1991

Habeas Corpus Committee - Correspondence

Lewis F. Powell Jr.

M E M O R A N D U M

TO: Justice Powell DATE: July 15, 1991

FROM: Hew

Senate Crime Bill -- Habeas Corpus

The President's Crime Bill passed the Senate last week on a 58-40 vote. The Bill is voluminous, and includes provisions on many topics. Of interest to you will be the fact that it contains a waiting period for the purchase of handguns as well as other gun control measures. In brief summary, the habeas corpus provisions include the following:

A. General Habeas Corpus Reform. The Bill includes both a general habeas reform provision, and a specific section for capital cases.

1. Limitations Period. A one-year limitations period applies. Same as the Ad Hoc Committee proposal (which would have applied to capital cases only) with the Ad Hoc Committee rules for tolling of the limitations period.

2. Exhaustion. Exhaustion requirement is codified; petition may be denied on merits despite failure to exhaust state remedies.

3. Deference to State Factfinding. The present requirement of deference to state court factfinding is retained, and may only be rebutted with "clear and convincing" evidence.

4. "Full and Fair" Provision. This is the most significant provision, which bars federal habeas relief for any claim that was "fully and fairly adjudicated" in the state courts. The statute thus appears to extend the rule of your Stone v. Powell opinion beyond the Fourth Amendment context. My understanding is that the statute is intended to require deference to state court legal rulings, not to limit habeas review to cases of "mob dominated trials" and the like. You have privately expressed support for this type of provision before, but it was not part of the Ad Hoc Committee recommendation.

B. Capital Case Habeas Reform. The following are the major highlights of the statute's special section on capital habeas reform:

1. Counsel Requirement. The statute allows States to "opt in" under essentially the same requirements for the provision of counsel as the Ad Hoc Committee proposal -- States would have latitude to define qualifications based on local needs. Appointment rules and procedures are essentially the same as the Ad Hoc Committee's.

2. Mandatory Stay. Like the Ad Hoc Committee proposal, the Bill provides for a mandatory stay

of execution during the "one trip" through federal habeas.

3. Limits on Successive Petitions. The Ad Hoc Committee's recommendation for successive petitions is adopted: No successive petition except for new claims going to factual innocence of the crime that could not have been presented at the time of the first petition.

4. Limitations Period and Time Limits. The limitations periods of the bill are shorter than the Ad Hoc Committee proposal. The Bill also places limitations on the amount of time that a petition may be pending in court. Essentially, a petition must be filed within 180 days of appointment of counsel. The district court and court of appeals must decide the case within 180 days each (no time limit on the Supreme Court). The Ad Hoc Committee did not recommend time limits on adjudication.

5. Full and Fair. The "full and fair" provisions described above also apply in capital cases.

6. No Certificate of Probable Cause. Like the Ad Hoc Committee proposal, the Bill eliminates the requirement of a CPC for appeal of the first petition.

R.H.P.

The University of Georgia
School of Law

26 AUG 1991

Powell Committee File

August 20, 1991

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

Dear Justice Powell,

Attached is a copy of a letter that I recently sent to Congressman Henry Hyde concerning habeas corpus proposals now pending before the House of Representatives. As you may have heard, the Senate version of the crime bill includes reform proposals that apply both to capital and non-capital habeas corpus litigation. My major objection to these provisions is that they adopt the Powell Committee recommendations and then restrict federal habeas corpus review in capital cases to the full and fair hearing standard. The latter restriction basically overrules Brown v. Allen. In my view, the time is not yet ripe to eliminate substantive federal habeas corpus review in state death penalty cases. One irony in this on-going debate is that many of the groups most critical of the Powell Committee report last year see it as an optimal compromise position on habeas corpus reform now. They have learned a hard lesson in practical politics and probably have learned it a bit too late.

I learned over the summer that you had fallen and injured your hip. I hope you have managed a successful recovery from that misfortune. I will be at the Court to argue a case some time in the fall. If your schedule permits and it is otherwise ethical for me to do so, I would like to drop by to say hello.

