



3-1990

Habeas Corpus Committee - Correspondence

Lewis F. Powell Jr.

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

My copy

Ad Hoc File

(501) 353-0911

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

March 1, 1990

(VIA FACSIMILE)

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

This fax was just received from Chief Judge Lay. I thought you would want to have it in connection with your consideration of the proposed supplementary comment.

Respectfully,

Charles

Attachment

Distribution:

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

8 612 290 3309

MAR 01 '90 09:46 CIRCUIT EXECUTIVE - ST PAUL

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DONALD F. LAY
CHIEF JUDGEP. O. BOX 70008
ST. PAUL, MINNESOTA 55178UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

February 28, 1990

Ms. Karen K. Siegel
Administrative Office of
the U.S. Courts
Washington, D.C. 20544Re: Powell Committee - Habeas Corpus Reform Act
Judicial Conference of the United States

Dear Karen:

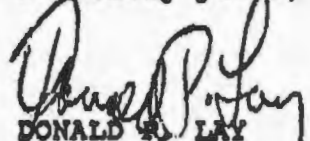
I have visited with Judge Charles Clark, and we are in accord as to how the Powell Report is to be presented to the Conference.

After the Powell Report has been moved for adoption and seconded, I will then move to adopt the Powell Report with certain modifications as expressed through the resolution, which I now enclose. This has been amended from the earlier draft and I would hope you can distribute it to all conferees. We will offer the modifications in five subsections (A through E) and will ask that each subsection be considered separately with the idea in mind that discussion should be carried on concerning each subsection. A separate vote would follow discussion on each subsection.

As I explained to Judge Clark, I anticipate that there may be different votes on different subsections and some modifications might be adopted and others rejected.

If there is any problem with this, please let me know.

Sincerely yours,


DONALD F. LAYDPL/ja
Enclosure
cc: Judge Charles Clark

8 612 290 3309

MAR 01 '90 09:47 CIRCUIT EXECUTIVE - ST PAUL

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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 with 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

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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, regarding those proceedings at which competent counsel was not present.

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 have not. The result would be confusion and a proliferation of litigation. Hence, we

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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 for the language substituted 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, however, favors a change in that recommendation so that it be clear that the Conference 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 also undermine the court's confidence 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:

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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, which should be one year, 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.

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

March 1, 1990

Ad Hoc Committee on Habeas Corpus

Dear Chief:

I will deliver with this letter a facsimile copy of a "supplementary comment" prepared by Judges Clark and Roney. Copies of it have gone to the members of our Committee, and I believe that Judges Hodges and Sanders have expressed their approval.

I think it would be helpful to have Judge Clark present this supplementary comment on behalf of the Committee. The Judicial Conference heard me at the September session.

Also I have just received Judge Lay's letter, and his proposed resolution on habeas corpus. I send you copies.

Sincerely,

The Chief Justice

lfp/ss

cc: Hon. Charles Clark
Hon. Paul H. Roney
Hon. William Terrell Hodges
Hon. Barefoot Sanders
Professor Albert M. Pearson
William R. Burchill, Jr., Esquire

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, and the American Bar Association Task Force on Death Penalty Habeas Corpus has published its final report and dissents. Recently, Chief 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. The general criticism is that litigation takes too long and is repetitious. 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 competent, 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 moving in 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 states which opt in would have to set standards under a court or legislative plan which must result in the appointment of competent counsel. The Biden Bill and Judge Lay's group would mandate states follow the Anti-Drug Abuse Standards; the ABA Task Force adopts the much more complex ABA Guidelines for appointment and qualification of counsel. Both the ABA Task Force and Judge Lay's group require the mandatory standards for trial, direct appeal, and collateral proceedings.

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.

We note that Judge Lay's group abandons the Powell Committee's "opt-in" approach, in which states gain in finality in return for providing counsel. Instead, these proposals make state habeas counsel mandatory in all cases under penalty of removing procedural default and exhaustion rules and eliminating the presumption of correctness of state court factfinding. These proposals would create a new right of "effective assistance" in state collateral proceedings to be litigated case-by-case. This would result in increased litigation.

