing phase in a capital case. . . . [T]he only appropriate exception is when the new claim goes to the underlying guilt or innocence of the state prisoner under capital sentence.

Powell Committee, Report and Proposal, August 23, 1989, at 17-18. By encouraging relitigation of claims arising from the penalty phase of capital litigation, and other claims unrelated to the guilt or innocence of the defendant, S. 1757 punches a gaping hole in the finality provisions of the carefully crafted Powell Committee proposal.

In addition, section 2257(c)(3) of S. 1757 establishes a further exception to finality after completion of a first federal habeas petition where "a stay and consideration of the requested relief are necessary to prevent a miscarriage of justice." This free floating exception is linked neither to a past inability to raise the claim, nor to a situation where the defendant's factual innocence may be at stake. Presumably, it could be raised successively in a second, third, or fourth federal habeas petition, each time with a new variation on an old claim constituting the alleged "miscarriage of justice." In our view, the exceptions to finality outlined in the Powell Committee proposal are fully adequate to ensure that no real miscarriage of justice occurs. The undefined "miscarriage of justice" exception in S. 1757 only invites abuse, and raises the specter of disparate treatment of capital litigants as courts are called

upon to give content to this term in the context of last-minute stay applications.^{1/}

Proposed 28 U.S.C. § 2258 in S. 1757 deviates substantially from the Powell Committee's proposed time limitations on the filing of an initial federal habeas corpus petition. The Powell Committee proposal provides for a 180 day filing period, which is tolled during state post conviction proceedings, with a 60 day extension available for good cause. Under S. 1757, the limitations period would be more than doubled to 365 days, subject to a possible extension of up to 90 days for good cause. Moreover, unlike the Powell Committee proposal, under S. 1757 the limitations period would be tolled while a petition for certiorari was filed from state collateral proceedings.

We agree with the conclusion of the Powell Committee that the proposed 180 day period "ensures adequate time for the development and presentation of claims." Powell Committee, Report and Proposal, at 6. As Chief Judge Clark noted in his testimony before the Committee, a one-year limitations period would do nothing more than codify the present average delay in moving from state post-conviction to federal habeas corpus proceedings. Given that the Powell Committee proposal assures that capital defendants will have counsel available to investigate and frame their legal claims throughout the process, codifying the existing level of delay (where inmates often act pro se or are delayed by difficulty in obtaining counsel) is wholly unjustified.

We also disagree with § 2258(2) of S. 1757 which would toll the statute of limitations while a petition for certiorari was pending from state post-conviction proceedings. Given the availability of a petition for certiorari both on direct review and after one round of federal habeas, this provision would seem to add delay simply for delay's sake. The Supreme Court rarely grants review of petitions arising from state post-conviction proceedings, and, under the Powell Committee proposal, a stay of execution would remain in effect until Supreme Court review of a

^{1/} The Supreme Court has used the term "miscarriage of justice" in the context of an exception to the usual rules governing procedural defaults. See Murray v. Carrier, 477 U.S. 478, 495-496 (1988). Even in this context, the Court has made it clear that a "miscarriage of justice" involves "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id. at 496. See also Harris v. Reed, 109 S. Ct. 1038, 1048 (O'Connor, J. concurring). Of course, the Powell Committee proposal itself adequately guards against any miscarriage of justice in the sense that term is defined by the Supreme Court.

petition for certiorari from federal habeas corpus proceedings was disposed of.

Proposed 28 U.S.C. § 2259 of S. 1757 would preclude application in the capital context of the rules of procedural default for failure to raise federal claims before the state courts. In Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court held that a federal court should not entertain a claim in federal habeas proceedings which would not be entertained by the state courts because of failure to raise the claim in accord with state procedural rules. The Court recognized an exception to this rule where the defendant could show "cause," e.g., a persuasive reason for failure to raise the claim in a timely manner, and "prejudice," e.g., that the constitutional error alleged was so fundamental as to infect the entire proceeding. See Murray v. Carrier, supra, at 492-494. Without these rules, the Court feared that federal habeas proceedings would breed disrespect for state procedures, and "encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in the state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." Wainwright v. Sykes, supra, at 89.

Under the approach taken by S. 1757, the Wainwright test would be inapplicable to capital cases governed by its provisions. A district court would be required to consider a claim which had not been properly raised in state court if "the failure to raise the claim in a State court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice." In contrast, the Powell Committee's proposal essentially codifies the Wainwright test.

In our view, S. 1757's abandonment of the well settled standards for evaluating procedural defaults is ill-advised, particularly in the capital context. No litigants have a greater incentive to withhold claims for use in later proceedings than capital defendants, for whom delay results in effective abrogation of their sentences. Given the fact that under both the Powell Committee proposal and S. 1757, capital defendants would be provided with counsel throughout trial, appeal, and post-conviction proceedings, allowing the "ignorance or neglect of the prisoner" to excuse a failure to properly raise a claim in state court proceedings seems a positive invitation to abuse. In addition, S. 1757 allows a federal court to ignore the failure to raise a claim in accordance with state procedures where failure to consider a claim would result in a "miscarriage of justice." If this provision simply codifies present law in this area, see n. 1, supra, it is already covered by the Powell Committee proposal. If it is meant to go beyond existing law, it simply introduces uncertainty and a further incentive to delay. Under

both the Powell Committee proposal and present law, capital defendants are free to raise the claim on federal habeas that counsel's ineffectiveness was the "cause" of a procedural default. See Murray v. Carrier, supra, at 496. It seems to us very unlikely that many States will chose to be governed by the regime of S. 1757, which gives capital litigants an incentive to ignore the State's own procedural rules for prompt and orderly presentation of claims before the state courts.

