1990

Habeas Corpus Committee - Bill Texts

Lewis F. Powell Jr.

II

101ST CONGRESS
1ST SESSION

S. 88

To reform procedures for collateral review of criminal judgments, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1989

Mr. THURMOND (for himself, Mr. HATCH, Mr. D'AMATO, Mr. HELMS, Mr. WILSON, Mr. GRASSLEY, Mr. DECONCINI, Mr. SIMPSON, and Mr. DOMENICI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To reform procedures for collateral review of criminal judgments, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Reform of Federal Intervention in State Proceedings Act of 1989".

SEC. 2. Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) When a person in custody pursuant to the judgment of a State court fails to raise a claim in State proceedings at

the time or in the manner required by State rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted and—

"(1) the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States;

"(2) the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"(e) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

"(1) the time at which State remedies are exhausted;

"(2) the time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed,

where the applicant was prevented from filing by such State action;

"(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

SEC. 3. Section 2253 of title 28, United States Code, is amended to read as follows:

"§ 2253. Appeal

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a

State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.".

SEC. 4. Federal Rule of Appellate Procedure 22 is amended to read as follows:

"RULE 22

"HABEAS CORPUS AND § 2255 PROCEEDINGS

"(a) Application for an Original Writ of Habeas Corpus. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be consid-

ered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representative, a certificate of probable cause is not required.".

SEC. 5. Section 2254 of title 28, United States Code, is amended by redesignating subsections "(e)" and "(f)" as subsections "(f)" and "(g)", respectively, and is further amended—

(a) by amending subsection (b) to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the States.";

(b) by redesignating subsection "(d)" as subsection "(e)", and amending it to read as follows:

"(e) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence."; and

(c) by adding a new subsection (d) reading as follows:

"(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings.".

SEC. 6. Section 2255 of title 28, United States Code, is amended by deleting the second paragraph and the penultimate paragraph thereof, and by adding at the end thereof the following new paragraphs:

"When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted and—

"(1) the failure to raise the claim properly, or to have it heard, was the result of governmental action in violation of the Constitution or laws of the United States;

"(2) the right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) the time at which the judgment of conviction becomes final;

"(2) the time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action;

"(3) the time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

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United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 101st CONGRESS, FIRST SESSION

Vol. 135 WASHINGTON, TUESDAY, JANUARY 31, 1989 No. 8

Senate

HABEAS CORPUS REFORM ACT OF 1989

Mr. GRAHAM. Mr. President, the Constitution of the United States affords every individual specific protections in judicial proceedings. Those constitutional protections are being jeopardized under the pretense of a legitimate search for justice.

Our courts are increasingly burdened by frivolous and dilatory petitions which impede the timely disposition of legitimate claims—including legitimate habeas corpus requests.

On January 25, joined by my colleagues Senator NUNN, MACK, and BRYAN, I introduced the Habeas Corpus Reform Act of 1989. The Habeas Corpus Reform Act is designed to protect prisoners' right while it protects the integrity of our judicial system.

The bill proposed includes a number of reforms of the current Federal habeas corpus process.

For State prisoners: it imposes a 1-year limit on habeas corpus applications, normally running from exhaustion of all possible State habeas corpus petitions and appeals.

For Federal prisoners: it imposes a 2-year limit on Federal habeas corpus applications, normally running from the time of final judgment on the original Federal determination of guilt.

This legislation also clarifies present law—establishing the requirement that a State prisoner must ordinarily raise all claims in accordance with State rules of procedure or be barred from asserting such claims in a Federal habeas corpus proceeding, and clearly states that a Federal habeas court petition may be denied on the merits without requiring prior exhaustion of State remedies.

Finally, this legislation seeks to relieve the administrative burden on district courts and simplify the appellate process by providing that an appeal from the district court in a habeas corpus proceeding may not be taken unless a certificate of probable cause is issued by a circuit judge.

There are at least four reasons that establish an urgent need for the reforms that this legislation would provide.

First, the number of petitions filed is increasing at an alarming rate.

Beginning in the late 1970's, the filing of Federal habeas corpus petitions by State prisoners increased significantly; 1987 filings of 9,524 surpassed the all-time peak figure and represented an increase of 35 percent over the 1978 filings.

Given recent trends, 1988 will probably reflect the highest number of State petitions ever filed for Federal habeas corpus relief.

Second, a significant number of these petitions simply duplicate earlier litigation.

According to a Department of Justice study of six district courts and one circuit court, more than 30 percent of the State prisoner habeas corpus petitions were filed by persons who had filed one or more previous Federal habeas corpus petitions. More than 44 percent had previously filed at least one petition in State court.

Third, Federal district courts and courts of appeals are unable to keep up with these increases. In 1986, in both Federal district courts and U.S. courts of appeals, the number of habeas corpus cases filed exceeded the number of habeas corpus cases resolved.

Although State habeas corpus petitions in 1985 constituted less than 8 percent of all Federal appeals filed, they constituted almost 19 percent of the backlog in Federal courts.

Fourth, many petitions are filed years after the crime, when evidence is stale or nonexistent. The Department of Justice study found that almost one-third of the habeas corpus petitions were filed more than 10 years after conviction.

In response to this crisis, Chief Justice William Rehnquist has appointed a commission to survey habeas corpus reform proposals. This commission, headed by retired Supreme Court Justice Lewis Powell, has begun to gather information on the extent of the prob-

lem and is expected to report to Congress later this year.

Last year the Anti-Drug Abuse Act of 1988 included a provision to ensure that habeas corpus reform proposals receive timely action in the 101st Congress.

In section 7323 of the Act it was provided:

Beginning on the date the Chief Justice of the United States forwards to the Committees on the Judiciary of the Senate and the House of Representatives the report and recommendation of the Special Committee on Habeas Corpus Review of Capital Sentences, appointed by the Chief Justice of the United States and chaired by Justice Lewis Powell, the chairman of the Committee on the Judiciary of the Senate shall have 15 days of session thereafter to introduce a bill to modify Federal habeas corpus procedure after having fatihfully considered the report and recommendations of the Special Committee. If no such bill is introduced by the chairman within the 15-day period, such bill may be introduced by the ranking minority member of the committee within an additional 10 days of session.

We hope the Habeas Corpus Reform Act of 1989 will offer focus to the public debate and complement the efforts of the Powell Commission.

Habeas corpus is a cherished constitutional right of all Americans. Our proposal will enhance the potential of habeas corpus to achieve justice expeditiously through a reduction of unseemly litigation and delay.

It will bring us closer to timely justice for society and the accused.

Our responsibility is to ensure that the system works in the way it was orignianlly intended, with equal and timely dispensation of justice in all habeas corpus cases.

Mr. President, I ask unanimous consent that the text of S. 271 be printed in the RECORD, to be followed by a statement in support of S. 271.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 271

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Habeas Corpus Reform Act of 1989".

SEC. 2. FINALITY OF DETERMINATION.

Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) When a person in custody pursuant to the judgment of a State court fails to raise a claim in State proceedings at the time or in the manner required by State rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted and—

"(1) the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States;

"(2) the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"(e) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

"(1) the time at which State remedies are exhausted;

"(2) the time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action;

"(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

SEC. 3. APPEAL AND REVIEW.

Section 2253 of title 28, United States Code, is amended to read as follows:

"§ 2253. Appeal

"(a)(1) In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"(2) There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"(b) An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding if the detention complained of arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.".

SEC. 4. PROCEDURES UNDER RULE 22 OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

"RULE 22.

"HABEAS CORPUS AND SECTION 2255 PROCEEDING

"(a) Application for an Original Writ of Habeas Corpus. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representative, a certificate of probable cause is not required.".

SEC. 5. STATE CUSTODY; REMEDIES IN FEDERAL COURTS.

Section 2254 of title 28, United States Code, is amended—

(1) by amending section (b) to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the States.";

(2) by amending subsection (d) to read as follows:

"(d) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence.".

SEC. 6. FEDERAL CUSTODY; REMEDIES ON A MOTION ATTACHING SENTENCE.

Section 2255 of title 28, United States Code, is amended by—

(1) striking the second paragraph which begins "A motion for such relief" and the penultimate paragraph which begins "An appeal may be taken"; and

(2) adding at the end thereof the following new paragraphs:

"When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted and—

"(1) the failure to raise the claim properly, or to have it heard, was the result of governmental action in violation of the Constitution or laws of the United States;

"(2) the right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) the time at which the judgment of conviction becomes final;

"(2) the time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action;

"(3) the time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

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(2) one member appointed from among recommendations submitted by the Speaker of the House of Representatives of the State of Maine;

(3) one member appointed from among recommendations submitted by the President of the Senate of the State of Maine;

(4) one member appointed from among recommendations submitted by the Chancellor of the University of Maine System;

(5) three members appointed from among recommendations submitted by State and local historic, cultural or historic preservation organizations; and

(6) one additional member appointed by the Secretary.

(b) TERMS.—(1) Members of the Commission shall be appointed for terms not to exceed 3 years.

(2) The Secretary may stagger the terms of initial appointments to the Commisions in order to assure continuity in operation.

(c) VOTING.—The Commission shall act and advise by affirmative vote of a majority of its members.

(d) COMPENSATION.—Members of the Commission shall receive no pay on account of their service on the Commission, but while away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed expenses under section 5703 of title 5, United States Code.

(e) EXEMPTION FROM CHARTER RENEWAL REQUIREMENTS.—Section 14(b) of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.

(f) TERMINATION.—The Commission shall terminate 20 years from the date of enactment of this Act.

(g) SUPPORT.—The Director of the National Park Service shall provide such staff support and technical services as may be necessary to carry out the functions of the Commission.

SEC. 4. DUTIES OF THE COMMISSION.

The Commission shall advise the Secretary with respect to—

(1) the selection of sites for interpretation, preservation, and development by means of cooperative agreements pursuant to section 5; and

(2) the development and implementation of a comprehensive interpretive program of the Acadian culture in the State of Maine pursuant to section 6(d).

SEC. 5. COOPERATIVE AGREEMENTS.

(a) IN GENERAL.—In furtherance of the purposes of this Act, the Secretary is authorized, after consultation with the Commission, to enter into cooperative agreements with the owners of properties of natural, historical, or cultural significance associated with the Acadian people in the State of Maine, pursuant to which agreements the Secretary may provide management services and program implementation.

(b) RIGHT OF ACCESS.—Each cooperative agreement shall provide that the Secretary, through the National Park Service, shall have the right of access at all reasonable times to all public portions of the property covered by the agreement for the purpose of conducting visitors through such properties and interpreting them to the public.

(c) ALTERATION OF PROPERTIES.—Each cooperative agreement shall provide that no changes or alterations shall be made in the property covered by the agreement except by mutual agreement between the Secretary and the other party to the agreement.

SEC. 6. ACADIAN CULTURAL CENTER.

(a) IN GENERAL.—The Secretary is authorized, after consultation with the Commission, to establish a center for the preservation, perpetuation, and interpretation of Acadian culture within the State of Maine.

(b) ACQUISITION OF LAND.—The Secretary is authorized to acquire lands and interests therein, not to exceed 20 acres in total, by purchase, donation, or exchange, and to develop, operate, and maintain interpretive and preservation facilities and programs at the center in furtherance of the purposes of this Act.

(c) OPERATION.—The Secretary may contract with public and private entities for the operation of the center in accordance with program standards approved by the Secretary.

(d) INTERPRETIVE PROGRAM.—In connection with center operations, the Secretary shall develop and implement a comprehensive interpretive program of the Acadian culture in the State of Maine, including preparation of interpretive and informational materials, exhibits, films, lectures, and other educational materials.

(e) STATUTORY AUTHORITY.—The Secretary shall administer properties acquired and cooperative agreements entered into pursuant to this Act in accordance with the Act entitled "An Act to establish a National Park Service, and for other purposes", approved August 25, 1916 (16 U.S.C. 1 et seq.) and other statutory authority for the conservation and management of natural, historical, and cultural resources.

SEC. 7. AUTHORIZATION OF APPROPRIATIONS.

(a) AUTHORIZATIONS OF APPROPRIATIONS TO THE COMMISSION.—There are authorized to be appropriated to the Commission such sums of money as may be necessary for the performance of its duties under this Act.

(b) LIMIT ON EXPENDITURES BY THE SECRETARY.—The Secretary is authorized to expend annually, in the performance of the Secretary's functions under sections 5 and 6, amounts equal to 50 percent of the aggregate cost of performing those functions, the remainder of such cost to be paid with non-Federal funds.

SECTION-BY-SECTION ANALYSIS OF THE BILL FOR MAINE ACADIAN CULTURAL CENTER

Section 1: titles the bill as the "Maine Acadian Culture Preservation Act.

Section 2: expresses the legislation's purposes: to recognize the contributions of Acadian immigrants to this country and assist efforts at preserving, perpetuating and interpreting that culture in Maine.

Section 3: establishes a "Maine Acadian Culture Preservation Commission" for 20 years. The Commission will have eight members appointed by the Secretary (from nominations submitted by specified groups or individuals). Commission members shall serve three-year terms. They will receive no compensation, but will be paid a per diem. The National Park Service will provide the Commission staff support and technical services.

Section 4: proscribes the duties of the Commission: to advise the Secretary of the Interior in siting, establishing and implementing the cooperative agreements and the Maine Acadian Cultural Center authorized in the legislation.

Section 5: authorizes the Secretary to enter into cooperative agreements with owners of properties associated with the Acadian people in Maine. Under the agreements, the Secretary may provide management services, program implementation and financial assistance. The only restrictions on the property owners will be the requirements for the National Park Service to have access to the public portions of the property in order to conduct visitors through the properties. In addition, no changes or alterations could be made to the properties without the agreement of the Secretary.

Section 6: authorizes the Park Service to acquire up to 20 acres of land by purchase, donation or exchange for a Center for the interpretation and preservation of Acadian culture within the State of Maine. The Park Service is authorized to develop, operate, and maintain interpretive facilities and programs at the Center, although public and private entities could be contracted to operate the center in accordance with program standards approved by the Secretary.

Section 7: authorizes such sums as may be necessary to carry out sections 5 and 6. Federal support is limited to 50% of the total costs.

By Mr. BIDEN:

S. 1757. A bill to amend title 28, United States Code, to provide special habeas corpus procedures in capital cases; to the Committee on the Judiciary.

HABEAS CORPUS REFORM ACT

Mr. BIDEN. Mr. President, for some time now the Senate, on both sides of the aisle, has expressed its displeasure over the way our Federal courts review death penalty sentences imposed in State criminal trials. Some Senators have complained about the delays involved in these Federal habeas corpus actions, as they are known, and others have complained about the lack of adequate counsel available to capital prisoners who are seeking full and fair review of their claims; that is, people who have been convicted of a capital offense.

Last year's drug bill, the Anti-Drug Abuse Act of 1988, set out a procedure to consider legislation or for considering legislation to reform the habeas corpus actions in capital cases. The act provided that, following the report of the special committee on habeas corpus reform, chaired by now retired Justice of the Supreme Court Lewis F. Powell, I was instructed, as chairman of the Judiciary Committee, to "introduce a bill to modify Federal habeas corpus procedures after having faithfully considered the report and recommendations of the special committee."

As required by law, I have studied the report of the Powell committee and today, within the provisions provided by the act, I am introducing a habeas corpus reform bill.

Before I explain some of the particulars of my bill, let me examine the basic principle of the Powell Commission's report on habeas corpus.

The Powell Committee studies the issue that we have debated for many, many years here in the Senate. It has been the issue of debate, I know the Presiding Officer knows, at least for the 17 years that I have been a Senator and I suspect for the many more years that the Presiding Officer has been in the U.S. Senate. We found that much of the delay in capital cases was attributable to repetitive applica-

tions for habeas corpus review in Federal courts.

In response, the Powell committee recommended that a special procedure be created for capital cases that would provide each State prisoner with a single opportunity to litigate all available claims available to him or her in Federal court. In other words, the committee recommended that the State prisoner get just one bite out of the apple.

The committee recognized, however, that review of death sentences is an enormously serious and important undertaking and that if there were to be only a single opportunity for Federal review of the State death cases, the procedure would have to provide the prisoner in question new safeguards, safeguards that do not now exist. Nothing less would be sufficient to guard against the possibility of mistake or prejudice in carrying out the death sentence, according to the Powell committee.

Therefore, the Powell committee proposed that the one-bite-at-the-apple rule would apply but only if the prisoner had been afforded court-appointed counsel at every step of the proceedings for them to be able to make this habeas corpus one-bite-at-the-apple procedure. If the State provides such counsel—that is, court-appointed counsel—to capital prisoners, the Powell committee proposed they could limit those prisoners to a single round of litigation in Federal court.

This quid pro quo is the essence of the Powell plan. The bill I am introducing today adopts this quid pro quo approach. It provides that State prisoners who are afforded qualified counsel at trial and throughout State death penalty proceedings shall have only a single opportunity to litigate their habeas corpus claim in Federal court.

Mr. President, some may think this odd for the Senator from Delaware, who opposed the changes in this rule on past occasions, largely due to the risk of error in the applications to be proposing legislation that will, to use the common description given by some, speed up execution. But I see no irony in this proposal. Delay for delay's sake serves no one in the capital punishment system—a system that I do not oppose on moral grounds, have occasionally supported for specific death penalty cases, and generally have argued more safeguards should be built into the system when there is going to be a capital offense available to the prosecution.

It is, obviously, harmful to the system itself and to the families of crime victims and to all if, in fact, the system is allowed to be, shall we say, prostituted; allowed to be used and manipulated in a way that was never intended. But, less obviously, it does nothing for the capital prisoner, either.

The current system does much to delay the inevitable and does too little to help the prisoner with legitimate challenges to their sentences brought before the Supreme Court through habeas corpus.

The Powell quid pro quo, which I support, recognizes this. With some simple, but essential, changes, it should result in a system that is an improvement over the present system in all respects.

My bill adopts the structure and text of the legislation recommended by the Powell committee in many respects, but there are a number of areas in which I have made changes necessary, in my view, to ensure that this streamlined procedure is as fair as possible.

First, it is essential to the success of the Powell committee's approach that the counsel appointed to represent the defendant in State proceedings be qualified counsel. The Powell report included no standards governing the qualifications of attorneys appointed in capital cases, but yet spoke to the need for qualified counsel. My bill includes such standards, adopting the minimums enacted by Congress in the 1988 drug bill as part of the appointment of counsel requirement made applicable by that law.

In other words, we have already set the standards in the 1988 drug bill where we call for the appointment of counsel in specific circumstances and we set out criteria for that counsel that that counsel must meet. Essentially what I do, Mr. President, is take that standard and apply it to the habeas corpus cases, as well.

Second, the Powell report provides for a second Federal habeas corpus application in only the most narrow circumstances, when the claim of factual innocence was not previously presented due to State action or facts not available at the time. I believe that this safety valve provision should be broader than that recommended by the Powell Committee.

For example, in my bill, a prisoner can bring a second habeas corpus application in Federal court if—and I say if—it is necessary to avoid a miscarriage of justice, an established legal standard currently in place that ensures that in extraordinary cases justice will be done. The Powell plan repeals this miscarriage of justice exception. I believe it is necessary to provide the Federal court with the power to prevent unjust executions.

Third, the Powell report limits claims prisoners can raise in Federal court to those claims raised earlier in State court proceedings. While I understand the principles motivating this proposal, I believe that, if we are going to adopt the one-bite-out-of-the-apple approach, the single review provided in Federal court must be as thorough as possible. Keep in mind, Mr. President, what I am proposing here and what the Powell commission is proposing is a significant change in what is presently available.

There is no one-bite-out-of-the-apple. You can take, 3, 2, 10, 9,000, if possible, bites out of the apple. That is the reason for the reform.

The bill I am proposing and what the Powell commission proposed is only one shot in Federal court. And my view, Mr. President, is that we should, in fact, not limit that one bite out of the apple to only issues raised in State courts if there is good reason for there to be additional issues raised.

Therefore, my bill would allow a prisoner to present in Federal court any claim that bears on the legality of his death sentence, as long as the reasons that this claim was not presented in State court was due to ignorance or neglect of his attorney, or, again, if the court's failure to consider such claim would result in the miscarriage of justice.

So, notwithstanding the fact, Mr. President, I propose a claim may be brought that was not raised in State court in this one chance in Federal court, even under those circumstances I limit it, as does the Powell commission. It is limited only to circumstances where there was ignorance on the part of the attorney representing the person sitting on death row, and therefore it did not get raised, or, the second provision I put in my bill, there would be a miscarriage of justice resulting. Obviously, that is a judgment for the court to make, if there would be a miscarriage of justice.

Fourth, the Powell committee recommended that the time period for filing habeas corpus petitions should be limited to 6 months. Currently there is no time limit whatsoever. I agree that there should be some time limit on filing such petitions for otherwise a prisoner with no incentive to speed the arrival his State execution might delay the filing of his claim indefinitely. Six months, however, is too short a time for a qualified and presumably very busy attorney to drop what other work he or she might be doing, conduct a thorough investigation of the case, and prepare an appropriate filing for this one bite out of the apple.

For that reason, Mr. President, my bill would require the State habeas corpus petition to be filed within 1 year.

