5-1990

Habeas Corpus Committee - Correspondence

Lewis F. Powell Jr.

101 N. Carolina Ave. S.E.
Washington, D.C. 20003
H: (202) 543-5227
W: (202) 633-4409

Mr. Kyle Crichton
Editorial Page
The New York Times
229 West 43d St.
New York, N.Y. 10036

May 1, 1990

Dear Mr. Crichton:

Enclosed please find for your consideration a reply to the column on habeas corpus reform by Judge Irving Kaufman that appeared in this morning's New York Times. Habeas corpus reform is certainly an important and topical issue that deserves treatment in the Times. However, as the enclosed reply makes clear, Judge Kaufman's piece presents only one side of a complex issue and demands an informed response. As both pieces make clear, a number of legislative proposals for habeas corpus reform are pending before the Congress and will be acted upon before the close of this session.

I recently completed a clerkship on the United States Supreme Court, and I am currently employed by the Department of Justice in Washington, D.C. You may reach me by telephone during the day at (202) 633-4409, in the evening at (202) 543-5227.

Thank you for your time and attention.

Sincerely,

Andrew G. McBride

Encl.

FEDERAL EXPRESS

NO JUSTICE--AT ANY COST

by Andrew G. McBride[1]

I turned with great interest and anticipation to Judge Kaufman's recent commentary on habeas corpus reform contained in these pages. Judge Kaufman is a well-respected jurist of deserved scholarly reputation, and I have often found myself engrossed in and enlightened by his careful analysis of topical legal issues in this publication. Only in the context of such great expectations could Judge Kaufman's cursory treatment of the issue of habeas corpus reform so disappoint and dismay. Judge Kaufman misses the mark in both description and prescription in the area of federal habeas corpus litigation. Here's why.

Judge Kaufman begins by painting a picture of what he terms "speedy justice" in the context of death penalty litigation. The Supreme Court has "cut back on the scope of the writ" threatening to render it "a dinosaur on the legal landscape." This in turn conjures up images of an unseemly rush to the gallows--death row inmates with meritorious legal claims are barred at the federal court house door. A glance at the true state of death penalty litigation in this country reveals that Judge Kaufman's vision is nothing less than surreal. Far from a dinosaur teetering on the brink of extinction, the federal writ of habeas corpus is more aptly compared to Carl Sagan's universe: it is constantly expanding.

Judge Kaufman makes reference to the venerable origins and constitutional status of the "Great Writ" of habeas corpus. He then suggests that this august legal tool is in jeopardy. The reference is misleading.

The original writ of habeas corpus was a civil suit filed either to challenge detention without trial or to challenge detention pursuant to the judgment of a court with no jurisdiction to try the defendant. The writ was unavailable where the defendant was accorded a full and fair trial. This was the conception of the Great Writ when Congress first extended federal habeas corpus to state prisoners in 1867. Since that time, the writ has, by judicial interpretation, grown to bear little resemblance to its venerable English forbear. After trial, after appeal, and after filing a state court petition for habeas corpus, prisoners use the relatively new, substantially

---

[1] Mr. McBride completed a clerkship on the Supreme Court in June, 1989 and is presently employed at the Department of Justice in Washington, D.C. The views expressed herein represent his personal opinions.

expanded Great Writ to contest their convictions and sentences again and again and again. The only limit on the number of federal habeas corpus petitions a capital defendant may file today is the creativity of defense counsel.

A few facts about death penalty litigation and the use of habeas corpus today confirm that, contrary to Judge Kaufman's dire pronouncements, the new Great Writ is alive and well--indeed it has effectively nullified the death penalty as a sanction for first degree murder in this country. The Justice Department reports that, in 1988, 296 individuals were convicted of first degree murder and sentenced to 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. In fact, in 1988 more death row inmates died of natural causes than had their sentences executed. The reason is the endless lottery of habeas corpus--file a "new" (or slightly refurbished) claim before a new judge and perhaps another stay of execution will be forthcoming.

Judge Kaufman's three prescriptions for reform would only exacerbate the abuse of our habeas corpus system that now plagues capital litigation. First, Judge Kaufman would make all new legal rules fully retroactive "at least with respect to capital crimes." This would effectively reconstitute the Great Writ as an endless time machine. For example, a defendant properly tried and convicted of murder in 1980 could succeed in delaying the execution of his sentence for a decade, and then simply enter his habeas corpus time machine to argue that his conviction is contrary to a new Supreme Court decision issued in May 1990. Judge Kaufman argues that this retroactivity is necessary "to provide state courts with an incentive to apply the Constitution fully and fairly." It is difficult to see how this is so since the state court judge in 1980 cannot with any certainty predict the results of cases that might be decided ten years later. Perhaps Judge Kaufman simply means that state court judges must be given an incentive to guess for the most "pro-defendant" future.

Judge Kaufman's second suggestion is equally infirm. He would have Congress codify a "deliberate bypass" test where a prisoner omits a legal argument from an initial federal habeas corpus petition but includes it in a second petition. Under this "subjective standard," the state would have to prove that the prisoner "omit[ted] the new claim from the original petition for the purpose of delay." No litigant has a greater incentive to "sandbag" by withholding arguments for use in later habeas corpus petitions than an inmate on death row. A capital litigant seeking delay has little to gain by putting forward all the best legal challenges to his or her conviction in a timely manner. Judge Kaufman's "subjective standard" indulges this incentive and

would effectively assure the filing of claims in a piecemeal fashion in an endless series of habeas corpus petitions.

Finally, Judge Kaufman would substantially revise the doctrine of "procedural default." This refers to a situation where a state prisoner has failed to properly raise an argument in his state court trial or appeal, but wishes a federal court to nonetheless address the argument in the context of a federal habeas corpus proceeding. Because allowing such claims would encourage litigants to violate state rules of procedure, the Supreme Court has developed what is known as the "cause and prejudice test." If a state prisoner can show "cause" for not raising the issue (e.g., the legal argument was unavailable or his counsel was incompetent) and prejudice (e.g., that the alleged error affected the outcome at trial) the federal court will entertain the claim despite the "procedural default" in state court. In addition, the Supreme Court has indicated that it would waive the "cause and prejudice" requirement if faced with a possible "miscarriage of justice," such as the conviction of a possibly innocent person. Thus, contrary to Judge Kaufman's suggestions, these rules are neither "rigid," nor are, as he asserts, "the most compelling cases . . . barred from review because of a technical slip by the defense counsel." Under Judge Kaufman's view, habeas corpus petitioners would only be bound by their attorneys' failure to raise claims in the state courts where the attorney swore under oath that the decision was a tactical one, and not an error. The incentives for attorney misbehavior in capital litigation that would be engendered by Judge Kaufman's test are not pleasant to contemplate.

Thus, there is no rush to the gallows, the Supreme Court has not eviscerated the Great Writ, and the only crisis at hand is the complete and utter nullification of the penalty for first degree murder in 36 States. Rather than heeding Judge Kaufman's suggestions, Congress should turn its attention to Justice Powell's carefully balanced proposal for habeas corpus reform which has the support of the Bush Administration. Under Justice Powell's proposed legislation, States that provide quality counsel to capital litigants in state court would benefit from a statute of limitations and strict rules concerning successive petitions for habeas corpus in federal court. That is the start of true reform.

The New York Times

DATE: 5-1-
PAGE: A23

Speedy Justice — At What Cost?

By Irving R. Kaufman

Federal habeas corpus may become a dinosaur on the legal landscape unless Congress acts quickly to preserve its existence. Recent Supreme Court decisions have cut back the scope of the writ, and a bill circulating in Congress would further limit its availability.

For years, Federal habeas corpus has proved an essential guardian of individual liberties and an important vehicle for establishing landmark constitutional law. The writ remains the primary means by which state prisoners can challenge in Federal court the constitutionality of their convictions or sentences.

Because of frequent abuse through repeated meritless applications for review, however, the writ's unique history and function seem on the verge of dilution. A majority of the Supreme Court and Congress appear preoccupied with the problems of delay caused by piecemeal and repetitious litigation rather than with the need to safeguard essential liberties.

The Supreme Court has barred inmates from seeking relief based on "new rules" of law — that is, legal interpretations — that were not in effect when their last appeal was exhausted and their convictions became final. Last fall, Senator Joseph Biden, Democrat of Maryland, introduced a bill that would effectively prohibit successive habeas corpus petitions and limit an inmate facing capital punishment to a single round of state and Federal post-conviction challenges.

Society unquestionably suffers when the availability of the habeas corpus writ is abused by inmates who generate fruitless litigation in our a overloaded Federal judicial system. Yet, as reported by the Association of the Bar of the City of New York, approximately 40 percent of all inmates convicted of capital crimes obtain some relief in post-conviction proceedings.

Resort to the death penalty, while legally defensible in limited circumstances, must be preceded by a thorough review of the factual and legal grounds underlying a conviction. While a speedy and efficient system is desirable, a just system is indispensable. Pragmatism should not serve as an excuse for cutting off Federal judicial review.