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 days for good cause. The ABA and Biden proposals would allow counsel to stay out of court 365 days plus 90 days. Judge Lay's group recommends not only doubling the time, but also not starting to measure it until after all state collateral proceedings are complete. When this recommendation is coupled with the automatic stay of execution, a defendant's counsel could stay out of court indefinitely.

Comment: 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.

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 petitioners.

Comment. Under the recent Supreme Court decision in *Teague v. Lane*, 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 reflects that federal habeas corpus should serve as a vehicle to correct errors in state judgments. The Powell Committee is of the view that retroactivity should not create 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. The Supreme Court 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." 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.

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* and cases that follow 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 change advocated by the Biden, ABA, and Lay proposals would promote, not lessen, 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.

Successive Habeas Corpus Petitions. The Powell Committee would permit successive federal litigation only (1) as a result of state action in violation of the Constitution, or (2) when the Supreme Court has announced a new retroactive right, or (3) when new facts are alleged which could not have been discovered earlier; and the allegations 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 a successive petition on any new legal predicate by allowing successive petitions "if necessary to prevent a miscarriage

of justice." Judge Lay's group would allow successive petitions on all of these same grounds plus allowing petitioner to attack the appropriateness of the sentence.

Comment: 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.

A review of every one of the 677 federal habeas corpus cases decided since 1967 that involved the death penalty reveals only 5 cases which on a successive petition resulted in relief as to the sentence. None involved Brady material. All 5 concerned matters of record which could and should have been raised in prior proceedings. In the hypothetical instance where a constitutional claim affecting the sentences wasn't discovered until fully counseled state and federal proceedings had been exhausted, it 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.

OK

U.Va. Teaching

MEMO TO MIKE:

This is a checklist of things you will do to help me prepare to teach. I list them below in no particular order.

1. ^{a.} ~~My~~ memo to you of February 27 on the "Racial Justice Act".

2. ^{a memo on} Capital cases involving minor offenders. ^{3.} Also a memo, with a brief summary paragraph, on all capital cases decided since McCleskey.

4. ~~Notes on Federalism~~ See correspondence with Prof. [unclear]

~~2. F. J.~~ L. F. J.

4. ~~a memo~~ "help me on ~~Federalism~~ Federalism. He also is reviewing my draft of a statement on the work of the Ad Hoc Committee.

cc to New

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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

March 5, 1990

(601) 353-0911

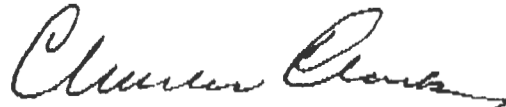
(VIA FACSIMILE)

Ms. Karen Siegel
Administrative Office of the
U. S. Court
Washington, DC 20544

Dear Karen:

I enclose the supplementary comments of the former Powell Committee members regarding developments that have occurred since the committee's report was submitted to the Conference. Please distribute these comments to the members of the Conference with the revised consent and discussion calendars.

Sincerely,



Attachment

cc: Justice Lewis F. Powell
Judge William Terrell Hodges
Judge Paul H. Roney
Judge Barefoot Sanders
Professor Albert M. Pearson
William R. Burchill, Jr., Esq.

(w/o attachment)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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

March 5, 1990

(601) 353-0911

VIA FACSIMILE

The Hon. William H. Rehnquist
Chief Justice of the United States
Supreme Court
Washington, DC 20543

Dear Chief:

I enclose a copy of the supplementary comment of the former Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, which is being distributed to the members of the Conference today.