Finally, Mr. President, the Powell committee made no provision for capital prisoners who have the benefit of favorable Supreme Court rulings decided after their trial and direct appeals. My bill remedies this and instructs the court to apply the most recent Supreme Court ruling to the claims brought by capital prisoners where appropriate. Again, if we are going to speed the process under which the death sentences are reviewed, then it seems to me we must do all we can to ensure the review proceedings are complete.

Again, we are making a significant tradeoff here. Right now there are no

limits on the number of times a prisoner can seek habeas corpus in a Federal court. We are limiting that to one time.

In sum, I believe the proposal I am introducing today is a reasonable compromise among the competing concerns in this area, balancing a prisoner's right to have full review of his claims with the State's interest in ending delay in capital sentences. Hopefully it will give us a system that is both faster and fairer for all concerned.

Mr. President, in closing I commend the Powell committee for its thorough work and thoughtful recommendations. I am pleased to announce today our first hearing on habeas corpus reform will be held on November 8, and our first witness at that hearing will be the distinguished Justice Powell himself.

I look forward to having his insights on his proposal and the bill that I am introducing today. The President's plan, and any other alternatives that may be proposed in the coming weeks, will also be considered at that time.

Mr. President, I ask unanimous consent that the text of the bill and a side-by-side comparison of my bill and the Powell committee's recommendations be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 1757

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Habeas Corpus Reform Act of 1989".

SEC. 2. SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES.

Title 28, United States Code, is amended by inserting the following new chapter immediately following chapter 153:

"CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

"Sec.

"§ 2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

"(a) This chapter shall apply to cases arising under section 2254 of this title brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable fees and litigation expenses of competent counsel consistent with section 2261 of this title.

"(c)(1) Upon receipt of notice that counsel has been appointed to represent a prisoner under sentence of death after the prisoner's conviction and sentence have been upheld on direct review in a State court of last resort and in the Supreme Court of the United States if application is made to that court, the State court of last resort shall enter an order confirming the appointment and shall direct its clerk to forward the record of the case to the attorney appointed.

"(2) Upon receipt of notice that counsel has been offered to, but declined by, such a prisoner, the State court of last resort shall direct an appropriate court or judge to hold a hearing, at which the prisoner and the attorney offered to the prisoner shall be present, to determine whether the prisoner is competent to decide whether to accept or reject the appointment of counsel and whether, if competent, the prisoner knowingly and intelligently waives the appointment of counsel. The court or judge shall report its determinations to the State court of last resort, which shall review the determinations for error. If the State court of last resort concludes that the prisoner is incompetent and does not waive counsel, the court shall enter an order confirming the appointment of the attorney assigned to the prisoner by the appointing authority and shall direct the clerk to forward the record to the attorney appointed. If the court concludes that the prisoner is competent and waives counsel, the court shall enter an order that counsel need not be appointed and shall direct the clerk to forward the record to the prisoner; provided that nothing in this section requires the appointment of counsel to a prisoner who is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner in State collateral proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel appointed under this chapter during State or Federal collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under this chapter or section 2254 of this title. This limitation shall not preclude the appointment of different counsel at any phase of State or Federal post-conviction proceedings.

"§ 2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

"(a) Upon the entry in the State court of last resort of an order pursuant to section 2256(c) of this title, a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed pursuant to section 2254 of this title. The application must recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus petition under section 2254 of this title within the time required in section 2258 of this title; or

"(2) upon completion of district court and court of appeals review under section 2254 of this title the petition for relief is denied and—

"(A) the time for filing a petition for certiorari has expired and no petition has been filed;

"(B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or

"(C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, in the presence of counsel and after having been advised of the consequences of his decision, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254 of this title.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—

"(1) the basis for the stay and request for relief is a claim not previously presented by the prisoner in the State or Federal courts, and the failure to raise the claim is—

"(A) the result of State action in violation of the Constitution or laws of the United States; "(B) the result of the Supreme Court recognition of a new Federal right that is retroactively applicable; or "(C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or

"(2) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed; or

"(3) a stay and consideration of the requested relief are necessary to prevent a miscarriage of justice.

"§ 2258. Filing of habeas corpus petition; time requirements; tolling rules

"Any petition for habeas corpus relief under section 2254 of this title must be filed in the appropriate district court not later than 365 days after the date of filing in the State court of last resort of an order issued in compliance with section 2256(c) of this title. The time requirements established by this section shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner seeks review of a capital sentence that has been affirmed on direct appeal by the court of last resort of the State or has otherwise become final for State law purposes;

"(2) during any period in which a State prisoner under capital sentence has a properly filed request for post-conviction review pending before a State court of competent jurisdiction; if all State filing rules are met in a timely manner, this period shall run continuously from the date that the State prisoner initially files for post-conviction review until final disposition of the case by the State court of last resort, and further until final disposition of the matter by the Supreme Court of the United States, if a timely petition for review is filed; and

"(3) during an additional period not to exceed 90 days, if counsel for the State prisoner—

"(A) moves for an extension of time in the United States district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition under section 2254 of this title; and

"(B) makes a showing of good cause for counsel's inability to file the habeas corpus

petition within the 365-day period established by this section.

"§ 2259. Evidentiary hearings; scope of Federal review; district court adjudication

"(a) Whenever a State prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall—

"(1) determine the sufficiency of the evidentiary record for habeas corpus review; and

"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it.

"(c)(1) Except as provided in paragraph (2), a district court may refuse to consider a claim under this section if—

"(A) the prisoner previously failed to raise the claim in State court at the time and in the manner prescribed by State law;

"(B) the State courts, for that reason, refused or would refuse to entertain the claim; and

"(C) such refusal would constitute an adequate and independent State law ground that would foreclose direct review of the State court judgment in the United States Supreme Court.

"(2) A district court shall consider a claim under this section if the prisoner shows that the failure to raise the claim in a State court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

"§ 2260. Certificate of probable cause inapplicable

"The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to this chapter except when a second or successive petition is filed.

"§ 2261. Counsel in capital cases; trial and post-conviction; standards

"(a) A mechanism for the provision of counsel services to indigents sufficient to invoke the provisions of this chapter under section 2256(b) of this title shall provide for counsel to indigents charged with offenses for which capital punishment is sought, to indigents who have been sentenced to death and who seek appellate or collateral review in State court, and to indigents who have been sentenced to death and who seek certiorari review in the United States Supreme Court.

"(b)(1) In the case of an appointment made before trial, at least one attorney appointed under this chapter must have been admitted to practice in the court in which the prosecution is to be tried for not less than 5 years, and must have had not less than 3 years' experience in the trial of felony prosecutions in that court.

"(2) In the case of an appointment made after trial, at least one attorney appointed under this chapter must have been admitted to practice in the court of last resort of the State for not less than 5 years, and must have had not less than 3 years' experience in the handling of appeals in that State courts in felony cases.

"(3) Notwithstanding this subsection, a court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable the attorney to properly represent the defendant, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation.

"(c) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or issues relating to sentence, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefor, under subsection (d). Upon finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment of such services nunc pro tunc.

"(d) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to an attorney appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under subsection (c), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of this subsection.

"§ 2262. Law controlling in Federal habeas corpus proceedings; retroactivity

"In cases subject to this chapter, all claims shall be governed by the law as it was when the petitioner's sentence became final, supplemented by any interim change in the law, if the court determines, in light of the purpose to be served by the change, the extent of reliance on previous law by law enforcement authorities, and the effect on the administration of justice, that it would be just to give the prisoner the benefit of the interim change in the law.".

SIDE-BY-SIDE COMPARISON OF POWELL AND BIDEN BILLS

Section	Powell bill	Biden bill
2256(a)	This subchapter establishes an optional procedure for Federal habeas cases involving State capital offenders.	Same.
2256(b)	This procedure is applicable only if the State in which the defendant is convicted appoints qualified counsel in State post-conviction proceedings.	Same, but the requirement of qualified counsel applies at trial and for certiorari review as well, and the standards of qualification are made explicit in Sec. 2261.
2256(c)	There must be a procedure for appointing counsel or establishing that the defendant has waived counsel.	Same, except the procedures for determining competency to waive counsel are made explicit.
2256(d)	Counsel appointed for post-conviction review shall not be the same as trial counsel.	Same.
2256(e)	Ineffectiveness of counsel in State or Federal habeas proceedings shall not be a ground for relief in federal habeas proceedings.	Same.
2257(a)	Execution orders shall be stayed if the State has chosen to follow the procedures in this subchapter.	Same.
2257(b)	The stay of execution expires if: (1) the defendant fails to comply with the time requirements; (2) the Federal habeas petition is denied; or (3) the defendant waives Federal habeas proceedings.	Same.
2257(c)	No successive Federal habeas petitions unless: (1) the claim was not previously presented; (2) failure to raise the claim the result of State action, new law, or new facts that could not have been discovered previously; and (3) the claim suggests factual innocence.	There are three alternative grounds for allowing a successive petition: (1) 1 and 2 from the Powell bill; or (2) 3 from the Powell bill; or (3) that review is necessary to avoid a miscarriage of justice.
2258	Require petitions for collateral review to be filed in 6 months.	Require petitions for collateral review to be filed within 12 months.
2258(a)	The time period is tolled during certiorari review of a direct appeal.	Same.
2258(b)	The time period is tolled during State collateral review, but not including certiorari review of such collateral review.	The time period is tolled during State collateral review, including certiorari review of such collateral review.
2258(c)	The court is permitted to extend the time for filing Federal habeas by 60 days for good cause.	The court is permitted to extend the time for filing Federal habeas by 90 days for good cause.
2259(a)	The Federal habeas court may refuse to consider a claim not raised in State court unless the default was due to: (1) state action; (2) new law; or (3) new facts that could not have been discovered previously.	The Federal habeas court may consider any claim, as limited by 2259(c) below.
2259(b)	The court shall rule on the merits after completion of an evidentiary record.	Same.
2259(c)	No provision.	Same. The Federal habeas court may refuse to consider a claim not raised in State court, but may not refuse review where the default was due to ignorance or neglect, or if the failure to consider a claim would result in a miscarriage of justice.
2260	Certificates of probable cause are not required for appeal of Federal habeas.	Same.
2261	No provision.	Standards for appointment of counsel: The standards are the same as those enacted in the 1988 drug bill for death penalty cases (21 U.S.C. 848(q)(4)), except that counsel for collateral review would be different from trial counsel.
2262	No provision.	The Federal habeas court could determine, on the basis of a balancing test, whether changes in the law would apply retroactively to issues raised habeas cases.

Mr. THURMOND. Mr. President, I commend the distinguished Senator from Delaware for his interest in habeas corpus matters. We had a hearing a couple of weeks ago in which the distinguished chairman presided. We had a lady there whose face had been disfigured. A defendant killed three people and he tried to kill her and thought he killed her and he left her for dead. Anyway, she was able to come to testify.

This defendant was tried and convicted 10 years ago, and he was sentenced to the electric chair. And he has had his fourth appeal to the Supreme Court of the United States. His fourth appeal is pending now.

This is utterly ridiculous. It brings the criminal justice system in disrepute and we must take steps to pass a habeas corpus bill that remedies this situation.

I am glad the distinguished Senator has introduced a bill on this subject and I shall introduce the recommendation of the Powell committee. We will have those two bills before the committee. I have already introduced a bill now before the committee, which I think is a good bill. But we will have all three there as we consider the

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I am glad the distinguished Senator has introduced a bill on this subject and I shall introduce the recommendation of the Powell committee. We will have those two bills before the committee. I have already introduced a bill now before the committee, which I think is a good bill. But we will have all three there as we consider the

matter and try to get the best out of all three.

I do think this is important. I hope the Members of the Senate will act promptly on this measure and not delay it. It needs to be passed. Some of these defendants have gone to the Supreme Court over and over again; although the State courts have settled the matters many years ago.

I look forward to working with the distinguished chairman on this important subject.

Mr. BIDEN. Mr. President, I say to the Senator that he has been calling for this reform for some years now. I hope he will have an opportunity to look closely at the proposal I have made. Nonetheless, however it works out, I look forward to working with him and I am sure we will be able to resolve it.

Mr. THURMOND. Mr. President, I feel sure we will be able to bring in a good bill. We have the one my colleagues introduced and the one I introduced and, for the record, the recommendations of the Powell committee. We will try to take them all and get the best of all three and bring it to the Senate.

I thank the chairman again for his interest in this matter. It is very important to the welfare of this country and to promote the criminal justice system.

By Mr. GLENN (for himself, Mr. LEVIN, Mr. HARKIN, Mr. HEINZ, Mr. KOHL, Mr. SASSER, and Mr. RUDMAN):

S. 1758. A bill to provide for the establishment of an Office for Small Government Advocacy, and for other purposes; to the Committee on Governmental Affairs.

SMALL GOVERNMENTS REGULATORY PARTNERSHIP ACT

● Mr. GLENN. Mr. President, I rise today to introduce the Small Governments Regulatory Partnership Act. Small governments are at the core of the American federalist system—yet we in the Federal Government often forget them, disregard them, or underestimate the role and effect of them.

Small governments provide most of our citizens with their first and most consistent contact with participatory democracy. Many Americans live in towns, townships, and villages primarily administered by volunteers. These are the communities where everyone pitches in to govern, and the quality of government service provided is made better because of it.

Local governments form the base upon which the success of our most vital national programs rests. We in Washington entrust local officials throughout the country with the implementation of Federal plans to safeguard our citizens' environment, their health, and their livelihood.

It is possible, however, that the Federal Government can ask too much of local governments. Placing large regulatory burdens on small governments can stifle creative community programs and discourage enthusiastic local volunteers—in short, endanger and undercut the very policies devised and promoted at the Federal level.

In 1980, Congress passed the Regulatory Flexibility Act—RFA—to ensure that this sort of uneven regulatory burden-sharing would not occur. The RFA applies to virtually every Federal regulation. Briefly, the RFA mandates that when a Federal agency issues a regulation, it must certify whether the regulation will affect "small entities"—small businesses and small governments. And, the agency must propose alternative regulations which would achieve the same purpose but place less burden on small entities.

Last Congress, in a hearing before the Governmental Affairs Committee, witnesses testified that the Regulatory Flexibility Act is not working for small governments. Nine years ago, the National Science Foundation reported that local governments dealt with more than 1,000 Federal and State mandates annually; our witnesses told us that, during the 1980's, this number has increased dramatically.

The committee found three particular weaknesses in the act. First, the RFA assigns responsibility for its enforcement to the Small Business Advocate, who is part of the Small Business Administration. The Advocate is understandably more interested in convincing Federal agencies to apply the RFA to small businesses than he is in convincing them to apply it to small governments. Second, the RFA's waiver provisions allow Federal agencies to bypass some of the act's requirements without adequate explanation. And third, in attempting to comply with the RFA, many Federal agencies do not have access to reliable or complete data to analyze the effects of their proposed regulations on small governments.

The bill I am now introducing, the Small Governments Regulatory Partnership Act, addresses each of these issues. To improve enforcement of the RFA for small governments, the bill establishes an Office for Small Government Advocacy in the Office of Management and Budget. The bill vests this Office with powers similar to those of the Office of the Small Business Advocate. The Office for Small Government Advocacy will monitor Federal agency compliance with the Regulatory Flexibility Act, and track the regulatory burden imposed by the Federal Government on small communities.

The Office for Small Government Advocacy will be aided by Small Government Coordinators, which the bill establishes in each of the major rulemaking agencies. These Coordinators will watch their own agencies' actions under the Regulatory Flexibility Act and provide support and data to the Office for Small Government Advocacy. At least two times a year, these Coordinators will meet on an interagency committee to share information.

The Office for Small Government Advocacy will also have the benefit of advice from a council created by the bill that will be comprised of outside experts; many of these experts will be acting local officials.

Another component of the Small Governments Regulatory Partnership Act consists of amendments to the RFA itself. For example, the bill clarifies that the Regulatory Flexibility Act applies to small governments as well as to small businesses. Also, the bill makes it more difficult for agencies to exercise some of the RFA's waiver provisions; for instance the legislation requires that agencies back up, with some evidence and citation of data sources, claims that a proposed regulation will have no ill effects on small entities.

Finally, the Small Governments Regulatory Partnership Act addresses the problem of inadequate data on small governments. It requires agencies to use standard measures when analyzing the effect of regulations on small governments. It also mandates that agencies collect these data using uniform procedures. These provisions should make it easier for different offices within one agency to share such data, and for the Federal Government as a whole to track its regulatory impact on small governments more accurately.

In brief, the Small Governments Regulatory Partnership Act can make the RFA work for local governments. It will force those of us in Washington to face the fact that we do indeed operate in a federal system. And, it will force us to be cognizant of the effects that our legislation and regulations have on our Nation's small communities.

Local governments have always been our partners—but too often our silent partners. And as silent partners, they have often suffered. It is my sincere hope that the Small Governments Regulatory Partnership Act will provide local governments with the clear convincing voice they deserve—and that all of us who care about effective Federal Government want them to have.

Mr. President, I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1758

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Small Governments Regulatory Partnership Act of 1989".

TITLE I—ESTABLISHMENT OF THE OFFICE FOR SMALL GOVERNMENT ADVOCACY AND SMALL GOVERNMENT COORDINATORS

SEC. 101. DEFINITIONS.

For purposes of this Act—

(1) the term "small government" means—

Mrs. Hatzipetrou is a 50 year old Greek national. She has a life-threatening case of cervical cancer and in need of U.S. medical treatment.

She first came to the United States for medical treatment in 1986. She then returned to Greece where her treatment results were less than satisfactory. Currently, she is receiving medical treatment at the University of Pennsylvania Medical Center where her doctors feel she must stay for optimal medical care. However, the Immigration and Naturalization Service has given her until October 25 to return to Greece. This is her final extension.

Many on Capitol Hill have known Mrs. Hatzipetrou's sister, Ms. Liria Vouzikas as the owner of the Senate Hair Salon for a number of years. She, along with the rest of Mrs. Hatzipetrou's siblings, now reside in the United States. Only her parents, aged 89 and 74, still reside in Greece. Her family has suffered one tragedy after another, with a seriously ill brother and the recent loss of a niece. Now, as the family struggles with Amalia Hatzipetrou's health problems, they are fighting to permit her to stay with them in the United States to receive the treatment she needs.●

By Mr. THURMOND:

S. 1760. A bill to amend title 28, United States Code, to provide special habeas corpus procedures in capital cases; to the Committee on the Judiciary.

PROVISION OF SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

Mr. THURMOND. Mr. President, I rise today to introduce the legislative recommendations of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases chaired by former Associate Supreme Court Justice Lewis Powell. This committee, commonly referred to as the Powell committee, was formed by the Chief Justice William Rehnquist in June of 1988. The Powell committee was charged with inquiring into the "necessity and disirability of legislation directed toward avoiding delay and the lack of finality" in capital cases in which the prisoner had or had not been offered counsel. Pursuant to the Chief Justice's request, the Powell committee has made its recommendations and has proposed a legislative remedy to the problem of habeas corpus review in capital cases. It is these recommendations I introduce today.

This Nation is facing a crisis in its criminal justice system. Federal habeas corpus and collateral attack procedures are in dire need of reform. This is evidenced by the glut of habeas petitions in the Federal system. The large increases in the number of habeas corpus filings, many of which are frivolous and used as a delaying tactic, require that legislation be enacted to address this problem.

Habeas petitions have grown by vast numbers in recent years. Last year, Federal district courts received an incredible 9,880 habeas petitions. The problem of these numerous filings is compounded by the extraordinary delay in habeas corpus filings. The result is a criminal justice system which is overburdened with piecemeal and repetitious litigation and years of delay between sentencing and a final judicial resolution of the criminal matter.

Mr. President, on August 3 of this year I took the floor and made a statement regarding the need for habeas corpus reform. In that statement I discussed a particular case which exemplifies the problem of habeas corpus abuse. In February of 1979, Ronald Wommer went on an 8-hour crime spree in South Carolina. By the time he was finished, four people were murdered. Woomer, who has never disputed his guilt, was convicted of murder and sentenced to death that summer. He was first sentenced on July 18, 1979—over 10 years ago—to die in the electric chair. He is still on South Carolina's death row. The Woomer case is a prime example of the obstruction of justice and inordinate delay surrounding these habeas corpus cases.

On the first day of this Congress, I introduced legislation, as I have since the 97th Congress, which would appropriately address this problem. My bill, S. 88, is a much broader bill than the legislation I am introducing today as it applies to all criminal cases, not just capital offenses.

Pursuant to law, Senator BIDEN introduced legislation which embodies a modified version of the Powell recommendations. Yet, since the Powell committee spent a significant time formulating its recommendations and the Chief Justice has expressed a belief that the need for strong habeas reform is urgently needed, I believe there should be a Senate vehicle which fully embodies the Powell committee recommendations. As the Judiciary Committee prepares to hold hearings on habeas corpus reform, I look forward to working with Senator BIDEN on S. 88 and the bills we introduce today in an effort to formulate the best legislative solution.

Mr. President, it is appropriate that the Powell committee recommendations be before the Senate for consideration. This legislation I am introducing today proposes new statutory procedures for Federal habeas corpus review of capital sentences. The Powell committee proposal is aimed at achieving the following goal: Capital cases should be subject to one complete and fair course of collateral review in the State and Federal system, free from the time of impending execution, and with the assistance of competent counsel for the defendant. Once this appropriate, fair review is completed, the criminal process should be brought to a conclusion.