Proposed 28 U.S.C. § 2261 of S. 1757 would set specific standards of counsel experience for capital cases. In general, representation at all stages would normally be limited to counsel with five years of bar admission and three years of felony litigation experience in the particular courts in which the case is being adjudicated. The specified requirements could be waived on an ad hoc basis, for good cause, if the court determined that other counsel could properly handle the representation. These standards are based on the competence standards for counsel under the death penalty provisions of the Anti-Drug Abuse Act of 1988 (21 U.S.C. § 848(q)(4)-(10)).

We believe that the original formulation of the Powell Committee on this issue, which leaves the formulation of standards of competency to the state court of last resort or state legislation is preferable to the approach taken by S. 1757. While some states might wish to define competency in terms of the specific experience requirements proposed in S. 1757 and the Anti-Drug Abuse Act death penalty provisions, it is also obvious that there may be other legitimate choices. For example, S. 1757 refers to bar admission and litigation experience in the particular state courts in which the litigation takes place, but states may find that bar admission and criminal litigation experience in the federal courts or in other state jurisdictions is an adequate substitute for this particular experience requirement. Or states may find that special training programs or certification procedures for counsel involved in capital punishment litigation are superior to a straight years-of-experience requirement, as proposed in S. 1757. In adopting a rigid approach, S. 1757 disserves both the interest of defendants in having a pool of qualified counsel available for appointment and the public interest in ensuring that the litigation of capital cases will not be delayed because of the unavailability of qualified counsel.

We are also concerned by proposed § 2261(d) of S. 1757, which abrogates normal rules and standards governing the compensation of counsel. Clearly, leaving this issue to the unguided determination of individual judges is not the best way of ensuring appropriate levels of compensation, and general rules governing compensation of counsel -- as illustrated by the Criminal Justice Act provisions, 18 U.S.C. § 3006A(d)-(e), for federal cases -- may incorporate sufficient flexibility to permit

adequate compensation in cases of unusual difficulty or complexity. The wholesale waiver of normal compensation standards under the Anti-Drug Abuse Act death penalty provisions (21 U.S.C. § 848(q)(10)) was unwarranted, and the error should not be compounded by imposing a like provision on the states.

Finally, proposed § 2262 of S. 1757 would overturn the Supreme Court's recent decisions in Teague v. Lane, 109 S. Ct. 1060 (1989), and Penry v. Lynaugh, 109 S. Ct. 2934 (1989), which held that changes in law are generally not to be applied retroactively in collateral proceedings. The Court's opinions in these cases ended an essentially ad hoc approach to the retroactivity of Supreme Court decisions; an approach which worked substantial unfairness by treating similarly situated litigants differently. See Teague, supra, at 1072 (plurality opinion). Teague and Penry completed the Court's adoption of an approach to retroactivity long advocated by Justices Harlan and Powell: all new decisions are presumptively retroactive on direct review, and presumptively inapplicable to defendants already involved in collateral proceedings. This provides a fair and workable rule upon which both the States and criminal defendants can rely. Moreover, even on collateral review, under Teague, a decision will be retroactively applied if it absolutely bans the punishment of certain conduct or the application of a certain punishment, or substantially improves the truth-seeking function of the trial process. Thus, as the Court's opinion in Penry indicates, fundamental challenges to the application of capital punishment may still be retroactive on collateral review. Penry, supra, at 2952.

S. 1757 replaces the improvement in the law worked by Teague and Penry with an approach that invites individualized determinations of retroactivity guided only by extremely vague criteria. This would resurrect all the unfairness and uncertainty in the area of retroactivity which the Court endeavored to eliminate in Teague. Moreover, it would act as a positive detriment to finality, by allowing capital litigants to point to even the most trivial changes in Supreme Court precedent as grounds for a successive habeas corpus petition. As Justice O'Connor noted in her opinion for the Court in Engle v. Isaac, 456 U.S. 107, 128, n. 33 (1982): "State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas corpus] proceeding, new constitutional commands." In our view, it is extremely unlikely that States will elect to be governed by the provisions of S. 1757, which perpetuates this frustrating state of affairs in the area of retroactivity.

In sum, S. 1757, is not the Powell Committee's proposal, nor does it implement anything resembling the recommendations of the Powell Committee. The procedures proposed in S. 1757 would generate more, not less, unnecessary delay and confusion in

capital litigation. Because S. 1757 offers state court judgments in capital cases less finality than they now enjoy, no State would choose to operate under its one-sided provisions. The Department of Justice continues to believe that the Powell Committee proposal offers a sound and workable basis for habeas corpus reform, and remains eager to work with the Congress in strengthening that proposal. S. 1757 represents a step in the wrong direction, and, as Justice Powell suggested in his testimony, its adoption would mean that "an important opportunity to provide needed safeguards for inmates, and to bring sanity to our system of capital review, will have been lost." Statement of Justice Lewis F. Powell, Jr., at 11.

The Office of Management and Budget has advised that there is no objection to the transmittal of this letter from the standpoint of the Administration's program.

