9-21-1989

Habeas Corpus Committee - Press Briefing

Lewis F. Powell Jr

Suspend - Monday

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Memorandum

Ad Hoc File

DATE: September 15, 1989

FROM: David Sellers, Public Information Officer DF

SUBJECT: Judicial Conference Media Arrangements

TO: Hugh Pate, Law Clerk to Justice Kennedy

As per our telephone conversation of September 15, 1989, the following plans have been made with regard to media and the upcoming meeting of the Judicial Conference of the United States.

Early next week the press will be informed that Justice Powell will be announcing the report of the Habeas Corpus Committee at a September 21 briefing in the Supreme Court Lawyers' Lounge. It is my understanding that you are in the process of preparing a statement for Justice Powell. We will supply you with Judicial Conference letterhead. Please provide us with a copy of the statement so we can incorporate it in the package to be released Thursday. Keep in mind that the media may not be up to speed on this somewhat technical issue.

Wednesday night we will make final changes in the press release to reflect final action taken by the Conference. As we discussed, a draft press release will be delivered to you later today.

Thursday morning at 9 a.m. the report of the Habeas Corpus Committee will be released to the media embargoed to 10 a.m. Shortly before 10 a.m. I will tell the reporters assembled in the Lawyers' Lounge that Justice Powell has a brief statement to make concerning the report of the Habeas Corpus Committee, and that he will accept questions relating only to this issue. At 10 a.m. Justice Powell will enter the room and make his statement. I suggest that he take about ten minutes of questions. We should decide before hand whether he would like someone to step in after ten minutes to indicate that there will be one final question, or whether he would like to end the questioning himself.

Ask Hugh

When Justice Powell has concluded his appearance, he should return to chambers. Either you or AO General Counsel Bill Burchill may like to remain in case additional question regarding the report are raised. I then will inform the media of any other action taken by the Judicial Conference and distribute the press release and other relevant handouts. For those who did not attend the briefing, the press release and copies of Justice Powell's statement and Committee report will be mailed to about 100 media

outlets that are on a list maintained by my office. Copies also will be made available through Toni House's office.

C-SPAN is undergoing some renovations of its studios, and will arrange for the interview to take place either in a conference room in their building (444 N. Capitol St., NW), or in a suitable room at the Court. You and I will accompany Justice Powell to the interview. The precise location will be finalized on Monday. The interview will begin at 11:30 a.m. and last 20 minutes. It is requested that Justice Powell report to the designated location at 11:20 a.m. The interview will be conducted by Connie Doebele, who is the station's expert on the courts and has interviewed Justice Powell in the past. She will limit her questions to the Habeas Corpus Committee report.

C-SPAN will supply Justice Powell with a complimentary tape of his interview. The interview is tentatively scheduled to air Thursday night and then again over the weekend. We will be given the exact times next week.

I will update you as these plans are finalized. Please do not hesitate to call me at 633-6040, if you have any questions.

cc: Mr. Mecham
Mr. Feidler
Ms. House

MEMORANDUM TO JUSTICE POWELL

From Toni House
September 18, 1989
Re: Arrangements for Your Press Briefing

Thursday's Schedule

This memorandum is to confirm our discussion this morning regarding the arrangements for your press briefing Thursday.

The briefing is scheduled to take place at 10 a.m. in the Employees Conference Room, G-1. I will arrive in your chambers a few minutes before 10 and walk down to the briefing with you. David Sellers, my counterpart at the Administrative Office, will already be in G-1, and will have advised the reporters to limit their questions to the contents of the committee report.

Our Report to Reporters at 9 AM

We plan to duplicate the committee report, embargoed for release at 10 a.m., and provide copies to interested reporters an hour in advance, so they should be prepared to ask informed questions. 10 AM

Ask Hew. Our reports have Our Report should suffice.

I understand from David that Hugh Pate is drafting a prepared statement for you. I know the press would find it helpful to have a copy of any such statement, at least by the time you deliver it, if not in advance.

I suggest you take questions for 10 to 15 minutes -- as long as it takes to satisfy all legitimate queries. I will be on hand to "rescue" you, should that event appear necessary. At the briefing's conclusion, I'll walk back upstairs with you.

Concerning your interview with C-Span: Connie Doebele has asked that it be conducted somewhere here in at the Court. C-Span's studio is torn up for renovations. I recommend the Employees Conference Room. In addition to the desk, there is a conference table and two comfortable chairs, so you have your choice of settings. OK

The C-Span interview is set for 11:30 a.m. Connie would appreciate your arriving about 11:20 to test voice-levels, etc. Either David or I will come to chambers to pick you up. 11.20 AM

Please let me know if these arrangements are not satisfactory. And thank you for your gracious cooperation.