Sincerely,

Albert M. Pearson
Professor of Law

AMP/khb

Athens, Georgia 30602 • Telefax (404) 542-5556

The University of Georgia

School of Law

26 AUG 1991

August 19, 1991

The Honorable Henry J. Hyde
U.S. House of Representatives
Washington, DC 20515

Re: Habeas Corpus Reform Proposal

Dear Congressman Hyde:

The attached editorial in today's Atlanta Constitution inspired me to write you. I served as counsel to the Powell Committee and did all of the basic drafting on the proposal which is now known as the Powell Committee Report. Permit me to register my views on the habeas corpus provisions of the Senate Crime Bill now before the House for consideration.

When your version of the Powell Committee Report was approved by the House of Representatives last year, I was much gratified. In my view, the House of Representatives would be well advised to adopt your version of habeas corpus reform in death penalty cases again this year. This would mean stripping the language in the habeas corpus reform provisions of the Senate Crime Bill making the "full and fair hearing" standard applicable in capital cases. So modified, the proposed habeas corpus provisions would establish a statute of limitation and impose the "full and fair hearing" standard in all state criminal cases that do not involve the death penalty. This in itself would represent a major change in the scope of federal habeas corpus review in a class of cases where it can be justified. As you know, less than 2% of all non-death penalty habeas corpus petitions are acted upon favorably by the federal courts. Needless to say, that does not necessarily mean that the federal courts were always correct in those cases; it means only that they disagreed with the analysis advanced by the state courts in denying post-conviction relief. At this juncture, however, these general changes in habeas jurisdiction should not apply to federal habeas corpus review of state capital convictions.

The retention of substantive habeas corpus review in capital cases is justifiable for two reasons: (1) the uniqueness of the death penalty as a form of punishment in comparison to incarceration and other penal restrictions on the person; and (2)

the high reversal rate in federal court of state death penalty convictions. Your version of the Powell Committee Report -- which did not include the "full and fair hearing" standard -- would give the states a way to promote finality in death penalty cases and yet, at the same time, would heighten fairness through improvement in the quality of death penalty defense representation. Based on the attached editorial, it appears that you have some concern about applying the full and fair hearing standard in capital cases. If that is indeed your view, I hope that you can persuade the administration and your colleagues in the House to see both the soundness and the fairness of the position you take. Even without that feature of the bill, habeas corpus would be much reformed if the balance of the administration's version of habeas corpus were to be enacted by Congress.

Good luck in your legislative endeavors.

Sincerely,

Albert M. Pearson
Professor of Law

AMP/khb

Friday, August 16, 1991 ******

THE ATLANTA CONSTITUTION

For 123 Years the South's Standard Newspaper

Don't suspend writ of habeas corpus

Article 1, Section 9 of the U.S. Constitution declares that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

President Bush, with no rebellion or invasion at hand but with the acquiescence of the Senate, is effectively proposing to do just that.

Known in English common law as the Great Writ, habeas corpus permits defendants to challenge the legality of their convictions in court. It is the greatest bulwark we have against unfair treatment by the criminal-justice system. In the United States, it has enabled the federal judiciary to provide relief for defendants unconstitutionally convicted and sentenced by state courts.

But this will no longer be the case if the 1991 crime bill is enacted in the form passed by the Senate last month.

The Senate bill would bar federal habeas corpus review if a federal judge concluded that the petitioner had received a "full and fair" hearing in state court. "Full and fair" is a legal term of art that merely means a proceeding is procedurally adequate. For example, if a trial judge refused to allow the defense to call witnesses [illegible] to meet the "full and fair" standard, the proceeding would be considered [illegible] constitutional violations [illegible] the trappings of a fair trial.

It is no exaggeration to say that the Senate crime bill would make federal habeas review all but a dead letter. This is particularly dangerous in death penalty cases, where public interest and public passion run high. Judges in states like Georgia who must stand for re-election are often extremely reluctant to reverse death penalty sentences even where constitutional violations are clear.

Rep. Henry Hyde (R-Ill), the key minority member of the House Civil and Constitutional Rights Subcommittee, has indicated that he understands that the "full and fair" standard will leave those convicted of capital offenses seriously unprotected. It is up to him and other understanding Republicans to join with House Democrats in refusing to go along with the Senate bill.