Sincerely,

Carol T. Crawford
Assistant Attorney General

lfp/ss 02/21/90 MEADOR SALLY-POW

U.Va. Class - Habeas Corpus in Capital Cases

(Prof. Meador)

MEMO S. 1757 (the Biden bill)

This bill (S. 1757) purports to implement the recommendations of the Ad Hoc Committee. Like our recommendations, it provides that a state may "opt" (elect) to be governed by the bill. There are major differences that probably would deter any state from electing to comply with S. 1757. See the Assistant Attorney General's letter in which he states that the Biden bill would result in "increased delay and confusion" in capital cases. I am inclined to agree with him.

In Woodward v. Hutchins, 464 U.S. 377, 380 (1984)(an opinion I wrote) we noted the way multiple review often is obtained in habeas capital cases. I can testify to my own experience with piecemeal applications. Sometimes there are as many as three the day before an execution.

Our Committee's Bill

After trial and direct state review the capital defendant would have (i) state post conviction reviews, and (ii) one full habeas corpus review through the DC, the CA and by cert to the Supreme Court.

A unique feature of the Ad Hoc bill is that it would require a capital defendant to be provided with competent counsel "throughout both federal and state collateral proceedings" after his conviction and sentence had been affirmed on direct appeal. Moreover, a mandatory stay of execution would remain in effect throughout the process of collateral review. Under the Biden bill, the capital defendant would have repetitive reviews as at present.

I note here that the requirement of competent counsel under our proposal applies to the state collateral review. Thus, the new counsel appointed at that time would be free to argue ineffective assistance of the trial counsel.

I should see Chief Judge Charles Clark's testimony before the Biden Committee. Apparently he makes clear that S. 1757 departs in fundamental respects from the recommendations of the Ad Hoc Committee. It would in effect prevent the enforcement of the laws of 37 states.

The Biden bill would permit review of the sentence in the event of "newly discovered claims, newly recognized rights, and unlawful state action." Under the Ad Hoc Committee's proposal, none of the foregoing grounds would permit a defendant to raise a claim for the first time in a successive habeas petition in the absence of a colorable claim of factual innocence. Thus, S. 1757 would reject one of the more important recommendations of the Ad Hoc Commit-

tee. See the quote from our report on page 4 of the Assistant Attorney General's letter.

Section 2254(c)(3) of the Biden bill would establish a further exception to finality. This could occur after completion of a first federal habeas review where "a stay and consideration of the requested relief are necessary to prevent a miscarriage of justice." There is no limiting principle as to what constitutes a miscarriage of justice. As the Assistant Attorney General's letter notes, this would be a "free floating exception" that is linked neither to any past inability of the defendant to raise the claim, or to a situation where there is a colorable claim of factual innocence. Indeed, under the language of §2257(c)(3) the "miscarriage of justice" claim apparently could be raised successively in a second, third or fourth federal habeas petition.

Filing Period for Post Conviction Proceedings

The Ad Hoc Committee proposal provides for a 180-day filing period within which an initial federal habeas corpus petition must be filed. This period would be tolled during state post-conviction proceedings, with a 60-day extension for good cause. The Biden limitations period would be one year, with a possible extension of up to 90 days. Moreover, unlike our proposal, under S. 1754 the limitations period would be tolled while a petition for cert is filed from state collateral proceedings.

Chief Judge Clark's testimony before the Committee correctly noted that the one-year limitations period would do no more than codify the present average delay by a defendant moving from state post-conviction to federal habeas corpus proceedings. Since our Committee would assure that capital defendants will have counsel available throughout this period, 180 days seems adequate.

Rules of Procedural Default

The Biden bill, in effect, would preclude the application in capital cases of the rules of procedural default. That is, where the defendant fails to raise federal claims before the state court. See Wainwright v. Sykes, 433 U.S. 72 (1977) in which we held that a federal court on habeas may not consider a claim that could have been raised in state courts but was not - that is, where there was a procedural default. We recognized an exception to this rule where the defendant could show "cause" - i.e., a satisfactory reason for failure to raise the claim in a timely manner, and also show "prejudice". The constitutional error alleged must be so fundamental that it creates doubt as to the fairness of the entire proceedings.

The Ad Hoc Committee would codify the Wainwright test. The Biden bill would substantially change the law, resulting in further delay.

Standards of Counsel

Section 2261 of the Biden bill would set specific standards of counsel's experience required in capital cases. In general, representation at all stages would be limited to counsel with five years of experience after bar admission, and three years of felony litigation experience in the particular courts in which the case is being adjudicated. These are standards similar to those for counsel under the death penalty provisions of the Anti-Drug Abuse Act of 1988. These, of course, apply to federal cases.

It is difficult enough to find competent counsel in capital cases. Even where the states provide for compensation, it may be quite inadequate. Also capital cases last a long time, and counsel may find far more profitable representation. Also the standards Biden would require would exclude a good many lawyers with extensive criminal experience that may not have include any capital cases.

* * *

The Biden bill also would nullify Taeque and Penry v. Lynaught.