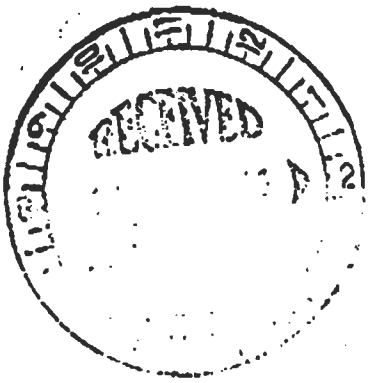
cc: Hugh Pate
David Sellers

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
POST OFFICE BOX 1767
OKLAHOMA CITY, OKLAHOMA 73101

WILLIAM J. HOLLOWAY, JR.
CHIEF JUDGE

TELEPHONE
405 / 231-4866
FTS 736-5876

September 18, 1989



Honorable Aubrey E. Robinson, Jr.
Chief Judge
U. S. District Court
District of Columbia
U. S. Courthouse
3rd & Constitution Avenue, N.W.
Washington, D. C. 20001

Re: Ad Hoc Committee Report on Habeas Statutes

Dear Judge:

From my study that I mentioned to you on the phone, I have some serious concerns about the proposal of the Committee. For your information I am transmitting a brief memorandum which outlines these thoughts.

For the reasons explained therein, I will not be able to join in the report recommending the statutory change proposed by the Committee.

It was good to visit with you and I look forward to seeing you at the Conference.

Sincerely,

Wm. J. Holloway, Jr.

WJH:kw

With full deference to the studious efforts and the proposal of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, we must respectfully disagree with the Report. The Committee has obviously given thorough and exhaustive consideration to many problems in the operation of the habeas statutes. Their commendable concerns about the adequacy of representation of indigent death row defendants are particularly manifest in the innovative suggestions in the Report.

We, nevertheless, first must express our special objection to proposed Section 2257(c)(3) of Title 28. That subsection would deprive a federal habeas court of any authority to issue a stay of execution or any habeas relief even though the court's confidence in the determination of the sentencer to impose a penalty of death is undermined by a showing based on a factual predicate that could not have been discovered earlier through the exercise of reasonable diligence in time to present the claim for state or federal post-conviction review. Second, we likewise have serious concerns about the six-month time bar imposed by proposed § 2258. This mechanical time-bar runs counter to established equitable principles which have traditionally been applied with respect to the Great Writ.

I

The Committee concludes that if there is any doubt about the sentencing phase of a capital case, it should be raised during a state prisoner's initial attempt to obtain post-conviction review. Of course, repetitive habeas proceedings should be avoided and it is desirable that all claims challenging both the determination of

guilt and the sentence be asserted in the very earliest phase of any direct appeal or post-conviction proceedings. Nevertheless, as noted below, there have been numerous instances where the factual predicate for a substantial constitutional claim could not be discovered earlier, despite the exercise of reasonable diligence. It is for this compelling reason that the Committee has wisely provided in proposed Section 2257(2) for the assertion of claims of violation of the Constitution or laws of the United States for relief from a guilty verdict where, such claims are based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time for state or federal post-conviction review. Nevertheless, Section 2257(3) would deny any relief where only the death sentence and not the guilty verdict, is undermined by such a showing.

Brady v. Maryland, 373 U.S. 83 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis added). See also United States v. Agurs, 427 U.S. 97 (1976). Thus the constitutional rule clearly calls for relief in circumstances where the extreme penalty itself is thrown in doubt, even though the conviction may not be so undermined. In the margin we note a number of cases where courts have been compelled to set aside judgments in criminal cases because of Brady violations,[1] and

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1 See, e.g., Giglio v. United States, 405 U.S. 150 (1972); United States v. Hoffa, 437 F.2d 11 (6th Cir. 1971), cert. denied, 402 U.S. 988 (1971); Bowen v. Maynard, 799 F.2d 593 (10th Cir.) cert. denied, 479 U.S. 962 (1986); United States ex rel. Thompson

(Footnote continued on next page)

several of them have been cases where a death penalty alone was undermined.[2]

In circumstances where the penalty determination alone is thus skewed, we must vigorously disagree with the Report's recommendation to deny all authority to the federal courts to grant relief in subsequent post-conviction proceedings. Denial of relief where newly discovered mitigating evidence could be shown would run directly counter to the principle that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor . . . ." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (emphasis added); see also Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934, 2946; 57 U. S. L. W. 4958, 4962 (1989) (citing Eddings and its principle that "a sentencer may not be precluded from considering and may not refuse to consider any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death."). [3] Where a Brady violation occurs and results in the suppression of mitigating evidence, or evidence undermining an aggravating circumstance, the extreme penalty would

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(Footnote continued):
v. Dye, 221 F.2d 763 (3rd Cir. 1955), cert. denied, 350 U.S. 875 (1955); United States ex rel. Almeida v. Baldi, 195 F.2d 815 (3rd Cir. 1952), cert. denied, 345 U.S. 904 (1953). See generally Annotation, Withholding or Suppression of Evidence by Prosecution in Criminal Case as Vitiating Conviction, 34 A.L.R. 3d 16 (1970) (collecting cases).

2

See, e.g., Chaney v. Brown, 730 F.2d 1334, 1358 (10th Cir. 1984), cert. denied, 469 U.S. 1090 (1984); United States ex rel. Almeida v. Baldi, 195 F.2d 815, 819-820 (3rd Cir. 1952), cert. denied, 345 U.S. 904 (1953); Orndorff v. Lockhart, 707 F. Supp. 1062 (E.D. Ark. 1988); Richardson v. Florida, 546 So.2d 1037 (Fla. 1989); Lightbourne v. Dugger, Nos. 73609, 73612, slip op. (Fla. July 20, 1989).