A plea to preserve habeas corpus.

Proper legislation could redirect the current path of habeas corpus and preserve the historic function of the Great Writ — which dates to 17th century England and was codified by the First Congress in 1789 — as an avenue for relief. Three important areas must be addressed.

First, at least with respect to capital crimes, Congress should favor a policy of fully retroactive legal rules. If habeas corpus review truly is to provide state courts with an incentive to apply the Constitution fully and fairly, we should not retreat from applying the principles of constitutional law retroactively.

Ironically, the present no-retroactivity rule rewards those defendants whose cases progress more slowly through the legal system. The longer it takes to reach a final state of conviction, the more constitutional rules may become available to the inmate for use in a habeas corpus challenge to that conviction. The prize is given to those who willfully delay.

Second, Congress could just as easily limit vexatious and repetitive post-conviction litigation by enacting legislation strictly endorsing the Supreme Court's "deliberate bypass" standard. Under this subjective test, a prisoner may mount successive attacks on his conviction — provided he did not omit the new claim from the original petition for the purpose of delay. Congress should scorn the trend in some Federal courts to close the door to habeas corpus relief by converting this subjective standard into an objective test that pays little or no attention to the individual circumstances of each inmate.

Third, Congress should cut through the hornet's nest of legal doctrines collectively known as "procedural default." Under a rigid application of these rules, the most compelling cases are sometimes barred from review because of a technical slip by the defense counsel. While there are times when counsel for the defense makes a tactical choice to waive objections or claims, an inmate should not be precluded from relying on arguments omitted from the original proceeding because of counsel's error.

Through these simple measures Congress can save the Great Writ and preserve for us all the individual liberties guaranteed by the Bill of Rights. For some, the difference can be a matter of life instead of death. □

Irving R. Kaufman is a judge of the United States Court of Appeals for the Second Circuit.

MEMORANDUM

TO: Justice Powell May 1, 1990

FROM: Hew

RE: Habeas Corpus Update

The library and a friend on the Senate Judiciary staff both inform me that Jack Brooks of Texas is the Chairman of the House Judiciary Committee. Brooks has been ill recently. It is possible that Rep. Kastenmeier is serving as Acting Chairman.

There is no real news on the progress of habeas reform in the Congress. Habeas reform is scheduled to come to the Senate floor for debate on May 21. It is rumored that Southern Democrats are attempting fashion a bill somewhere "between" your proposal and the Biden Bill. At this time, the only pending bills are those we have reviewed: (1) Senator Thurmond's broad reform proposal; (2) The Powell Committee Bill, introduced by Senator Thurmond; and (3) the Biden Bill. As for the House side, there seems little chance of a bill emerging. There are rumors that some in the House would like to see a House Bill that would "head off" the Powell Committee bill. Any legisilation coming from the House is likely to be similar to the Biden Bill, or worse, perhaps adopting the ABA proposal.

R.H.P.

U.S. Department of Justice
Office of Legal Counsel

Washington, D.C 20530

May 23

File - Ad Hoc Committee

Suspend to day before the House Committee's hearing.

3 MAY 1990

May 2, 1990

Lewis F. Powell
Associate Justice (Retired)
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Dear Justice Powell:

Enclosed please find a proposed editorial piece on habeas corpus reform which I sent to The New York Times yesterday. The piece responds to Judge Irving Kaufman's earlier op-ed (attached) advocating certain habeas "reforms." I also got in a good word for the work of your distinguished Committee. I don't hold out much hope that they will publish it, but it felt great in the writing!

My best to Hew and Sally.

Sincerely,

Andrew G. McBride
Special Assistant to the
Assistant Attorney General

Enclosure

cc: R. Hewitt Pate
Law Clerk to Justice Kennedy

U.S. Department of Justice
Office of Legal Counsel

Washington, D.C 20530

May 2, 1990

Lewis F. Powell
Associate Justice (Retired)
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Dear Justice Powell:

Enclosed please find a proposed editorial piece on habeas corpus reform which I sent to The New York Times yesterday. The piece responds to Judge Irving Kaufman's earlier op-ed (attached) advocating certain habeas "reforms." I also got in a good word for the work of your distinguished Committee. I don't hold out much hope that they will publish it, but it felt great in the writing!

My best to Hew and Sally.

Sincerely,

Andrew G. McBride
Special Assistant to the
Assistant Attorney General

Enclosure

cc: R. Hewitt Pate
Law Clerk to Justice Kennedy

Lunch or dinner
soon!
Andy

May 11

May 2, 1990

Dear Chief:

Thank you for your note of April 30. It is good to know that you will speak to the ALI about the need for reform of federal habeas corpus review of capital sentencing - "whether the members like it or not!" It will be helpful for me to have a copy of what you say.

I enclose a memo of this date from Hew Pate. There is little we can do about the politics of this issue.

Sincerely,

The Chief Justice

lfp/ss
Enc.
bc: Hew
Hew: I doubt that what the Chief says will change significantly what I normally would say. I therefore will welcome, as always, your help with a draft. The Chief's talk probably can be obtained from Janet in his chambers by Friday, May 11.

May 3, 1990

PERSONAL

Dear Andrew:

Thank you for your letter of May 2, enclosing your piece on habeas corpus reform that you have sent to The New York Times.

You will not be surprised when I say that I think your article is excellent, and I hope that The New York Times will publish it.

We still miss you here at the Court. I am glad that you and Hew have a strong friendship that should last over the years.

Sincerely,

Lewis Powell

Andrew G. McBride, Esquire
Special Assistant to the
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
Washington, D. C. 20530

lfp/ss

cc: R. Hewitt Pate, Esquire

May 3, 1990

PERSONAL

Dear Andrew:

Thank you for your letter of May 2, enclosing your piece on habeas corpus reform that you have sent to The New York Times.

You will not be surprised when I say that I think your article is excellent, and I hope that The New York Times will publish it.

We still miss you here at the Court. I am glad that you and Hew have a strong friendship that should last over the years.

Sincerely,

Andrew G. McBride, Esquire
Special Assistant to the
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
Washington, D. C. 20530

lfp/ss

cc: R. Hewitt Pate, Esquire

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

CHAMBERS OF
THE CHIEF JUSTICE

May 3, 1990

Dear Hew,

Here is a draft copy of the speech about capital punishment which I intend to give at the A.L.I. meeting on May 15th. I welcome any comments or suggestions you might have.

Sincerely,

Enc.

May 4, 1990

Ad Hoc Committee - Hearing May 24, 1990

Dear Hew:

I enclose a copy of the letter of May 4, from Congressman Jack Brooks, Chairman of the House Committee on the Judiciary.

The letter confirms the invitation for me to testify, and states the Committee's requirements with respect to prepared statements. These are more than a little burdensome. We are requested to file 50 copies of my statement not later than Tuesday, May 22, and suggests that an extra "35 statements would be appreciated."

In addition, we are requested to file 50 copies of a one page summary.

Sincerely,

R. Hewitt Pate, Esquire

lfp/ss
Enc.

cc: The Chief Justice

Enclosing a copy of Chairman Bfooks' letter and "notice to witnesses."

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

MAJORITY—225-3951
MINORITY—225-6906

May 4, 1990

7 MAY 1990

The Honorable Lewis F. Powell, Jr.
Associate Justice, Retired
United States Supreme Court
Washington, DC 20543

Dear Justice Powell:

The Subcommittee on Courts, Intellectual Property, and the Administration of Justice is planning to conduct a legislative hearing on the issue of habeas corpus. The hearing will be held at 9:30 a.m. on Thursday, May 24, 1990 in room 2226 Rayburn House Office Building.

I would like to invite you to appear and testify. Please summarize your opening statement so that it does not exceed five minutes. Enclosed you will find a notice which sets forth the Committee's requirement that prepared statements be filed at least 48 hours prior to your scheduled appearance. In accordance with Committee policy, 50 copies of your statement must be submitted by no later than Tuesday, May 22, 1990. Please forward them to the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, 2137 Rayburn House Office Building, Washington, D.C. 20515. Due to the large number of Members (15) on the Subcommittee, an extra thirty-five statements would be appreciated.

Please do not hesitate to contact the Committee if you need further information.

Your earliest acceptance of this invitation would be appreciated.

Sincerely,

JACK BROOKS
Chairman

Enclosure

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NOTICE TO WITNESSES

Prepared Statements

Section 118(b) of the Legislative Reorganization Act of 1970 provides that each committee of the House of Representatives shall, insofar as practicable, require all witnesses appearing before it to file in advance written statements of their proposed testimony, and to limit their oral presentation to a brief summary.