L.F.P., Jr.

ss

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CHARLES CLARK
CHIEF JUDGE
245 EAST CAPITOL STREET, ROOM 302
JACKSON, MISSISSIPPI 39201

February 22, 1990

*Received
2/22*

(601) 583-0911

(VIA FACSIMILE)

TO MEMBERS OF THE AD HOC COMMITTEE ON FEDERAL HABEAS
CORPUS REVIEW OF CAPITAL SENTENCES

Judge Roney and I propose the attached supplementary comment be issued by the committee to the Judicial Conference in connection with the consideration of the committee's report. We continue to feel that the criticism which focuses on successive petitions directed only to sentencing presents the area of most concern to members of the Conference. If anyone can think of a structure that would allow sentences to be attacked in successive petitions on a limited basis, we may wish to indicate that such an amendment would be acceptable. As of now, neither Judge Roney nor I can come up with an acceptable formulation.

Your most prompt consideration and response would be appreciated. Our comment should be a part of the materials which go to Conference members on March 5, so we really need to conclude the structure of our comment before the end of next week.

Respectfully,

Charles Clark

Attachment

Distribution:

Justice Lewis F. Powell
Judge William Terrell Hodges
Judge Paul H. Roney
Judge Barefoot Sanders
Professor Albert Pearson
Mr. William R. Burchill

**SUPPLEMENTARY COMMENT BY THE AD HOC COMMITTEE ON
FEDERAL HABEAS CORPUS IN CAPITAL CASES--
THE POWELL COMMITTEE REPORT**

Since our report in September 1989, a number of comments, reports, suggestions, and recommendations have been circulated. Senator Biden has introduced a bill addressing the subject; the American Bar Association Task Force on Death Penalty Habeas Corpus has published its final report and dissents; and the Federal Courts Study Committee has circulated a draft report. Recently, Judge Lay and seven other members of the Judicial Conference have circulated a resolution proposing specific modifications of the Powell Committee report.

The members of the Powell Committee have reviewed the committee report in light of these developments. We conclude that the Conference should adopt the report without any modifications. The following comments support this conclusion.

The overwhelming consensus of those who have studied the present situation advocates changes that would address fundamental faults in the present procedures. Perceptions differ, so do the theory and structure of proposed solutions.

The Powell Committee report does not purport to cure all of the faults in all of the systems involved. Rather, it recommends legislation designed to achieve a balanced compromise which would commit federal courts to a single but comprehensive and orderly district and appellate habeas corpus proceeding designed to assure fairness to the state and the defendant in exchange for state funded counsel for petitioners in state collateral procedure. This exchange is the heart of the committee proposal. It recognizes that if a state is willing to furnish a petitioner competent counsel for state court post-conviction proceedings, those proceedings can provide really meaningful collateral review--a process now left almost entirely to federal habeas corpus. The committee recommendation provides an automatic stay of execution until all state collateral and federal habeas corpus proceedings are completed. A time limitation would replace the present use of writs of execution to keep litigation before the courts. The time limit would cut in half the average of one year now lost when no collateral proceedings are before any court.

Habeas corpus reforms are frequently proposed, but seldom enacted. Unless proposed legislation balances the interests of the state and the defendant, it will have little or no chance of enactment. Our design proposes an opt-in compromise. States must voluntarily implement and

fund a program providing competent counsel and litigation costs which is not constitutionally compelled. The proposals advanced by others would mandate counsel standards, take away present procedural rights, and overrule existing Supreme Court precedent. Imposing these burdens will probably nullify any hope of enactment and, if enacted, such legislation would surely attract no state cooperation. In either event, present faults would continue to plague the process.

The most significant areas of difference between our committee report and other proposals are:

Counsel Standards. The Powell Committee recommendation provides that state procedures must result in the appointment of competent counsel. The Biden Bill and Judge Lay's group adopt the Anti-Drug Abuse Standards; the ABA Task Force adopts the much more complex ABA Guidelines for appointment and qualification of counsel.

Comment: The Powell Committee approach leaves counsel standards to individual states but keeps the ultimate question of competency in the hands of the federal courts. If the procedures a state adopts for appointing counsel are not valid, the guidelines and time limits do not take effect. Rather than saddle the defendant with counsel who would meet some pre-fixed requirement but might not be competent otherwise, the Committee recommends this be left to community standards and judicial development. Legislation has not been necessary to implement the constitutional definition of "effective assistance of counsel," and it would be counterproductive here. Times change more often than statutes, and a defendant is entitled to counsel that meets current notions

of competency. Experience has shown that capital defendants often receive excellent representation by counsel who might not fit the ABA or proposed drug statute standards.

Down Time. The Powell Committee requires that a federal petition be filed within 180 days of appointment of counsel, but this period is tolled whenever the case is in state court, and may be supplemented by 60 more days for good cause. Judge Lay's group proposes to double the time counsel can stay out of court to 365 days. The ABA and Biden proposals use 365 days plus 90 days.

Comment: This is a judgment call. Case studies show that allowing counsel to stay out of court for one year would not shorten present delays. In practice, petitions are sometimes required to be filed in a matter of days, or weeks, when an execution date has been set. One Hundred Eighty days is ample. That is the time approved by the Judicial Conference in 1974. Experience proves the wisdom of that decision. The same counsel serves the defendant in both state collateral and federal habeas. No re-education or study is needed. Since the proposal contemplates full litigation of all issues in state court, the move by the same counsel from state to federal court should not involve any major problem in investigation, preparation and drafting. Once the petition is filed in federal court, the limitation ends.