This proposal allows a State to bring capital litigation by its prisoners within the new statute by providing competent counsel for inmates on State collateral review. Participation in the new procedures is optional with the States. This legislation also provides for a 6-month period within which a Federal habeas petition must be filed. This 6-month period begins to run on the appointment of counsel for the prisoner and is tolled during the pendency of all State court proceedings. In addition, this legislation provides for an automatic stay of execution, which is to remain in place until Federal habeas proceedings are completed. This provision ensures that habeas claims not be considered by a court under the time pressure of an impending execution.

In summary, this proposal balances the need for finality in death penalty cases with the requirement that a defendant have a fair examination of his claims. Therefore, if the conviction and sentence are found to be appropriate, judicial proceedings will be at an end, absent any exceptional developments in the defendants case.

In closing, we cannot continue to delay action on legislation to correct the growing problem in habeas corpus cases. Criminal cases must be brought to a close. Endless consideration of issues that have no merit in criminal cases and are filed only for purposes of delay must be eliminated from our judicial system. The principles of justice, upon which our criminal system is based, demands that we take action to address the habeas problem.

For these reasons I urge my colleagues to carefully consider this measure.

Mr. President, I ask unanimous consent that the full text of the bill and a copy of the Powell committee report be printed in the RECORD immediately following my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows: POWELL PROPOSA

S. 1760

Be it enacted by the Senate and House of Representaives of the United States of America in Congress assembled,

SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

(a) Title 28, United States Code, is amended by inserting the following new chapter immediately following chapter 153:

"CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

"Sec.

"2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or sttute; procedures for appointment.

"2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

"2258. Filing of habeas corpus petition; time requirements; tolling rules.

"2259. Evidentiary hearings; scope of Federal review; district court adjudication.

"2260. Certificate of probable cause inapplicable.

§§ 2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

"(a) This chapter shall apply to cases arising under section 2254 of this title brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State to have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

"(1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner—

"(A) is indigent and has accepted the offer; or

"(B) is unable competently to decide whether to accept or reject the offer;

"(2) finding, after a hearing, if necessary, that the prisoner has rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

"(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal collateral post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under this chapter or section 2254 of this title. This subsection shall not preclude the appointment of different counsel at any phase of State or Federal post-conviction proceedings.

"§ 2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

"(a) Upon the entry in the appropriate State Court of record of an order pursuant to section 2256(c) of this title, a warrant or order setting an execution date for a State prisoner shall be stayed upon application of any court that would have jurisdiction over any proceedings filed pursuant to section 2254 of this title. The application must recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus petition under section 2254 of this title within the time required in section 2258 of this title; or

"(2) upon completion of district court and court of appeals review under section 2254 of this title, the petition for relief is denied and—

"(A) the time for filing a petition for certiorari has expired and no petition has been filed, the petition for reflief is denied and—

"(A) the time for filing a petition for certiorari has expired and no petition has been filed;

"(B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or

"(C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, a State prisoner under capital sentence waives the right to pursue habeas corpus review under Section 2254 of this title, in the presence of counsel and after having been advised of the consequences of making the waiver.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—

"(1) the basis for the stay and request for relief is a claim not previously presented in the State or Federal courts;

"(2) the failure to raise the claim—

"(A) was the result of State action in violation of the Constitution or laws of the United States;

"(B) was the result of a recognition by the Supreme Court of a new Federal right that is retroactively applicable; or

"(C) is due to the fact that the claim is based on facts that could not have been discovered through the exercise of reasonable diligence in time to prevent the claim for State or Federal post-conviction review; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed.

"§ 2258. Filing of habeas corpus petition; time requirements; tolling rules

"(a) Any petition for habeas corpus relief under section 2254 of this title must be filed in the appropriate district court not later than 180 days after the filing in the appropriate State court of record of an order issued in compliance with section 2256(c) of this title. The time requirements established by this section shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner seeks review of a capital sentence that has been affirmed on direct appeal by the court of last resort of the State or has otherwise become final for State law purposes;

"(2) subject to subsection (b), during any period in which a State prisoner under capital sentence has a properly filed request for post-conviction review pending before a State court of competent jurisdiction; and

"(3) during an additional period not to exceed 60 days, if counsel for the State prisoner—

"(A) moves for an extension of time in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus petition under section 2254 of this title; and

"(B) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 180-day period established by this section.

"(b)(1) The time requirement established by subsection (a) shall be continuously tolled under paragraph (2) of that subsection from the date the State prisoner initially files for post-conviction review until the date of final disposition of the case by the highest court of the State so long as all State filing rules are timely met.

"(2) Tolling shall not occur under subsection (a)(2) during the pendency of a petition for certiorari before the Supreme Court following State post-conviction review.

"§ 2259. Evidentiary hearings; scope of Federal review; district court adjudication

"(a) When a State prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall—

"(1) determine the sufficiency of the evidentiary record for habeas corpus review based on the claims actually presented and litigated in the State courts, unless the prisoner shows that the failure to raise or develop a claim in the State courts—

"(A) was the result of State action in violation of the Constitution or laws of the United States;

"(B) was the result of a recognition by the Supreme Court of a new Federal right that is retroactively applicable; or

"(C) is due to the fact that the claim is based on facts that could not have been discovered through the execise of reasonable diligence in time to present the claim for State post-conviction review; and

"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it.

"§ 2260. Certificate of probable cause inapplicable

"The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to this chapter except when a second or successive petition is filed.".

SUPREME COURT OF THE UNITED STATES,
Washington, DC, September 22, 1989.

Hon. JOSEPH R. BIDEN, JR.,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I forward herewith the report and proposal received by the Judicial Conference of the United States on September 20, 1989, from its Ad Hoc Committee on Federal Habeas Corpus in Capital Cases. The Ad Hoc Committee, chaired by Justice Lewis F. Powell, Jr., has given careful consideration to this subject over the past year.

In receiving this report, the Judicial Conference determined to discharge Justice Powell's committee, to make the report publicly available, and to defer any further consideration of the report until its next meeting, scheduled for March 13, 1990. I shall advise you at that time as to any additional action the Conference might take with respect to the report.

Sincerely,

WILLIAM H. REHNQUIST.

[Committee report and proposal from the Judicial Conference of the United States ad hoc Committee on Federal Habeas Corpus in Capital Cases, Aug. 23, 1989]

AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES COMMITTEE REPORT

I. INTRODUCTION

Studies of public opinion establish that an overwhelming majority of our citizens favors the death penalty for certain murders. The Supreme Court has made clear that the evolving standards of decency embodied in the Eighth Amendment permit imposition of this punishment for some offenders. Of course, both the Court and society have recognized that, because it is irre-

versible, death is a unique punishment. This realization demands safeguards to ensure that capital punishment is administered with the utmost reliability and fairness.

But our present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law. The resulting lack of finality undermines public confidence in our criminal justice system. Of course, any system of review entails some delay. It is not suggested that the delay needed for review of constitutional claims is inappropriate. But much of the delay inherent in the present system is not needed for fairness. Adding to the problem is the fact that prisoners often cannot obtain qualified counsel until execution is imminent. The resulting last-minute rushed litigation disserves inmates, and saps the resources of our judiciary.

To address these problems, Chief Justice William H. Rehnquist formed this Committee in June 1988. His charge to us was to inquire into "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in capital cases in which the prisoner had or had been offered counsel. The Chief Justice appointed as members of this Committee Chief Judge Clark of the Fifth Circuit, Chief Judge Roney of the Eleventh Circuit, District Judge Hodges of Florida and District Judge Sanders of Texas. The States in the Fifth And Eleventh Circuits have by far the greatest numbers of prisoners subject to capital sentences, and each of these judges has had extensive experience with federal review of capital cases. The chairman of the Committee, retired Associate Justice Lewis F. Powell, Jr., served as Circuit Justice for the Eleventh Circuit while sitting on the Supreme Court. Professor Albert M. Pearson of the University of Georgia School of Law, who has experience representing defendants in capital cases, was the Reporter for the Committee. William R. Burchill, Jr., General Counsel of the Administrative Office of the U.S. Courts, served as Secretary.

The Committee met six times and considered with care the problems associated with collateral review of capital sentences. We invited written comments from a broad spectrum of interested parties and organizations, and received a number of helpful presentations. These included the views of state and federal prosecutors groups urging abolition of the death penalty, state executives and legislators, and criminal defense and public defender organizations. The responses contributed to our findings, which follow, and to the formulation of the legislation we propose.

II. FINDINGS

A. Unnecessary Delay and Repetition

The Committee identified serious problems with the present system of collateral review. These many be broadly characterized under the heading of unnecessary delay and repetition. The lack of coordination between the federal and state legal systems often results in inefficient and unnecessary steps in the course of litigation. Prisoners, for example, often spend significant time moving back and forth between the federal and state systems in the process of exhausting state remedies. Frequent litigation over motions for stays of execution is another example of an unnecessary step in the process. Under current procedures, a prisoner has no incentive to move the collateral review process forward until an execution date is set, and at this point additional litigation over a request for a stay of execution is inevitable.

The existing system also fosters piecemeal and repetitive litigation of claims. Because res judicata is inapplicable to federal habeas proceedings, many capital litigants return to federal court, with second—or even third and fourth—petitions for relief. Current rules governing abuse of the writ and successive petitions have not served to prevent these endless filings. Another example of piecemeal litigation is the fact that current rules allow at least three petitions for certiorari to the United States Supreme Court—after direct review, after state collateral proceedings, and after federal collateral proceedings.

Few would argue that the current state of death penalty administration is satisfactory. There are now approximately 2,200 convicted murderers on death row awaiting execution. Yet since the Supreme Court's 1972 Furman decision only 116 executions have taken place. The shortest of these judicial proceedings required two years and nine months to complete. The longest covered a period of 14 years and six months. The length of the average proceeding was eight years and two months. The Committee does not believe eight years are required for the appropriate habeas review of state criminal proceedings.

The Committee's analysis of cases from Alabama, Florida, Georgia, Mississippi, and Texas shows that 80% of the time spent in collateral litigation in death penalty cases occurs outside of state collateral proceedings. A table showing the average time periods and ratios in death penalty cases in these States is attached to this report.

The relatively small number of executions, as well as the delay in cases where an execution has occurred, makes clear that the present system of collateral review operates to frustrate the law of 37 States.[1] The collateral review process tends to be erratic and frequently is repetitious. The long separation of sentence and executive often hampers justice without improving the quality of adjudication.[2] This Committee believes that any serious reform proposal must address the problems of delay and repetitive litigation.

B. The Need for Counsel

A second serious problem with the current system is the pressing need for qualified counsel to represent inmates in collateral review. As the Supreme Court recently reaffirmed in Murray v. Giarratano, provision of counsel for criminal defendants is constitutionally required only for trial and direct appellate review. Because, as a practical matter, the focus of review in capital cases often shifts to collateral proceedings, the lack of adequate counsel creates severe problems. This situation is not likely to be remendied by the new provisions of the Anti-Drug Abuse Act of 1988 that require appointment of counsel in capital federal habeas corpus proceedings.

Capital inmates almost uniformly are indigent, and often illiterate or uneducated. Capital habeas litigation may be difficult and complex. Prisoners acting *pro se* rarely present promptly or properly exhaust their constitutional challenges in the state forum. This results in delayed or ineffective federal collateral procedures. The end result is often appointment of qualified counsel only when an execution is imminent. But at this stage, serious constitutional claims may have been waived. The belated entry of a lawyer, under severe time pressure, does not do enough to ensure fairness. In sum, the Committee believes that provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.

C. Last-Minute Litigation

Another disturbing aspect of the current system is that litigation of constitutional claims often comes only when prompted by the setting of an excution date. Judicial resources are expended as the prisoner must seek a stay of execution in order to present his claims. Justice may be ill-served by conducting judicial proceedings in capital cases under the pressure of an impending excution. In some cases last-minute habeas corps petitions have resulted from the unavailability of counsel at any earlier time. But in other cases attorneys appear to have intentionally delayed filing until time pressures were severe. In most cases, successive petitions are meritless, and we believe many are filed at the eleventh hour seeking nothing more than delay.

The foregoing types of abuses have no place in a rational system of justice. The merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true both during state and federal collateral review. But once this review has occurred, absent extraordinary circumstances there should be no further last-minute litigation.

III. THE COMMITTEE PROPOSAL

In response to the problems described above, the Committee proposes new statutory procedures for federal habeas corpus review of capital sentences where counsel has been provided. Separate procedures for capital cases are appropriate in light of the special problems of capital litigation. The incentives facing the capital litigant are unique. The inmate under captial sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out. Such an inmate is avoiding the punishment prescribed by the law of the State. In contrast, prisoners serving an ordinary term of years have every incentive to bring their claims to resolution as soon as possible in order to gain relief. And they are serving their sentences while litigation takes place.

The Committee's proposal is aimed at achieving this goal: Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant. When this review has concluded, litigation should end.

The specific operation of our proposed legislation[3] is described in notes following each statutory section. Some general comments are appropriate here. The proposal allows a State to bring capital litigation by its prisoners within the new statute by providing competent counsel for inmates on state collateral review. Participation in the proposal is thus optional with the States. Becuase it is optional, the proposal should

[1] Federal law also provides for capital punishment in certain cases. See P.L. 100-690, 102 Stat. 4387 (Anti-Drug Abuse Act of 1988) (murders committed in connection with narcotics offenses).

[2] Contrary to what may be assumed, the Constitution does not provide for federal habeas corpus review of state court decisions. The writ of habeas corpus available to state prisoners is not that mentioned in the Constitution. It has evolved from a statute enacted by Congress in 1867, now codified at 28 U.S. § 2254.

[3] Our proposal would add a new Subchapter B dealing with Capital Cases. Sections 2241-2255 of Subchapter A will not be changed. We refer to these changes simply as a proposed "statute" or as a "proposal."

cause minimal intrustion on state prerogatives. But for States that are concerned with delay in capital litigation, it is hoped that the procedural mechanisms we recommend will furnish an incentive to provide the counsel that are needed for fairness.

The statute provides for a six-month period within which the federal habeas petition must be filed. The filing period begins to run only on the appointment of counsel for the prisoner, or a refusal of the offer of counsel. The filing period also is tolled during the pendency of all state court proceedings. In view of the provision of counsel, the tolling provisions, and the fact that the exhaustion requirement mandates that the prisoner's federal petition present the same claims contained in the state petition, the six-month period ensures adequate time for the development and presentation of claims. A further extension of time is available for cases where good cause is shown. Although the time period may seem short in view of the fact that no time limit whatsoever exists at present, it should be noted in comparison that six months is far longer than the time provided for appeals in the state and federal systems, or for seeking certiorari review in the Supreme Court.

Importantly, the statute provides for an automatic stay of execution, which is to remain in place until federal habeas proceedings are completed, or until the prisoner has failed to file a petition within the allotted time. This automatic stay ensures that claims need not be evaluated under the time pressure of scheduled execution. It should substantially eliminate the rush litigation over stay motions that is troubling for both litigants and the judiciary.

Federal habeas proceedings under the proposal will encompass only claims that have been exhausted in state court. With the counsel provided by the statute, there should be no excuse for failure to raise claims in state court. The statute departs from current exhaustion practice by allowing for immediate presentation of new claims in federal court in extraordinary circumstances. In the event the entire counseled state and federal collateral process concludes without relief being granted, the statute includes new mechanisms to promote finality. Subsequent and successive federal habeas petitions can no longer be the basis of a stay of execution or grant of relief absent extraordinary circumstances and a colorable showing of factual innocence.

IV. CONCLUSION

The fundamental requirement of a criminal justice system is fairness. In habeas corpus proceedings fairness requires that a defendant be provided a searching and impartial examination of his claims. Fairness also requires that if a defendant's claims are found to be devoid of merit after such examination, society is rightfully entitled to have the penalty prescribed by law carried out without unreasonable delay.

Every capital defendant is now entitled to competent counsel at state trail and appeal and, under recent congressional enactment, in federal habeas corpus proceedings. The Committee's proposal seeks to fill a gap that now exists by encouraging the appointment of competent counsel also in state habeas or collateral proceedings. The proposal further assures that upon completion of state proceedings a defendant will have one opportunity to have his claims reviewed carefully by the federal courts. Thereafter, if no infirmity in the conviction has been found, judicial proceedings will be at an end, absent exceptional new developments.

The Committee believes that its proposal will go far to rectify the current chaos in capital litigation—periodic inactivity and last-minute frenzied activity, scheduling and rescheduling of execution dates—which diminished public confidence in the criminal justice system. In sum, adoption of this proposal will significantly enhance fairness in death penalty litigation.

SUMMARY OF DEATH PENALTY LITIGATION STATISTICS BASED ON 60 CASES FROM FLORIDA, TEXAS, ALABAMA, MISSISSIPPI, AND GEORGIA

Average times crime to:	*Months*
Conviction	13
End of state direct appeal	40
Direct certiorari review by U.S. Supreme Court	47
Execution	106
Valid sentence to:	
End of state direct appeals	27
Certiorari denied on direct review	34
Execution	93
Total time:	
State collateral	9
Federal collateral	38
All collateral	47
Percentage ratios:	
Sentence to cert. on direct/sentence to execution	36
Down time [1] sentence to execution	14
State collateral/sentence to execution	10
Federal collateral/sentence to execution	40
Total collateral/sentence to execution	50
State collateral/total collateral	20
Federal collateral/total collateral	80

[1] Time when no proceedings are pending in any court.

STATUTORY PROPOSAL—CHAPTER 153. HABEAS CORPUS

Subchapter A. General Provisions [a proposed redesignation]

[Sections 2241-2255 would not be changed.]

Subchapter B. Capital Cases: Special Procedures [new]

Section 2256. Prisoners in state custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.—

(a) This subchapter shall apply to cases arising under section 2254 brought by prisoners in state custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This subchapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for state law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation and reimbursement of counsel as provided in subsection (b) must offer counsel to all state prisoners under capital sentence and must provide for the entry of an order by a court of record: (1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer; (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a state prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during state or federal collateral post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254 of this subchapter. This limitation shall not preclude the appointment of different counsel at any phase of state or federal post-conviction proceedings.

Comment: Subsection (a) defines the scope of what would be new subchapter B, which establishes rules and procedures that apply solely to section 2254 cases involving prisoners under capital sentence. The aim of this subchapter is to provide a mechanism for the post-conviction litigation of capital cases that will enhance procedural safeguards for the prisoner and yet is less time consuming and less cumbersome from the viewpoint of the jurisdiction seeking to enforce its death penalty. There is no intent to alter the substantive scope of federal habeas corpus review under section 2254.

Subchapter B offers an alternative to the present process of post-conviction review in capital cases. If it is applicable, it would in all but the most unusual of capital cases limit each prisoner to a single opportunity for federal habeas corpus review under section 2254. This limitation would advance the state interest in the finality of criminal convictions and capital sentences. But to avail itself of subchapter B's more structured habeas corpus review procedures, a State would have to establish a system for the appointment and compensation of competent counsel throughout all stages of state post conviction review. The purpose of this mechanism is to assure that collateral review will be fair, thorough, and the product of capable and committed advocacy. While subchapter B attempts to strike a realistic balance between the values of judicial efficiency and procedural fairness in the context of a federal system, it does not impose a solution on the States. Each State must assess the utility of subchapter B for itself. Unless a State takes the affirmative steps required in sections 2256(b) and (c), its litigation of capital cases under section 2254 will be governed by the statutory and court rules that presently apply to all federal habeas corpus cases.

Central to efficacy of this scheme is the development of standards governing the competency of counsel chosen to serve in this specialized and demanding area of litigation. This mechanism is to be established by state statute or by rule of the state court of last resort. The Committee believes that it is more consistent with the federal-state balance to give the States wide latitude to establish a mechanism that complies with subsection (b). The final judgment as to the adequancy of any system for the appointment of counsel under subsection (b), however, rests ultimately with the federal judiciary. If prisoners under capital sentence in a particular State doubt that a State's mechanism for appointing counsel comports with subsection (b), the adequacy of the system—as opposed to the competency of particular counsel—can be settled through litigation.

If the requirements of subsection (b) are satisfied, the state mechanism must offer counsel to all state prisoners under capital

sentence. In addition, it must provide for the entry of an appropriate judicial order based on the state prisoner's response to the offer of counsel. Judicial control of this process is necessary to establish a clear point in time to determine the applicability of sections 2257 and 2258. It is also necessary to assure that a full record exists showing which state prisoners have appointed counsel and which do not.

Under subsection (c), all indigent state prisoners under capital sentence would be entitled to counsel in state post-conviction proceedings as a matter of right. If an indigent prisoner is not competent to decide whether to accept or decline the State's offer, the State must appoint counsel in any event. If a prisoner is not indigent, which would be the rare case, he would not be entitled to the appointment of counsel even if he accepted the State's offer. Finally, in some instances, a prisoner might reject the offer of counsel. This rejection would become effective and binding only after a judicial inquiry into the prisoner's understanding of the legal consequences of his decision.