The House Committee on the Judiciary will require all witnesses scheduled to testify before it to provide the Committee with a minimum of 50 copies of a prepared statement and 50 copies of a one-page summary at least forty-eight hours prior to the scheduled appearance of the witness. While there is no set form required for the prepared statement, it is recommended that the statement be typewritten, ~~double~~ single-spaced, or printed. The 50 copies will be for the use of the members and staff of the Committee. If the witness desires the Committee to make available to the press, or the public, copies of the prepared statement, the witness will provide the Committee in advance of the hearing with such additional copies as may be desirable for distribution. A copy of a biographical sketch is required to be submitted with the witness' statement.

MEMORANDUM

TO: The Chief Justice May 4, 1990

FROM: Hew Pate

RE: ALI Speech -- Capital Habeas Corpus

Thank you for giving me the opportunity to review your excellent speech on capital habeas corpus. I have the following comments:

Page 1: The House subcommittee hearing has now been moved back to May 24th. As for the length of delay, the average time for prisoners whose sentenced are actually carried out is over eight years. It may be useful to point out that many prisoners have been awaiting execution far longer. Since the rate of execution is far lower than the rate of entry of new capital prisoners into the system, it is inevitable that the delay in carrying out many sentences will be far longer than eight years.

Page 3: For an ALI audience, it might be useful to emphasize that the statutory mechanism of §2254 is not the writ of habeas corpus mentioned in the Constitution. The constant talk about the "Great Writ" in this context by opponents of reform is misleading. You might note that the original writ was a challenge to detention without trial, and that the modern expansions of even the statutory §2254 remedy have come about mostly through judicial innovation.

Page 4: It is vital to point out that the incentives for the capital prisoner and the prisoner serving a term of years are exactly the opposite with respect to habeas relief. This is a good and important part of the speech.

Page 5: Rather than saying that "most" states have their own system of collateral review, it would be fair to say that "virtually all" do. I researched this point about a year ago for Justice Powell. All states appear to have some form of collateral relief, but some are limited in the evidence that may be presented, or retain incidents of old common law proceedings that are very different from federal habeas. That is why I suggest saying "virtually" all. Also, you might go ahead and make the point near the top of page 5 that there is no statute of limitations as to federal habeas (a few States have limitations periods for their own collateral remedies). This is the reason that a prisoner has nothing to lose by waiting. Under the present system, the capital prisoner would be crazy to seek expeditious rulings on his claims -- far better to wait and litigate only when litigation brings the benefit of a stay.

Page 6: Given the cases that have come here in the past two terms, I think it would be accurate to say that there is almost always a second petition, often a third, and sometimes a fourth petition filed in capital cases that end in execution.

Page 7: The recent case of Jesse Tafero (or the Harris case from California) would provide a perfect illustration.

As of the end of April, Tafero had been before the Florida Supreme Court at least five times, had two full courses of federal habeas review before the district courts and CA11, and been before this Court on cert five times. As his scheduled execution date approached, Tafero's attorneys filed yet another state petition and then a sixth petition here. They filed a motion to suspend the effect of that denial of relief, for his seventh filing. They then filed a third federal habeas petition, receiving a temporary stay while the district court considered the claims, again appeared before CA11, and again filed a cert petition and stay application. Within a few hours Tafero filed a fourth petition with a different federal district judge, which never came here. This case involved a total of eight filings in the U.S. Supreme Court, three within a single week. Given that the Justices and Judges give each capital cases high degree of individual attention, the strain on the system is obvious. Of course, none of Tafero's claims ever suggested that he was not in fact guilty of the double murder for which he was convicted.

Page 8: It may be worthwhile in view of the attacks on the Powell Committee proposal as a "rush to the gallows" to point out just how extensive a system of review would remain under this limited reform. A prisoner would appear before a trial judge and a jury in a bifurcated proceeding, then proceed to a full appeal in the state supreme court, followed by a cert petition here. He would then return to state

trial court, supreme court, and perhaps this Court on cert in state collateral proceedings. Next, a federal district judge, three judge court of appeals panel, and another cert petition here. Assuming a five-judge state supreme court, the prisoner would at the end of the process have had review by at least 19 judges. The suggestions that this is a "rush" are not responsible.

Page 11: With respect to the amendment to the Powell Committee recommendation on successive petitions, it would be fair to say that the amendment not only "partially defeats" the goal of reform, but in fact makes the successive petition situation worse than it is now. Any conceivable 8th Amendment challenge can be described as going to the "appropriateness" of the sentence.

Page 12: In addition to Senate bills, there are now ten bills pending in the House. More significant is that Rep. Kastenmeier plans to introduce his own bill either today or early next week. His staff is supposed to send Justice Powell a copy of the new bill, and I will forward a copy to you. This bill will be the focus of the House subcommittee hearings. You also say on this page that a significant number of capital cases are set aside. This is true, but the reversal rates quoted by opponents of reform include all reversals, including those on technical issues of exhaustion, default, and the like. Moreover, even reversals on the merits only result in resentencing. The suggestion often made that reversals reflect a finding that a

prisoner was "wrongfully" sentenced to capital punishment is misleading. It would be valuable to have figures showing how many of those whose sentences are vacated are ultimately resentenced to capital punishment. I have never seen a figure on this, but my impression is it would be high.

Page 13: It may not be fair to say that Sen. Biden's Bill (S. 1757) is at the other extreme. The extreme position on that side has been staked out by the ABA. The ABA proposals may well turn up in Rep. Kastenmeier's bill. In any event, it is fair to say that Sen. Biden's bill is not just a less effective reform; it would make the situation worse than it is now.

Page 14: It might be more accurate to say that new rules will not be applied to defendants "whose trial and direct appeal took place before the new rule was announced," but this is implicit in what you say earlier.

Page 18: The theme of public respect for the administration of justice is a strong one, and you might emphasize it more in concluding the speech. It is fair to say that the present system brings the judiciary into disrepute. Gov. Deukmejian's statement following the Harris stay provides an example. The present scheme of litigation by fits and starts, multiple warrants and eleventh hour stays, wreaks havoc on the courts, prison administrators, the prisoner himself, and the often-forgotten families of the victims of the crime that caused the whole proceeding in the first place.

***

I hope these general comments are helpful. If I can be of any assistance in finding further research materials, please let me know. I have a large file on the subject put together for the Powell Committee. I have also attached a copy of a recent New York Times article by Judge Kaufman, and a response sent to the Times by Andrew McBride, who clerked for Justice O'Connor last term and is now at OLC. I will be stunned if the Times prints McBride's piece, but maybe it will spark some further ideas for your speech. If you have five or ten minutes to spare sometime, I would appreciate the opportunity to talk with you about this subject before I leave in July. Thank you again for letting me look over the speech.

R.H.P.

May 9, 1990

Dear Virginia:

It was most thoughtful of you to send me the copies of the habeas corpus bill that was introduced by your Subcommittee. As I understand it our hearing has now been scheduled for Thursday, May 24, at 9:30 a.m.

I appreciate your also keeping advised (i) my former law clerk Hewitt Pate, who is now clerking for Justice Kennedy, and (ii) Professor Al Pearson, Law School, University of Georgia (Reporter for the Committee appointed by Chief Justice Rehnquist).

Sincerely,

Ms. Virginia Sloan
Committee on the Judiciary
House of Representatives
2138 Rayburn HOB
Washington, D. C. 20515-6216

lfp/ss

cc: The Chief Justice
Professor Albert M. Pearson
R. Hewitt Pate, Esquire

lfp/ss 05/10/90 HEW1 SALLY-POW

Fourth Circuit Judicial Conference, June 27-30

MEMO TO HEW:

Chief Judge Ervin, who will preside over the CA4 Judicial Conference at the Greenbrier, called to ask me to talk about the Ad Hoc Committee Report at the Saturday, June 30, morning session. There will have been a number of developments since I presented the Report of the Committee to the Judicial Conference in September, including the expected action of the House Committee. I would be grateful if you would give me a draft of what you think I should say. A 15 page double spaced draft will suffice, and I will not need it until mid-June.

I hope that Justice Kennedy will be tolerant of my intrusion on your time. He probably knows of your association with this subject from the beginning.

L.F.P., Jr.

ss

cc: The Chief Justice

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

CHAMBERS OF
THE CHIEF JUSTICE

See pg

May 10, 1990

Dear Lewis,

I enclose an advance copy of the speech I plan to give to the American Law Institute on Tuesday, May 15th about federal habeas reform. I thought you might be interested.

Sincerely,

Bill Rehnquist

Enc.

Remarks of the Chief Justice
American Law Institute Annual Meeting
Mayflower Hotel
May 15, 1990

This morning I want to talk about a serious malfunction in our legal system -- the manner in which death sentences imposed by state courts are reviewed in the federal courts. Today the average length of time between the date on which a trial court imposes a sentence of death, and the date that sentence is carried out -- after combined state and federal review of the sentence -- is between seven and eight years. More than three years of this time are taken up by collateral review alone, with little certainty as to when that review has run its course. Surely a judicial system properly designed to consider both the claim of the state to have its laws enforced and the claim of the defendant to the protections guaranteed him by the federal Constitution should be able to reach a final decision in less time than this.