Successive Habeas Corpus Petitions. The Powell Committee would permit successive federal litigation only as a result of state action in violation of the Constitution, when the Supreme Court has announced a new retroactive right, or when alleged facts, if proven, would undermine the court's confidence in the jury's determination of guilt of the capital offense. The Biden Bill and ABA Task Force

would, in addition, permit further litigation as to any new legal predicate. This is contrary to present Supreme Court precedent on retroactivity. A successive petition would also be permitted "if necessary to prevent a miscarriage of justice." Judge Lay's group would allow successive petitions on the same grounds as the ABA Task Force plus allowing petitioner to attack the appropriateness of the sentence.

Comment: The Powell Committee opposes overruling Supreme Court precedent. In effect, the Powell Committee proposal would limit the "miscarriage of justice" concept to preventing a state from executing a defendant who could show facts which would undermine the court's confidence in the jury's determination of guilt of the capital offense. The general "miscarriage of justice" standard finds its definition so largely in the eye of the beholder rather than in accepted legal principles as to forfeit the measure of federal finality the committee's proposed compromise needs. To broaden this exception to finality with the Lay group's words "to undermine the court's confidence . . . in the appropriateness of the sentence of death" would open the door even wider to repetitious litigation. These appear to be new words in the federal law of habeas corpus. The committee is unaware of any decision which permits a federal court to grant constitutional relief from a state death sentence on the ground that the court does not have confidence that the sentence is "appropriate." The recommendation does not reflect whether the federal court would apply a state or federal standard of "inappropriateness," but the inference is that a federal standard would be used. We cannot imagine that any state would opt into a system which opened up this new avenue for successive federal litigation.

In the rare instance where constitutional claims affecting the sentences weren't known until fully counseled state and federal proceedings have

been exhausted, they can still be presented in state court.

The Powell Committee proposal is neither for nor against the death penalty. Its sole aim is to improve the process of federal habeas corpus by proposing a legislative compromise that has a realistic chance of being adopted and implemented. We continue to believe that the Powell Committee report in its present form holds the best promise to eliminate the faults that now hamper the rights of all.

Ad Hoc Committee File

MEMORANDUM

TO: Justice Powell February 23, 1990

FROM: Hew *Friday*

RE: Draft Ad Hoc Committee Comments. (*Charger by Clark*)

I have received the copy of a proposed draft concerning new habeas corpus measures sent by Judge Clark. The general approach is good. I think a few clarifications and additions are needed. Perhaps we can talk about those on Saturday. I have the time to write out some proposed comments for you that we could send out by the end of the day on Monday.

R.H.P

February 23, 1990

Ad Hoc Committee on Federal Habeas

Dear Charles and Paul:

I received today by "fax" your memorandum for the Judicial Conference. I am impressed that you both have continued to consider the various proposals to make changes in death penalty habeas corpus.

You will not be surprised to know that I find no merit in the Biden bill or in the ABA Task Force proposals. The Federal Court Study Committee report, only in draft form, is consistent with most but not all of our report and recommendation.

I may have some minor language changes to suggest in your draft, and will call you on Monday.

My best to you both.

Sincerely,

Hon. Charles Clark
Hon. Paul H. Roney

lfp/ss

cc: The Chief Justice
Hon. William Terrell Hodges
Hon. Barefoot Sanders
Professor Albert M. Pearson
William R. Burchill, Jr., Esquire

February 23, 1990

Ad Hoc Committee on Federal Habeas

Dear Chief:

I will deliver to you a "faxed" letter from Charles Clark, together with a "supplementary comment", that would go to members of the Judicial Conference on March 5.

After considerable further study, Judges Clark and Roney think the original proposal of our Committee is the best of those that have been submitted. I certainly agree that the Biden bill and the ABA report could well make the situation worse rather than better.

You may be too busy to give this any thought at this time. I will call Charles Clark on Monday and suggest some minor language changes.

Sincerely,

The Chief Justice

lfp/ss

27 FEB 1990

United States District Court

MIDDLE DISTRICT OF FLORIDA
UNITED STATES COURTHOUSE
TAMPA, FLORIDA 33602

WM. TERRELL HODGES
JUDGE

February 23, 1990

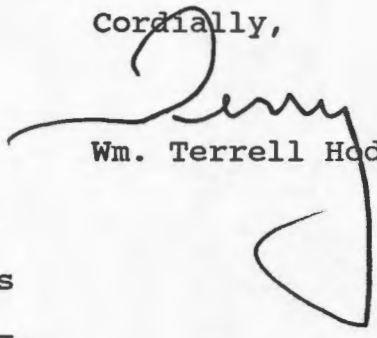
Honorable Charles Clark, Chief Judge
United States Court of Appeals
Fifth Circuit
245 East Capitol Street, Room 302
Jackson, Mississippi 39201

Dear Charles:

I endorse, with enthusiasm, your proposed supplementary
comment by the members of the Ad Hoc Committee to the Judicial
Conference.

Warm personal regards.

Cordially,


Wm. Terrell Hodges

cc: Honorable Lewis F. Powell
Honorable Paul H. Roney
Honorable Barefoot Sanders
Mr. Albert Pearson
Mr. William R. Burchill, Jr.

February 26, 1990

Ad Hoc Committee Supplementary Comment

Gentlemen:

I have reviewed the proposed Supplementary Comment prepared by Judge Clark and Judge Roney. I congratulate them on an excellent draft. I do have a few ideas for possible clarifications, and two proposed additions.