Subsection (d) establishes a rule requiring the appointment of new counsel at the state post-conviction phase of capital litigation. The primary reason for the rule is that during the post-conviction review, ineffective assistance of trial and appellate counsel is frequently a major issue. It would be unrealistic to expect a capital defendant's trial or appellate counsel to raise a vigorous challenge to his own effectiveness. A secondary reason is that trial and appellate counsel in death penalty cases serve under great pressure and often work themselves to the point of emotional and physical exhaustion. They are understandably less able to undertake a fresh and dispassionate consideration of the issues raised or possibly overlooked at trial and on direct appeal. The appointment of new counsel at the state habeas phase will do as much as can be done to overcome these difficulties. The Committee, however, did not believe the rule should be absolute. In some cases, the prisoner under capital sentence may have such trust and confidence in his trial or appellate counsel that he would desire the attorney-client relationship to continue during state post-conviction review. Subsection (d) would permit, though not require, continued representation if the prisoner and his counsel expressly make a request to the appointing authority established by the State.

Subsection (e) provides that the ineffectiveness or incompetence of counsel during state or federal post-conviction review in a capital case is not a ground for relief in section 2254 proceedings. This rule reflects settled constitutional doctrine which limits ineffective assistance of counsel challenges to those criminal proceedings to which the Sixth Amendment right to counsel attaches. *Murray* v. *Giaratano*, 109 S. Ct. 2765 (1989), *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987). The Committee recognizes that the competence of counsel during all stages of state and federal post-conviction review is of the utmost importance in capital cases. However, as far as federal review in a proceeding under section 2254 is concerned, it believes that the focus should be on the performance of a capital defendant's trial and appellate counsel. The provision of counsel under the new statute therefore does not involve the creation of any potential claim of ineffective assistance of counsel in collateral review. The effectiveness of state and federal post-conviction counsel is a matter that can and must be dealt with in the appointment process. Only one who has the clear ability and willingness to handle capital cases should be appointed under subsections (b) and (c). If at any time during state or federal post-conviction review it appears that appointed counsel is unable to discharge his obligations in a timely and competent manner, the remedy is for the court to appoint a replacement, and to permit post-conviction review to go forward.

Section 2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.—

(a) Upon the entry in the appropriate state court of record of an order pursuant to section 2256(c), a warrant or order setting an execution date for a state prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed pursuant to section 2254. The application must recite that the State has invoked the post-conviction review procedures of this subchapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if:

(1) A state prisoner fails to file a habeas corpus petition under section 2254 within the time required in section 2258; or

(2) Upon completion of district court and court of appeals review under section 2254 the petition for relief is denied and (A) the time for filing a petition for certiorari has expired and no petition has been filed; (B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or (C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

(3) Before a court of competent jurisdiction, in the presence of counsel and after having been advised of the consequences of his decision, a state prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254.

(c) If one of the conditions in subsection (b) has occurred, no federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless:

(1) the basis for the stay and request for relief is a claim not previously presented in the state or federal courts;

(2) the failure to raise the claim is (A) the result of state action in violation of the Constitution or laws of the United States; (B) the result of the Supreme Court recognition of a new federal right that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state or federal post-conviction review; and

(3) The facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed.

Comment: This subchapter rests on the assumption that every state prisoner under capital sentence should have one opportunity for full state and federal post-conviction review before being subject to execution. Although this appears to have been the practice in capital cases since *Furman* v. *Georgia*, 408 U.S. 238 (1972), it has never been formally recognized as such. Many state prisoners under capital sentence have struggled to secure a stay of execution—often against the vigorous opposition of the State—before availing themselves of even one chance to pursue state and federal post-conviction review. Stay of execution litigation often has been subject to tight deadlines, and places unrealistic demands on judges, lawyers, and the prisoner.

If applicable, section 2257 would eliminate stay of execution litigation during a state prisoner's first request for post-conviction relief. It provides for a mandatory stay of execution in capital cases at any time following the appointment of counsel pursuant to section 2256(c). If an execution date has been set, the prisoner can obtain a stay as a matter of right simply by making application to any federal court that would have jurisdiction over the case in a proceeding brought under section 2254. In practice, however, even this step is not likely to be necessary. If a State takes the steps required in section 2256 to bring its capital litigation under this subchapter, there will be no reason to set an execution date until the completion of state and federal post-conviction review. At that juncture, the federal courts would have no authority to stay executions except under the very limited circumstances identified in section 2257(c).

Subsection (b) establishes the duration of a stay of execution issued under this subchapter. In effect, it provides that a stay of execution issued under subsection (a) will remain in effect as long as state and federal post-conviction review in a capital case is being actively pursued by the state prisoner.

The relationship between subsection (b)(1) and section 2258 is particularly important. Under subsection (b)(1), a stay of execution remains in force as long as the state prisoner files a section 2254 petition in federal court within the 180-day period set forth in section 2258. It is important to emphasize here that the object of the 180 days period established in section 2258—which includes the right to apply for a 60-day extension—is not to produce default. Rather it is one of a series of provisions in this subchapter designed to stimulate the orderly and expeditious consideration on the merits of all federal issues arising in capital cases.

If a state prisoner files a petition under section 2254 within the time period set forth in section 2258, subsection (b)(2) extends the right to a stay of execution to include the entire period that the case is pending before the district court, the court of appeals, and the Supreme Court if a petition for certiorari is filed. The right to a stay would expire after the opportunity for Supreme Court review has passed or after the Supreme Court has considered a petition for certiorari and has denied the petition or disposed of the case without overturning the capital sentence. The Committee assumes that in capital cases the state prisoner will want to pursue every opportunity for federal post-conviction review open to him, including Supreme Court review. But once this review process comes to its conclusion with a reversal of the capital sentence, it is the Committee's belief that federal review should end.

In subsection (b)(3), the authority of a federal court to stay the execution of a state prisoner expires if there is a waiver of the right to pursue habeas corpus review under section 2254. To eliminate doubt about the validity of the waiver, subsection (b)(3) requires that the prisoner announce the decision before a court of competent jurisdiction and in the presence of his counsel. It also requires the court—which can be state or federal—to advise the prisoner of the consequences of the waiver decision.

After the occurrence of one of the conditions resulting in the expiration of the right to a mandatory stay of execution under subsection (b)(2), federal review in capital cases pursuant to section 2254 is extremely limited. Subsection (c) would thereafter permit a stay of execution and the grant of relief in a capital case only if: (1) the claim has never been raised in state or federal court previously; (2) there is a valid excuse for not discovering and raising the claim during the prisoner's initial opportunity for state and federal post-conviction review; and (3) the

facts underlying the claim raise a serious doubt about the prisoner's guilt of the offense or offenses for which the death penalty was imposed.

The third of these conditions is clearly the most important. In the Committee's view, 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. Often factual guilt is not seriously in dispute. Both the prisoner and his counsel have every incentive to ask whether all relevant informaton in mitigation of punishment was presented and whether the sentencing phase of the trial was otherwise conducted in a constitutionally fair manner. Given the clear incentive to do this, the Committee does not believe that the federal courts should have to consider a second petition under section 2254 which challenges only the sentencing phase in a capital case. As subsection (c) reflects, the only appropriate exception is when the new claim goes to the underlying guilt or innocence of the state prisoner under capital sentence.

Section 2258. Filing of habeas corpus petition; time requirements; tolling rules.—Any petition for habeas corpus relief under section 2254 must be filed in the appropriate district court within 180 days from the filing in the appropriate state court of record of an order issued in compliance with section 2256(c). The time requirements established by this section shall be tolled:

(a) From the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a state prisoner seeks review of a capital sentence that has been affirmed on direct appeal by the court of last resort of the State or has otherwise become final for state law purposes.

(b) During any period in which a state prisoner under capital sentence has a properly filed request for post-conviction review pending before a state court of competent jurisdiction; if all state filing rules are met in a timely manner, this period shall run continuously from the date that the state prisoner initially files for post-conviction review until final disposition of the case by the highest court of the State; provided, however, the tolling rule established by this subsection does not apply during the pendency of a petition for certiorari before the Supreme Court following such state post-conviction review.

(c) During an additional period not to exceed 60 days, if counsel for the state prisoner: (1) moves for an extension of time in the federal district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition under section 2254 and (2) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 180 day period established by this section.

Comment: Section 2258 requires a state prisoner under capital sentence to file a section 2254 petition within 180 days from the entry of an order under section 2256(c). In almost all cases, this will be an order appointing counsel to initiate state post-conviction review. But even if a state prisoner is not entitled to the appointment of counsel or simply rejects the State's officer of appointment, the 180 day period applies to all capital cases if the State is subject to this subchapter.

In death penalty jurisdictions, the sole incentive for a prisoner initiate post-conviction review is either the scheduling of an execution date or the threat to schedule one. The disadvantages to this method of administering capital litigation persuaded the Committee to recommend the mandatory stay of execution provisions in section 2257. But it is clear that there must be some substitute mechanism to cause understandably reluctant state prisoners to seek post-conviction review when such action may remove the only obstacle preventing the State from carrying out the death sentence.

The entry of an order under section 2256(c) is such a substitute. It begins the running of the filing period in capital litigation. Unless the state prisoner actively litigates his case after his conviction and capital sentence have become final on direct appeal, he risks losing the right to file a section 2254 petition in federal court. Thus, the 180 day filing requirement serves the state interest in promoting finality in capital cases. At the same time, this subchapter serves to advance that interest only if the State provides prisoners under capital sentence with the means—competent counsel at state expense—to assert their legal rights in state post-conviction proceedings. As stressed earlier, the interaction of sections 2256, 2257 and 2258 is designed not to produce finality through procedural default but rather through a structured process of post-conviction litigation that brings all potentially meritorious claims to the attention of the state and federal courts before the imposition of the death penalty becomes legally permissible.

There are several important tolling rules in section 2258. With one exception the filing period does not run after the filing of a section 2256(c) order as long as a capital case is pending for consideration before a court of competent jurisdiction. The policy underlying section 2258 is to encourage litigants to initiate the post-conviction review process and to keep it moving from stage to stage. If delay in the litigation process is due to slow judicial consideration of death penalty litigation, that time obviously should not be and is not counted in computing the 180 day period under section 2258.

Under section 2258(a), the 180 day period is tolled when a state prisoner files a petition for certiorari in the Supreme Court after affirmance of his capital sentence on direct appeal to the state court of last resort. It is extremely important to recognize, as section 2258(b) makes clear, that there is no comparable tolling rule to permit the filing of certiorari petitions after state post-conviction review. The Committee believes that multiple opportunities for Supreme Court review are not essential to fairness in the consideration of capital cases. In this vein, it would point out that of the 106 capital cases in which the Supreme Court has granted certiorari since 1972, only 2 came to the Court from state post-conviction review. Elimination of this step does not result in disadvantage to the state prisoner, since all issues raised in state post-conviction review can be carried forward in a section 2254 petition and ultimately presented to the Supreme Court.

The filing period is also tolled under section 2258(b) during any period that a capital case is pending for post-conviction review before a state court of competent jurisdiction. After all state post-conviction review has been completed, including review by the court of last resort, the 180 day period begins to run again if the capital sentence is undisturbed. The next step for the state prisoner is to file a section 2254 petition in federal district court. If counsel for the state prisoner properly discharges his responsibilities, default under the 180 day rule will not occur.

In the event that counsel experiences some difficulty in filing a section 2254 petition on time, subsection (c) authorizes a 60 day extension upon a showing of good cause in the federal district that would have jurisdiction over the section 2254 petition when ultimately filed.

Section 2259. Evidentiary hearings; scope of federal review; district court adjudication.—

(a) Whenever a state prisoner under a capital sentence files a petition for habeas corpus relief to which this subchapter applies, the district court shall:

(1) determine the sufficiency of the evidentiary record for habeas corpus review based on the claims actually presented and litigated in the state courts except when the prisoner can show that the failure to raise or develop a claim in the state courts is (A) the result of state action in violation of the Constitution or laws of the United States; (B) the result of the Supreme Court recognition of a new federal right that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state post-conviction review; and

(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it.

Comment: Subsection (a) defines the scope of federal review in capital cases to which this subchapter applies. It authorizes the district court to consider only those federal claims actually raised and litigated in the state courts. If the section 2254 petition presents no new claims, the district court will proceed to rule on the merits of the claims properly before it as long as the state evidentiary record and findings of fact are adequate. If they are deficient in any respect recognized under section 2254(d), the district court must complete the evidentiary record before addressing the issues on the merits. To this extent, subsection (a) does not depart from existing law and practice.

If a petitioner asserts a claim not previously presented to the state courts, the district court can consider the claim only if one of the three exceptions to the general rule listed in subsection (a)(1) is applicable. In that case, the district court must conduct an evidentiary hearing necessary to a full and fair consideration of the claim and in accordance with subsection (b) adjudicate it on the merits along with all other issues presented in the section 2254 petition.

As far as new or "unexhausted" claims are concerned, section 2259 represents a change in the exhaustion doctrine as articulated in *Rose* v. *Lundy*, 455 U. S. 509 (1982). Section 2259 bars such claims from consideration unless one of the subsection (a)(1) exceptions is applicable. The prisoner cannot return to state court to exhaust even if he would like to do so. On the other hand, if a subsection (a)(1) exception is applicable, the district court is directed to conduct an evidentiary hearing and to rule on the new claim without first exhausting state remedies as *Rose* v. *Lundy* now requires. Because of the existence of state procedural default rules, exhaustion is futile in the great majority of cases. It serves the state interest of comity in theory, but in practice it results in delay and undermines the state interest in the finality of its criminal convictions. The Committee believes that the States would prefer to see post-conviction litigation go forward in capital cases, even if that entails a minor subordination of their interest in comity as it is expressed in the exhaustion doctrine.

Section 2260. Certificate of probable cause inapplicable.—The requirement of a certificate of probable cause in order to appeal

from the district court to the court of appeals does not apply to habeas corpus cases subject to the provisions of this subchapter except when a second or successive petition is filed.

Comment: The premise of this subchapter is that a state prisoner under capital sentence is entitled to one opportunity for state and federal post-conviction review before being subject to execution. Consistent with this premise, the Committee believes that in a section 2254 proceeding, a state prisoner should be allowed to appeal from the district court to the court of appeals as a matter of right. With one exception, section 2260 eliminates the certificate of probable cause requirement in cases to which this subchapter is applicable. The exception arises when a second or successive petition is filed. Even if such a petition is authorized under the provisions of section 2257(c), the right to appeal in that instance will be governed by section 2253 rather than section 2260.

By Ms. MIKULSKI:

S. 1761. A bill to establish a national center for information and technical assistance relating to all types of family resource and support programs, and for other purposes; to the Committee on Labor and Human Resources.

FAMILY RESOURCE ACT

●Ms. MIKULSKI. Mr. President, I am very pleased to introduce today a significant bill aimed at informing the Nation, and the world, about the good things being done for American families by American families. Mr. President, we all know too well the statistics about how the American family has changed over the last few decades.

Hardly a week goes by without the media focusing on how families are changing in our country. But we rarely hear about how our families are successfully adapting to the changes besetting them and their communities.

Well, in fact families have been in the forefront of developing services and programs to help themselves and other families to alleviate the stress and isolation they often face. Families in communities all across the country have increasingly come together to create community-based parent education and support services. These programs constitute what has come to be commonly referred to as the "family resource and support" movement.

It is the family resource and support movement which I am here to tell you about today. More importantly, I am today introducing a bill aimed at getting the word out around the country about this movement. I should note here that I am especially pleased that families and community and State leaders in my home State of Maryland are in the vanguard in this exciting movement.

Let's step back for a moment, first, and look at why such a movement has developed in this country. The families in our country are changing. These changes include the continually increasing numbers of mothers working outside the home; changes in family structure brought about by divorce, remarriage, and single parenthood, especially among teenagers; growing geographic mobility of families; and spiralling poverty among children, particularly in female-headed households.

The result of these changes often is isolation and frustration within families, placing them at risk of a range of social problems. Traditional social institutions, both public and private, have been slow to respond to the changes in family life, to the needs within families, and to their potentially costly and long-term repercussions. For the most part, the delivery of social services to families in the United States continues to operate on a casualty-based, crisis-driven system. Resources are primarily devoted to treating existing, well-defined problems rather than building the capacity of families to avoid problems or to deal effectively with them at an early stage.

Virtually no supportive services are available to children or parents in the critical years before a child enters school, even though research and experience indicate strongly that much of a child's important physical, social, and intellectual development occurs in these early years. This is the period in which positive support to parents in the form of parenting education, child development information, peer support, and links to other community services can increase parents' confidence and competence in their job of being parents. Their children in turn benefit from improved child rearing practices and a more secure and nurturing home environment.

In response to this unmet need for supportive services, families in communities across the country have organized family resource and support programs to help themselves. These programs are significantly and deliberately different from traditional social service programs. Rather than focusing on a limited and carefully circumscribed group of families who are in the midst of severe problems, family resource and support programs reach out to all families in the community, with the goal of helping them function better so as to enhance their quality of life and avoid or lessen problems which might develop later.

Family resource and support programs exist in a range of settings, including community centers, schools, the workplace, or wherever it is convenient for families to meet. In some cases, traditional social service agencies—child care centers, community mental health agencies, Head Start programs, or health clinics—have added family resource and support components to their existing program.

Family resource and support programs also differ fundamentally from traditional social service programs in their interaction with participants. The services they offer begin with and build on a family's strengths, seeking to empower families to meet their own needs. As a result, parents are closely involved in setting the direction of a family resource and support program and work as partners with program staff.

Several State government agencies—including my home State of Maryland's Department of Human Resources—have recognized the potential of family resource and support programs for assisting parents at an early point, thereby avoiding family crises and problems which State agencies would later have to address.

These family support centers are prevention oriented drop in programs that serve young parents and their children from birth to age three. All of the centers target teen parents because they, and their children, are most vulnerable to the negative consequences of early childbearing. The centers' overriding objective is to interrupt the cycle of poverty among young parents and their children by preventing additional pregnancies, encouraging, and—whenever possible—enabling them to complete their education, acquire job skills, and increase their parenting competencies and confidence. To achieve the center's objectives, participants and staff plan a combination of structured and unstructured activities. At the core of all the services is a focus on enhancing child development.

Mr. President, there is no better investment we could make with our national resources. In order to assure the development of effective family resource and support programs within communities wanting to develop such programs, the bill I am introducing today would create a national center whose primary goal is to promote the establishment of model family resource and support programs around the country. The national center would promote the development of family resource and support programs in two key ways. First, the national center would establish a clearinghouse to systemically identify, collect and disseminate information on all types of family resource and support programs around the country. I want to point out here that a seemingly small but essential function of this clearinghouse is to inform individual parents either of existing family resource and support programs within their communities or to provide training and technical assistance to them in setting up such a program in their community if one does not already exist.

The second important task of the national center is to identify different types of model family resource and support programs. The purpose of this task is to work with the model program administrators to develop training and technical assistance materials and seminars for use by other communities in setting up such model programs.

Finally, this bill would also mandate the conduct of evaluations of the various types of family resource and sup-

101ST CONGRESS
1ST SESSION

S. 1757

To amend title 28, United States Code, to provide special habeas corpus procedures in capital cases.

IN THE SENATE OF THE UNITED STATES

OCTOBER 16 (legislative day, SEPTEMBER 18), 1989

Mr. BIDEN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to provide special habeas corpus procedures in capital cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Habeas Corpus Reform Act of 1989".

SEC. 2. SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES.

Title 28, United States Code, is amended by inserting the following new chapter immediately following chapter 153:

"CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

"§ 2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

"(a) This chapter shall apply to cases arising under section 2254 of this title brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable fees and litigation expenses of competent counsel consistent with section 2261 of this title.

"(c)(1) Upon receipt of notice that counsel has been appointed to represent a prisoner under sentence of death after the prisoner's conviction and sentence have been upheld on direct review in a State court of last resort and in the Supreme Court of the United States if application is made to

that court, the State court of last resort shall enter an order confirming the appointment and shall direct its clerk to forward the record of the case to the attorney appointed.

"(2) Upon receipt of notice that counsel has been offered to, but declined by, such a prisoner, the State court of last resort shall direct an appropriate court or judge to hold a hearing, at which the prisoner and the attorney offered to the prisoner shall be present, to determine whether the prisoner is competent to decide whether to accept or reject the appointment of counsel and whether, if competent, the prisoner knowingly and intelligently waives the appointment of counsel. The court or judge shall report its determinations to the State court of last resort, which shall review the determinations for error. If the State court of last resort concludes that the prisoner is incompetent and does not waive counsel, the court shall enter an order confirming the appointment of the attorney assigned to the prisoner by the appointing authority and shall direct the clerk to forward the record to the attorney appointed. If the court concludes that the prisoner is competent and waives counsel, the court shall enter an order that counsel need not be appointed and shall direct the clerk to forward the record to the prisoner; provided that nothing in this section requires the appointment of counsel to a prisoner who is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner in State collateral proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel appointed under this chapter during State or Federal collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under this chapter or section 2254 of this title. This limitation shall not preclude the appointment of different counsel at any phase of State or Federal post-conviction proceedings.