3

See also, Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (en banc), cert. denied, ___ U.S. ___, 108 S.Ct. 116 (1987).

be carried out in violation of the principle of Brady that due process is denied where suppressed evidence goes to guilt or punishment, and of Eddings, which guarantees that all mitigating evidence must be considered.

It would also be distressing for relief to be unavailable where a death penalty is obtained in violation of Napue v. Illinois, 360 U.S. 264, 269 (1959), which recognized that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. . . ." See also Giglio v. United States, 405 U.S. 150, 154-55 (1972) (undisclosed promise of leniency made to key prosecution witness in return for his testimony violates due process requirements enunciated in Napue); Miller v. Pate, 386 U.S. 1 (1967) (prosecution's deliberate use of false evidence not discovered until second habeas proceeding commenced). Again, both Brady violations and Napue violations, first established by later discovered evidence, are cases where a constitutional claim challenging the sentence alone could not be heard by a federal habeas court if the proposal of Section 2257 were adopted.[4]

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4 Cf. e.g., Chaney v. Brown, 730 F.2d at 1342; United States, ex rel. Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), cert. denied, 345 U.S. 904 (1953); Orndorff v. Lockhart, 707 F. Supp. 1062 (E.D. Ark. 1988); Jones v. Commonwealth of Kentucky, 97 F.2d 335 (6th Cir. 1938); Hill v. Thigpen, 667 F. Supp. 314 (N.D. Miss. 1987); Troedell v. Wainwright, 667 F. Supp. 1456 (S.D. Fla. 1986); Richardson v. Florida, 546 So.2d 1037 (Fla. 1989); Lightbourne v. Dugger, Nos. 73609, 73612, slip op. (Fla. July 20, 1989).

II

We must also express our concern as to the desirability of the proposed six-month period in which the federal habeas petition must be filed. Although implementation of this limitation is facilitated by the provision for counsel and the carefully drafted tolling provisions, the filing period itself nevertheless remains a rigid limitation. Such a mechanical provision is not in harmony with the regard for the Great Writ which "has traditionally been regarded as governed by equitable principles." Fay v. Noia, 372 U.S. 391, 438 (1963) (citing United States ex rel Smith v. Baldi, 344 U.S. 561, 573 (1953) (Frankfurter, J., dissenting)). Consistently with such equitable principles, Rule 9 of the Rules Governing Habeas Corpus Petitions under 28 U.S.C. § 2254 already provides protection for the states against prejudice resulting from the assertion of untimely or successive petitions. This relief seems adequate and consistent with the history of the writ.

One extremely disturbing situation must be noted related to the time bar proposed. If a defendant under a death sentence were denied requested and properly admissible Brady material that strongly supported a mitigating circumstance or seriously undermined an aggravating circumstance, and if that evidence was not discovered within the 180 day time bar of § 2258, then a federal court would be powerless under § 2257 to grant a stay or any habeas relief against a seriously questionable death sentence. If the evidence did not relate to the guilty verdict no relief would be possible. It is a distressing contradiction that statutes of limitations in civil cases have tolling exceptions that permit one to assert a claim to recover his property when a wrong concealed by fraud is discovered, and yet under the proposed

habeas statute one seeking to set aside his death sentence on the ground of a constitutional violation undermining the sentence alone would be denied relief, although his very life is at stake.

We must, therefore, respectfully disagree with the Committee's report and cannot join in recommending such statutory provisions to the Congress.

MEMORANDUM

TO: Justice Powell September 19, 1989

FROM: Hew

RE: Probable Questions on Habeas Proposal

1. Constitutionality: Habeas corpus for state prisoners is not mentioned in the Constitution at all. It did not exist until Congress created it by statute in 1867, and Congress is free to alter §2254. Of course, at the time of the adoption of the Constitution, it was left to Congress to decide whether there should even be lower federal courts at all, much less whether habeas relief should be available if the courts were created.

Even if the Suspension Clause did apply, the relatively minor limits on habeas proposed here could never be termed a "suspension." The Court has made clear in Swain v. Pressley, 430 U.S. 372 (1977), that the Constitution could only be implicated if prisoners were limited to an "inadequate and ineffective" remedy. It cannot reasonably be argued that one full course of state and federal habeas review with a state-provided lawyer and an automatic stay of execution is "inadequate and ineffective."

2. Statute of Limitations: The 180-day period is not unnecessarily short. The 180 days represents only time when no litigation is taking place, and the period starts to run

only when a lawyer is appointed. There is a provision for a 60-day extension when necessary. In view of the fact that the prisoner will have assistance of counsel, and that his federal court claims must have already been presented in state court, the time is ample. Note that the 6-month period is far longer than afforded for taking any type of state or federal appeal.