1. Counsel Standards. We might note that Judge Lay's group abandons our "opt-in" approach, in which States gain in finality in return for providing counsel. Instead, Judge Lay's proposal makes state habeas counsel mandatory in all cases under the threat of removing procedural default and exhaustion rules and eliminating the presumption of correctness of state court factfinding. His proposal would create a new right of "effective assistance" on state habeas, to be litigated case by case. This would result in increased litigation.

2. Down Time. I would delete the comment that this is a "judgment call." That could be interpreted as a statement that the 180-day period is not important to our proposal. You may want to note that under Judge Lay's plan the limitations period does not begin to run until after state habeas. This would omit one of the benefits of our plan -- the elimination of the execution warrant as the method to move litigation along in the state system. Also, if the limitations period does not run until the state habeas proceedings end, then there should be no automatic stay of execution until that time.

3. Successive Petitions. It might be desirable to comment separately on the Biden, Lay, and ABA changes as to successive petitions, and on their changes as to retroactivity. The present draft Supplementary Comment handles both of these under the successive petition heading. The draft

correctly points out that the Biden/ABA/Lay approach to successive petitions essentially provides no limits, and in fact may make successive petitions more available. This would hardly be in the public interest or consistent with a rational system of criminal justice. The Biden, ABA, and Lay proposals also separately propose statutory overruling of Teague v. Lane, the 1989 Supreme Court decision adopting Justice Harlan's approach to retroactivity on federal habeas corpus. I do not think the Judicial Conference should consider overruling this recent decision of the Supreme Court. I would omit the mention of retroactivity and "overruling Supreme Court precedent" under the "successive petitions" heading, and add a separate discussion of retroactivity along the lines of the attached "Rider A," that could follow the successive petition section.

4. Procedural Default. The Ad Hoc Committee report does not suggest any change in the current law of procedural default governed by Wainwright v. Sykes and its progeny. The Biden, ABA, and Lay proposals favor sweeping changes in the law. They propose, in varying degrees, to do away with state procedural default rules. This undermines the valid state interest in having objections raised at trial, when they can be dealt with, and not years later in habeas litigation on the eve of execution. By changing the law of procedural default in a manner far more favorable to defendants, these competing proposals ensure more delay than under the present system. I think we should add a new section opposing this attempt to overrule existing precedent in order to create more delay and piecemeal litigation. I attach a proposed "Rider B," that might follow the section on "Down Time."

The foregoing are merely suggestions. I emphasize again our debt to Judges Clark and Roney for taking on this project long after our Committee has been "discharged."

Sincerely,

The Chief Justice
 Chief Judge Judge Clark
 Judge Roney
 Judge Hodges
 Judge Sanders
 Prof. Pearson
 Mr. Burchill.

lfp/ss

Rider A

Retroactivity. The Ad Hoc Committee Report does not alter present law with respect to the retroactivity of new rules of criminal law. The Biden Bill, the ABA Task Force, and Judge Lay's group propose overruling Supreme Court precedent to make retroactivity rules more favorable to capital inmates.

Comment. Under the recent Supreme Court decision in Teague v. Lane, 109 S. Ct. 1060 (1989), a new rule of criminal procedure will not be applied retroactively on federal habeas unless the new rule places an entire category of conduct of defendants beyond the reach of the law, or the new rule is "implicit in ordered liberty." This current retroactivity law correctly reflects that federal habeas corpus should serve as a vehicle to correct errors in state judgments. It should not serve as a forum to argue for new rules of law, which would then be applied to overturn state court judgments that were correct at the time they were decided. No principle of justice or fairness is served by allowing a habeas petitioner to challenge his conviction on the basis of law that was not on the books at the time of his crime, trial, or appeal. As the Supreme Court, citing Judge Friendly, stated in Teague: "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." 109 S. Ct., at 1074. Retroactivity is an area that has been traditionally handled by the courts, not by legislation. The proposed statutory changes in retroactivity under the Biden, ABA, and Lay proposals will worsen the present situation with respect to finality and federal state relations in the area of capital habeas corpus without any gain in fairness.

Rider B

Procedural Default. The Ad Hoc Committee Report does not propose any alteration of the present law with respect to procedural default. The Biden, ABA, and Lay proposals, however, propose dramatic alteration of this entire area of the law.

Comment. The Biden, ABA, and Lay proposals would, under various formulations, require that federal courts ignore state procedural default rules any time the failure to raise a claim was due to "ignorance or neglect" of the prisoner or counsel. These proposals would overrule by legislation Wainwright v. Sykes, 433 U.S. 72 (1977), and the entire line of cases that follows it. State procedural default rules serve the valid purpose of requiring objections to be raised at trial, when corrective measures can be taken, not years later in a federal habeas petition. The drastic change advocated by the Biden, ABA and Lay proposals would again promote delay and piecemeal litigation. Addition of this provision to any reform package would make its passage less likely, and eliminate any incentive for the States to support it.

February 27, 1990

Ad Hoc Committee on Federal Habeas

Dear Chief:

I am sure you know that a number of new proposals with respect to federal habeas have or will be submitted to the Judicial Conference. These include proposals by Judge Lay, Judge Holloway, and the ABA Committee. As I understand these proposals, they could result in greater opportunities to abuse the writ of habeas corpus than exist at present.