Sincerely,



Enclosure

cc: Justice Lewis F. Powell
Judge William Terrell Hodges
Judge Paul H. Roney
Judge Barefoot Sanders

21 MAR 1990

Ad Hoc File

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

WASHINGTON, D.C. 20544

March 16, 1990

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

Dear Justice Powell:

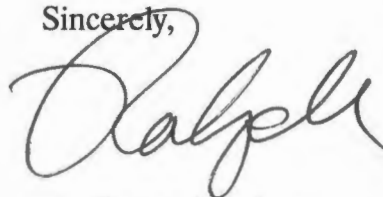
Thank you for your characteristically gracious note of March 14th concerning the dinner and reception honoring the Campbells and Godbolds. It was wonderful to have you and Mrs. Powell there and I am pleased that you both felt that it was a good occasion. Certainly the honored guests deserved the recognition which they received.

It is particularly encouraging to know that you and your colleagues feel that we are running things reasonably well here at the Administrative Office. As you know we are called upon to implement policies established by the Judicial Conference and the Congress which are not always popular which frequently puts us in the middle.

One of the things that I have learned during my nearly five years as Director is the exceptionally high regard and esteem in which you are held universally by federal judges and others in the court family. I noticed, of course, your willingness to take on what in many ways was a thankless job to chair the Capital Habeas Corpus Ad Hoc Committee assignment at the request of the Chief Justice. I know it was not easy and I am afraid it was not pleasant but you, as usual, heeded the call to duty when it would have been very easy to say no.

With best wishes for your good health and well being.

Sincerely,



L. Ralph Mecham

March 19, 1990

Ad Hoc Committee on Federal Habeas

Dear Colleagues and Friends:

Two rather unwelcome changes were made in our recommendation, both by a vote of 14-12. Charles thoughtfully came to my Chambers and reported both about the debate and the results.

The Chief Justice was disappointed but thought that at least in the long term the work of our Committee will be positive. He mentioned that two members of the Conference who voted for the amendments were from the District of Columbia, which does not have either capital punishment or a dual system of state and federal habeas corpus. The Chief also said that Charles and Barefoot "fought the good fight."

From my viewpoint I am happy to have served on the Committee. We met formally six times, and conferred informally with each other many times. I will always count each of you as friends. I include Al Pearson and Bill Burchill, who provided the necessary staff work with great skill and devotion.

Sincerely,

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

lfp/ss

My Ad Hoc
File

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

11
/

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

Dissenting Statement of Congressman Kastenmeier

I support the committee's recommendation that the states be encouraged to develop meaningful plans providing administrative remedies that would satisfactorily resolve prisoner grievances and thereby diminish the need for such prisoners to have their grievances litigated in the federal courts. I am unconvinced, however, that deficiencies in the the Civil Rights for Institutionalized Persons Act (CRIPA) are responsible for the relative absence of state plans now in place. Arguably, CRIPA has never been properly implemented by the United States Department of Justice. In my home state of Wisconsin, for example, a plan was developed but never implemented, solely because the United States Department of Justice never acted on Wisconsin's proposed plan. It may be that Congress needs to reassess the Act in light of the Committee's criticisms, but I do not believe that the solution necessarily lies in Congress relinquishing to the courts all responsibility for ensuring the adequacy of the state plans.

? upper case to honor dissenters' preference of habeas corp

D. State Prisoner Habeas Corpus Petitions in Federal Courts

Habeas corpus petitions, particularly those from state prisoners, constitute a substantial portion of the federal courts' caseload. The writ is the means by which state prisoners challenge their state convictions on federal constitutional grounds. This matter is therefore of central concern to the nation and to its federal courts. Simultaneously with this report, Congress is considering several wide-range recommendations for revising habeas corpus procedures in death penalty cases. There are

number of grew from 5,037 in 1945 to 10,521 in 1989

*You showed how
an April document from
honda. Attached in format
come to us*

proposals relative to non-death cases in various stages of development. Given the research and activity already in progress, we have decided to make no recommendations on habeas corpus law or procedure. We are bound to note, however, that the 537 habeas corpus petitions filed in 1945 grew to ~~9,867~~ in ~~1986~~—an increase of ~~1,737~~ percent.