"§ 2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

"(a) Upon the entry in the State court of last resort of an order pursuant to section 2256(c) of this title, a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed pursuant to section 2254 of this title. The application must recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus petition under section 2254 of this title within the time required in section 2258 of this title; or

"(2) upon completion of district court and court of appeals review under section 2254 of this title the petition for relief is denied and—

"(A) the time for filing a petition for certiorari has expired and no petition has been filed;

"(B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or

"(C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, in the presence of counsel and after having been advised of the consequences of his decision, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254 of this title.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—

"(1) the basis for the stay and request for relief is a claim not previously presented by the prisoner in the

State or Federal courts, and the failure to raise the claim is—

"(A) the result of State action in violation of the Constitution or laws of the United States;

"(B) the result of the Supreme Court recognition of a new Federal right that is retroactively applicable; or

"(C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or

"(2) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed; or

"(3) a stay and consideration of the requested relief are necessary to prevent a miscarriage of justice.

"§ 2258. Filing of habeas corpus petition; time requirements; tolling rules

"Any petition for habeas corpus relief under section 2254 of this title must be filed in the appropriate district court not later than 365 days after the date of filing in the State court of last resort of an order issued in compliance with section 2256(c) of this title. The time requirements established by this section shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner seeks review of a capital sentence that has been affirmed on direct appeal by the court of last resort of the State or has otherwise become final for State law purposes;

"(2) during any period in which a State prisoner under capital sentence has a properly filed request for post-conviction review pending before a State court of competent jurisdiction; if all State filing rules are met in a timely manner, this period shall run continuously from the date that the State prisoner initially files for post-conviction review until final disposition of the case by the State court of last resort, and further until final disposition of the matter by the Supreme Court of the United States, if a timely petition for review is filed; and

"(3) during an additional period not to exceed 90 days, if counsel for the State prisoner—

"(A) moves for an extension of time in the United States district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition under section 2254 of this title; and

"(B) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 365-day period established by this section.

"§ 2259. Evidentiary hearings; scope of Federal review; district court adjudication

"(a) Whenever a State prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall—

"(1) determine the sufficiency of the evidentiary record for habeas corpus review; and

"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it.

"(c)(1) Except as provided in paragraph (2), a district court may refuse to consider a claim under this section if—

"(A) the prisoner previously failed to raise the claim in State court at the time and in the manner prescribed by State law;

"(B) the State courts, for that reason, refused or would refuse to entertain the claim; and

"(C) such refusal would constitute an adequate and independent State law ground that would foreclose direct review of the State court judgment in the United States Supreme Court.

"(2) A district court shall consider a claim under this section if the prisoner shows that the failure to raise the claim in a State court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

"§ 2260. Certificate of probable cause inapplicable

"The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to this chapter except when a second or successive petition is filed.

"§ 2261. Counsel in capital cases; trial and post-conviction; standards

"(a) A mechanism for the provision of counsel services to indigents sufficient to invoke the provisions of this chapter under section 2256(b) of this title shall provide for counsel to indigents charged with offenses for which capital punishment is sought, to indigents who have been sentenced to death and who seek appellate or collateral review in State court, and to indigents who have been sentenced to death and who seek certiorari review in the United States Supreme Court.

"(b)(1) In the case of an appointment made before trial, at least one attorney appointed under this chapter must have been admitted to practice in the court in which the prosecution is to be tried for not less than 5 years, and must have had not less than 3 years' experience in the trial of felony prosecutions in that court.

"(2) In the case of an appointment made after trial, at least one attorney appointed under this chapter must have been admitted to practice in the court of last resort of the State for not less than 5 years, and must have had not less than 3 years' experience in the handling of appeals in that State courts in felony cases.

"(3) Notwithstanding this subsection, a court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable the attorney to properly represent the defendant, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation.

"(c) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or issues relating to sentence, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefor, under subsection (d).

Upon finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment of such services nunc pro tunc.

"(d) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to an attorney appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under subsection (c), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of this subsection.

"§ 2262. Law controlling in Federal habeas corpus proceedings; retroactivity

"In cases subject to this chapter, all claims shall be governed by the law as it was when the petitioner's sentence became final, supplemented by any interim change in the law, if the court determines, in light of the purpose to be served by the change, the extent of reliance on previous law by law enforcement authorities, and the effect on the administration of justice, that it would be just to give the prisoner the benefit of the interim change in the law.".

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101ST CONGRESS
1ST SESSION

S. 1760

To amend Title 28, United States Code, to provide special habeas corpus procedures in capital cases.

IN THE SENATE OF THE UNITED STATES

OCTOBER 16 (legislative day, SEPTEMBER 18), 1989

Mr. THURMOND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend Title 28, United States Code, to provide special habeas corpus procedures in capital cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

(a) Title 28, United States Code, is amended by inserting the following new chapter immediately following chapter 153:

"CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

"§ 2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

"(a) This chapter shall apply to cases arising under section 2254 of this title brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State to have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sen-

tence and must provide for the entry of an order by a court of record—

"(1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner—

"(A) is indigent and has accepted the offer; or

"(B) is unable competently to decide whether to accept or reject the offer;

"(2) finding, after a hearing, if necessary, that the prisoner has rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

"(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal collateral post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under this chapter or section 2254 of this title. This subsection shall not preclude the appointment of

different counsel at any phase of State or Federal post-conviction proceedings.

"§ 2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

"(a) Upon the entry in the appropriate State court of record of an order pursuant to section 2256(c) of this title, a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed pursuant to section 2254 of this title. The application must recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus petition under section 2254 of this title within the time required in section 2258 of this title; or

"(2) upon completion of district court and court of appeals review under section 2254 of this title, the petition for relief is denied and—

"(A) the time for filing a petition for certiorari has expired and no petition has been filed;

"(B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or

"(C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254 of this title, in the presence of counsel and after having been advised of the consequences of making the waiver.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—

"(1) the basis for the stay and request for relief is a claim not previously presented in the State or Federal courts;

"(2) the failure to raise the claim—

"(A) was the result of State action in violation of the Constitution or laws of the United States;

"(B) was the result of a recognition by the Supreme Court of a new Federal right that is retroactively applicable; or

"(C) is due to the fact that the claim is based on facts that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State or Federal post-conviction review; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed.

"§ 2258. Filing of habeas corpus petition; time requirements; tolling rules

"(a) Any petition for habeas corpus relief under section 2254 of this title must be filed in the appropriate district court not later than 180 days after the filing in the appropriate State court of record of an order issued in compliance with section 2256(c) of this title. The time requirements established by this section shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner seeks review of a capital sentence that has been affirmed on direct appeal by the court of last resort of the State or has otherwise become final for State law purposes;

"(2) subject to subsection (b), during any period in which a State prisoner under capital sentence has a

properly filed request for post-conviction review pending before a State court of competent jurisdiction; and

"(3) during an additional period not to exceed 60 days, if counsel for the State prisoner—

"(A) moves for an extension of time in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus petition under section 2254 of this title; and

"(B) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 180-day period established by this section.

"(b)(1) The time requirement established by subsection (a) shall be continuously tolled under paragraph (2) of that subsection from the date the State prisoner initially files for post-conviction review until the date of final disposition of the case by the highest court of the State so long as all State filing rules are timely met.

"(2) Tolling shall not occur under subsection (a)(2) during the pendency of a petition for certiorari before the Supreme Court following State post-conviction review.

"§ 2259. Evidentiary hearings; scope of Federal review; district court adjudication

"(a) When a State prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall—

"(1) determine the sufficiency of the evidentiary record for habeas corpus review based on the claims actually presented and litigated in the State courts, unless the prisoner shows that the failure to raise or develop a claim in the State courts—

"(A) was the result of State action in violation of the Constitution or laws of the United States;

"(B) was the result of a recognition by the Supreme Court of a new Federal right that is retroactively applicable; or

"(C) is due to the fact that the claim is based on facts that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State post-conviction review; and

"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it.

"§ 2260. Certificate of probable cause inapplicable

"The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to this chapter except when a second or successive petition is filed.".

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101ST CONGRESS
1ST SESSION

S. 1760

To amend Title 28, United States Code, to provide special habeas corpus procedures in capital cases.

IN THE SENATE OF THE UNITED STATES

OCTOBER 16 (legislative day, SEPTEMBER 18), 1989

Mr. THURMOND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend Title 28, United States Code, to provide special habeas corpus procedures in capital cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

(a) Title 28, United States Code, is amended by inserting the following new chapter immediately following chapter 153:

"CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

"Sec.

"§ 2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

"(a) This chapter shall apply to cases arising under section 2254 of this title brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State to have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sen-

tence and must provide for the entry of an order by a court of record—

"(1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner—

"(A) is indigent and has accepted the offer; or

"(B) is unable competently to decide whether to accept or reject the offer;

"(2) finding, after a hearing, if necessary, that the prisoner has rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

"(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal collateral post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under this chapter or section 2254 of this title. This subsection shall not preclude the appointment of

different counsel at any phase of State or Federal post-conviction proceedings.

"§ 2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

"(a) Upon the entry in the appropriate State court of record of an order pursuant to section 2256(c) of this title, a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed pursuant to section 2254 of this title. The application must recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus petition under section 2254 of this title within the time required in section 2258 of this title; or

"(2) upon completion of district court and court of appeals review under section 2254 of this title, the petition for relief is denied and—

"(A) the time for filing a petition for certiorari has expired and no petition has been filed;

"(B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or

"(C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254 of this title, in the presence of counsel and after having been advised of the consequences of making the waiver.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—

"(1) the basis for the stay and request for relief is a claim not previously presented in the State or Federal courts;

"(2) the failure to raise the claim—

"(A) was the result of State action in violation of the Constitution or laws of the United States;

"(B) was the result of a recognition by the Supreme Court of a new Federal right that is retroactively applicable; or

"(C) is due to the fact that the claim is based on facts that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State or Federal post-conviction review; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed.

"§ 2258. Filing of habeas corpus petition; time requirements; tolling rules

"(a) Any petition for habeas corpus relief under section 2254 of this title must be filed in the appropriate district court not later than 180 days after the filing in the appropriate State court of record of an order issued in compliance with section 2256(c) of this title. The time requirements established by this section shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner seeks review of a capital sentence that has been affirmed on direct appeal by the court of last resort of the State or has otherwise become final for State law purposes;

"(2) subject to subsection (b), during any period in which a State prisoner under capital sentence has a

properly filed request for post-conviction review pending before a State court of competent jurisdiction; and

"(3) during an additional period not to exceed 60 days, if counsel for the State prisoner—

"(A) moves for an extension of time in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus petition under section 2254 of this title; and

"(B) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 180-day period established by this section.

"(b)(1) The time requirement established by subsection (a) shall be continuously tolled under paragraph (2) of that subsection from the date the State prisoner initially files for post-conviction review until the date of final disposition of the case by the highest court of the State so long as all State filing rules are timely met.

"(2) Tolling shall not occur under subsection (a)(2) during the pendency of a petition for certiorari before the Supreme Court following State post-conviction review.

"§ 2259. Evidentiary hearings; scope of Federal review; district court adjudication

"(a) When a State prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall—

"(1) determine the sufficiency of the evidentiary record for habeas corpus review based on the claims actually presented and litigated in the State courts, unless the prisoner shows that the failure to raise or develop a claim in the State courts—

"(A) was the result of State action in violation of the Constitution or laws of the United States;

"(B) was the result of a recognition by the Supreme Court of a new Federal right that is retroactively applicable; or

"(C) is due to the fact that the claim is based on facts that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State post-conviction review; and

"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it.

"§ 2260. Certificate of probable cause inapplicable

"The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to this chapter except when a second or successive petition is filed.".

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2. As we have discussed numerous times, I am not convinced we are currently achieving the proper balance between two needs: (1) operational uniformity for the system as a whole, and (2) local management flexibility for individual facilities. Budgets that call for greater efficiency at a time of increasing demands upon the system make the need to address these matters even more pressing.

3. Over the past several months, we have consulted with knowledgeable parties on the management of VHS&RA field operations, both in and outside VA. We found near consensus regarding the medical districts whose functions as defined are seen as duplicative in view of the regions' line authority and accordingly creates administrative layering which is costly and impedes communication between Central Office and the medical centers. It is also evident the regions themselves have developed considerable variation in their management processes despite the existence of centralized policy guidance and directives. The result has been insufficient management accountability—an unacceptable price to pay for permitting greater regional and local discretion in operations. We must strive for greater uniformity especially in the area of access to care for our nation's veterans irrespective of the region where they reside.

4. After weighing many factors, I have made the following decisions:

(a) That we should begin to phase out the Districts, folding certain elements of grassroots planning and MEDIPRO into the Regions. This should begin immediately, and end no later than March 31, 1990.

(b) That we should cut the number of Regions from seven to three, along the lines of the attached map. This proposal will be reported to the appropriate Congressional committees with the transmittal of the FY 91 Budget. However, planning for this should begin immediately so we are able to implement this change as soon as Congressional clearance is obtained.

5. Please submit to me within 30 days an implementation plan for the new three-region structure for VHS&RA which would address the following considerations:

(a) Resource savings that will result, and *will be used* to provide additional direct patient care in the respective regions.

(b) Site location, bearing in mind logical demographics and ease of travel.

(c) Staffing patterns for each Region for both Central Office and the field, assuming the Regional Directors will remain in the field.

6. Within the next two weeks I would like to meet with you to discuss selection of the three Regional Directors and the geographic locations of their offices.

EDWARD J. DERWINSKI.

APPENDIX B

DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH SERVICES AND RESEARCH ADMINISTRATION, SUMMARY OF REORGANIZATION COSTS/RECOVERIES

ASSUMPTIONS

1. Reorganization will result in a four region structure. Existing region offices will be closed in Albany, NY; Durham, NC; Gainesville, FL; Dallas, TX; and St. Louis, MO.

2. New regional offices will be activated in Baltimore, MD and Jackson, MS. Structure and staffing of these offices will be as recommended in the CMD's November 6, 1989, proposal to the Secretary.

3. Two Regional Offices in Ann Arbor, MI and San Francisco, CA will be expanded. Structure and staffing of these offices will be as recommended in the CMD's November 6, 1989, proposal to the Secretary.

4. Twenty-seven Medical Districts will be phased out NLT March 31, 1990. Activation of the new four region structure will occur on March 31, 1990. Assumes that a waiver to 210(b) will be grantd early in CY 1990.

5. The projected costs of this reorganization are one-time, non-recurring expenses. The resources associated with recovery of 85 FTEE from total region and district staff are recurring (per FTEE salary/benefits is $47,453).

6. The new regions will have a staffing complement of approximately 94 FTEE (fifty-eight will be located at the regional field office and thirty-six will be VAMC based; journalized to the region). As a result of the reorganization approximately 215 employees will be relocated throughout the system. The average cost per relocation is $40,000.

7. Two SES positions will be recovered from the reorganization (7-region structure requires 14 SES positions; 4-region structure requires 12 SES positions).

SUMMARY OF REORGANIZATION COSTS/RECOVERIES, FISCAL YEARS 1990–94

[Fiscal year 1990 start-up]

	Cost	Recovery
CLOSURES		
Region field offices in Albany, NY; Durham, NC; St. Louis, MO; Dallas, TX; Gainesville, FL and VACO SES positions.		
Personal services: (Separations)	[1] $136,436	
(Salary and benefits)		[2] $172,508
All others		[2] 254,249
Total regional closure	136,436	426,749
District offices:		
Total district recovery		[4] 2,016,753
Total for all closures	136,436	2,443,502
ACTIVATION OF NEW REGIONS (BALTIMORE AND JACKSON)		
Personal services: (relocations)	[5] 4,640,000	
All other	[6] 1,442,940	
Total for activation	6,082,940	
EXPANSIONS		
Expansion of existing field offices in Ann Arbor, MI and San Francisco, CA.		
Personal services: (relocations)	$2,400,000	
All others	1,549,940	
Total for expansion	3,949,940	
Fiscal year 1990 reorganization total	10,169,316	$2,443,502
Total fiscal year 1990 costs	7,725,814	

[1] Separation Pay (terminal leave, severance pay, etc.).
[2] Recoveries of Two Senior Executive Positions (pay and benefits).
[3] Recoveries achieved through region phase out. Includes rental space, contractual agreements, equipment rentals, telephone service, ADP maint, mail (parcel post and express), etc.
[4] Recovery achieved through redirecting 85 FTEE at approximately an annual salary benefit of $42,453 to VAMCs at (¾ year FY 1990).
[5] Cost of relocating 116 FTEE at approximately $40,000 per FTEE to establish the Baltimore and Jackson RO offices.
[6] Cost of establishing RO office includes: rental space, furniture, ADP and other equipment, maintenance agreements, telecommunications, vehicle rentals, etc.

By Mr. KENNEDY (for himself, Mr. JEFFORDS, Mr. METZENBAUM, Mr. HATFIELD, Mr. SIMON, Mr. DURENBERGER, Mr. PELL, Mr. PACKWOOD, Mr. GORE, Ms. MIKULSKI, Mr. ADAMS, Mr. BIDEN, Mr. BINGAMAN, Mr. BRADLEY, Mr. BURDICK, Mr. COHEN, Mr. CONRAD, Mr. CRANSTON, Mr. DODD, Mr. FOWLER, Mr. HARKIN, Mr. INOUYE, Mr. KERREY, Mr. KOHL, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mr. MATSUNAGA, Mr. MITCHELL, Mr. MOYNIHAN, Mr. RIEGLE, Mr. SARBANES, Mr. SPECTER, and Mr. WIRTH):

S. 2104. A bill to amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes; to the Committee on Labor and Human Resources.

CIVIL RIGHTS ACT OF 1990

Mr. KENNEDY. Mr. President, on behalf of Senator JEFFORDS and Senators METZENBAUM, DURENBERGER, GORE, HATFIELD, MIKULSKI, PACKWOOD, PELL, SIMON, ADAMS, BIDEN, BINGAMAN, BRADLEY, BURDICK, COHEN, CONRAD, CRANSTON, DODD, FOWLER, HARKIN, INOUYE, KERREY, KERRY, KOHL, LAUTENBERG, LEAHY, LEVIN, MATSUNAGA, MITCHELL, MOYNIHAN, RIEGLE, SARBANES, SPECTER, WIRTH, and I introduce the Civil Rights Act of 1990.

From the beginning, civil rights has been the unfinished business of America—and it still is. In the past 35 years, America has made significant progress in removing the stain of bigotry and segregation from our land. We have had our own ongoing peaceful revolution, and its accomplishments are a tribute to the remarkable resilience of our democracy and its institutions.

In achieving this progress, the role of one of these institutions—the Supreme Court—has been indispensable. For a generation, a long line of landmark decisions has kept the Nation true to the standard of the Constitution and the principle of equal justice under law.

In the past year, however, the Supreme Court has issued a series of rulings that mark an abrupt and unfortunate departure from its historic vigilance in protecting civil rights. The fabric of justice has been torn. Significant gaps have been opened in the existing laws that prohibit racism and other types of bias in our society.

The Civil Rights Act of 1990 is intended to overturn these Court decisions and restore and strengthen these basic laws.

The Patterson decision, interpreting an 1866 civil rights law, drew an artificial distinction that prohibits race discrimination in hiring workers, but leaves workers on the job unprotected from harassment or from being fired or denied promotion because of racial prejudice. At a single stroke, the Supreme Court nullified the only Federal antidiscrimination law applicable to the 11 million workers in the 3.7 million firms with fewer than 15 employees. Already, the damage is unmistakable. The Patterson decision has caused the dismissial of at least 96 claims of race discrimination in the past 8 months—and it should be overruled by Congress.

In the Wards Cove decision, the Court unfairly shifted a key burden of proof from employers to employees, in cases involving practices that operate to exclude minorities and women. Hundreds of cases in the past two decades have struck down subtle and not-so-subtle practices designed to keep minorities and women from participat-

ing fully and fairly in our economy. By shifting the burden of proof to workers, the Supreme Court has made it far more difficult and expensive for victims of discrimination to challenge the barriers they face.

Wards Cove was a 5 to 4 decision in 1989 that overruled the unanimous Griggs decision by Chief Justice Burger in 1971. Chief Justice Burger was right in 1971, and Congress should restore the law in 1990.

What is at stake in this apparently technical restoration of the law is of profound importance for the future of our country. Ninety-one percent of the growth in the Nation's work force in the 1990's will be women and minorities. If America is to compete successfully in the world, Congress cannot look the other way while the Supreme Court erects artificial and senseless barriers to their full participation in our economy.

My friend and colleague, Senator HOWARD METZENBAUM, has previously introduced S. 1261, a measure to overrule the Wards Cove decision, which has been substantially incorporated into the Civil Rights Act of 1990; and I am pleased that he is a cosponsor of this important legislation.

In a third objectionable decision, Martin versus Wilks, the Court held that consent decrees settling job discrimination cases may be reopened in future lawsuits. In the wake of that decision, longstanding decrees have been challenged in new lawsuits in cities across America. The Civil Rights Act proposes fair procedures to limit this endless litigation and ensure that fairly settled cases stay settled.

The act also contains a number of provisions to fill additional gaps in our antidiscrimination laws resulting from other Supreme Court decisions and to ensure fair and effective civil rights enforcement.

For example, victims of sexual harassment on the job currently have no effective Federal remedy. The act will close this serious loophole by granting victims of intentional discrimination the right to recover compensatory damages, and, in particularly flagrant cases, punitive damages as well.