The essence of the question is not the pros and cons of capital punishment, but the pros and cons of federalism. The

Supreme Court has held that capital punishment is lawful if imposed consistently with the requirements of the Eighth Amendment. Whether or not a state should choose to have capital punishment must be up to each state: thirty-seven states have elected to have it, and thirteen states have chosen not to have it. The capital punishment question is one which deeply divides people, and always has. But this question is only tangentially involved when we consider the procedures designed to provide collateral review in the federal courts for federal constitutional claims of defendants who have been sentenced to death. Surely the goal must be to allow the states to carry out a lawful capital sentence, while at the same time assuring the capital defendant meaningful review of the lawfulness of his sentence under the federal Constitution in the federal courts. This, as I have said, is essentially a question of federalism -- what is the proper balance between the lawful authority of the states and the role of federal courts in protecting constitutional rights?

The writ of habeas corpus was originally a creature of the English common law, not designed to challenge judgments of conviction rendered after trial, but to challenge unlawful detention of citizens by the executive. It played much the same role in this country for the first century and a half of our existence. As a result of judicial decisions and congressional ratification of these decisions over the past century, however, it has evolved into something quite different. In civil litigation, as we all know, once the parties have had a trial and whatever appeals are available, the litigation comes to an end and the judgment is final. But in criminal cases a defendant whose conviction has become final on direct review in the state courts may nonetheless raise federal constitutional objections to that conviction and sentence in a federal habeas proceeding. This system is unique to the United States; no such collateral attack is allowed on a criminal conviction in England where the writ of habeas corpus originated.

Reasonable people have questioned whether a criminal

defendant ought to have as broad a "second bite at the apple" in the federal courts as he presently does, but that is a question of policy for Congress to decide. So long as we are speaking of non-capital defendants, the present system does not present the sort of practical difficulties in the administration of justice that it presents in the case of capital defendants. This is because someone who is convicted and sentenced to prison for a term of years in state court, and wishes to challenge that conviction and sentence in a federal habeas proceeding, has every incentive to move promptly to make that challenge. He must continue to serve his sentence while his federal claims are being adjudicated in the federal courts. Therefore, the sooner he obtains a decision on these claims, the sooner he will get the benefit of any decision that is favorable to him. This is true even though there is no statute of limitations for bringing the federal habeas proceeding.

But the incentives are quite the other way with a capital defendant. All federal review of his sentence must obviously

take place before the sentence is carried out; consequently, the capital defendant frequently finds it in his interest to do nothing until a death warrant is actually issued by the state. States also have varying systems of collateral review and one of the rules of federal habeas corpus is that certain kinds of claims must first be presented to the state courts in collateral proceedings before they may be decided on the merits by the federal courts. There is no constitutional right to counsel in the state collateral review proceedings, and therefore a capital defendant is frequently without legal advice as to how to proceed. The upshot is that often no action by the defendant is taken until shortly before the date set for execution. The result is foreseeable: arguments in state and federal courts over whether the execution should be stayed pending decision on the merits, because there is no provision for an automatic stay.

Not only is there no statute of limitations for filing for federal habeas, but normal rules of res judicata do not apply. A criminal defendant is not necessarily barred from bringing a

second petition in federal court after his first petition has been decided against him on the merits. Instead of res judicata, a doctrine of "abuse of the writ" has been developed, but its outlines are in some respects not fully developed. As a result, a capital defendant, after his first federal habeas petition is decided against him, may file a second petition, and even on occasion a third petition. On each occasion, arguments are pressed that an additional stay of execution is required in order for a court to consider these successive petitions. The result is that at no point until a death sentence is actually carried out can it be said that litigation concerning the sentence has run its course.

The system at present verges on the chaotic. The eight years between conviction in the state court and final decision in the federal courts is consumed not by structured review of the arguments of the parties, but in fits of frantic action followed by periods of inaction. My colleagues and I can speak with first hand experience of this, and so can the district judges and the

judges of the courts of appeals who regularly pass on these applications. It is not unknown for our court to have pending before it within a period of days not merely one application for a stay of execution but two from the same person: one seeking review of collateral state proceedings, and the other seeking review of federal habeas proceedings, both brought in the court of first instance within a matter of days before the execution is set to take place. Thus delay is not the only fault in the present system. The last-minute nature of so many of the proceedings in both the state courts and the federal courts leaves one with little sense that the legal process has run an orderly course, whether a stay is granted or whether it is denied.

Let me speak briefly with you about the case of Jesse Tafero, who was executed on May 4, 1990. The death sentence imposed in his case was upheld by the Supreme Court of Florida in 1981, and in 1982 our Court denied a petition for certiorari. Tafero then filed a federal habeas petition, which was denied in

1985. The denial was affirmed by the Court of Appeals in 1986, and our Court denied certiorari in 1987. Tafero then filed another federal habeas petition, which was denied by the District Court in 1988. That denial was upheld by the Court of Appeals in 1989, and our Court denied certiorari on April 16, 1990 -- approximately a month ago. By this time Tafero had had two federal habeas petitions proceed through every level of the federal courts following the earlier direct review of his sentence by the Supreme Court of Florida. The state scheduled his execution for May 2, 1990.

On April 27th, Tafero filed an application in our Court to suspend the order denying certiorari pending filing for a rehearing, which was denied. Three days earlier, on April 24th, he had filed with the Florida Circuit Court his third motion to vacate the judgment of death under the Florida proceeding for collateral review. This determination was affirmed by the Supreme Court of Florida on April 30th. Tafero then filed his third federal habeas petition in the District Court, and that

court granted a 48-hour stay of execution to consider it. On May 3rd the Court denied the petition, the Court of Appeals affirmed that denial, and our Court denied a stay of execution.

Tafero was executed the following day.

This system cries out for reform. I submit that no one -- whether favorable to the prosecution, favorable to the defense, or somewhere in between -- would ever have consciously designed it. The question is how the present law can be changed to deal with these problems while still serving the federalism goal which I mentioned previously.

In June 1988 I established an Ad Hoc Committee on Federal Habeas Corpus in Capital Cases under the chairmanship of retired Associate Justice Lewis F. Powell, Jr. In addition to Justice Powell, I appointed to this Committee, the Chief Judges of the Fifth and Eleventh Circuit Courts of Appeals, the two federal appellate courts having had the most experience with litigation about capital sentences, and a district judge from each of these circuits. I thought it best to have people on the Committee who

not only had a judicial perspective, but who had "hands on" experience in dealing with capital sentence proceedings.

The Committee investigated ways of improving both the fairness and efficiency of our system of collateral review in death penalty cases. In September of 1989 it issued its report recommending the coordination of our state and federal legal systems in capital cases and the structuring of collateral review. The Report concluded that capital cases "should be subject to one fair and complete course of collateral review in the state and federal system, free from time pressure of impending execution and with the assistance of competent counsel."

Under the Powell Committee proposal, persons convicted of capital crimes and sentenced to death would, after a full set of appeals, have one opportunity to collaterally attack their sentences at the state level and one such opportunity at the federal level. Second and successive petitions for collateral review would be entertained only if the petitioner could cast

doubt upon the legitimacy of his conviction of a capital crime. In the absence of underlying doubt concerning guilt or innocence, itself, courts would not entertain repetitive petitions attacking the appropriateness of the death sentence.

In the interests of reliability and fairness, the Powell Committee proposal would permit states to opt into the unified system of collateral review only where they agreed to provide competent counsel in state collateral proceedings. Under current federal law, counsel is provided in federal habeas corpus proceedings, but not in state proceedings. The Powell Committee proposal would also require an automatic stay of execution to permit the prisoner to bring his petition in an orderly fashion and without the pressure of pending execution, and would create a new automatic right of appeal from the federal district court to the federal court of appeals.

I believe that the Powell Committee Report strikes a sound balance between the need for ensuring a careful review in the federal courts of a capital defendant's constitutional claims and

the need for the state to carry out the sentence once the federal courts have determined that its imposition was consistent with federal law. The Conference of State Chief Justices at its meeting last February unanimously endorsed the report of the Powell Committee. When that report was presented to the Judicial Conference of the United States in March, five changes were proposed to make it closer to the position taken by the American Bar Association, which would not only enlarge the scope of federal review but make successive habeas petitions more readily available than at present. The Judicial Conference was closely divided on each of these five amendments, and adopted only two of them.

The first adopted would set more stringent standards for the appointment of counsel in state proceedings, and make those standards applicable not merely on collateral review but in trial and appellate proceedings in the state courts. The second would allow a successive habeas petition if the defendant bases the claim on a "factual predicate" that could not have been

discovered with due diligence and would "undermine" the court's confidence "in the appropriateness of the sentence of death." This latter amendment, in particular, strikes me as so vague and ill-defined as to substantially defeat the purpose of the recommendations of the Powell Committee.