10,521 1989 Over 1,800

E. The Chief Justice and the Chair of the Conference of Chief Justices Should Create a National State-Federal Judicial Council

The committee endorses the suggestion of the chairman of the Conference of Chief Justices for the creation of a national state-federal council, composed of an equal number of state and federal judges, to study and submit recommendations to ease friction and promote cooperative action between the two court systems. Areas in which it might offer recommendations are readily apparent. We have recommended that such a council work with the State Justice Institute to encourage effective state ~~correctional-administrative~~ grievance procedures. The council might explore possibilities for alternate, innovative procedures for habeas corpus cases and make recommendations to the courts, Congress and state legislatures for implementation. Problems of trial scheduling often create friction. Attorney discipline in state and federal courts is often uncoordinated. These are but a few of the areas in which the proposed council might offer recommendations in the interests of healthy judicial federalism. Implementation of such projects might be of interest to the State Justice Institute in keeping with the congressional intention in establishing the Institute.

PRISON

with
In Part II, see also ~~Ch. 2, § C~~; Ch. 2, § C, on developing ^{with} the State Justice Institute, more effective ~~PLEASE SUPPLY THE REST—MS. UNCLEAR.~~

For further analysis, see Part III at X. See Chapter 3, § C, which proposes to shift railway workers' injury cases from the federal courts to administrative workers compensation systems, possibly state systems.

prison grievance mechanisms.

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Chapter II

D. State Prisoner Habeas Corpus Petition in Federal Courts

Separate Statement and Dissent by J. Vincent April (3/6/90)

I regret that the Committee has elected to retreat from its initial public position on state prisoners' federal habeas corpus petitions. I remain unconvinced that the present proposals before Congress for revising habeas corpus procedures in death penalty cases should in any way limit this Committee's need to address the oft raised contention that the federal courts are subjected to unnecessary and overwhelming numbers of successive habeas corpus petitions and evidentiary hearings in non-death penalty cases brought by state prisoners. The information brought before this Committee in my opinion did not support either that contention or the need to impose new limitations on either successive petitions or evidentiary hearings in these actions. Indeed the primary assumption of the Powell Committee report is that the present federal habeas corpus procedures employed to adjudicate constitutional claims of state prisoners is inherently sound even in death penalty cases and will continue to remain a viable option in states which do not opt into the alternate "fast track" procedure.

In reality the federal courts have little difficulty under existing law disposing of improper successor petitions and little need in most cases to conduct evidentiary hearings except where state courts have either denied the petitioner a necessary hearing or have provided a deficient hearing under federal law.

I continue to support two of the original three tentative recommendations of this Committee which addressed federal habeas corpus petitions by state prisoners. The Committee should recommend in accordance with our tentative recommendations that:

1. Congress should make no change regarding the standards for hearing state prisoners' successive habeas corpus petitions under 28 U.S.C. § 2244.
2. Congress should make no change in the law respecting fact-finding procedures in habeas corpus cases.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

March 19, 1990

(601) 353-0911

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

21 MAR 1990

File

Teague - 27

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

Dear Judges:

I enclose an extract from the final draft of the Federal Courts Study Committee report. It proposes:

(1) Make no change regarding successive writs.

Retain Sanders limits on res judicata effect of prior writ adjudications.

(2) "Codify and clarify" Teague/Penry rules on retroactivity.

(a) Add "clearly foreshadowed" to Justice Harlan's two-part test.

(b) Add an exception for Brady-type material.

I had understood the comments on habeas corpus in the preliminary report might be dropped. I guess they couldn't resist.

Best regards,

Charles

Attachment

Distribution:

Justice Lewis F. Powell
Judge William Terrell Hodges
Judge Paul H. Roney
Judge Barefoot Sanders
Professor Albert M. Pearson
William R. Burchill, Jr., Esq.

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

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 ^{FEDERAL} 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?