Finally, one subject not addressed in our bill deserves mention. The rhetorical smoke screen that our opponents are already laying down is a blatant attempt to divert this important civil rights debate into a dead-end debate over quotas, minority set-asides and affirmative action. That is not the measure we are proposing. The bill does not address those questions, and it does not require quotas. The same die-hard opponents of civil rights will attempt to derail this legislation, just as they have attempted to block every other civil rights bill in Congress in recent years.

Second only to the Supreme Court, the bipartisan coalition for civil rights in Congress has been a powerful force for justice and equality of opportunity in America. All of us here today regret the Supreme Court's recent change of course, and we hope that it is only fleeting.

But as Senators and Representatives from both parties committed to civil rights, we intend to see this battle through. The Bush Administration has expressed a wait-and-see attitude about the need for this legislation. But our case is strong and our cause is just. As our bill moves through Congress, I urge the President to join us in enacting it this year. This is no time for Congress, the White House or America to retreat on civil rights.

I urge my colleagues to support the Civil Rights Act of 1990.

I am unanimous consent that the text of the bill and a detailed summary be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 2104

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1990".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) PURPOSES.—The purposes of this Act are—

(1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

(2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'group of employment practices' means a combination of employment practices or an overall employment process.

"(o) The term 'required by business necessity' means essential to effective job performance.

"(p) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee, or those Federal entities subject to the provisions of section 717.".

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

"(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—

"(1) An unlawful employment practice is established under this subsection when—

"(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

"(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practices are required by business necessity, except that—

"(i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and

"(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.".

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 4) is further amended by adding at the end thereof the following new subsection:

"(l) DISCRIMINATORY PRACTICE NEED NOT BE SOLE MOTIVATING FACTOR.—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such practice was also motivated by other factors.".

(b) ENFORCEMENT PROVISIONS.—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: "or, in a case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of any discrimination".

SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 4 and 5) is further amended by adding at the end thereof the following new subsection:

"(m) FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.—

"(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws—

"(A) by a person who, prior to the entry of such judgment or order, had—

"(i) notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person; and

"(ii) a reasonable opportunity to present objections to such judgment or order;

"(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

"(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government; or

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction.

"(3) Any action, not precluded under this subsection, that challenges an employment practice that implements a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order.".

SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.

(a) STATUTE OF LIMITATIONS.—Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by striking out "one hundred and eighty days" and inserting in lieu thereof "2 years";

(2) by inserting after "occurred" the first time it appears "or has been applied to affect adversely the person aggrieved, whichever is later,";

(3) by striking out ", except that in" and inserting in lieu thereof ". In"; and

(4) by striking out "such charge shall be filed" and all that follows through "whichever is earlier, and".

(b) APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.—Section 703(h) of such Act (42 U.S.C. 2000e-2) is amended by inserting after the first sentence the following new sentence: "Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.".

SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: "With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k))—

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the Federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. If compensatory or punitive damages are sought with respect to a claim arising under this title, any party may demand a trial by jury.".

SEC. 9. CLARIFYING ATTORNEY'S FEES PROVISION.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended—

(1) by inserting "(1)" after "(k)";

(2) by inserting "(including expert fees and other litigation expenses) and" after "attorney's fee,";

(3) by striking out "as part of the"; and

(4) by adding at the end thereof the following new paragraphs:

"(2) A court shall not enter a consent order or judgment settling a claim under this title, unless the parties and their counsel attest that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settlement.

"(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order.".

SEC. 10. PROVIDING FOR INTEREST, AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (c), by striking out "thirty days" and inserting in lieu thereof "ninety days"; and

(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties".

SEC. 11. CONSTRUCTION.

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:

"SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

"(a) EFFECTUATION OF PURPOSE.—All Federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies.

"(b) NONLIMITATION.—Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to restrict or limit the rights, procedures, or remedies available under any other Federal law protecting such civil rights.".

SEC. 12. RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end thereof the following new subsection:

"(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.".

SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

SEC. 14. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) APPLICATION OF AMENDMENTS.—The amendments made by—

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(b), 8, 9, 10 and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) paragraphs (2) through (4) of section 7(a) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) TRANSITION RULES.—

(1) IN GENERAL.—Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2) through (4), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) SECTION 6.—Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(c) PERIOD OF LIMITATIONS.—The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 4, 6, 7 (a)(2) through (4); or 12.

SUMMARY OF THE CIVIL RIGHTS ACT OF 1990

PROTECTING AMERICANS AGAINST RACE DISCRIMINATION ON THE JOB AND IN PRIVATE CONTRACTS

Last year, in *Patterson* v. *McLean Credit Union*, 109 S.Ct. 2363 (1989), the Supreme Court held that an 1866 statute barring intentional race discrimination in contracts (42 U.S.C sec. 1981) does not prohibit racial harassement on the job and other forms of discrimination in the application of contracts. The Civil Rights Act of 1990 amends sec. 1981 to reaffirm that the right "to make and enforce contracts" includes the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. By reaffirming the broad scope of sec. 1981, Congress will ensure that Americans may not be harassed, fired or otherwise discriminated against in contracts because of their race. Because sec. 1981 is the only federal statute baring race discrimination that is applicable to the 3.7 million employers with fewer than fifteen employees, it is vitally important to restore its broad ban on racism in contractual dealings.

RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES

For eighteen years following Chief Justice Warren Burger's unanimous opinion for the Supreme Court in the landmark case of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), Title VII had placed on employers the burden of showing that employment practices with a "disparate impact," (i.e., that operate to exclude women and minorities disproportionately) are required by business necessity. Last year, in *Wards Cove Packing Co.* v. *Atonio*, 109 S.Ct. 2115 (1989), the Court effectively overruled this Griggs rule and held that, no matter how strong the proof of discriminatory effect, the employer need no longer prove that its practices are required by business necessity. Instead, victims of discrimination must bear the heavy burden of proving that the employer has no legal justification for its exclusionary practices. The Civil Rights Act of 1990 restores the Griggs rule by providing that, once a person proves that an employment practice has a disparate impact, the employer must justify the practice by showing that it is based on business necessity.

FACILITATING PROMPT AND ORDERLY CHALLENGES TO CONSENT DECREES AND COURT ORDERS

In *Martin* v. *Wilks*, 109 S.Ct. 2180 (1989), a case involving a court-approved plan by the City of Birmingham to remedy past racial discrimination in its fire department, the Supreme Court held last year that whites who sat on the sidelines while the plan was being approved by the district court could later challenge it in a new lawsuit. The Civil Rights Act of 1990 guarantees notice to persons who might be adversely affected by a proposed court order, and a reasonable opportunity to challenge the order. But subsequent lawsuits challenging the court order will be barred except under certain unusual circumstances.

MAKING CLEAR THAT JOB BIAS IS ALWAYS ILLEGAL

In *Price Waterhouse* v. *Hopkins*, 109 S.Ct 1775 (1989), the Supreme Court suggested that employment decisions motivated at least in part by prejudice do not violate the law if the employer can show after the fact that the same decision would have been made if it had not engaged in intentional discrimination. The Civil Rights Act of 1990 provides that any reliance on prejudice in making employment decisions is illegal, while making clear that, in considering the appropriate relief for such discrimination, a court shall not order the hiring or promotion of a person not qualified for the position.

GRANTING WOMEN AND RELIGIOUS AND ETHNIC MINORITIES THE RIGHT TO RECOVER DAMAGES FOR INTENTIONAL EMPLOYMENT DISCRIMINATION NOW AVAILABLE TO RACIAL MINORITIES

Under present federal law, victims of sexual, religious, or ethnic harassment on the job have no effective remedy. The Civil Rights Act of 1990 closes this loophole by amending Title VII to grant any victim of intentional discrimination the right to recover compensatory damages, and, in egregious cases, punitive damages as well. The Act makes the remedies available for sex, religion and ethnic discrimination claims under Title VII the same as the remedies now available under sec. 1981 for racial discrimination.

RESTORING FAIR AND EFFECTIVE CIVIL RIGHTS ENFORCEMENT

The Civil Rights Act of 1990 also includes additional, technical provisions to address other Supreme Court decisions hampering antidiscrimination cases and to ensure fair and effective civil rights enforcement. These provisions clarify and extend the statute of limitations under Title VII and ensure that job bias victims will be able to obtain adequate legal assistance. They include the following:

Correcting Statutes of Limitation: In *Lorance* v. *AT&T Technologies*, 109 S.Ct. 2261 (1989), the Supreme Court held that the statute of limitations for challenging discriminatory seniority plans begins to run when the plan is adopted, rather than when the plan is applied to an individual. As a result, persons who were laid off pursuant to discriminatory seniority plans may be barred from bringing suit before they even knew they would be dismissed. The Act overrules Lorance and permits persons to challenge discriminatory seniority plans when those plans actually harm them, rather than only when they are adopted. At the same time, the Act confirms that proof of discrimination in the adoption of the seniority plan that actually required the layoff is required.

Extending statute of limitations in Title VII cases. The Act extends the statute of limitations in Title VII employment discrimination cases from 180 days to 2 years in all except federal-government cases, where the limit would be raised from 30 to ninety days.

Permitting Recovery of Prejudgment Interest Against the U.S.: To overrule the Supreme Court's 1986 decision in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1985), the bill permits the recovery of prejudgment interest against the federal government to compensate prevailing plaintiffs in job discrimination cases for delay in payment.

Permiting Award of Experts' Fees: To overrule a series of court of appeals decisions that extend the Supreme Court's 1987 *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1986), decision to the civil rights area, the Act permits prevailing plaintiffs to recover the reasonable costs of experts who assist them in preparing their case.

Permitting Recovery of Attoneys' Fees Expended in Defending Decrees: In response to the Supreme Court's decision last year in *Independent Federation of Flight Attendants* v. *Zipes*, 109 S.Ct. 2372 (1989), the Act makes it clear that parties who prevail in job discrimination cases may recover attorneys' fees expended in defending their court decrees against subsequent challenges.

Barring Forced Waiver of Attorneys' Fees Claims. To overrule the Supreme Court's 1986 decision in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), the Act requires that courts entering consent decrees settling job discrimination cases must first obtain from the parties and their counsel an attestation that a waiver of attorneys' fees was not compelled as a condition of the settlement.

Rule of Construction in Civil Rights Cases. The Act adopts rules of construction reaffirming the intention of Congress that civil rights laws must be construed generously, in order to provide effective remedies to eliminate discrimination.

THE BILL DOES NOT ADDRESS THE SCOPE OF RACE-CONSCIOUS REMEDIES

The Act specifically makes clear that it does not affect or change the law governing affirmative action and other race-conscious remedies. The Act does not mandate quotas in any fashion.

Mr. JEFFORDS. Mr. President, I am here today joining with a distinguished and bipartisan group of colleagues for the purpose of introducing the Civil Rights Act of 1990. This legislation, which has been eagerly anticipated since the Supreme Court issued the series of decisions last summer radically altering the civil rights landscape, is a direct result of and response to this effort by the Supreme Court to roll back the hard fought gains in employment equality for minorities and women won over the past 25 years.

Only the few have hailed the actions of the Court, while the many have condemned this retrenchment as a wrongheaded ideological attack, needlessly stirring up dissent where, more often than not, accord and accommodation had come to rule. Mr. President, I find myself with the many on this issue. One characteristic of these decisions that has particularly troubled me was the expansiveness of the holdings. Rather than observing the dictates of judicial restraint and issuing decisions on the cases presented to them, the conservative majority often leapt over the boundaries of the legal disputes involved in order to reach broad and wholly unnecessary conclusions and answering questions which had neither been raised by the parties nor mandated by the presented facts.

Like most Americans, I am proud of the progress our country has made over the past few decades in attacking job discrimination. In my opinion, the civil rights legislation enacted during that time has represented a historical high water mark and has created standards worthy of our continued, vigilant defense. By its recent actions, the Supreme Court has made it necessary for us to rise to the defense of those standards and we are here today to do just that.

The Civil Rights Act of 1990 was drafted with the specific intention of overruling some of these decisions, as well as to restore and strengthen our civil rights laws. Mr. President, it is my understanding that the text of the bill and a copy of a summary of its terms have been placed in the record. If this assumption is incorrect, I now ask unanimous consent that these items be included in the record after my remarks and that the bill be appropriately referred. I will not belabor the

record with a lengthy and detailed recitation of the terms of the bill. However, I would like to highlight a few significant points.

First. In Patterson versus McLean Credit Union, the Court reached the astounding conclusion that the Reconstruction-era civil rights statute (42 U.S.C. 1981), which bars intentional discrimination in contracts, pertained only to the formation of contracts and not to any conduct occurring thereafter. Thus, in the employment context, the Court held that racial harassment on the job and other forms of posthiring discrimination were not prohibited by that act. The Civil Rights Act of 1990 amends section 1981 to reaffirm that the right to make and enforce contracts includes the enjoyment of all the benefits, privileges, terms and conditions of the contractual relationship. This is all the more significant because section 1981 is the only Federal statute which bars race discrimination in employment by the 3.7 million employers with fewer than 15 employees. Thus, absent this restoration, and despite the existence of title VII (which governs only larger employers), a sizable population of employees would be without this vital Federal protection. To those who contend that State law provides coverage for such employees, I must respond that the hodgepodge of State tort and/or wrongful discharge actions is not an adequate substitute for Federal protection. The happy accident of State residence should not be the factor determining the measure of protection an employee will receive in so vital a right.

Second. The Court's decision in Martin versus Wilks reversed the longstanding and judicially accepted doctrine of impermissable collateral attack. By application of this doctrine, courts previously have permitted court ordered or consentual settlement decrees to have finality after allowing ample opportunity for affected persons to challenge their formulation on a before-the-fact basis. However, once such challenges had failed, or the duly notified potential challengers had failed to come forward, the doctrine would bar the raising of subsequent disputes about the operation of the decrees. The Wilks decision reversed this trend and allowed persons who had sat on their rights while a decree was being approved by the district court to attack it later in a separate lawsuit.

While it does ot specifically reinstate the impermissible collateral attack doctrine, the Civil Rights Act of 1990 achieves a similar effect by mandating that notice be given to persons who might be adversely affected by a proposed court order, and guaranteeing them a reasonable opportunity to challenge the order before it is instituted. Subsequent lawsuits challenging the court order would be barred except under the same unusual circumstances; (for example, fraud, collusion, lack of subject matter jurisdiction) which previously were accepted as exceptions to the doctrine. Thus, the interests of all parties are preserved in a context which provides for the due process rights of notice and opportunity to be heard. Accordingly, despite the protestations to the contrary which undoubtedly will be raised, none will be denied their day in court as a result of this legislation.

Third. We can also expect the detractors of this bill to rail against the imposition of a statistical standard of discrimination which they contend will result in the legitimization of quotas. We have already heard it stated on the floor of the Senate that this will be the inevitable result of that section which deals with the Court's decision in Wards Cove versus Atonio. However, this assessment is incorrect, for the act specifically makes clear that it does not affect or change the law governing affirmative action and does not mandate quotas in any fashion. All that is intended by the framers of this provision and, we believe, all that is accomplished therein is the restoration of the Griggs versus Duke Power rule that once a plaintiff has proven an employment practice produces a disparate impact on the basis of sex, race, or other protected category, the burden shifts to the employer to justify the practice on the basis of business necessity.

Obviously, there are other portions of the act which I have not chosen to highlight here. These partake of both the need to correct or reverse the incursions made by the Court on the existing body of civil rights law; (for example, reaffirming that mixed motive discrimination is still unlawful discrimination [Price Waterhosue] and that civil rights laws are to be construed in a fashion which furthers, rather than hinders the objectives of equal opportunity), as well as the desire to strengthen the protections provided under those law; (for example, equalizing the remedies available to women and religious, ethnic and racial minorities, extending the statute of limitations and assuring that job discrimination victims will be able to obtain adequate legal representation).

In these times when so many of the world's injustices are beginning to be addressed forthrightly an openly; when walls are coming down in eastern Europe and the doors of political prisons are being swung open in south Africa; now is no time for this Nation to backtrack on the civil rights promises it has been in the vanguard making. I have previously stated that I believe the Supreme Court's recent rulings represent an effort to renege on history and I, for one, am more than prepare to resist the effort. Equal employment opportunity is a worthy objecitve for this Nation. Whereas we have made great strides, we have not reached our goal and we must continue to strive onward. This bill presents us with an opportunity to do the right thing in this regard. Thus, I exhort my colleagues; let's continue to be the vanguard; let's do the right thing; let's give this legislation the prompt and complete attention it so rightly deserves; let's pass the Civil Rights Act of 1990.

Mr. METZENBAUM. Mr. President, I am proud to rise as an original cosponsor of the Civil Rights Act of 1990. At the outset, I want to commend Senator KENNEDY for his outstanding leadership on this bill. This is the latest example of his lifelong commitment to make America a better and fairer Nation.

The fact that there is a crying need for this legislation as we enter the 1990's is a sobering reminder that we are not moving forward as quickly as we should be to ensure justice and equality for all Americans. In 1965, I was privileged to join Dr. Martin Luther King, Jr.'s march in Selma. One could not help but share his spirit of optimism and commitment to justice for every man, woman and child in our society. Those were heady days. A year earlier, Congress had enacted the historic Civil Rights Act of 1964. That was a hard-fought victory—thousands of Americans struggled, marched, prayed and some even died to convince Congress to protect the basic civil rights of all people. One of these basic civil rights is embodied in title VII of the Civil Rights Act of 1964. That title holds out the promise of equal employment opportunity for all workers, regardless of race, creed, color, national origin or gender.

Twenty-five years later, despite significant progress, that promise remains unfulfilled. Women and minorities still fight major hiring and promotion barriers in our society. According to recent Government statistics, on average, a woman still earns some 30 percent less than a man. Black and Hispanic workers earn some 25 percent less than white workers. Even when women and minorities prove themselves at the highest levels of the corporate ladder they face discrimination. A major accounting firm recently denied a partnership to a woman beause she was considered too "aggressive" and her managers suggested she stood a better chance if she would act "more femininely." A survey of black corporate executives indicates they feel frustrated and angry because they are continually stymied and they have not gained a level of acceptance from their white peers.

Regrettably, the situation is getting worse, not better. The Supreme Court, led by President Reagan's appointees, has taken aggressive action to turn back the clock on civil rights. In a stunning series of 5-to-4 decisions announced last spring, the new majority on the Court reversed longstanding precedents and denied protection to the victims of employment discrimination.

The Civil Rights Act of 1990 is a direct response to those decisions. It sends a resounding message to the Court and to the public: our march toward a more fair and just Nation will not be turned back. We must quicken the pace of reform to stop, once and for all times, discrimination and harassment against women and minorities.

This is a bipartisan initiative. Protecting civil rights is not a political issue. It is a matter of justice and fairness. But equal employment opportunity is also an economic necessity if we are to remain competitive in the world. As the Labor Department has reported, the demographic trends indicate that women and minorities will be the fastest growing segment of our work force. Irrational barriers to employment and promotion, based on erroneous stereotypes, cannot be tolerated. We, as a nation, cannot afford to exclude any workers as we strive to remain competitive.

Opponents of this initiative will attempt to downplay the significance of the Supreme Court decisions. But the impact of these decisions is devastating. For example, in the Patterson case, the newly constituted majority dramatically narrowed the scope of section 1981. That is one of the landmark statutes enacted immediately after the Civil War to enable newly freed slaves to enjoy the full rights of citizenship. The Patterson decision declared that section 1981 could not be used to remedy intentional racial discrimination or harassment that occurs on the job. The impact of Patterson has been sharp and swift: in the 6 months since the decision was announced, lower courts, relying on Patterson, have dismissed nearly 100 pending, intentional racial discrimination cases.

The decision in Wards Cove versus Atonio represents another stunning example of unwarranted judicial activism. That decision was particularly disturbing because the majority, in a case where the facts pointed to the worst kinds of institutionalized discrimination, reached out to repudiate a settled area of the law. Nonwhite employees were challenging an employment system that, according to dissenting Justice Stevens, resembled a "plantation economy" complete with racially segregated housing and dining facilities. Despite these egregious circumstances, the majority ignored the plight of these workers and effectively gutted the established precedent in this area. In particular, the majority rejected the 1971 unanimous decision in the Griggs case, a decision authored by Chief Justice Burger. Earlier this year, I introduced S. 1261, the Fair Employment Reinstatement Act, to reinstate the law set forth in the Griggs decision. I am pleased that the Civil Rights Act of 1990 incorporates fully the provisions of the Fair Employment Reinstatement Act.

We have already scheduled hearings in the Labor and Human Resources Committee on this important matter. Make no mistake, we intend to push forward with the legislation this year. I urge all of my colleagues, on both sides of the aisle, to support this bill so that the victims of discrimination will receive the protection of our laws to which they are entitled. The Civil Rights Act of 1990 is landmark legislation. Its passage will bring us closer to the day when there is full equal employment opportunity for all Americans.

Mr. HATFIELD. Mr. President, I rise today in support of the Civil Rights Act of 1990. I am pleased to be an original cosponsor of this important legislation and look forward to its prompt passage.

During the 1988–89 term, the Supreme Court issued a series of unfortunate decisions that cut back on the scope and effectiveness of various civil rights protections, particularly those protections applicable in employment discrimination matters. The Civil Rights Act of 1990 would essentially overturn those Supreme Court decisions.