Both Houses of Congress will shortly address themselves to this question. The Senate will consider legislation very shortly, and later on this month a House Judiciary Subcommittee will begin hearings on this subject. Two bills have been introduced by Senator Strom Thurmond, the ranking minority member of the Senate Judiciary Committee. The first would allow federal habeas review only where a prisoner is unable to secure "full and fair adjudication" of his claims in state court. My own view is that, while this approach might commend itself some years hence, it does not do so at the present time. There have been a significant number of capital sentences set aside because federal courts decided that the sentences did not conform to the requirements of the Eighth Amendment. Very likely this is

because the contours of the Eighth Amendment as applied to capital sentencing have only evolved over the last fifteen years. If the present scope of federal habeas review can be retained without the delay and other faults contained in it, I think it should be. The second bill introduced by Senator Thurmond embodies the Powell Committee report, and I think that report shows how the present scope of federal habeas review can be retained without unnecessary delays.

Another bill, S.1757, has been introduced by Senator Joseph Biden, the Chairman of the Senate Judiciary Committee. It, in my view, is at the other end of the spectrum and would actually exacerbate the delays and repetitiousness of the present system. It would allow successive petitions where there is a claim of "miscarriage of justice." This phrase is apparently derived from recent decisions of our Court in another area of habeas law; as applied to capital cases it is not well-defined, and its use in regulating successive petitions may, as Justice Powell pointed out in his testimony, "produce confusion and open the door for

abuse."

Another area where the Powell Committee recommendations are, in my judgment, superior to the proposals contained in S.1757 is the area of procedural default. Under the rules of procedural default, a defendant must object to errors at the time of trial. Where the defense fails to object to an error, it waives its opportunity to raise the claim. The purpose of the procedural default rules is to assure that errors are pointed out at a time when they can easily be corrected, not years later in an attempt to obtain a new trial. The Powell Committee Report would leave these rules in effect. S.1757, by contrast, would make it easier for a prisoner to raise claims for the first time years after trial, thus exacerbating the problems of piecemeal litigation and delay that characterize the present system. And, it would accomplish this highly questionable goal by overturning a series of Supreme Court cases.

S.1757 would also overturn an entire body of Supreme Court precedent in an area where Congress has never previously

legislated. For nearly a quarter of a century the Supreme Court has wrestled with the problem of whether constitutional decisions announcing a new rule of law should or should not be applied "retroactively." The Court has gradually, one might say by a process of trial and error, decided that decisions which announce a new rule should be applied across the board to cases on direct review of a state conviction, but that with certain exceptions they should not be applied by federal habeas courts to a defendant whose trial took place before the new rule was announced. The reason for such a doctrine seems obvious: unless the new rule is truly a "fundamental principle," essential to a just result, state courts should not be penalized for applying the federal constitutional law which was in effect at the time of trial. But S.1757 would simply abrogate these decisions and permit capital defendants to challenge their convictions and sentences on the basis of constitutional decisions which had not even been announced at the time the case was in the state courts.

The bill introduced by Senator Thurmond, the bill introduced

by Senator Biden, and the Powell Committee Report all provide some form of statute of limitations to regulate the time in which capital defendants must avail themselves of the opportunity for collateral review. The Powell Committee Report sets the statute of limitations at six months; S.1757 introduced by Senator Biden sets it at one year. A statute of limitations is essential if we are to obtain orderly federal habeas review of the sentences, and so long as the capital defendant has counsel at this stage it imposes no unreasonable burden on him.

At this moment, there are about twenty-two hundred capital defendants on the various "death rows" in state prisons. There is no doubt that when some of these defendants present their constitutional claims to federal courts, their sentences will be set aside. Others of these defendants will, after full federal review, obtain a determination that the sentences imposed on them were consistent with the federal Constitution. Defendants who will ultimately prevail in their claims should not have to wait eight years for a decision to that effect, and states seeking to

carry out the sentence upon defendants whose claims are rejected by federal courts should not have to wait eight years to do that. Fair-minded people, whether they personally oppose or favor the death penalty, should have no difficulty agreeing that the present system is badly in need of reform.

All of the pending Senate bills on this matter are clothed in the garb of "reform," but unfortunately, not all of them are designed to achieve the sort of reform which the system badly needs. The proposal of the Powell Committee, in my view, accomplishes the task while the others do not. Under that proposal the capital defendant is given the necessary tools and the necessary incentives to make all of his constitutional claims in his first federal habeas proceeding, and that proceeding is allowed to run its full course in both the district court and in the court of appeals without any threat of imminent execution. If the result of these proceedings is a determination that the state sentence is consistent with the United States Constitution, that should (with rare exceptions) conclude the federal review,

and the state should be able to carry out its sentence. This is a solution to the problem in the best tradition of our federal system. It is a solution which will restore public confidence in the way capital punishment is imposed and carried out in our country.

May 11, 1990

Dear Chairman Brooks:

Thank you for your letter of May 4, inviting me to testify on the subject of federal habeas corpus at the hearing of your Subcommittee on Courts now scheduled Thursday, May 24, at 9:30 a.m.

I am happy to accept your invitation. With assistance here at the Court I will try to comply with your request for the number of copies of my testimony to be filed in advance with summaries thereof.

Sincerely,

Hon. Jack Brooks
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D. C. 20515-6216

lfp/ss

bc: The Chief Justice
Members of the Ad Hoc Committee
Professor Albert M. Pearson
William R. Burchill, Jr., Esquire
R. Hewitt Pate, Esquire

MEMORANDUM

TO: Justice Powell May 16, 1990

FROM: Hew

RE: Habeas "Reform"

Al Pearson gave me a distressing report yesterday of his meeting with Sen. Graham's aides. Sen. Graham is apparently negotiating with Sen. Biden to produce what he calls a "compromise" habeas reform package. But the substance of the compromise would be to accept all of the provisions of the Biden Bill, with the sole exception of the provision that would overrule Wainwright v. Sykes. The Bill that Sen. Graham appears willing to accept would, among other things (1) impose burdensome counsel standards, (2) broaden the successive petition rules to allow successive attacks on sentence, making the successive petition situation worse than it is now, (3) lengthen the limitations period of your proposal. These provisions are unfortunate, but at least use of this new system would be optional with the States. More important is that the "compromise" proposal would overrule Teague v. Lane across the board, regardless of whether a State "opts in." This would eliminate the move to Justice Harlan's view of retroactivity that you long advocated, and destroy the Court's recent cases such as Butler v. McKellar that have attempted to limit abuse of habeas corpus. I am astonished that this proposal has Sen. Graham's support, as he has supported good habeas reform measures in the past.

R.H.P.

May 16, 1990

Ad Hoc Committee on Federal Habeas

Dear Chief:

I enclose a copy of a memorandum of this date from Hew Pate. It reports briefly on Al Pearson's meeting with Senator Graham's staff people who are working on what they call a "compromise" habeas reform package.

As I mentioned this morning, the hearing before the House Committee is now set for 9:30 a.m., May 24. In view of the proliferation of bills I am inclined to stay with the recommendation of the Ad Hoc Committee.

Sincerely,

The Chief Justice

lfp/ss
Enc.
bc: Hew

DONALD P. LAY
CHIEF JUDGE
P. O. BOX 75908
ST. PAUL, MINNESOTA 55175

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

May 17, 1990

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

Dear Chief:

I appreciate the opportunity to visit with you next Wednesday in your chambers in Washington. I will be there at 2:00 p.m.

One of the matters that I would like to discuss with you concerns how we might further expedite the disposition of stay matters in capital cases to assist the Supreme Court. First I would like to correct a mistaken impression by Justice Kennedy in his concurring opinion in Delo v. Stokes, No. A-795 (May 11, 1990). Although we do not have a rule establishing an emergency three judge court on a stay matter, our long-standing procedure assigns a panel of three judges to an initial habeas capital case and that panel remains assigned to that case on any subsequent matters, motions, or petitions. The same panel in the Stokes case had worked together on his petitions over the last year. Under our procedures, when a motion for stay is filed in the federal district court, that court immediately notifies the court of appeals deputy clerk assigned to capital cases of the pending motion in the district court. The three judge panel assigned to the case is also immediately notified. Our deputy clerk remains on a 24-hour vigilance and in contact with your clerk's office until the matter is finally adjudicated.

This procedure was followed in the Stokes case. When the district judge granted Stokes' motion for stay of execution on May 9, our panel was immediately notified. The panel was notified late the next morning, May 10, that the state filed a motion to vacate the stay. The various documents and papers filed by the state and the attorneys for the petitioner, which included the district court record, totaled over 50 pages. However, before the state had filed the appeal, one judge had left his office to attend a local funeral and thereafter drove to an engagement in Illinois that evening. He did not contact his office because he had not been alerted to any appeal before he left. He assumed the stay was in effect and

no irrevocable action could take place. In hindsight he informs me, had he contacted his office, since he was out of the state, he would not have been able to review the filings until the next morning in order to give careful study of the matter. The panel has indicated they placed great reliance on the action of the district judge and therefore careful study of the state's motion to vacate and the contents of the petition was required. Judge Gunn, who granted the stay is one of our strongest district judges and was formerly a respected justice on the Missouri State Supreme Court. Our court also knew he was familiar with the entire case since he had presided over all of Stokes' habeas cases. Our panel justifiably assumed Judge Gunn would not have stayed the execution without good reason.