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

Federal Courts Study Committee

22716 United States Courthouse
Independence Mall West
601 Market Street
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Judge Joseph F. Weis, Jr.
Chairman

Telephone: 215-597-3320
Facsimile: 215-597-3350

William K. Slate, II
Director

April 2, 1990

Steven G. Gallagher
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Judge Jose A. Cabranes
Chief Justice Keith M. Callow
Chief Judge Levin H. Campbell
Edward S.G. Dennis, Jr.
Senator Charles E. Grassley
Morris Harrell
Senator Howell Heflin
Congressman Robert W. Kastenmeier
Judge Judith N. Keep
Professor Rex E. Lee
Congressman Carlos J. Moorhead
Diana Gribbon Motz
Judge Richard A. Posner

The Honorable Lewis F. Powell, Jr.
Retired Associate Justice
Supreme Court of the United States
Supreme Court Building
Washington, D.C. 20543

Dear Justice Powell:

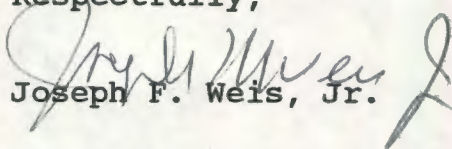
As Chairman of the Federal Courts Study Committee I am pleased to present to you our Report and Recommendations.

This Report is the culmination of fifteen months of intensive review of the judicial system as required by the Federal Courts Study Act, Pub. L. No. 100-702, §§ 101-109, 102 Stat. 4644 (1988). It is the first such extensive study of the Federal Courts in their 200-year history, and the Recommendations address a broad array of subjects. Among others, we have touched on such matters as the role of the Federal Courts, allocation of caseloads among various fora, improving efficiency in adjudication, structural reorganization, Congressional relationships, administrative processes, and planning for the future.

We have not attempted to prepare a pre-packaged legislative program, but rather have generally preferred to present our proposals in the form of concepts, which can be reduced to specifics in the implementation process. Our Recommendations are addressed to the Judiciary, Congress, Executive Departments, the research communities, and the bar. We hope that these Recommendations will serve as the basis for needed improvements in a dedicated, but overloaded judicial system.

you | The Federal Courts have earned the confidence of the American public in the last 200 years, but the demands on the system in recent years have imposed burdens that may no longer be ignored. We hope that our Report will awaken interest in measures to strengthen the courts and encourage consideration of matters that we were unable to pursue during the short life of the Committee.

Respectfully,


Joseph F. Weis, Jr.

April 3, 1990

Dear Bill:

It was thoughtful of you - as usually is true - to send me an early copy of the Report of the Federal Court Study Committee. You had a strong Committee, and I think it was fortunate to have you as its Director. The Report is high quality.

It was good to see you yesterday, and meet that lovely little girl. Keep in touch.

Sincerely,

William K. Slate, II, Esquire
Director, Federal Court Study Committee
22716 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1722

lfp/ss

April 4, 1990

Dear Joe:

I have now had an opportunity to take a fairly close look at the Report and Recommendations of your Federal Courts Study Committee. It is impressive, and reflects an enormous amount of thought and work.

You had a strong committee, and I have known and admired Bill Slate for many years. I am sure he was a fine Director. But in the end, the responsibility was yours.

I am sure you are relieved to be able to return full time to serving as a federal judge.

Sincerely,

Hon. Joseph F. Weis, Jr.
Chairman
Federal Courts Study Commission
22716 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, PA 19106-1722

lfp/ss

cc: William K. Slate, II, Esquire



JOSEPH F. WEIS, JR.
UNITED STATES CIRCUIT JUDGE
PITTSBURGH, PENNSYLVANIA, 15219

✓
12 APR 1990

April 10, 1990

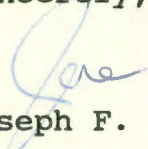
Dear Justice Powell:

Thank you very much for your kind remarks. I am relieved that the Committee Report could be presented in time to meet the Congressional deadline. That achievement was due in no small part to Bill Slate's excellent management and scheduling abilities.