Specifically, this act would do the following:

First, it would restore the prohibition against racial discrimination in the making and enforcement of contracts. The act reaffirms that "the right to make and enforce contracts" includes the making, performance, modification and termination of contracts, including the enjoyment of all benefits, terms, and conditions of the contractual relationship.

Second, the act restores the burden of proof of unlawful employment practices in disparate impact cases. In other words, it restores prior law tha once an employee proved an employer's employment practices had a discriminatory effect, then the employer must prove that such practices were based upon business necessity.

Third, the prohibition against impermissible consideration of race, color, religion, sex, or national origin in employment practices would be clarified. The law would be amended to provide that as a general rule an employer may not use race, religion, gender, or ethnicity as a motivating factor in employment decisions, regardless of whether such discrimination is accompanied by legitimate motives.

Fourth, the act would facilitate the prompt and orderly resolution of challenges to employment practices that carry out litigated or consent judgments or orders. Those who might be adversely affected by a proposed court order would be given the opportunity to be heard prior to the entry of the order. Once an order is entered, however, challenges would generally not be allowed.

Finally, a damages remedy for international discrimination would be added.

Mr. President, I commend my colleagues for their efforts in producing a comprehensive bill that reaffirms Congress' commitment to meaningful civil rights protections. The majority of the current Supreme Court, with its narrow interpretations of our civil rights laws, seems to lack the necessary commitment. It is up to Congress, therefore, to restore and strengthen the legal protections necessary to ensure equal employment opportunity for all. The Civil Rights Act of 1990 would do just that.

Mr. SIMON. Mr. President, I am pleased to be an original cosponsor of the Civil Rights Act of 1990. All Americans, as part of our birthright as citizens of this great Nation, should have equal opportunity to obtain a job, and should have equal opportunity for promotion and advancement once on the job. Today, more than ever before, our Nation must utilize the talents and productive capacity of all of its citizens in the work force, particularly that of minorities and women who frequently face the greatest barriers to employment opportunity.

Unfortunately, decisions reached by the Supreme Court last year put into place procedural and substantive roadblocks that serve to undermine the protections that Congress intended to be available to minorities and women under title VII of the Civil Rights Act of 1964. The recent Supreme Court decisions reflect a major shift away from equal employment rights established more than a quarter century ago when title VII of the Civil Rights Act was enacted.

Title VII has been an important weapon in the Nation's arsenal to eradicate discrimination in the workplace. As a result, women and minorities are integrated into the work force and have made major inroads where overt discriminatory practices once presented insurmountable barriers. But, the job is far from over. More subtle and intangible forms of bias still surface all too frequently in the workplace.

Last year, the Court changed its course drastically, narrowing the reach of title VII in ways that I believe Congress never intended. These decisions have already made it far more difficult for victims of bias to prove civil rights violations not only of title VII but also of section 1981, a long-established civil rights act guaranteeing equality in the making and enforcement of contracts. The protections that remain are not sufficient to provide women and minorities the justice that is their due. These recent decisions have, in effect, left many victims of discrimination with only hollow protection under title VII and section 1981.

It is now up to Congress to correct the mistakes made by the Court last year and to signal our clear intent that discrimination against women and minorities—no matter how unintentional

or subtle—has no place in the workplace or in our society.

The Civil Rights Act of 1990 would reverse five Supreme Court decisions that do particular harm to the notion of equal employment rights for all. The bill would reverse Patterson versus McLean Credit Union to protect Americans against racial discrimination on the job and in private contracts. A legal system that does not include protection against racial harrassment on the job as a substantive part of an employment contract, as the Court ruled in Patterson, is unfair to employees and needs revision. Equal employment opportunity means little when it is limited only to the doorway of employment. What is opportunity when, as in Patterson, employers may not—under section 1981—discriminate against employees when the initial contract is formed, but as soon as the employee begins work, the employer has a free hand to discriminate against that worker on the basis of his or her race?

The Civil Rights Act of 1990 would restore the burden of proof in cases that involve employment practices that on their face seem neutral, but that in practice exclude minorities and women. A legal system that requires an employee who claims discriminatory treatment to unravel the complexities of an employer's personnel policies, as the Court ruled in Wards Cove Packing Co. versus Atonio, places a particularly unfair and unreasonable burden on employees and needs revision.

The Court's ruling in Wards Cove is especially troubling because it reverses a unanimous 1971 decision, Griggs versus Duke Power Co. Under Griggs, title VII has been used effectively by women and minorities to overcome not only individual bias, but also more subtle employment practices that have been used to screen out entire classes of people. Now we must repair the damage of the Wards Cove decision simply to maintain standards the court established 18 years ago.

The Civil Rights Act of 1990 would correct the Court's ruling in Lorance versus AT&T Technologies that would require an employee to anticipate, and to bring suit in advance of, a future adverse application of a seniority system in order to protect his or her rights.

The Lorance case involved an Illinois woman, Patricia Lorance, who lost her job and was denied any remedy by the Court. Patricia Lorance challenged a senority system that she believed had been changed to prevent her and other women from competing for mostly male, higher paying jobs in a manufacturing plant. She was laid off under this system in 1983, although the seniority system was actually adopted in 1979. The Supreme Court adopted the most narrow interpretation possible, holding that employees must file charges within 300 days after a seniority system or other employment practice is adopted; that is, 300 days from the date of adoption, not when the actual discrimination takes place. That's not a long time, especially in this world of complicated management, labor, and legal practices. The discriminatory effect of a senority system may not play itself out until well after its adoption, until well into those 300 days. It is easy to imagine the confusion an employee encounters when her company adopts a complicated seniority or benefit system, let alone keep track of when the courts allow a plaintiff to file charges or whether or not a system will affect her adversely months down the line. The Civil Rights Act of 1990 would protect those who do not realize, until too late, that certain employment practices jeopardize their ability to advance, as in the Lorance case.

The Civil Rights Act of 1990 would also reverse the Court's decisions in Price Waterhouse versus Hopkins, a decision that permits an employer to discriminate without ramification if the predominant reason for the employment decision was something other than the plaintiff's gender, and Martin versus Wilks, a decision that could undermine many affirmative action plans currently in place and discourage the voluntary settlement of disputes. These decisions seriously undermine the statutory objectives of fair employment laws and need to be revised.

Unfortunately, discrimination still limits work opportunities for many of our citizens in today's world, and the ideal of a work force based on equal opportunity and advancement through hard work and merit is a difficult goal to reach. That goal is pushed further from reach when the Supreme Court, long viewed as the protector of civil rights, restricts the scope and undermines the effectiveness of two of our most important antidiscrimination laws. Fortunately, Congress can, and should, step in to restore the civil rights safety net ripped open by the Supreme Court, to ensure that all victims of bias are afforded adequate remedies in our judicial system.

The Civil Rights Act of 1990 is legislation that deserves our attention and swift approval.

Mr. PACKWOOD. Mr. President, I rise today along with Senators KENNEDY and JEFFORDS and a number of our colleagues. Both Republican and Democrat, to introduce the Civil Rights Act of 1990. Identical legislation is being introduced in the House of Representatives today.

The genesis of all civil rights in our great country is the U.S. Constitution. This document prohibits the Federal Government from depriving any person of life, liberty or property without due process of law. Our Constitution also forbids States from denying any person the equal protection of the laws. States are further obliged to protect the rights of persons equally, that is, without discrimination against any class of persons. Slavery is prohibited and voting rights are guaranteed to all citizens.

The Constitution gives Congress the power to enforce our civil rights by appropriate legislation. The first Civil Rights Act, passed in 1866, guaranteed to every U.S. citizen the same rights that white citizens have to inherit, purchase, lease, and sell property. A series of other laws in the years following the Civil War made clear that our nonwhite citizens were to enjoy the same rights as whites in other areas such as contracting and sitting on juries.

Twentieth century civil rights laws reflect the growing recognition of Congress and the American people of the need for equal protection in the areas of voting, public accommodation, education, employment, housing, credit and access to Federal programs. In addition to the protection of these substantive rights, Congress has acted to extend constitutional protection beyond race to religion, sex, handicap, national origin, age, and marital status. Our history reflects a dynamic process, expanding protection to ensure that all basic rights of all groups are safeguarded.

Our courts have played a major role in enforcing the civil rights protections enacted by Congress. Where civil rights have been endangered by denial of equal opportunity to take part in the social, economic, and political life of this great land, those affected have been able to turn to the courts for protection of those rights.

During 1989, however, the U.S. Supreme Court issued a series of decisions in employment discrimination cases that threaten to set back our progesss in the area of job opportunity by decades. As a result of the decision in Patterson versus McLean Credit Union, victims of even the most egregious racial harassment in the workplace can obtain no meaningful remedy. Because of the decision in Price-Waterhouse versus Hopkins, a person who proves that illegal discrimination played a part in an action against them by an employer cannot receive any remedy if the employer shows that there was also a legal reason for the action. In other words, overt sexism or racism in an employment decision is acceptable so long as it is not the only reason for the decision. The Court's opinion in Wards Cove Packing Co. versus Atonio makes a person who proves discrimination by an employer that the employer had no justification for the discrimination.

The results in these cases indicate that the Supreme Court needs a clear signal from Congress that employment discrimination is unacceptable in all forms and under all circumstances, and that Congress expects the Court to reflect that in its decisions. That is what the Civil Rights Act of 1990 would do.

I urge my colleagues to support this bill because it is the right thing to do. It is our opportunity to begin this decade with a renewed commitment to civil rights.

But there is another reason to support this legislation. America's economic well-being depends as never before on the role of women and minorities in our work force. Work Force 2000, a study commissioned by the U.S. Department of Labor, States that by the end of this century, 47 percent of our work force will be women and 15 percent will be nonwhite. At the same time, new jobs will demand much higher skill levels. We will be more dependent on women and minorities as workers, and they must be increasingly better trained. We simply cannot afford the prejudice that keeps women and minorities from obtaining the best possible training and that keeps them from being able to give their best on the job.

I wish that this legislation were not necessary, but I conclude from the actions of the Court that we must now take steps to protect the gains of the last 25 years in eliminating employment discrimination. I am proud and pleased to be sponsor of the Civil Rights Act of 1990.

Mr. CHAFEE. Mr. President, I commend my colleagues for their work in bringing the issue of civil rights before this body. Deeply entrenched in American culture is the belief that all individuals—no matter what their color, race, sex, religion, or national origin—deserve equal and fair treatment. That is the principle upon which Congress has established civil rights laws; today, that principle is being reemphasized.

Congressional intent is one of the tools used by the courts to decipher the meaning of Federal statutes. One of the purposes of the bill being introduced today is to make clear congressional intent regarding, and support for, civil rights. I applaud that goal wholeheartedly.

Currently, as my colleagues know, the Federal Government prevents discrimination in the workplace under two major statutes: the Civil Rights Acts of 1866 and 1964. The 1866 statute, known as section 1981, guarantees equal rights, regardless of race, in the making of employment and other contracts. Title VII of the 1964 act prohibits discrimination based on race, color, religion, sex, or national origin, with regard to employment decisions and practices.

Last year, the Supreme Court handed down a series of civil rights and employment-related rulings that affected the body of civil rights law that has developed from section 1981 and title VII over the past four decades. Three areas of civil rights law—burden of proof of discrimination, court-approved consent decrees, and on-the-job discrimination—were significantly affected.

The Civil Rights Act of 1990, as introduced, addresses to some degree each of those decisions. In the body of civil rights law, there are clear precedents or standards that served as the guidelines for this legislation. Sections of this act do faithfully restore civil rights guarantees as outlined by Court precedent; but the act also goes beyond simply restoring longstanding Court precedents.

First, the act would address those recent decisions in which no clear precedent or standard had been established by the Supreme Court. Second, there are sections of the bill that may loosely be referred to as compromise provisions: those that codify a position somewhere between the Supreme Court's ruling and the standard assumed prior to that ruling. Third, and finally, the bill breaks what I consider to be entirely new ground in specific areas.

While I support many of these provisions, I recognize that none are small steps. Given the breadth, the importance, and the potential impact of this bill, I believe we must take the time for careful analysis. It is my understanding that 4 days of hearings on this measure have already been scheduled. The hearing process should prove invaluable, and the resulting discussion should produce more insight into how best to protect civil rights. Should more hearings be necessary, I hope that they, too, will be scheduled.

Mr. CRANSTON. Mr. President, I am pleased to join as an original cosponsor of the Civil Rights Act of 1990. This legislation would clarify and strengthen Federal laws which forbid discrimination in employment based on race or sex and ensure that adequate remedies exist for victims of such discrimination.

Since the enactment of the Civil Rights Act of 1964, countless Court decisions and congressional actions have underscored the need to be vigilant against discrimination. We have made steady progress toward achievement of a juster and fairer society. The current Supreme Court, however, doesn't seem to understand the depth of the problem of invidious discrimination in this country or the importance of maintaining strong and effective remedies to eradicate this problem.

Last year, the Supreme Court handed down a series of decisions which have blunted some of the most effective laws which protect employees from discrimination. The bipartisan legislation being introduced today is designed to reverse the adverse impact of these decisions and to restore our Nation's strong and effective weapons against employment discrimination.

Mr. President, last year's Supreme Court decisions dealt a crippling blow to the ability of victims of job discrimination to litigate cases under Federal civil rights statutes. One decision, Wards Cove, overturned 18 years of settled law on the burden of proof in employment discrimination cases. Another, Patterson, emasculated a 1866 civil rights statute by limiting its coverage to exclude on-the-job discrimination. A third, Martin, would allow long-accepted settlement agreements discrimination cases to now be reopened.

Mr. President, the devastating impact of these decisions is already taking effect. According to a survey conducted by the NAACP Legal Defense and Education Fund, 96 claims involving racial and ethnic harassment and discrimination have been dismissed as a result of the Patterson decision.

One case thrown out as a result of the Patterson decision involved an employer found to have subjected one black employee to verbal and physical abuse, and a racially motivated demotion. The employer demoted the employee because it "wasn't right for a black to occupy such a high position." The trial court had found the employer guilty of illegal discrimination and awarded the victim $150,000 in damages. The appeals court reversed, on the grounds that the Patterson decision held that section 1981 of title 42 of the United States Code—the 1866 civil rights law—did not apply to on-the-job discrimination, only discrimination in hiring.

Since the only other remedy—Title VII of the Civil Rights Act of 1964—does not apply to employers with less than 15 employees, no Federal remedy was available to redress the blatant discriminatory treatment of this employee. Mr. President, to leave a victim of this kind of discrimination without a remedy contravenes all that Congress has fought for in ensuring equal treatment for all Americans.

If we truly lived in a color and sex-blind society perhaps there would be no need for the type of civil rights laws which exist today. But one need not look far to realize that, while progress has been made, we are far from achieving that kind of a color- and sex-blind society. To make that dream a reality we must ensure that Federal equal employment laws remain strong and effective. We have come too far on the long and arduous path toward achievement of equality and justice to turn backward now. I strongly support this measure and will fight for its enactment.

By Mr. RIEGLE (for himself, Mr. KASTEN, Mr. SIMON, Mr. DIXON, Mr. BUMPERS, Mr. PRESSLER, Mr. LEVIN, Mr. SARBANES, Mr. WILSON, Mr. GRASSLEY, Mr. LIEBERMAN, Mr. DASCHLE, Mr. LAUTENBERG, Mr. SASSER, Mr. WARNER, Mr. METZENBAUM, Mr. DURENBERGER, Mr. D'AMATO, Mr. DOLE, Mr. GARN, Mr. INOUYE, Mr. KOHL, Mr. EXON, Ms. MIKULSKI, Mr. MOYNIHAN, Mr. DODD, Mr. MCCLURE, Mr. LEAHY, Mr. BRYAN, Mr. MITCHELL, Mr. GORTON, Mr. WIRTH, Mr. SYMMS, Mr. BURDICK, Mr.

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101ST CONGRESS
2D SESSION

H. R. 4737

To amend title 28, United States Code, with respect to habeas corpus, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 7, 1990

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, with respect to habeas corpus, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Habeas Corpus Revision Act of 1990".

SEC. 2. LIMITATIONS PERIOD IN CAPITAL CASES.

Section 2254 of title 28, United States Code, is amended by adding after subsection (f) the following:

"(g)(1) In the case of an applicant under sentence of death, any application for habeas corpus relief under this sec-

tion must be filed in the appropriate district court within one year from the following date, whichever is appropriate:

"(A) The date of denial of a writ of certiorari, if a petition for a writ of certiorari to the highest court of the State on direct appeal from the conviction and sentence is timely filed in the Supreme Court.

"(B) The date of issuance of the mandate of the highest court of the State on direct appeal from the conviction and sentence, if a petition for a writ of certiorari is not filed in the Supreme Court.

"(C) The date of issuance of the mandate of the Supreme Court, if on a petition for a writ of certiorari the Supreme Court, upon consideration of the case, disposes of it in a manner that leaves the capital sentence undisturbed.

"(2) The time requirements established by this section shall be tolled—

"(A) during any period in which the applicant is not represented by counsel as described in section 8 of the Habeas Corpus Revision Act of 1990;

"(B) during the period from the date the applicant files an application for State postconviction relief until final disposition of the application by the State appellate courts and the Supreme Court, if all filing deadlines are met;

"(C) during any period authorized by law for the filing of any petitions for rehearing and similar petitions, if all filing deadlines are met; and

"(D) during an additional period not to exceed 90 days, if counsel moves for an extension in the district court that would have jurisdiction of a habeas corpus application and makes a showing of good cause.

"(3) The sanction for failure to comply with the time requirements established by this section shall be dismissal, except that the time requirements shall be waived if—

"(A) the applicant presents a colorable claim, not previously presented, of factual innocence or ineligibility for a capital sentence; or

"(B) other exceptional circumstances warrant a waiver.".

SEC. 3. STAYS OF EXECUTION IN CAPITAL CASES.

Section 2251 of title 28, United States Code, is amended—

(1) by inserting "(a)(1)" before the first paragraph;

(2) by inserting "(2)" before the second paragraph; and

(3) by adding at the end the following:

"(b) In the case of an individual under sentence of death, a warrant or order setting an execution date shall be stayed upon application to any court that would have juris-

diction over an application for habeas corpus under this chapter. The stay shall be contingent upon reasonable diligence by the individual in pursuing relief with respect to such sentence and shall expire if—

"(1) the individual fails to apply for relief under this chapter within the time requirements established by section 2254(g) of this title;

"(2) upon completion of district court and court of appeals review under section 2254 of this title, the application is denied and—

"(A) the time for filing a petition for a writ of certiorari expires before a petition is filed;

"(B) a timely petition for a writ of certiorari is filed and the Supreme Court denies the petition; or

"(C) a timely petition for a writ of certiorari is filed and, upon consideration of the case, the Supreme Court disposes of it in a manner that leaves the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, in the presence of counsel qualified under section 2257 of this title, and after being advised of the consequences of the decision, an individual waives the right to pursue relief under this chapter.".

SEC. 4. SUCCESSIVE PETITIONS IN CAPITAL CASES.

Section 2244(b) of title 28, United States Code, is amended—

(1) by inserting "(1)" after "(b)"; and

(2) by adding at the end the following:

"(2) In the case of an applicant under sentence of death, a second or successive application presenting a claim not previously presented by the applicant in an application under this chapter shall be dismissed unless—

"(A) the failure to raise the claim previously is—

"(i) the result of interference by State officials;

"(ii) the result of Supreme Court recognition of a new Federal right that is retroactively applicable; or

"(iii) the result of the discovery of facts that could not have been discovered previously by the exercise of reasonable diligence; or

"(B) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the applicant's guilt of the offense or offenses for which the capital sentence was imposed or the appropriateness of that sentence; or

"(C) consideration of the application is necessary to prevent a miscarriage of justice.

"(3) In the case of an applicant under sentence of death, a second or successive application presenting a claim previously presented in an application under this chapter shall be dismissed unless the interests of justice would be served by reconsideration of the claim.".

SEC. 5. CERTIFICATES OF PROBABLE CAUSE.

The third paragraph of section 2253, title 28, United States Code, is amended to read as follows:

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause. However, an applicant under sentence of death shall have a right of appeal without a certificate of probable cause, except after denial of a second application.".

SEC. 6. LAW APPLICABLE IN CHAPTER 153 PROCEEDINGS.

(a) IN GENERAL.—Chapter 153 of title 28, United States Code, is amended by adding at the end the following:

"§ 2256. Law applicable

"(a) Except as provided in subsection (b) of this section, each claim under this chapter shall be governed by the law existing on the date the court considers the claim.

"(b) The court may decline to apply a new rule if applying that new rule would—

"(1) fail to serve the purpose of the new rule;

"(2) upset State authorities' reasonable reliance on a different rule; and

"(3) seriously disrupt the administration of justice.

"(c) For purposes of this section, a new rule is a sharp break from precedent that positively changes the law from that governing at the time the claimant's sentence became final. A rule is not new merely because, based on precedent existing before the rule's announcement, it was susceptible to debate among reasonable minds.

"(d) For purposes of this section, a claimant's sentence becomes final at the conclusion of State court appellate and collateral litigation on the claimant's conviction and sentence and any direct review in the Supreme Court of the United States.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 153 of title 28, United States Code, is amended by adding at the end the following:

"2256. Law applicable in Federal proceedings.".

SEC. 7. PROCEDURAL DEFAULT IN STATE COURT.

