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## THE USE OF FEDERAL HABEAS CORPUS BY STATE PRISONERS

J. DEWEESE CARTER\*

In the past several years a problem of criminal procedure which is substantially interfering with the prompt and effective administration of criminal justice has caused serious concern among both the federal and state judiciary and members of the bar. I refer to the use by state prisoners of habeas corpus proceedings before lower federal courts for the purpose of reviewing final state judgments in criminal cases. Since this problem involves the review by lower federal courts of the final decisions of state courts in respect to rights arising under the Federal Constitution, it seems advisable, at the outset, to understand clearly the respective jurisdictions of these courts in regard to federal constitutional questions, under our dual system of government. Congress has the power to create and establish the jurisdiction of lower federal courts by virtue of the provisions of Article III of the Federal Constitution. In the exercise of this power it has not seen fit to vest the exclusive jurisdiction of questions arising under that Constitution in the lower federal courts. As a consequence, concurrent jurisdiction is vested in the state courts and, therefore, it becomes as much their duty to apply the provisions of the Federal Constitution to litigants properly before them, as is the case with lower federal courts with respect to litigants before them, because the supreme law of the land is equally binding on both. In so holding, the Supreme Court of the United States in *Robb v. Connolly* said:

Upon the State courts equally with the Courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them, for the Judges of the State Courts are required to take an oath to support that Constitution and they are bound by it and the laws of the United States made in pursuance thereof . . . as the supreme law of the land. . . . If they fail therein and withhold or deny rights, privileges or immunities secured by the Constitu-

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tion and laws of the United States, the party aggrieved may bring the case from the highest court of the State, in which the question could be decided, to this Court for final and conclusive determination.<sup>1</sup>

Historically, the writ of habeas corpus is probably the most famous writ in the law and is often called the great writ of liberty. It is directed to the person detaining another, commanding him to produce the body of the applicant at a certain time and place, with the cause of his detention, and submit to whatever order the court issuing the writ shall direct. It had its origin in the common law of England, and the English colonists in America regarded it as one of their most valued rights. It was originally intended to provide a speedy and certain right to judicial review of illegal restraint, but was never intended to be used for appellate review of lower court decisions.<sup>2</sup>

Jurisdiction of the lower federal courts to issue the writ is derived from Congress. By the First Judiciary Act of 1789, jurisdiction of such courts included only prisoners committed by authority of the federal government.<sup>3</sup> However, by the Act of 1867, immediately following the Civil War, that jurisdiction was extended to all persons restrained of their liberty in violation of the Constitution and laws of the United States by whatever authority, which, of course, included those imprisoned by a state court.<sup>4</sup> For many years following this Act the authority thereby conferred was not extensively used for various reasons, including an inclination on the part of the federal courts to deny the writ to state prisoners where the state court had original jurisdiction of the person and subject matter and was acting under a constitutional statute. Such an interpretation was made in the case of *French v. Magnum*,<sup>5</sup> as late as 1915. However, in 1923, the Supreme Court in *Moore v. Dempsey*,<sup>6</sup> repudiated the *Magnum* case and expanded the authority of the federal courts under the writ to include the right to inquire into any violation of constitutional rights, irrespective of the question of the original jurisdiction of the state court. In 1942, in the case of *Waley v. Johnson*,<sup>7</sup> the Supreme Court further expanded the scope of the writ by holding that inquiry under it was not confined to constitutional rights seasonably asserted

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<sup>1</sup>111 U.S. 624, 627 (1911).

<sup>2</sup>See Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171. Dissent of Justice Clark, *Fay v. Noia*, 372 U.S. 391, 448 (1963).

<sup>3</sup>Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 81.

<sup>4</sup>14 Stat. 385 (1867).

<sup>5</sup>237 U.S. 309, 325-29 (1915).

<sup>6</sup>261 U.S. 86 (1923).

<sup>7</sup>316 U.S. 101, 134 (1942).

in the trial proceedings, but included the right to inquire into the intrinsic fairness of such proceeding and any other constitutional questions concerned in the restraint of the applicant, although involving matters and proof outside the record. Later, in 1953, in the landmark case of *Brown v. Allen*,<sup>8</sup> the Supreme Court greatly enlarged the eligibility to apply for the writ by ruling that the statutory requirement that a state prisoner exhaust all available state remedies before applying for federal habeas corpus was not intended to require the exhaustion of collateral state remedies, such as state habeas corpus, where the issue had been previously decided by direct appellate review by the state court. The case further held that a denial of certiorari by the Supreme Court did not import any review of the case on its merits nor make the matter *res judicata*.

The collective effect of these rulings was that a prisoner serving a sentence under the final judgment of a state court could by federal habeas corpus collaterally attack that judgment on constitutional grounds in the broadest possible way, including the introduction of parole evidence concerning matters which were never heard at the trial and did not appear on the face of the record. This holding out to convicted state prisoners of the hope of escaping prison by a collateral attack on state convictions greatly increased the number of applications for habeas corpus in the federal courts. While only an insignificant percentage of these petitions resulted in setting aside the convictions, they created great delay in the finality of state judgments, were a constant threat to harmonious relations between the federal and state judiciary, and imposed upon the federal judges an unnecessary burden of work. From this practice resulted the unseemly situation of federal district courts trying the regularity of proceedings in state courts of co-ordinate jurisdiction and of state trial judges appearing as witnesses in defense of proceedings in their own courts. Moreover, a single judge of the lower federal court was required to review and pass upon convictions which had been affirmed by the highest court of the state and which the Supreme Court of the United States had refused to review on certiorari.