It would be the ugliest of ironies if Congress and the president celebrated the bicentennial of the Bill of Rights by gutting the Great Writ.

August 28, 1991

Dear Al,

Thank you for your letter of August 20. It is always good to hear from you.

I have not followed pending legislation on federal habeas corpus. It is not a subject that many members of the House or the Senate consider to be important.

We have been in our summer home in Richmond but will return to the Court early in September. As I have said before, you will always be welcome in my Chambers.

Sincerely,

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

LFP/djb

The University of Georgia
School of Law

File

26 DEC 1991

December 17, 1991

The Honorable Lewis F. Powell, Jr.
Associate Justice, Retired
Supreme Court of the United States
1 First St., N.E.
Washington, DC 20543

Dear Justice Powell,

I was recently at the Court doing an oral argument in the case of Franklin v. Gwinnett County School District. While I was there, I asked about you and several people told me that you were on the mend and still very active. Because I was in the building as an advocate, I was reluctant to drop by to see you. But, I hope you will be pleased to know that your views in the implied right of action cases were much on my mind. In particular, both in my brief and during argument, I referred to your dissenting opinion in the Cannon v. University of Chicago case as well as your majority opinion in Darone. If the present court rules in the favor of the school district on whose behalf I appeared, the judicial remedy in conditional spending power legislation will be confined to equitable relief. Your earlier views on this subject may indeed turn out to be quite prophetic.

You might also be interested to know, if someone has not already discussed this with you, that the Powell Committee position on habeas corpus reform has now become the compromise position between the liberal and conservative viewpoints. That, of course, is exactly how we cast the proposal almost from the outset. If it had not been considered along with the other array of crime-related legislative titles, the Powell Committee recommendations would now command the support of a substantial majority of the members of both the House of Representatives and the Senate. All in all, the efforts of the committee show a whole lot more political shrewdness than our earlier detractors were inclined to admit.

I hope that you and your family get together for an enjoyable holiday season and I hope that you continue to remain active and feel well.

Sincerely,

ap

Albert M. Pearson
Professor of Law

Athens, Georgia 30602 • Telefax (404) 542-5556

December 31, 1991

Dear Al:

Mrs. Powell and I were in our Richmond home for the Christmas holidays. When I returned the Court today I was pleased to find your letter of December 17. As I do not follow every case now argued before the Court, I hope you will let me know the outcome of Franklin v. Gwinnett County School District. I thought the decision of the Court in Cannon was dead wrong, and I believe subsequent decisions have come closer to my dissenting view.

Thank you also for the second paragraph in your letter reporting on the status of the recommendations made by the Powell Committee. Of course, these recommendations reflect to a large degree the superb advice we received from you.

Whenever you are here at the Court and have the time, I would enjoy a visit with you. Also I repeat that if you should ever need a recommendation I would be happy to support you strongly.

I am sending a copy of your letter to Hew Pate. My former firm, Hunton & Williams, is fortunate to have Hew as an associate. He also has a high opinion of you.

Sincerely,

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

lfp/ss

cc: R. Hewitt Pate, Esquire

Sally
JAN 1

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My Habeas Corpus Committee File

January 2, 1992

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

Dear Al:

Justice Powell kindly sent me a copy of your December 17, 1991 letter to him. Congratulations on your argument at the Court and good luck! I would love to hear about the argument sometime when you have a few minutes. If you have a spare copy of your brief on hand, I would also be most interested in reading it.

Your comments about the Powell Committee position on habeas corpus reform are right on the money. Obviously, the Administration wanted to go farther in restricting the scope of habeas. House liberals hoped to use the massive Crime Bill to sneak through measures such as a Teague-overruler that would make the habeas situation worse. It is too bad that Congress did not end up embracing the middle position offered by the Powell Committee. Do you think there are prospects for any more habeas legislation, or is everyone on the Hill tired of the subject?

Justice Powell was of course quite right to mention my "high opinion" of you and your work. I hope that we will have an opportunity to get together again sometime soon. Please let me know if you ever happen to be in the Richmond area. With best regards,

Yours sincerely,

Hew.

R. Hewitt Pate

834/619
cc: Honorable Lewis F. Powell, Jr.