Section 2254 of title 28, United States Code, is amended by adding after the subsection added by section 2 of this Act the following:

"(h) A district court may decline to consider a claim under this section if—

"(1)(A) the applicant previously failed to raise the claim in State court at the time and in the manner prescribed by State law;

"(B) the State courts, for that reason refused to entertain the claim; and

"(C) such refusal would constitute an adequate and independent State law ground that would foreclose direct review of the State court judgment in the Supreme Court of the United States; and

"(2) the applicant fails to show cause for the failure to raise the claim in State court and prejudice to the applicant's right to fair proceedings or to an accurate outcome resulting from the alleged violation of the Federal right asserted, or that failure to consider the claim would result in a miscarriage of justice.

"(3) For purposes of this subsection, cause is an explanation for procedural default not attributable to an intentional decision to ignore a State's procedural rules. An applicant may establish cause by showing that—

"(A) the factual or legal basis of the claim could not have been discovered by the exercise of reasonable diligence before the applicant could have raised the claim in State court, or was not

discovered or asserted because the applicant's counsel failed to exercise reasonable diligence;

"(B) the claim relies on a retroactive proposition of law announced after the applicant might have raised the claim in State court;

"(C) the failure to raise the claim in State court was due to interference by State officials; or

"(D) the failure to raise the claim in State court was due to counsel's ineffective assistance in violation of the United States Constitution.".

SEC. 8. COUNSEL IN CAPITAL CASES.

(a) REQUIREMENT.—A State in which capital punishment may be imposed shall provide legal services to—

(1) indigents charged with offenses for which capital punishment is sought;

(2) indigents who have been sentenced to death and who seek appellate or collateral review in State court; and

(3) indigents who have been sentenced to death and who seek certiorari review in the United States Supreme Court.

(b) ESTABLISHMENT OF APPOINTING AUTHORITY.—The State shall establish an appointing authority, which shall be—

(1) a statewide defender organization, appointing staff attorneys, members of the private bar, or both; or

(2) a resource center, appointing staff attorneys, members of the private bar, or both.

(c) FUNCTIONS OF APPOINTING AUTHORITY.—The appointing authority shall—

(1) recruit attorneys qualified to be appointed in the proceedings specified in subsection (a);

(2) draft and annually publish rosters of qualified attorneys;

(3) draft and annually publish procedures by which attorneys are appointed and standards governing the qualifications and performance of counsel appointed; and such standards shall include—

(A) membership in the bar of the jurisdiction or admission to practice pro hac vice;

(B) knowledge and understanding of pertinent legal authorities regarding the issues in capital cases in general and any case to which an attorney is appointed in particular;

(C) skills in the management and conduct of negotiations and litigation in capital cases;

(D) skills in the investigation of capital cases, the background of clients, and the psychiatric history and current condition of clients;

(E) skills in trial advocacy, including the interrogation of defense witnesses, cross examination, and jury arguments;

(F) skills in legal research and in the writing of legal petitions, briefs, and memoranda; and

(G) skills in the analysis of legal issues bearing on capital cases;

(4) periodically review the rosters, monitor the performance of all attorneys appointed, and delete the name of any attorney who—

(A) fails satisfactorily to complete regular training programs on the representation of clients in capital cases;

(B) fails to meet performance standards in a case to which the attorney is appointed; or

(C) fails otherwise to demonstrate continuing competency to represent clients in capital cases;

(5) conduct or sponsor specialized training programs for attorneys representing capital clients;

(6) appoint two attorneys, lead counsel and co-counsel, to represent a client in a capital case at the relevant stage of proceedings, promptly upon receiving notice of the need for the appointment from the relevant State court; and

(7) report such appointment or the client's failure to accept counsel in writing to the court requesting the appointment.

(d) DETERMINATION OF COMPETENCY AND WAIVER.—Upon receipt of notice from the appointing authority that an individual entitled to the appointment of counsel under this section has declined to accept such an appointment, the court requesting the appointment shall conduct, or cause to be conducted, a hearing, at which the individual and counsel proposed to be appointed under this section shall be present, to determine the individual's competency to decline that appointment, and whether the individual has knowingly and intelligently declined it.

(e) ROSTERS.—

(1) IN GENERAL.—The appointing authority shall maintain two rosters of attorneys: one roster listing attorneys qualified to be appointed for the trial and sentencing stages of capital cases, the other listing attorneys qualified to be appointed for the appellate, collateral and certiorari stages. Each of the rosters shall be divided into two parts, one listing attorneys qualified to be appointed as lead counsel, the other listing attorneys qualified to be appointed as co-counsel.

(2) LEAD COUNSEL AT TRIAL OR SENTENCING STAGE.—An attorney qualified to be appointed lead counsel at the trial or sentencing stages shall—

(A) be a trial practitioner with at least 5 years of experience in the representation of criminal defendants in felony cases;

(B) have served as lead counsel or co-counsel at the trial or sentencing stages in at least 3 homicide cases tried to a jury and in at least one case in which a capital sentence was sought;

(C) be familiar with the law and practice in capital cases and with the trial and sentencing procedures in the relevant State;

(D) have completed, within one year prior to the appointment, at least one specialized training program in the representation of capital defendants at the trial or sentencing stages; and

(E) demonstrate the proficiency and commitment necessary to the provision of legal services to capital clients.

(3) CO-COUNSEL AT TRIAL OR SENTENCING STAGE.—An attorney qualified to be appointed co-counsel at the trial or sentencing stages shall—

(A) be a trial practitioner with at least 3 years of experience in the representation of criminal defendants in felony cases;

(B) have served as lead counsel or co-counsel at the trial or sentencing stages of at least 2 homicide cases tried to a jury; and

(C) meet the standards in paragraph (2)(C), (D), and (E) for lead counsel at the trial or sentencing stages.

(4) LEAD COUNSEL AT APPELLATE, COLLATERAL, OR CERTIORARI STAGE.—An attorney qualified to be appointed lead counsel at the appellate, collateral, or certiorari stages shall—

(A) be an appellate practitioner with at least 5 years of experience in the representation of criminal clients in felony cases at the appellate, collateral, or certiorari stages;

(B) have served as lead counsel or co-counsel at the appellate, collateral, or certiorari stages in at least 3 cases in which the client had been convicted of a homicide offense and in at least one case in which a capital sentence had been imposed;

(C) be familiar with the law and practice in capital cases and with the appellate, collateral,

and certiorari procedures in the relevant State courts and the United States Supreme Court;

(D) have completed, within one year prior to the appointment, at least one specialized training program in the representation of capital clients at the appellate, collateral, and certiorari stages; and

(E) demonstrate the proficiency and commitment necessary to the provision of legal services to capital clients.

(5) CO-COUNSEL AT APPELLATE, COLLATERAL, OR CERTIORARI STAGE.—An attorney qualified to be appointed co-counsel at the appellate, collateral, or certiorari stages shall—

(A) be an appellate practitioner with at least 3 years of experience in the representation of criminal clients in felony cases at the appellate, collateral, or certiorari stages;

(B) have served as lead counsel or co-counsel at the appellate, collateral, or certiorari stages in at least 2 cases in which the client had been convicted of a homicide offense; and

(C) meet the standards in paragraph (4)(C), (D), and (E) for lead counsel at the appellate, collateral, or certiorari stages.

(f) APPOINTMENT OF NONROSTER ATTORNEYS IN CERTAIN CASES.—An attorney who is not listed on the relevant roster shall be appointed only on the request of the client concerned and in circumstances in which the attorney requested is able to provide the client with high quality legal representation and justice would be served by the appointment.

(g) PAYMENT OF ATTORNEYS FROM PRIVATE BAR.—

(1) IN GENERAL.—Attorneys appointed from the private bar shall be—

(A) compensated for actual time and service, computed on an hourly basis and at a reasonable rate in light of the attorney's qualifications and experience and the local market for legal representation in cases reflecting the complexity and responsibility of capital cases;

(B) reimbursed for expenses reasonably incurred in the representation of the client; and

(C) reimbursed for the costs of law clerks, paralegals, investigators, experts, or other support services reasonably needed in the representation of the client.

(2) COMPUTATION OF CERTAIN PAYMENTS.—Payments under subsection (g)(1)—

(A) with respect to law clerks and paralegals, shall be computed on an hourly basis reflecting the local market for such services; and

(B) with respect to investigators and experts, shall be commensurate with the schedule of fees paid by State authorities for such services.

(h) PROMPT PAYMENT OF ATTORNEYS FROM PRIVATE BAR.—Appointed attorneys from the private bar shall receive prompt payment for legal services and reimbursement for expenses and support services upon the submission of periodic bills, receipts, or other appropriate documentation to the appointing authority or other appropriate State agency. The appointing authority shall promptly resolve any disputes with respect to such bills. Attorneys appointed as staff counsel for a defender organization or resource center shall be entitled to the support services listed in subsection (g)(1)(B) and (C) at public expense.

(i) SANCTIONS.—

(1) IN GENERAL.—If—

(A) a State fails to provide counsel in a proceeding as required under this section; or

(B) such counsel fails to meet the performance standards established by the appointing authority; subsection (h) and section 2254(d) of title 28, United States Code, shall not apply with re-

spect to such proceeding in a case under chapter 153 of title 28, United States Code.

(2) CHAPTER 153.—The court may in its discretion provide relief under chapter 153 of title 28, United States Code, with respect to any failure described in paragraph (1).

(j) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 153 of title 28, United States Code, is amended by adding after the item added by section 6 the following:

"2257. Counsel in capital cases.".

SEC. 9. EXHAUSTION OF STATE REMEDIES.

Section 2254 of title 28, United States Code, is amended by striking subsections (a) through (b) and inserting the following:

"(a) An individual may apply for a writ of habeas corpus under this chapter if the individual is in custody pursuant to a State court criminal conviction and sentence obtained in violation of the Constitution or laws or treaties of the United States.

"(b) A claim for relief under this section may be dismissed if the petitioner has failed to exhaust available and effective State court remedies before presenting the claim in Federal court. Any dismissal for failure to exhaust State court remedies shall be limited to a claim with respect to which currently available remedies have not been exhausted

and shall be without prejudice to further application after such exhaustion.".

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CHAPTER 153. HABEAS CORPUS

Subchapter A. General Provisions [a proposed redesignation]

[sections 2241-2255 would not be changed.]

Subchapter B. Review of Capital Sentencing: Special Procedures [new]

Section 2256. Review of capital sentencing when prisoner in state custody; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This subchapter shall apply to cases arising under section 2254 of Title 28 involving prisoners in state custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) concerning the appointment of counsel are satisfied. No statute or rule of court in conflict with this subchapter shall be enforced in a proceeding to which this subchapter is applicable.

(b) To assert the expedited post-conviction review procedures in sections 2258 and 2259 of this subchapter, a state must establish by rule of its highest court or by statute a mechanism for the appointment of counsel to serve continuously, if feasible, through state and federal post-conviction proceedings in cases involving state prisoners under capital sentence. The rule of court or statute must satisfy the following additional conditions:

(1) Extend eligibility for representation to indigent state prisoners whose capital sentences have been upheld on

direct appeal in the highest court of the state and whose convictions have otherwise become final for state law purposes;

(2) Establish criteria based on integrity, experience and demonstrated professional competence to guide the recruitment and selection of counsel for appointment;

(3) Establish and fund a scheme to compensate counsel for their services and to reimburse them for the expenses of litigation in connection with the state phase of post-conviction review;

(4) Vest the authority to appoint counsel in the Chief Justice of the highest court of the state; and

(5) Authorize the Chief Justice to establish an office and to appoint such personnel as deemed necessary: (A) to assist in the identification of qualified counsel who would be willing to accept appointment to represent prisoners under capital sentence in state and federal post-conviction review proceedings and (B) to monitor the legal representation provided to the prisoners to assure that all filing requirements and deadlines are met.

(c) When the Chief Justice of the highest court of a state appoints an attorney as provided in subsection (b), he shall enter an order of appointment specifying an effective date therein and make the order a part of the public records of the court. He shall send a certified copy of the appointment order to the person or persons appointed to represent the prisoner under capital sentence and advise them of the existence of this

subchapter and their responsibilities under it. In addition, he shall give notice of the appointment order to the following persons or officials:

(1) the Attorney General of the state;

(2) the trial judge who presided in the court of conviction;

(3) the clerk of the court in the court of conviction;

(4) the district attorney who prosecuted in the court of conviction; and

(5) all counsel known to the Chief Justice to have represented the prisoner at trial or on direct appeal.

COMMENT: This section establishes the scope of the entire legislative proposal. The subchapter is triggered by the appointment of counsel pursuant to a mechanism described in subsections (b) and (c). Regardless of whether a state uses the statute or rule of court approach -- the latter may be problematic -- the mechanism for appointment of counsel is subject to judicial control through the authority of the chief justice of the highest court in the state. Centralizing authority at this level should enable a state to identify and keep track of attorneys willing and able to provide representation in death penalty cases better than would be true if this authority resided at the trial court level. It also should provide better oversight of attorney performance and facilitate judicial discipline if attorneys fail to discharge their responsibilities in a timely manner. Subsection (c) lays out some of the formalities of the appointment procedure mainly so that the starting date of the 365 day time period described in section 2258 will be clear, on the public record, and known to all attorneys and court officials who have had involvement in the case or who might be involved in post conviction proceedings.

One issue not addressed in this or any other section is whether there needs to be a procedure by which a state can know in advance that its system for the appointment of counsel in post-conviction review proceedings is acceptable. A related question is whether it is sound to let each state draft its own standards for compliance with section 2256? Another issue involves a basic assumption underlying the entire subchapter. If

the state complies with section 2256 and makes counsel available to a state prisoner under capital sentence, the expedited post-conviction review procedures apply to all death penalty cases in the jurisdiction even if some inmates elect to have other volunteer counsel or can afford to retain counsel. Is this assumption sound? If so, should it be made explicit?

Section 2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Running from the effective date of the order appointing counsel pursuant to section 2256, any order or warrant setting an execution date for a state prisoner under capital sentence shall be subject to automatic stay upon application to any court, state or federal, that has jurisdiction over the subject matter. The application must recite only that the state has invoked the post-conviction review procedures established by this subchapter and that the scheduled execution is subject to automatic stay.

(b) The stay of execution authorized by this section shall remain in effect throughout all stages of post-conviction review, including any time period during which a case is pending for consideration or disposition before the United States Supreme Court. It shall expire automatically if:

(1) Counsel for the state prisoner fails to file a habeas corpus petition in the proper federal district court within 365 days of the effective date of his appointment under section 2256.

(2) Upon completion of state and lower federal court post-conviction review, the Supreme Court has had the opportunity to consider a petition for certiorari and has either denied the

petition or, upon consideration of any questions on the merits, has disposed of the case in a manner that leaves the capital sentence undisturbed.

(c) No federal court thereafter shall have the authority to enter a stay of execution in the case unless:

(1) the basis for the stay is a claim not previously presented in the state or lower federal courts;

(2) the facts underlying the claim are sufficient, if proven, to undermine substantially the court's confidence in the jury's determination of guilt on the underlying offense or offenses for which the death penalty was imposed; and

(3) the failure to raise the claim is (A) the result of state action in violation of the Constitution or laws of the United States; (B) based on a federal right newly recognized by the Supreme Court that is retroactively applicable or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state or federal post-conviction review.

COMMENT: This section establishes an automatic stay of execution rule that comes into play upon the appointment of counsel pursuant to section 2256. Procedurally, obtaining an automatic stay would be a simple matter which is unlike current practice. Subsection (b) provides the rules for the expiration of the automatic stay: (1) if counsel fails to file a federal habeas petition within the 365 day period; and (2) after Supreme Court review of a case upon the completion of all state and lower federal court post-conviction review. With effective oversight of counsel, the first basis for the expiration of an automatic stay hopefully will never be a problem. Subsection (c) eliminates substantially all federal court authority to issue stays of execution after one full opportunity for state and federal post-conviction review. The exception is narrowly

defined and requires that the new claim cast doubt on the validity of the underlying conviction -- the factual guilt of the accused. As written, the exception does not apply to new evidence that arguably might have a bearing on the jury's determination to impose the death penalty.

Section 2258. Filing of habeas corpus petitions; time requirements; tolling rules

Counsel appointed under section 2256 to represent a state prisoner under capital sentence shall file the petition for habeas corpus in the appropriate federal district court within 365 days from the effective date of the appointment by the Chief Justice of the highest court in the state. The filing rule established by this section shall be tolled as follows:

(1) During the time period running from the date of the filing of a petition for certiorari in the Supreme Court until the date of final disposition of the case, if counsel for the state prisoner files a petition for certiorari following the affirmance of his capital sentence on direct appeal by the highest court of the state;

(2) During any period in which a state prisoner under capital sentence has a properly filed request for post-conviction review pending before a state court of competent jurisdiction; if all state filing rules are met in a timely manner, this period shall run continuously from the date that the state prisoner files a request for post-conviction review of his capital sentence in the court of conviction or other proper trial court until final disposition of the case on appeal by the highest court of the state;

(3) During a period not to exceed 60 days, if counsel for the state prisoner: (A) moves for an extension of time in the federal district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition and (B) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 365 day period established by this section. The motion for extension of time may not be filed prior to the completion of all state post-conviction review of the validity of a capital sentence.

COMMENT: This section requires that counsel for the prisoner under capital sentence file a federal habeas corpus petition within 365 days from the effective date of appointment under section 2256. The tolling rule applies while the case is pending in state court during post-conviction review there or while the case is pending before the Supreme Court if the case is taken up following affirmance of the capital sentence on direct appeal by the highest court of the state. It does not apply if counsel for the prisoner files a certiorari petition following a decision of the highest court of the state at the conclusion of state post-conviction review. This exception to the tolling rule is intended to discourage a repetitive and unnecessary step in the death penalty review process. Bear in mind that the Supreme Court will have a chance to take a final look at every death penalty case under this scheme after all lower court post-conviction review, state and federal, has been finished.

This section also permits in effect a 60 day extension of the 365 day period if counsel for the prisoner can show good cause for his inability to file a federal habeas corpus petition in time. Some safety valve of this type is probably essential to the scheme. It would be particularly important in the event appointed counsel turns out to be derelict in the performance of his duties. The oversight office of the Chief Justice could find substitute counsel and still keep a case on track if there is some way to gain extra time. This ground for tolling should not be utilized except in the rare instance. The incentive ought to be for the states to do their job carefully by making good counsel appointments at the front end so that the failure to meet filing deadlines is typically a remote possibility.

Section 2259. Evidentiary hearings; scope of federal review; [district court adjudication] [transfer to court of appeals for adjudication]

(a) Whenever a state prisoner under capital sentence files a petition for habeas corpus relief under this chapter, the district court shall:

(1) determine the sufficiency of the evidentiary record for the purposes of federal habeas corpus review based on the claims actually presented and litigated in the state courts except when the prisoner can show that the failure to raise or develop a claim in the state courts is (A) the result of state action in violation of the Constitution or laws of the United States; (B) based on a federal right newly recognized by the Supreme Court that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state post-conviction review; and

(2) consider and rule upon any request for an evidentiary hearing and conduct any evidentiary hearing necessary to complete the record for the purpose of federal habeas corpus review.

(b) [Upon the development of a complete evidentiary record, the district court shall rule on the merits of all claims properly before it] [Upon the development of a complete evidentiary record, the district court shall certify the record to the court of appeals as ripe for the adjudication of all claims properly before it].

[(c) Upon the receipt of a record from a district court in a case involving a state prisoner under capital sentence, the court of appeals shall proceed to consider and resolve all properly preserved and presented claims as if the case were on direct appeal from a ruling of the district court adverse to the petitioner on all claims, including any request for an evidentiary where that request was denied by the district court.]

COMMENT: This section makes several significant changes in the law.

First, it modifies the exhaustion doctrine by (a) authorizing federal court consideration in capital cases of only those issues previously presented to the state courts and (b) directing the immediate consideration of those issues once they are identified. If a new claim is raised in federal court for the first time, it will not be considered at all unless one of the exceptions is satisfied. In such an event, the evidentiary basis for the new but still assertable claim will be developed in federal court and the issue will be resolved there without sending it back to the state courts for initial review. This is a justified departure from practice under the mixed petition rule of Rose v. Lundy. Compliance with Rose v. Lundy consumes unnecessary time since state procedural default rules usually present a major barrier to the prisoner who returns to state court to exhaust with respect to a claim. Why require a generally futile step in the interest of promoting comity when it undercuts finality in a class of criminal cases where society's interest in finality is the highest.

Second, if additional fact finding needs to be done in order to consider any issue properly exhausted in state court, that factfinding is to be done by the district court. There will be no remand to the state courts for additional factfinding.

Third, in alternative language, subsections (b) and (c) would limit the district court role in death penalty cases to making the record ready for adjudication. Once the issues properly before the federal courts are identified and the evidentiary record is adequately developed, the district court would certify the record to the court of appeals for final adjudication. This would eliminate the repetitive process of having both a district judge and the court of appeals learning the record and ruling on the merits. The district judge's

ruling, while helpful, is never final. Are both needed given the limits on judicial time?

Section 2260. Certificate of probable cause inapplicable

The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to the provisions of this subchapter.

COMMENT: The certificate of probable cause requirement is incompatible with the scheme now under consideration.