3. Factual Innocence: The limitation of subsequent and successive petitions under §2257(c) to claims of factual innocence of the crime itself is vital to enhancing finality in capital litigation. To allow challenges to the sentence as well would gut the proposal. The so-called discovery of "new" mitigating evidence about the defendant's background is the single most frequent claim in last-minute habeas petitions. Unlike evidence about the crime, which turns on historical fact, mitigating evidence can be literally anything, including psychiatric speculation or some newly remembered fact about the prisoner's childhood. Such evidence is easily manufactured, often with the help of so-called "expert" psychiatric witnesses. The Committee does not believe that entertaining these repeated claims enhances fairness. It only contributes to delay. Our proposal gives the prisoner counsel and an automatic stay for one full course of review. It is fair to require any challenge to the sentence to be raised at this time. Where innocence of the

crime is at issue, the proposal of course provides an exception.

4. Reduction of Delay: The proposal is not certain to reduce "delay" as a whole, because it cannot affect the time spent while a case is actually being reviewed by a court. Rather, the proposal only attempts to limit the amount of "down time" -- time during which judicial review is not proceeding at all. There is now no incentive to move review forward until an execution date is set. It should be emphasized that reduction of delay is not the only function of the proposal. It also seeks to enhance fairness and to eliminate chaotic, time-pressured, last-minute litigation.

5. Separate Procedures for Capital Cases: Separate procedures are justified by the different incentives of capital and non-capital prisoners. Prisoners serving a term of years have every incentive to seek judicial review as soon as possible. The capital inmate's incentive is just the opposite -- delay in any way possible.

6. Standards for Competency: The Committee believes that the proposal will be more attractive to the States if the standards for appointing counsel are flexible. Different States may need different schemes for qualification and funding of counsel. Of course, the adequacy of a State's

program as a whole is a federal question subject to review by a federal court.

7. Ineffective Assistance Claims: Ineffective assistance of habeas counsel is not itself a ground for relief under the proposal, and should not be. The Constitution does not provide any right to counsel on post-conviction review. Murray v. Giarratano. The Committee did not believe creation of such a new right to effective assistance was appropriate. This would open a new ground for collateral litigation and delay. The competency of counsel is best addressed in the State's system for appointment, not in individual cases.

For Prem Conference Thursday

Ad Hoc File

Read Hews memo Wed AM, and again on Thurs AM before Prem Conference

MEMORANDUM

TO: Justice Powell September 19, 1989

FROM: Hew

RE: Probable Questions on Habeas Proposal

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not required by Court.

Even if the "Suspension Clause" did apply, the relatively minor limits on habeas proposed here could never be termed a "suspension." The Court has made clear in Swain v. Pressley, 430 U.S. 372 (1977), that the Constitution could only be implicated if prisoners were limited to an "inadequate and ineffective" remedy. It cannot reasonably be argued that one full course of state and federal habeas review with a state-provided lawyer and an automatic stay of execution is "inadequate and ineffective."

Even if applicable, it is inapplicable. No "Suspension" of Fed H/C here.

2. Statute of Limitations: The 180-day period is not unnecessarily short. The 180 days represents only time when no litigation is taking place, and the period starts to run

dead time

only when a lawyer is appointed. There is a provision for a 60-day extension when necessary. In view of the fact that the prisoner will have assistance of counsel, and that his federal court claims must have already been presented in state court, the time is ample. Note that the 6-month period is far longer than afforded for taking any type of state or federal appeal.

yes

3. Factual Innocence: The limitation of subsequent and successive petitions under §2257(c) to claims of "factual innocence" of the crime itself is vital to enhancing finality in capital litigation. To allow challenges to the "sentence" as well would gut the proposal. The so-called discovery of "new" mitigating evidence about the defendant's background is the single most frequent claim in last-minute habeas petitions. Unlike evidence about the crime, which turns on historical fact, "mitigating evidence" can be literally anything, including psychiatric speculation or some newly remembered fact about the prisoner's childhood. Such evidence is easily manufactured, often with the help of so-called "expert" psychiatric witnesses. The Committee does not believe that entertaining these repeated claims enhances fairness. It only contributes to delay. Our proposal gives the prisoner counsel and an automatic stay for one full course of review. It is fair to require that any challenge to the sentence to be raised on the first review ~~at this time~~. Where innocence of the

§2257(c) properly limits successive petitions to claims of innocence of the crime. It does not allow successive petitions to review the "sentence". New "mitigating evidence" can always be claimed

yes

crime is at issue, the proposal of course provides an exception.

4. Reduction of Delay: The proposal is not certain to reduce "delay" as a whole, because it cannot affect the time spent while a case is actually being reviewed by a court. Rather, the proposal only attempts to limit the amount of "down time" -- time during which judicial review is not proceeding at all. There is now no incentive to move review forward until an execution date is set. It should be emphasized that reduction of delay is not the only function of the proposal. It also seeks to enhance fairness and to eliminate chaotic, time-pressured, last-minute litigation.

Our proposal seeks to enhance fairness

5. Separate Procedures for Capital Cases: Separate procedures are justified by the different incentives of capital and non-capital prisoners. Prisoners serving a term of years have every incentive to seek judicial review as soon as possible. The capital inmate's incentive is just the opposite -- delay in any way possible. Yes

6. Standards for Competency: The Committee believes that the proposal will be more attractive to the States if the standards for appointing counsel are flexible. Different States may need different schemes for qualification and funding of counsel. Of course, the adequacy of a State's

program as a whole is a federal question subject to review by a federal court.