Now that I am Chairman Emeritus, I am enjoying the return to reading briefs and writing opinions.

Best personal wishes.

Sincerely,


Joseph F. Weis, Jr.

The Honorable Lewis F. Powell, Jr.
Retired Associate Justice
The Supreme Court of the United States
Supreme Court Building
Washington, D.C. 20543

April 27, 1990

Ad Hoc Committee on Federal Habeas

MEMO TO COMMITTEE MEMBERS:

A member of the staff (Ms. Virginia Sloan) of Chairman Kastenmeier of the House Judiciary Committee called me today to advise that there will be a hearing before the Committee at 9:30 a.m., on Wednesday, May 16, on the subject of federal habeas corpus.

Chairman Kastenmeier plans to propose legislation that will differ in some respects from that recommended by the Senate Judiciary Committee. I inferred that the Kastenmeier bill also will differ from the Ad Hoc Committee's proposal. The work of our Committee never seems to end.

I have requested that a copy of the Kastenmeier bill be sent to the Chief Justice, each of you, Al Pearson and Bill Burchill. I am under the impression that it may be several days before the Kastenmeier bill will in fact be available.

L.F.P., Jr.

ss

cc: The Chief Justice
Hon. Charles Clark
Hon. Paul H. Roney
Hon. Barefoot Sanders
Hon. William Terrell Hodges
Professor Albert M. Pearson
William R. Burchill, Jr., Esquire
Hewitt Pate, Esquire

April 27, 1990

Dear Chairman Kastenmeier:

I was informed today by Ms. Virginia Sloan of your staff that your Committee will hold a hearing on federal habeas corpus on Wednesday, May 16, probably at 9:30 a.m.

In view of the serious problem of repetitive habeas corpus review, particularly in capital cases, in 1988 Chief Justice Rehnquist appointed what became known as the Ad Hoc Committee on Federal Habeas Corpus. I enclose a list of its members. Professor Pearson of the University of Georgia Law School served as reporter of the Committee. William R. Burchill, Jr., General Counsel of the Administrative Office, served as counsel.

I assume that your Committee has, or will have, the report and recommendations of the Senate Judiciary Committee on this subject. Senator Biden introduced a bill that differs in some major respects from our recommendation. Senator Thurmond has introduced a bill that embodies our proposal, as well as a separate bill of his own.

My understanding is that you would welcome testimony at the hearing on May 16. Probably a member of our Committee will testify as to the need for legislation. Possibly Professor Pearson also will be available to testify.

It will be helpful if the staff of your Committee would send pertinent letters or other communications as well as copies of any proposed legislation under consideration by your Committee, directly to the members of my Committee, to Professor Pearson at the Law School of the University of Georgia, and to William Burchill, General Counsel of the Administrative Office. Of course, the Chief Justice, who initiated our study, should be kept advised.

With best wishes.

Sincerely,

Hon. Robert W. Kastenmeier
Chairman
Committee on the Judiciary
2138 Rayburn HOB
Washington, D. C. 20515-6216

lfp/ss
Enc.
cc: The Chief Justice

The Chief Justice
U.S. Supreme Court
Washington, D. C. 20543

Hon. Charles Clark
Chief Judge
U.S. Court of Appeals for
the Fifth Circuit
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Hon. William Terrell Hodges
United States District Court
Middle District of Florida
United States Courthouse
Suite 108
Tampa, Florida 33602

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

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

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

*Suspended
to May 11*

CHAMBERS OF
THE CHIEF JUSTICE

April 30, 1990

Dear Lewis,

I see from your letter of April 27th that you or another member of your "ad hoc Committee" will testify before Bob Kastenmeier's Judiciary Subcommittee on May 16th about the need for reform of federal habeas review of capital sentencing. I am going to speak to the A.L.I. on the preceding day, and am devoting my entire talk to this subject -- whether the members of the A.L.I. like it or not! I will send you a copy of my remarks in advance.

Sincerely,

Bin