Chief Judge Charles Clark and Judge Paul Roney - both on our Ad Hoc Committee - have drafted a statement to be submitted to the Conference that strongly supports the recommendations of our Committee. I have reviewed this, and with the help of Hew Pate, have suggested some changes. I have sent you a copy of my letter to Judges Clark and Roney.

I received (a week or so ago), the enclosed undated draft of a letter from the Justice Department to Senator Biden. This draft also strongly supports the conclusions and recommendations of our Committee. It is my understanding that this letter has been circulated among Senators and Members of Congress. In view of what will be before the Judicial Conference, perhaps you could suggest that this or a similar letter be sent by the Justice Department to the Judicial Conference.

I believe that Chief Judge Clark, Chairman of the Conference Executive Committee, will present the memorandum that he and Paul Roney prepared.

I write this letter to be sure that you are familiar with these developments. In view of the possibility that this legislation could make the situation worse, it may be prudent to leave the present law undisturbed.

Sincerely,

The Chief Justice

lfp/ss
Enc.

Important

Ad Hoc Committee

27 FEB 1990

File

See page

To: Judge Charles Clark
From: Al Pearson
UGA Law School
Re: Second Petition Study
Date: February 26, 1990

Enclosed is a copy of the preliminary¹ study that I have conducted on second or successive petitions in death penalty cases. The case list consists of all circuit court and Supreme Court decisions since 1976 involving the death penalty. The case list has been compiled over the years and kept up to date by the capital litigation unit in the Alabama Attorney General's office.

I had a team of third year law students look up every case on this list. I wanted them to classify every case as either a first or a second or successive petition case. In addition, I wanted to know whether the case was decided on substantive or procedural grounds and, if on the former, whether relief was granted or denied.

My overall objective was to determine how important the availability of second or successive petitions has been to the fairness of the death penalty litigation process.

As the statistical summary and Exhibit 1 reflect, the number of "successful" second or successive petitions -- either 6 or 8 depending on your counting method -- is quite low when you recognize that 481 decisions were rendered on the merits through December 31, 1989. Bear in mind that I leave out 73 circuit court decisions where the opinion involved a remand on procedural grounds.

In Exhibit 2, you have the citations to the 6 or 8 decisions involving the grant of relief in second or successive petition cases. Arguably, if competent counsel had been available to the defendant throughout state and federal habeas litigation, relief could and should have been granted in each case except Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), when the first habeas petition was considered.

¹I describe the study as preliminary because I have not personally checked all the cases listed. This was done by third year law students under my direction and supervision.

The results suggest fairly strongly that the Powell Committee's proposed curtailment of second or successive petitions will not heighten the chance of a miscarriage of justice in any death penalty case. In fact, when one considers the benefits of continuous legal representation which the Powell Committee report favors in state and federal post conviction review, capital defendants really gain more than the states. } 1/2

NOTE ON METHODOLOGY

A case was classified as either a first or second (or successive) petition based on the procedural history given in the opinion. By and large, the opinions in second (or successive) petition cases explicitly recognized their procedural posture as such. I don't think we made many errors, if any, at this level of differentiation.

After designating a case as a first or second (or successive) petition, we then described how the court disposed of the case. If a court addressed the issues on the merits or found some or all procedurally barred, we counted the decision as being on the merits and indicated a relief grant or relief denial. If relief was granted, we indicated whether the conviction was reversed or whether the sentence only was reversed.

Of course, because of certain habeas corpus doctrines like the exhaustion requirement, a significant number of cases were remanded for further consideration by the district courts or the state courts. Such cases were noted by the entry "remand procedural grounds."

A final category -- "not applicable" -- was employed to describe cases that did not fit into one of the preceding classifications. They happened to be picked up on the case list because they involved judicial action which resulted in an official reporter citation. The following list is illustrative of the "not applicable" category:

1. Petitions for rehearing
2. Application for a writ of mandamus
3. Filing of petition for certiorari
4. Motion to stay execution
5. Petition for certificate of probable cause to appeal
6. Appeal dismissal because district order was not final
7. Section 1983 actions
8. Motions to recall mandate
9. Order granting stay of execution
10. Order consolidating cases

cc: Justice Lewis F. Powell, Jr.
William R. Burchill, Jr.

STATISTICAL SUMMARY

This memorandum briefly describes the statistical data reflected in Exhibit Number 1, a copy of which is attached.

The universe of cases considered numbers 677. Since three (3) cases address both a first petition and a second petition, and two (2) cases report two individual second petitions consolidated into one case, the total cases considered more accurately totals 682.

Of the 682 cases noted above, 548 cases are segregated into the first petition category. However, as will be described in the methodology memorandum, many of these 548 cases are not true habeus corpus cases. Breaking down the 548 cases in the first petition category, the data reflects the following:

- (1) Relief was granted in 145 cases,
- (2) Relief was denied in 226 cases,
- (3) 61 cases were remanded for procedural grounds, and
- (4) 116 cases were categorized as not applicable opinions.

134 of the 682 cases are categorized as second or successive petition cases. Of these 134, relief was denied in 102 cases; 12 cases were remanded for procedural grounds and 12 opinions were categorized as not applicable. In the remaining eight (8) second or successive petition cases, relief was granted. These eight (8) cases are briefly described in Exhibit Number 2, a copy of which is attached.