7. Ineffective Assistance Claims: Ineffective assistance of habeas counsel is not itself a ground for relief under the proposal, and should not be. The Constitution does not provide any right to counsel on post-conviction review. Murray v. Giarratano. The Committee did not believe creation of such a new right to effective assistance was appropriate. This would open a new ground for collateral litigation and delay. The competency of counsel is best addressed in the State's system for appointment, not in individual cases.

lfp/ss 09/19/89STATE SALLY-POW

Judicial Conference
September 20, 1989
Lewis F. Powell, Jr.

AD HOC COMMITTEE REPORT

The Chief Justice suggested that I make a brief statement about the work of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases. The Chief Justice created this Committee in June 1988, and asked me to chair it.

Other members of the Committee were Chief Judges Charles Clark and Paul Roney, and District Judges Terry Hodges of Florida and Barefoot Sanders of Texas. Each of these judges serves in the Fifth or Eleventh Circuits, whose States have the greatest numbers of prisoners under capital sentence.

Professor Al Pearson of the University of Georgia Law School, who has had experience representing defendants in capital cases, served as Reporter. Bill Burchill of the Administrative Office served as Secretary.

The Committee's Report, dated August 23, with drafts of proposed legislation, has been sent to each of you. In view of the mass of papers members of the Conference have to consider, it may be helpful if I comment briefly on the problem and what the Committee recommends.

I think you will all agree that the present system of post-conviction review in capital cases is unsatisfactory. It neither provides sufficient protections for prisoners nor adequately recognizes the states' interest in finality. The hard fact is that the laws of 37 states are not being enforced by the courts.

About 20,000 murders are committed in our country each year. Only a fraction of the worst murderers - even those convicted - are sentenced to die.

There are now approximately 2,200 convicted murderers on death row awaiting execution. Since the Supreme Court's 1972 Furman decision only 116 executions have taken place. The average length of time between conviction and execution has been more than eight years. Delay

of this magnitude is hardly necessary for fairness or for thorough review.

A major problem with the present system is the need for qualified counsel to represent indigent prisoners at all stages. As you know, the Constitution requires counsel for the trial and direct review. A new federal statute requires appointment of counsel on federal habeas in capital cases. But his leaves a serious gap in some state collateral systems.

Another aspect of the present system causes related problems. In most states the setting of an execution date now provides the only incentive for the condemned prisoner to initiate post-conviction review. As a result, nothing happens until a date is set. Then counsel is appointed or found, and urgent efforts are made to stay execution.

Capital litigation is distinctly different from other criminal cases. Typically, there are long periods of inactivity, followed by hurried eleventh hour activity. This last-minute

litigation does not comport with the sober and deliberate review that is appropriate.

I respect those who argue for outright abolition of death punishment. But it seems irrational to retain the penalty, and frustrate its fair implementation.

The Committee proposes new statutory procedures that would apply in capital cases. Of course, Congress is free to legislate with respect to review of state convictions by federal habeas corpus. Habeas corpus for state prisoners is not mentioned in the Constitution. It was created by Congress by statute in 1867.

Separate procedures are appropriate for capital litigation because it is unique. The incentives facing a capital defendant differ from those facing the ordinary prisoner. The prisoner serving a term seeks speedy review. But delay is the objective of one sentenced to death.

The aim of our proposal is this: Capital cases should be subject to one fair and complete course of collateral review through the state and federal systems. This review should be

free from the time pressure of an impending execution and with the assistance of competent counsel for the prisoner. When this review has concluded, litigation should end.

This proposal would not be binding on a state. It would allow a State to elect to bring collateral litigation, involving its capital prisoners, within the scope of the new statute. A state could do this by providing competent counsel in state post-conviction review.

The proposal would reduce unnecessary delay by providing a time limit on the filing of federal habeas petitions. The time limit would have tolling rules that ensure ample time for the presentation and consideration of all claims.

Finality would be enhanced by limiting the circumstances in which federal relief may be sought after one full course of litigation up to the Supreme Court.

In addition to competent counsel, the new proposal provides other measures to protect the rights of prisoners. An automatic stay of execution is provided during the course of review

to eliminate time pressure. And the certificate of probable cause is eliminated to provide for automatic review by the Court of Appeals.

Two members of the Conference have expressed some concern about two aspects of our proposal. I say a few words about each.

First, the proposal limits subsequent and successive applications for federal habeas relief to claims of innocence of the crime itself. It does not allow the prisoner to use a repeat petition to challenge the sentence alone.

In my view, this provision, in §2257(c), is vital to providing finality. Allowing repetitive challenges to the sentence would be far different from providing an exception for claims of innocence.

Unlike evidence about the crime, which turns on historical fact, mitigating evidence - as this Court has held - can be unlimited. It may include speculation and facts only dimly remembered. New "expert" witnesses are easy to find.

It has been suggested that not allowing an exception to challenge the sentence where the state has withheld evidence of mitigation, would run counter to Brady v. Maryland. But meritorious claims of withholding sentencing evidence are extremely rare.