On the morning of May 11, the judges studied the various filings presented, a vote was taken, and at approximately 11:00 a.m. the panel entered its 2-1 order denying the motion to vacate the stay.

I am informed that the state served notice to the clerk of the Supreme Court of the panel's order at that time. However, instead of filing a motion to vacate the stay with the Supreme Court, the state chose to file a motion for rehearing en banc before our court. This motion was filed in the clerk's office on Friday noon. We have nine active judges. On that particular Friday afternoon one judge was en route to Colorado and two judges, including myself, were en route to Little Rock, Arkansas for the investiture ceremony of a new district judge. I was notified by the clerk's office of the motion to vacate the stay upon my arrival in Little Rock. I had the clerk immediately poll the court. However, the judges were in seven different states and it was not until 5:30 p.m. that the clerk reported to me that he was able to obtain votes from all judges, except one. Please be aware that it was necessary for the clerk to deliver to six judges who were not on the original panel the contents of the petition and to forward wherever possible the various papers that were received and studied by the panel. Once again, I am confident that all judges gave these filings careful consideration.

Our order denying the motion for rehearing en banc was entered at approximately 5:30 p.m. Notwithstanding our stay, and unknown to us at that time, the state had removed Stokes from death row and was preparing him for execution. This occurred notwithstanding our direct orders in other cases that they were not to do that as long as the stay was in effect.

There were three judges in Little Rock at the investiture ceremony. We attended a reception at 7:30 p.m. at a private home.

The clerk of court had our telephone number and informed me upon my arrival at the reception that the Supreme Court had vacated our stay, ruling 5-4. We were then informed that the petitioner had filed an alternative writ on two others grounds before our court. We were alerted, for reasons unexplained, that the Missouri Department of Corrections had moved up the time of execution to 9:30 p.m. Because of the shortness of time, I decided to convene the other two judges and myself as a panel to hear this alternative writ. The writ was read to us over a speaker phone in Little Rock. There was approximately another half hour consultation, then our order was entered at approximately 8:15 p.m. denying any further stay. It is my understanding that Stokes was executed at 9:30 p.m.

I recite the above facts to you not as an apology or excuse. However, it is my sincere judgment that our procedures are as streamlined as those of any circuit in the country. I respectfully submit, in light of the irrevocable penalty that Stokes faced, the time it took our court to dispose of this matter, to study the papers involved, and to give careful consideration to the issues was expedient under the circumstances. The delay in obtaining the votes from our full court located in seven different states is a practical reality which makes these matters difficult to expedite by any more prompt means.

I am now informed that there are five other death sentences that will be brought before our court in the next few weeks. There are approximately 100 inmates on death row in three states in our circuit. My recommendation is, in order to give more prompt notification to all of the court, that each of our active judges be equipped with a telephone beeper so that wherever they are, particularly those that might be traveling or out of the state, they can be immediately notified that they should call the clerk's office in St. Louis. Our geographic spread and the various engagements of our judges in and out of the states seem to make this imperative. I am exploring the funding of a beeper system with Mr. Mecham.

I am forwarding a copy of this letter to all the Justices so that each Justice can be informed of the procedures that we have implemented in the past and will continue to follow in the cases immediately ahead. If you have any additional suggestions as to how we might improve our procedures to provide an even more prompt disposition of these matters, I would be happy to receive them. I am not aware that our handling of this case in any way deprived the state of a fair opportunity for due process in this matter.

I look forward to having the opportunity to discuss this matter with you.

With kind personal regards.

Sincerely yours,

DONALD P. LAY

DPL/ja
cc: Justice William J. Brennan, Jr.
cc: Justice Byron R. White
cc: Justice Thurgood Marshall
cc: Justice Harry A. Blackmun
cc: Justice John Paul Stevens
cc: Justice Sandra Day O'Connor
cc: Justice Antonin Scalia
cc: Justice Anthony M. Kennedy
cc: All Eighth Circuit Judges
cc: Mr. Mecham

The University of Georgia

School of Law
Legal Aid Clinic

MEMORANDUM

TO: JUSTICE LEWIS F. POWELL

FROM: AL PEARSON

RE: HR 4737 (Kastenmeier Bill)

DATE: May 18, 1990

I. Introduction

As you already know, this proposal goes beyond Senator Biden's bill in many respects. It is a far cry from the Ad Hoc Committee recommendations. In this memorandum, I will summarize HR 4737 for you. In addition, I will review my recent meeting with staff members from the offices of Senators Nunn and Graham. They are working on a compromise proposal that builds on the Biden bill though in my opinion this attempt is not very sensible if one is interested in developing a balanced piece of habeas corpus reform legislation in the capital punishment area. Finally, I will mention some ideas for improving the capital litigation process at the front rather the back end which either you or I might mention before the subcommittee next week. Each of these proposals could be implemented without undercutting the basic approach outlined in the Ad Hoc Committee's recommendations.

II. HR 4737 Summarized

A. General Structure

The proposed bill consists of nine sections. It borrows a number of ideas from the report of the Ad Hoc Committee, but adds or extends them significantly at almost every juncture. The provisions of this proposal are mandatory with the exception of the counsel provisions.* You will note that all changes are proposed as additions to the present habeas corpus legislation, not as a new and separate chapter limited in scope to capital cases. This appears to be especially important in connection with section 7 of the bill dealing with procedural default. The counsel mechanism is technically optional with each state but only if the state is willing to litigate capital cases without: (a) any federal procedural default rule at all even the very forgiving section 7 procedural default which is proposed as a substitute for Wainwright v. Sykes and (b) any presumption that state fact finding is correct under section 2254(d).

*Some provisions apply to non-capital cases.

191 East Broad Street Suite 310 • Athens, Georgia 30601 • (404) 542-4241

Effectively, HR 4737 proposes changes that are highly beneficial to capital litigants whether or not a. . . . state provides counsel in accordance with the exacting competency rules of section 8. In addition, it provides de novo federal review in all capital cases if a state ignores or fails to comply with section 8. Bear in mind here that existing law already provides for the federal appointment of counsel in capital cases anyway. This means that a state's inability or refusal to appoint counsel that are competent under the section 8 standards becomes an irrelevancy. The real defense of a capital case under HR 4737 will begin in federal court in the event of non-compliance with section 8. The proponents of HR 4737 probably do not see this as a penalty mechanism, but rather as the preferred consequence of the law if enacted. In this respect, HR 4737 is an extraordinarily disengenuous proposal.

B. Section-By-Section Analysis*

1. Section 2--It establishes a one year requirement for the filing of a federal habeas corpus action in capital cases. The time period runs from the point when a state conviction is deemed to have become final. Finality includes the opportunity for Supreme Court review. The Ad Hoc Committee proposal links the time period (180 days under our proposal) to the date of appointment of counsel.

Section 2 includes tolling rules similar in some respects to those proposed by the Ad Hoc Committee. The one year period mentioned above is tolled indefinitely in capital cases if counsel is not appointed in full compliance with section 8. Of course, since one can challenge the competency of counsel appointed under section 8 even in habeas proceedings, one never knows whether this tolling rule is applicable until the end of the first round of federal habeas review--not an optimal approach if you are trying to promote some degree of efficiency in the operation of the system.

The remaining tolling rules are probably comparable to ours except section 2 which would toll the one year period in situations where a certiorari petition is filed following state habeas corpus review. The Ad Hoc Committee concluded that two chances for Supreme Court review rather than three was adequate.

*Section 1 just states the title of the proposed legislation: the "Habeas Corpus Revision Act of 1990."

Section 2 provides for dismissal if the one year time requirement is not satisfied, but allows for an override of the dismissal sanction if a litigant can make a colorable showing of innocence or ineligibility for the death penalty. An override is also available if "other exceptional circumstances warrant a waiver." This is an example of the bill's preference for back end rather than front end remedies.

2. Section 3--It provides for mandatory stays of executions in capital cases. It is comparable to the proposal of the Ad Hoc Committee. I don't think that it warrants any comment before the subcommittee.

3. Section 4--It nominally restricts successive petitions in capital cases. If a claim has not been previously raised, this section provides several distinct ways to litigate it in a federal habeas proceeding, the most important of which is in cases where a new right is made retroactively applicable. This provision appears innocuous until you turn to section 6 which overrules Teague v. Lane. The combined effect of sections 4 and 6 provide an excellent legal basis for filing a colorable successive petition.