Exhibit Number 1

TOTAL ENTRIES = 677 *

FIRST PETITIONS = 548

Relief Granted = 145

Relief Denied = 226

Remand Procedural Grounds = 61

Not Applicable = 116

SECOND PETITIONS = 134

Relief Granted = 8 **

Relief Denied = 102

Remand Procedural Grounds = 12

Not Applicable = 12

* Three (3) entries reported both a first and a second petition within the same opinion. Two (2) entries reported two individual second petitions, consolidated into one case.

** One petitioner succeeded in two individual second petitions at the Circuit Court level, both consolidated and addressed as one case. The Supreme Court vacated both grants of relief and remanded to the Circuit Court. Upon reconsideration by the Circuit Court, relief was again granted in both petitions. Statistically, this case is reported twice, reflecting four relief grants at the second petition level, two in each Circuit Court opinion. However, substantively, this case should be considered as granting relief in only two petitions at the second petition level. Thus, it should be considered that relief has been granted in six (6) cases rather than eight (8) cases.

Exhibit Number 2

<u>CASE NAME</u>	<u>PETITION NUMBER</u>	<u>RELIEF</u>	<u>GROUND</u> S
<u>Adams v. Wainwright</u> , 804 F.2d 1526 (11th Cir. 1986)	Second	Sentence Reversed	<u>Caldwell v.</u> <u>Mississippi</u> Violation
<u>Deutscher v. Whitley</u> , 884 F.2d 1152 (9th Cir. 1989)	Second	Sentence Reversed	Ineffective Assistance of Counsel
<u>Evans v. Lewis</u> , 855 F.2d 631 (9th Cir. 1988)	Second	Sentence Reversed	Ineffective Assistance of Counsel
<u>Potts v. Kemp</u> , 814 F.2d 1512 (11th Cir. 1987)	Second	(1) Conviction Reversed (2) Sentence Reversed	Faulty Jury Instruction Prosecutorial Misconduct in Argument
Note: Two separate petitions were consolidated in this opinion. Relief was granted in each petition.			
<u>Potts v. Zant</u> , 734 F.2d 526 (11th Cir. 1984)	Second	(1) Conviction Reversed (2) Sentence Reversed	Faulty Jury Instruction Prosecutorial Misconduct in Argument
Note: Same case as <u>Potts v. Kemp</u> , 814 F.2d 1512 (11th Cir. 1987). Supreme Court vacated and remanded in 106 S.Ct. 3328.			
<u>Songer v. Wainwright</u> , 769 F.2d 1488 (11th Cir. 1985)	Second	Sentence Reversed	Failure to Consider Non- statutory Mitigating Factors

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

February 27, 1990

(601) 883-0911

CHARLES CLARK
CHIEF JUDGE
248 EAST CAPITOL STREET, ROOM 302
JACKSON, MISSISSIPPI 39201

(VIA FACSIMILE)

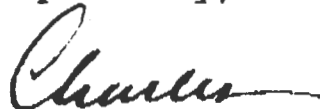
FOR THE JUDICIAL CONFERENCE
March 13-14, 1990

TO MEMBERS OF THE AD HOC COMMITTEE ON FEDERAL HABEAS
CORPUS REVIEW OF CAPITAL SENTENCES

Justice Powell has made excellent suggestions and I have attempted to incorporate them in the proposed redraft. I have omitted the reference to the Federal Court Study Committee draft report since I am advised the final report will take no position on any proposal. In the text of Justice Powell's "Rider A and Rider B," I have taken the editorial license he extended and deleted cites (which I don't expect Conference members to consult on reading our otherwise informal comment), one sentence which I took to largely paraphrase the quote from *Teague*, and an adjective and adverb or two. I have also added three sentences to the final paragraph of the comment on successive petitions to reflect the statistical work just completed by Professor Pearson.

Would all of you take another look and give me the benefit of your suggestions?

Respectfully,



Attachment

Distribution:

Justice Lewis F. Powell
Judge William Terrell Hodges*
Judge Paul H. Roney*
Judge Barefoot Sanders*
Professor Albert Pearson
Mr. William R. Burchil

*with copy of Professor Pearson's summary sheet

February 28, 1990

Dear Al:

Thank you for sending me a copy of your memorandum to Chief Judge Charles Clark, together with your "preliminary study". I must say it hardly looks preliminary.

Subject to taking a closer look, the results of the study are as follows:

1. 682 cases were reviewed.
2. 548 of these were the first habeas petition filed. Not all of these were "true" habeas corpus cases.
3. Relief was granted in 145 cases, denied in 226. 61 cases were remanded on non-habeas grounds, and 116 cases were "categorized as not applicable opinions."

We are primarily interested in successive habeas petitions. The study states that 134 of the 682 cases were second or third petition cases. Of these, relief was denied in 102 cases; 12 were remanded on non-habeas grounds, and the other cases were inapplicable.

The most significant statistic is that of the 134 second or successive petition cases, relief was granted in only 8 of them..

Sincerely,

Professor Albert M. Pearson
School of Law
University of Georgia
Athens, Georgia 30602

lfp/ss

lfp/ss 02/28/90 HEWM2 SALLY-POW

Professor Pearson's Study of Second Habeas Cases

MEMO TO HEW:

I enclose Al's Statistical Summary. The bottom line statistic, if I understand Al correctly, is that of the 134 second or successive habeas petition cases only 8 resulted in relief being granted.

I am sending you the first four pages in Al's large study that takes up each of the successive petition cases.

L.F.P., Jr.

ss