Our proposal gives the prisoner counsel and an automatic stay for one full course of review. It is fair to require any challenge to the sentence to be raised at this time.

A second concern mentioned is that the 180 day limitations period is too short. The period includes only time when no litigation is taking place, and the period starts to run only when a lawyer is appointed.

There also is a provision for a 60-day extension when necessary. The prisoner will have assistance of counsel. The time for preparation is therefore ample.

I note that, although there has been no serious time limit on habeas in the past, the 180-day period is far longer than afforded for

taking any type of state or federal appeal, including cert petitions.

In conclusion, I note that the fundamental requirement of a justice system is fairness in individual cases. Where the death penalty is involved this means a searching and impartial review of the propriety of the sentence.

Fairness also requires that if a prisoner's claims are found to be without merit, society is entitled to have a lawful penalty carried out without unreasonable delay.

I thank the Conference for allowing me to present this Report. Our reporter Professor Al Pearson, is here. He deserves much of the credit for the careful drafting of the proposed new statutes. My law clerk, Hewitt Pate, also attended all six of the Committee meetings, and supplemented the research.

Press Briefing
September 21, 1989
Lewis F. Powell, Jr.

STATEMENT OF JUSTICE POWELL

The Chief Justice suggested that I make a brief statement about the work of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, and the Report that we have submitted to the Judicial Conference. The Chief Justice created this Committee in June, 1988, and asked me to chair it.

The Conference received the Committee Report yesterday, and decided to release the Report to the public. The Conference deferred final action on the Report until its March meeting.

This Report concerns procedures allowing post-conviction challenges to state criminal convictions in federal court. These procedures

are not required by the Constitution. They were created by Congress in 1867, and Congress is of course free to alter them. In brief summary, habeas corpus is a procedure by which a prisoner convicted in state court may challenge his conviction and sentence in federal court by claiming that it violated the Constitution.

This federal review takes place after the direct appeal of the conviction to the state supreme court, and often after a petition for certiorari to the United States Supreme Court. Each State also has its own habeas corpus procedures, and prisoners are required to seek state habeas relief before moving to federal court. Our Committee was formed to study the application of the habeas corpus system in cases involving the death penalty.

The Committee sought the views of a number of groups interested in capital punishment. Although there was disagreement as to what should be done, there was almost unanimous agreement that the present system is unsatisfactory. It neither provides sufficient protections for prisoners nor

adequately recognizes the public's interest in enforcement of the law.

The hard fact is that the laws of 37 States are not being enforced by the courts. About 20,000 murders are committed in our country each year. Only a fraction of the worst murderers -- even those convicted -- are sentenced to die. There are now approximately 2,200 convicted murderers on death row awaiting execution. Since the Supreme Court's 1972 Furman decision only 116 executions have taken place. The average length of time between conviction and execution has been more than eight years. Delay of this magnitude is hardly necessary for fairness or for thorough review.

A major problem with the present system is the need for qualified counsel to represent indigent prisoners at all stages. The Constitution requires counsel for the trial and direct review. A new federal statute requires appointment of counsel on federal habeas in capital cases. But this leaves a serious gap in

state systems that do not provide counsel for post-conviction review.

Another aspect of the present system causes several difficulties. In most States the setting of an execution date now provides the only incentive for the condemned prisoner to initiate post-conviction review.

As a result, nothing happens until a date is set. Then counsel is appointed or found, and urgent efforts are made to stay execution. Capital litigation is therefore distinctly different from other criminal cases. Typically, there are long periods of inactivity, followed by hurried eleventh-hour activity. This last-minute litigation does not comport with the careful and deliberate review that is appropriate.

I respect those who argue for outright abolition of death punishment. But it seems irrational to retain the penalty, and frustrate its fair implementation.

Separate habeas corpus procedures are appropriate for capital litigation because it is unique. The incentives facing a capital defendant

differ from those facing the ordinary prisoner. The prisoner serving a term seeks speedy review. But delay is the objective of one sentenced to death.

The aim of our proposal is this: Capital cases should be subject to one fair and complete course of collateral review through the state and federal systems.

This review should be free from the time pressure of an impending execution and with the assistance of competent counsel for the prisoner. When this review has concluded, litigation should end.

This proposal is optional. It would not be binding on a State. It would allow a State to elect to bring collateral litigation involving its capital prisoners within the scope of the new statute. A State could do this by providing competent counsel in state post-conviction review.

The proposal would reduce unnecessary delay by providing a time limit on the filing of federal habeas petitions. The time limit would

have tolling rules that ensure ample time for the presentation and consideration of all claims.

Finality would be enhanced by limiting the circumstances in which federal relief may be sought after one full course of litigation up to the Supreme Court.

In addition to competent counsel, the new proposal provides other measures to protect the rights of prisoners. For example, an automatic stay of execution is provided during the entire course of review to eliminate time pressure.

In conclusion, I note that the fundamental requirement of a justice system is fairness in individual cases. Where the death penalty is involved this means a searching and impartial review of the propriety of the sentence. Fairness also requires that if a prisoner's claims are found to be without merit, society is entitled to have a lawful penalty carried out without unreasonable delay.