In addition, a litigant can file a colorable second petition if the new claim raises guilt/innocence issues or questions about the "appropriateness" of a capital sentence. This provision reflects a major point of difference with the Ad Hoc Committee recommendations. Then, as if the preceding rule were not sufficient, section 4 allows for a successive petition based on a previously unlitigated claim if "necessary" to prevent a miscarriage of justice. Both the "appropriateness" and the "miscarriage of justice" standards are vague and fact specific in nature. It is difficult to see how they in any meaningful sense promote finality. When you couple them with the retroactivity rule that section 4 incorporates by reference from section 6, the idea that this provision is a limit on successive petitions is difficult to understand.

Finally, section 4 allows a federal court in capital cases to reconsider previously litigated claims if the petitioner can demonstrate that it would be in "the interests of justice" to reconsider such claims.

4. Section 5--It deals with certificates of probable cause to appeal and is comparable to the Ad Hoc Committee's proposal. It doesn't warrant comment before the subcommittee.

MEMORANDUM

May 18, 1990
page 4

5. Section 6--This section overrules Teague v. Lane flatly and unequivocally. It allows a petitioner in a capital case to get the benefit of the law in effect at the time a decision is handed down. Of course, this principle applies whenever a successive petition is filed as well. It is crucial to the establishment of the infinite regression model of capital defense litigation. I don't see how any state that has capital punishment would view this provision favorably. Bear in mind that this provision is not linked to any reform of death penalty procedures in capital habeas litigation. It would apply to all federal habeas cases capital and non-capital.

6. Section 7--This section overrules Wainwright v. Sykes. It pays nominal respect to the independent and adequate state ground rationale and then softens the procedural default rule to the point that it is virtually non-existent. In addition to the "cause" and "prejudice" tests as an escape from procedural bar, section 7 permits a litigant to overcome procedural bar if necessary to avoid a "miscarriage of justice". It then goes on to elaborate on the "cause" standard. It makes clear that the "knowing bypass" test is being revived and that it would present the only clear cut legal basis for finding a lack of cause. Another noteworthy aspect of this elaboration on the "cause" standard is that any development in the law after a state conviction has become final on direct appeal is per se "cause" for failure to raise a claim under section 7.

Like the retroactivity rule in section 6, this section applies to all cases, capital and non-capital. It is immaterial whether a state complies with the counsel requirements set forth in section 8.

7. Section 8--This section establishes a detailed and highly exacting series of counsel standards and makes them applicable throughout all state and federal phases of capital litigation. The obligation to fund and organize this scheme rests entirely with the states having capital punishment. The costs are potentially so great that few states, if any, would be tempted to try to comply with section 8.

Suffice it to say, this section would limit the number of attorneys who can qualify as lead or co-counsel in capital litigation to a highly select few--mostly individuals already heavily committed to capital defense litigation in the first place and hence those most inclined morally and philosophically to extend the length of capital litigation to its absolute limit. The sanction for failure to turn capital defense

litigation over to this group of attorneys is to deny any effect to state court adjudication in capital cases and then to turn such cases over to capital defense specialists for de novo review in federal court.

In my opinion, the sanction mechanism is not calculated to generate state efforts to develop better systems of capital defense representation. It is designed to assure that virtually any politically feasible attempt to improve and extend such representational schemes cannot succeed. This effectively sets the stage for shifting all serious and potentially final review in capital cases over to the federal courts. In effect, section 8 would make state involvement in capital cases a long and expensive prologue to the main event. Again, it is difficult to understand how any state which has capital punishment could justify supporting section 8 or virtually any part of HR 4737.

8. Section 9--This provision appears to soften Rose v. Lundy. It permits dismissal of non-exhausted claims but does not require dismissal. When one couples this with the proposed changes in the retroactivity and procedural default rules, section 9 would permit capital habeas litigation to be conducted in a piecemeal fashion. It would make the process more confused and confusing than anyone can reasonably imagine at this point.

Note that this section applies to all cases, capital and non-capital.

C. Conclusion

HR 4737 is a bill that reforms habeas corpus generally. It is not limited to capital cases. It is the ideal approach to habeas corpus review if you are deeply skeptical of the way in which state criminal justice systems operate. It gives little finality or presumption of correctness even in non-capital cases and almost none in capital cases. If the skeptics are correct in their assessment of state criminal justice systems, then HR 4737 should have been enacted long ago. If the states are unwilling to accept the proffered challenge to the underlying fairness of their criminal justice systems, as they no doubt are, it is difficult to understand why HR 4737 was proposed. In states where capital punishment is not in force, one would have particular cause to wonder why this statute is needed.

III. Staff Meeting with Nunn and Graham Representatives

On Monday, May 14, 1990, I met with representatives from the staffs of Senators Nunn and Graham. They are working on a compromise based on the Biden bill. Senator Graham is quite eager to get some type of habeas corpus reform legislation passed. Essentially, he is willing to go along with the Biden bill if the procedural default rule in it is deleted. The trade off is that Senator Graham would support a provision worded almost exactly like section 6 of HR 4737 overruling Teague v. Lane. It is hard to understand why Senator Graham views this as a compromise since the "new law" argument often provides an arguable basis for showing "cause" under Wainwright v. Sykes. In any event, Senator Graham finds some kind of equivalency that eludes me.

Senator Graham disliked the Ad Hoc Committee report's refusal to allow second petitions challenging the sentence determination. His staff person appeared to understand what I said in explanation of the Ad Hoc Committee position, but he believed that Senator Graham would never accept it as an adequate rationale. To Senator Graham, it makes the system look like it is willing to send persons to their fate while ignoring potentially valid arguments against the imposition of capital punishment in particular cases.

IV. Other Reform Options

I list here some additional steps that would improve the fairness of capital litigation at the front end and have the additional benefit of making federal review more effective and final when it occurs:

1. Establish discovery rules in capital cases that would give capital defense litigators access to the prosecutor's files or designated portions of them in advance of trial. Include in this the right under designated circumstances to depose witnesses in capital cases.

2. Establish immunity rules under which a capital litigant can obtain the testimony of individuals who might have favorable information but would otherwise be exposed to possible self-incrimination.

3. Make mental and physical examinations of the defendant mandatory in all cases in which capital punishment is sought.

4. Require more liberal discovery in both state and federal post conviction proceedings so that previously undiscovered evidence that might give rise to previously unlitigated issues can be developed and ruled upon.

5. Require states to make more liberal use of foreign jury panels in cases where the community climate for a trial is potentially inflamed.

6. Provide sufficient federal funding so that the states can develop schemes of representation in capital cases that meet congressional standards.

IV. Conclusion

This overview became more detailed than I had originally intended. Please call me or have Hew Pate call me for further discussion if that would be helpful to you. I intend to arrive early enough on Wednesday, May 23, 1990 to be available for a full discussion of the upcoming testimony.

May 22, 1990

Memo to Marshal's Office:

On Thursday, May 24, at 9:30 a.m., I will be testifying before the House Subcommittee on Courts in Room 2226 of the Rayburn building.

Please reserve a Court car to leave the building at 9:10 a.m. Nat will drive.

I would like a police officer in uniform to escort me to this hearing.

L.F.P., Jr.

ss

May 22, 1990

Ad Hoc Committee on Federal Habeas Corpus

Dear Chief:

As you know, I have been invited to testify before a Subcommittee of the House Committee on the Judiciary at 9:30 a.m., on Thursday, May 24. Professor Al Pearson has also been asked to testify. I believe that Paul Roney of our Committee will be present, and do not know whether he will testify. Charles Clark had a conflict that will prevent him from attending.

I enclose a copy of the full Statement that I have prepared with the assistance of Hew Pate. Eighty-five copies of this statement are being filed with the Committee this afternoon. When I testify, I will use a greatly abbreviated summary. I have been told that the Subcommittee would expect me not to exceed a half-a-dozen minutes.

Pending bills, introduced by Biden and Kastenmeier, would as a practical matter, prevent the enforcement of capital punishment.

Sincerely,

The Chief Justice

lfp/ss
Enc.

lfp/ss 05/23/90 HEW5 SALLY-POW

My Summary Testimony Tomorrow

MEMO TO HEW:

I think it best to identify the two changes made in the recommendations of the Ad Hoc Committee that the Conference adopted. We could add a brief paragraph along the lines of the attached draft. I would appreciate your adding a brief description of the amendments.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 23, 1990

Re: McCleskey v. Zant, No. 89-7024

Dear Tony,

I do not think reformulating the questions presented in the above case is necessary. The questions as phrased by the petitioner adequately raise all the issues in the case. Cert petitions often frame questions presented in an argumentative or possibly "inflammatory" manner. Since petitioner is represented by the NAACP Legal Defense Fund, we can be sure that the briefing will be of high quality.

Moreover, I do not believe that your proposed question 2--whether the Sixth Amendment was violated--is presented in the case at this juncture. The CA11 assumed that there was a violation but found it harmless. If we conclude that there was no abuse of the writ and that the CA11's analysis of the harmless error issue was erroneous, the CA11 would address the merits of the Sixth Amendment claim on remand. I see no reason that this Court should address the merits of the Sixth Amendment claim in the first instance.