Press Briefing
September 21, 1989
Lewis F. Powell, Jr.

STATEMENT OF JUSTICE POWELL

The Chief Justice suggested that I make a brief statement about the work of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, and the Report that we have submitted to the Judicial Conference. The Chief Justice created this Committee in June, 1988, and asked me to chair it.

The Conference received the Committee Report yesterday, and decided to release the Report to the public. The Conference deferred final action on the Report until its March meeting.

This Report concerns procedures allowing post-conviction challenges to state criminal convictions in federal court. These procedures

are not required by the Constitution. They were created by Congress in 1867, and Congress is of course free to alter them. In brief summary, habeas corpus is a procedure by which a prisoner convicted in state court may challenge his conviction and sentence in federal court by claiming that it violated the Constitution.

This federal review takes place after the direct appeal of the conviction to the state supreme court, and often after a petition for certiorari to the United States Supreme Court. Each State also has its own habeas corpus procedures, and prisoners are required to seek state habeas relief before moving to federal court. Our Committee was formed to study the application of the habeas corpus system in cases involving the death penalty.

The Committee sought the views of a number of groups interested in capital punishment. Although there was disagreement as to what should be done, there was almost unanimous agreement that the present system is unsatisfactory. It neither provides sufficient protections for prisoners nor

adequately recognizes the public's interest in enforcement of the law.

The hard fact is that the laws of 37 States are not being enforced by the courts. About 20,000 murders are committed in our country each year. Only a fraction of the worst murderers -- even those convicted -- are sentenced to die. There are now approximately 2,200 convicted murderers on death row awaiting execution. Since the Supreme Court's 1972 Furman decision only 116 executions have taken place. The average length of time between conviction and execution has been more than eight years. Delay of this magnitude is hardly necessary for fairness or for thorough review.

A major problem with the present system is the need for qualified counsel to represent indigent prisoners at all stages. The Constitution requires counsel for the trial and direct review. A new federal statute requires appointment of counsel on federal habeas in capital cases. But this leaves a serious gap in

state systems that do not provide counsel for post-conviction review.

Another aspect of the present system causes several difficulties. In most States the setting of an execution date now provides the only incentive for the condemned prisoner to initiate post-conviction review.

As a result, nothing happens until a date is set. Then counsel is appointed or found, and urgent efforts are made to stay execution. Capital litigation is therefore distinctly different from other criminal cases. Typically, there are long periods of inactivity, followed by hurried eleventh-hour activity. This last-minute litigation does not comport with the careful and deliberate review that is appropriate.

I respect those who argue for outright abolition of death punishment. But it seems irrational to retain the penalty, and frustrate its fair implementation.

Separate habeas corpus procedures are appropriate for capital litigation because it is unique. The incentives facing a capital defendant

differ from those facing the ordinary prisoner. The prisoner serving a term seeks speedy review. But delay is the objective of one sentenced to death.

The aim of our proposal is this: Capital cases should be subject to one fair and complete course of collateral review through the state and federal systems.

This review should be free from the time pressure of an impending execution and with the assistance of competent counsel for the prisoner. When this review has concluded, litigation should end.

This proposal is optional. It would not be binding on a State. It would allow a State to elect to bring collateral litigation involving its capital prisoners within the scope of the new statute. A State could do this by providing competent counsel in state post-conviction review.

The proposal would reduce unnecessary delay by providing a time limit on the filing of federal habeas petitions. The time limit would

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In addition to competent counsel, the new proposal provides other measures to protect the rights of prisoners. For example, an automatic stay of execution is provided during the entire course of review to eliminate time pressure.

In conclusion, I note that the fundamental requirement of a justice system is fairness in individual cases. Where the death penalty is involved this means a searching and impartial review of the propriety of the sentence. Fairness also requires that if a prisoner's claims are found to be without merit, society is entitled to have a lawful penalty carried out without unreasonable delay.

An Beginning:
1. Members of Committee { Clarke, Roney, Hodgson, Barefoot (ABA)
2 Prof. Pearson here
3. Six ~~5~~ meetings / several drafts

Ad Hoc File

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Lewis F. Powell, Jr.

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are not required by the Constitution. They were created by Congress in 1867, and Congress is of course free to alter them. In brief summary, as you know, habeas corpus is a procedure by which a prisoner convicted in state court may challenge his conviction and sentence in federal court by claiming that it violated the Constitution.

This federal review takes place after the direct appeal of the conviction to the state supreme court, and often occurs after a petition for certiorari to the United States Supreme Court. Each State also has its own habeas corpus procedures, and prisoners are required to seek state habeas relief before moving to federal court. Our Committee was formed to study the application of the habeas corpus system in cases involving the death penalty.

The Committee sought the views of a number of groups interested in capital punishment. ~~Although~~ there was disagreement as to what should be done, But there was almost unanimous agreement that the present system is unsatisfactory. It neither provides sufficient protections for prisoners nor adequately recognize the public interest in enforcement of the law.