Unless one of the other three who voted to grant cert would prefer the reformulated questions, I would prefer not to change the questions presented.

Sincerely,

WJB/gm

Justice Kennedy
Copies to the Conference

May 24, 1990

Dear Al:

I think our hearing before the House Judiciary Committee today went well. Between the three of us, we made the best arguments that can be made for the recommendations of the Ad Hoc Committee. Your responses to questions about the Kastenmeier bill were particularly good.

It has been a pleasure to have the opportunity to work with you. Over the long years of my private practice, including substantial litigation, you would rank with the best lawyers I have known. I have marveled at your capacity to work quickly without losing the effectiveness of what you write.

If I were in Georgia I would enjoy supporting you for Attorney General of the state. Whenever you are here at the Court, I will welcome the opportunity to see you.

Sincerely,

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

lfp/ss
bc: Hew

May 24, 1990

Dear Hew:

I assume that at 11:30 a.m. today when we left the House Judiciary Committee hearing room, the work of the Ad Hoc Committee ended. I have reported to the Chief Justice by telephone, and he expressed warmly his appreciation for what we tried to accomplish.

In all of this I relied a great deal on your intelligent assistance. However we may come out with the Congress, I think the Ad Hoc Committee will have made an important educational contribution.

Your role in this was an important one.

Sincerely,

R. Hewitt Pate, Esquire

lfp/ss

May 24, 1990

Dear Paul:

It was most helpful to have you beside me at the hearing before the Kastenmeier Committee this morning. Your long experience with federal habeas corpus qualified you as a truly expert witness. My impression was that we presented the best case that can be made for the recommendations of the Ad Hoc Committee.

The assignment given us by the Chief Justice was not an easy one. The opportunity to serve with - and to know you even better - is one I appreciate. I feel the same way about Charles Clark and the other members of our Committee. We had a strong and conscientious Committee.

I admire your good judgment in retiring at an age when you and Sally can do the things we all would like to do. But I must say that at my ancient age I would not undertake - as you and Sally will - a trip around the world. Jo would certainly join me in sending affectionate best wishes to you and Sally.

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: Hon. Charles Clark
Hon. Wm. Terrell Hodges
Hon. Barefoot Sanders

DONALD P. LAY
CHIEF JUDGE
P. O. BOX 75908
ST. PAUL, MINNESOTA 55175

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

To Have to Note

May 30, 1990

11 JUN 1990

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

Dear Mr. Justice Powell:

I was sorry that we did not get a chance to visit longer at the Congressional hearing. I sincerely feel that our modifications of the committee report at the conference are not as severe as people try to make them be. We are all indebted to you for your efforts in illuminating these important issues. It appears that the Senate did not listen to any of us and simply wrote a bill (parts of it in the hallway and cloakroom). It has some provisions that are unthinkable.

Sometime ago I wrote an article in the Detroit Law Review on habeas corpus relating to the Stone v. Powell decision. As you can see in my discussion of that decision, I had some personal involvement because of the companion case of Rice v. Wolff. I thought you might appreciate the personal anecdote that I relate in that decision.

Sometime ago I wrote to you for a small favor. I mentioned that I am a United States stamp collector and I was trying to get a set of first day covers of the Supreme Court stamp for my grandson. All of the Justices were kind enough to send me a personal envelope with their signature on it. You were kind to do so.

Unfortunately, in mailing these to the Postmaster for the first day cover, they now assert that they have "misplaced" four of these. One of the misplaced envelopes was yours. I wonder if I could impose upon you again to send me an unfranked, personal envelope with your signature in the left hand corner. The Postmaster has assured me that I can hand deliver them to the Postmaster here and they will provide the special first day stamping. I hope you will not find this too burdensome to do.

With kind personal regards.

Sincerely yours,

DONALD P. LAY

The University of Georgia
School of Law
Legal Aid Clinic

Ad Hoc File

11 JUN 1990

June 7, 1990

Justice Lewis F. Powell
United States Supreme Court
Washington, D.C. 20543

Dear Justice Powell:

I received your gracious and generous letter of May 24, 1990. Thank you for taking the time to write it. I gained a lot working on the project and working with you and the others involved.

Whenever someone speaks well of me as you did in your letter, the best response I can give is to live up to the compliments bestowed by my actions in the future. I will stay in touch to make sure that you take good care of yourself and decline onerous projects in the future.

Sincerely,

ALBERT M. PEARSON
Director

AMP:ec

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA. 17120

ERNEST D. PREATE, JR.
ATTORNEY GENERAL

16TH FLOOR
STRAWBERRY SQUARE
HARRISBURG, PA. 17120
(717) 787-3391

June 25, 1990

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

Dear Chief Justice Rehnquist:

As you know, the issue of federal Habeas Corpus revision is a subject of much debate (sometimes heated) in the Congress, in the American Bar Association, in the Judicial Conference, amongst Attorneys General, and prosecutors.

As you know, the Senate has for the moment approved by voice vote the Specter-Thurmond Amendment of Senator Joe Biden's S.1970. The entire bill, however, still remains open to the other amendments and final passage is somewhat uncertain.

The House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice, chaired by Representative Robert W. Kastenmeier, recently completed several days of testimony on this subject.

Former Associate Justice Powell, who under your charge reported last year several helpful recommendations, testified before that Subcommittee. On the opposing side were several federal judges, the A.B.A., and other interest groups who favored H.R. 4737, Representative Kastenmeier's bill.

Although, because of time constraints, I was not able to be designated as the National Association of Attorneys General's spokesperson on this issue, I was the only Attorney General, indeed, the only state prosecutor to testify on H.R. 4737. My testimony was the product of the combined efforts of the staff of several Attorneys General, most notably Mississippi, Texas, Georgia, California, and North Carolina. To be sure, I reiterated my strong opposition to the bill. I have enclosed a copy of my June 6, 1990, testimony for your review.

Since that time, I have met on several occasions with Senator Arlen Specter to request that he accept clarifying amendments to the Specter-Thurmond compromise, for, as prosecutors, we cannot support that hastily prepared and impractical compromise that bypasses the state Habeas process and permits an "appropriateness of death" review by federal courts that, as you have pointed out, is vague, standardless, and in my judgement, without legal precedent.

In those meetings with Senator Specter, I have been ably aided by Ron Castille, Philadelphia District Attorney, and, the legislative chairman of the National District Attorneys Association.

I am pleased to report that our meetings with Senator Specter have been productive thus far. The Senator has indicated a willingness to consider our clarifying proposals, and, where possible, work them into Specter-Thurmond, most likely in conference committee.

I have also spoken on two occasions with Representative Bill Hughes of New Jersey, who is chair of the Crimes Subcommittee of the House Judiciary Committee, and who is a member of Representative Kastenmeier's Subcommittee. Congressman Hughes is important in this process because Congressman Jack Brooks, Chair of House Judiciary, has designated Mr. Hughes as coordinator of the House anti-crime bill passage.

On June 21, 1990, along with Attorney General Bob Del Tufo of New Jersey, I also met at length with Congressman Hughes' Subcommittee Counsel, Andy Fois, as well as House Judiciary Counsel, Hayden Gregory. They have informed me that Representative Kastenmeier's bill will be the markup vehicle for the Habeas Corpus portion of the House package. The first markup is scheduled for Wednesday, June 27, 1990. The intent is to complete markup by July 4, 1990.

I have been informed that Congressman Bill McCollum, a ranking minority member of the House Judiciary Committee, has been designated by Chief of Staff Sununu to be the Administration's point person on the House package. In a sense, he would be Congressman Hughes' counterpart on the package.

Congressman McCollum has informed myself and other prosecutors at a meeting on Thursday, June 21, that Speaker Foley has told him he hoped to bring the House package up for vote as early as August and surely before the election recess in the fall.

The House Judiciary Counsel has asked Attorney General Del Tufo and myself to give them our five highest priority suggested revisions. But, given the makeup of the Committee, I am not optimistic that the House Judiciary Subcommittee and full Committee will do much to accommodate our suggestions.

Nonetheless, I will continue to work with all interested groups and legislative bodies to provide whatever assistance I can to achieve the goal you have set out in revising our death penalty review process.

To that end, I have enclosed a proposed resolution to be submitted to the National Association of Attorneys General at the July 8-11, 1990 meeting. I am hopeful that mobilizing Attorneys General and the National District Attorneys Association and its members, we can change the direction of Congress on this important issue.

I remain,

Respectfully yours,

Ernest D. Preate, Jr.

Ernest D. Preate, Jr.
Attorney General, Pennsylvania
Vice-Chair, NAAG Criminal Law Committee

EDPjr:gcc
enclosure

cc: Attorney General Tom Miller, Iowa, NAAG President
Justice Lewis F. Powell, Jr.