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The hard fact is that the laws of 37 States are not being enforced by the courts. About 20,000 murders are committed in our country each year. Only a fraction of the worst murderers -- even those convicted -- are sentenced to die. There are now approximately 2,200 convicted murderers on death row awaiting execution. Since the Supreme Court's 1972 Furman decision only 116 executions have taken place. The average length of time between conviction and execution has been more than eight years. Delay of this magnitude is hardly necessary for fairness or for thorough review.

A major problem with the present system is the need for qualified counsel to represent indigent prisoners at all stages. The Constitution requires counsel for the trial and direct review. A new federal statute requires appointment of counsel in federal habeas ~~in~~ capital cases. But this leaves a serious gap ~~in~~ where state systems do not provide counsel for post-conviction review.

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Another aspect of the present system causes ~~several~~ difficulties. In most States the setting of an execution date now provides the only incentive for the condemned prisoner to initiate post-conviction review.

As a result, nothing happens until an execution date is set. Then counsel is appointed, ~~or found~~, and urgent efforts are made to stay execution. Capital litigation ~~is therefore~~ is distinctly different from other criminal cases. Typically, there are long periods of inactivity, followed by hurried eleventh-hour activity. ~~This last-minute litigation does not comport with the careful and deliberate review that is appropriate.~~

I fully respect those who argue for outright abolition of death punishment. But it seems irrational to retain the penalty, and frustrate its fair implementation.

Separate habeas corpus procedures are appropriate for capital litigation because it is unique. The incentives facing a capital defendant

This has occurred in other demonstrations.

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differ from those facing the ordinary prisoner. The prisoner serving a term seeks speedy review. But delay is the objective of one sentenced to death.

The aim of our proposed legislation ~~proposal~~ is this: Capital cases should be subject to one fair and complete course of collateral review through the state and federal systems.

This review should be free from the time pressure of an impending execution and with the assistance of competent counsel for the prisoner. When this review has concluded, litigation should end.

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That is where neither the Court nor state law (in most states) provides counsel.

Finality would be enhanced

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Finality would be enhanced by limiting the circumstances in which federal relief may be sought after the defendant has had one full course of litigation up to the Supreme Court.

In addition to competent counsel, the new proposal provides other measures to protect the rights of prisoners. For example, an automatic stay of execution is provided during the entire course of review, ~~to eliminate time pressure~~.

In conclusion, I ~~note~~ hardly need say that the fundamental requirement of a justice system is fairness in individual cases. Where the death penalty is involved this means a searching and impartial review of the propriety of the sentence. Fairness also requires that if a prisoner's claims are found to be without merit, society is entitled to have a lawful penalty carried out without unreasonable delay.

Now answer Q if any.

[1989 SEPT.]

If I were a State legislator, I would vote against capital punishment. But 72% of the American public don't agree with this view. As a judge, I recognize that capital punishment is the law in 37 states. Federal law also provides for capital punishment in certain cases. The Supreme Court has consistently held that capital punsishment is constitutionally permissible. Of course, because capital punishment is irreversible, the Court and society have recognized that safeguards are required to ensure that the penalty is enforced with the utmost reliability and fariness. But our present system for the judicial review of capital cases simply isn't working. It neither provides adequate safeguards for prisoners nor recognizes society's interest in the finality of criminal judgments.

Our present system allows state prisoners who have already appealed their convictions to their state supreme court and to the United States Supreme Court to continue challenging their convictions by petitions for habeas corpus. Habeas corpus provides a valuable safeguard of constitutional rights, and many

trial court errors have been found during habeas corpus proceedings. But under current law, there is no time limit on how long a prisoner may wait before challenging his sentence. If the prisoner faces a death sentence, he has no incentive to begin litigation until an execution date is set. Moreover, there is no serious limit on the number of petitions that a prisoner may file. It is common for a prisoner in a capital case to file two, three, or more habeas petitions. A case may be reviewed by the Supreme Court five or more times.

Not surprisingly, this system of unlimited review has led to lengthy delays in capital cases. There are now approximately 2,200 convicted murderers on death row awaiting execution. Since the Supreme Court's 1976 decisions upholding capital sentencing statutes, only 118 executions have taken place. The average length of time between conviction and execution has been more than eight years. Delay of this magnitude is hardly necessary for fairness or for thorough review. In many cases, the system

is being used not for protection of prisoners' rights, but to produce delay for its own sake.

During the past year, I have served as chairman of a committee of the Judicial Conference of the United States that was formed to consider post-conviction review in capital cases. Both federal and state judicial systems allow prisoners to challenge their conviction and sentence through petitions for habeas corpus. Federal habeas corpus is available to prisoners after they have completed direct appeals to their state supreme court and the United States Supreme Court, and then sought further post conviction remedies in the state system, perhaps with another trip to state and federal supreme courts. Federal habeas corpus remedies for state prisoners are not a part of the Constitution. They were created by Congress in 1867, and Congress is free to alter them. In capital case

I respect the views of those who call for the abolition of capital punishment. But it seems irrational to retain the penalty and frustrate its fair implementation.

Some critics, including the Washington Post, have taken the view that the chaos and delay of the present system is desirable because it undermines imposition of a penalty of which they do not approve. This type of argument is simply not consistent with the ideal of a government based on the rule of law.