The evils arising from this use of the writ were recognized and attempted to be corrected by two efforts of the Judicial Conference of the United States, which is composed of members of the federal judiciary. Some of these efforts were endorsed by the Conference of Chief Justices of the States,<sup>9</sup> and the National Association of Attorneys-Gen-

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<sup>8</sup>344 U.S. 443 (1953).

<sup>9</sup>See Reports, Annual Meetings, Conf. of Chief Justices, 1955-63-64.

eral of the States.<sup>10</sup> A third effort is presently being made by Congressman Smith of Virginia. The first effort consisted of the introduction in Congress of the so-called *Parker Bill* in 1955 and 1957.<sup>11</sup> The second was the introduction of the so-called *Phillips bill* in 1960 and 1964.<sup>12</sup> A third effort was made in 1965 through the *Smith bill* now pending in the House, which is similar to the *Amended Phillips bill* of 1964.<sup>13</sup> I should like to briefly discuss the history of these efforts so that you might better understand the nature of the problem.

Prompted by concern for the effect of the decisions of the Supreme Court greatly expanding the eligibility for and the scope of the federal writ, the Judicial Conference of the United States, in 1953, reactivated its habeas corpus committee with Chief Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit as Chairman and other federal circuit and district judges as members to study the problem and report. The Committee met with similar committees from the Conference of Chief Justices of the States and the National Association of State Attorneys-General. The Parker Committee, in collaboration with these other committees, and with the approval of the organizations they represented, the American Bar Association, and the Department of Justice, prepared H.R. 5649, known as the *Parker bill*, and had it introduced in the 84th Congress, in 1955.<sup>14</sup> In effect, this bill divested lower federal courts of any jurisdiction to review final state judgments in criminal cases under the writ except in unusual situations where the state had no adequate procedure to afford relief. The bill provided in substance that an application for the writ could only be entertained by a lower federal court if the constitutional question: (1) had not been previously determined by a state court or otherwise; (2) was one which the prisoner had not previously had a fair and adequate opportunity to raise and have determined; and (3) the available state procedure was such that he could not present it for determination in the state court and have an adequate record made which could be reviewed by the Supreme Court of the United States.

If all three of these conditions existed, then in those exceptional cases, he could present his constitutional contentions to a lower federal court; otherwise, he had to present them to the state court, whose

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<sup>10</sup>See Reports, Annual Meetings, Nat. Ass'n of Att'y Gen. 1955-63-64.

<sup>11</sup>H.R. Rep. No. 5649, 84th Cong., 1st Sess. (1955).

<sup>12</sup>Amended Phillips Bill, H.R. Rep. No. 1835, 88th Cong. (1964), H.R. Rep. No. 1384 (1960).

<sup>13</sup>H.R. Rep. No. 5958, 89 Cong., 1st Sess. (1964).

<sup>14</sup>Hearings before the House Committee on the Judiciary on H.R. Rep. No. 5649, 84th Cong., 1st Sess., Sub-Comm. 3, Ser. 6 (1955); 83 A.B.A. Rep. 189-90, 225, 275, 366 (1958).

final action would only be subject to review in the Supreme Court review, on certiorari, from a denial of the writ by a lower federal court.<sup>15</sup> In speaking of the merits and purposes of the bill before the Judiciary Committee of the House in June, 1955, Chief Judge Parker said:

The proposed statutes will, I think, eliminate the abuses which have arisen and will at the same time, preserve the right of a prisoner to apply to the lower Federal courts for relief in those exceptional cases where he cannot get adequate relief from the courts of the State or make in those Courts a record which he can have reviewed by the Supreme Court of the United States. . . . It was never intended by the framers of our Constitution that writs of habeas corpus should be used by the lower Federal Courts to review State Court action. . . . To subject their decisions to lower Federal Courts or Judges produces confusion and friction, adds to the burdens of the Federal judiciary, is not necessary for the preservation of constitutional rights and serves no useful purpose in the administration of justice.

In speaking of the correctness and reliability of the decisions of state judges in respect to federal constitutional questions, he further said on that occasion:

As a Federal judge, I want to say I think the State Courts are entitled to great respect. . . . I think by and large the State Courts are just as able as the Federal Courts and just as conscientious. When the State Courts have convicted a man, it was the opinion of the Conference that if inquiry is to be made as to his conviction it should be done in the State Courts, if possible. . . .<sup>16</sup>

The *Parker bill* was approved by the Judiciary Committee of the House and passed the House but died in the Senate in 1955. Its failure to gain Senate approval at that session was attributed to opposition by liberal Senators, some of whom threatened filibuster, and liberal organizations representing the rights of individuals.<sup>17</sup> In 1957, the measure was again introduced in Congress by the Judicial Conference of the Federal Judiciary. At this session, in addition to the opposition existent at the previous session, members of the Supreme Court let it be known they were apprehensive about the proposal on the grounds that it might create an unmanageable work load of pe-

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<sup>15</sup>Supra note 11.

<sup>16</sup>Hearings before the House Committee on the Judiciary on H.R. Rep. No. 5649, 84th Cong., 1st Sess., Sub-Comm. 4, Ser. 6, at 5 (1955).

<sup>17</sup>See letter Asst. Dir. Washington Office, A.B.A., dated June 9, 1965.

titions for certiorari.<sup>18</sup> However, notwithstanding this opposition, the bill again passed the House and this time secured the endorsement of the Judiciary Committee of the Senate but again failed to attain Senate approval.<sup>19</sup> In view of the combined opposition at this session, a second defeat, and the death of Chief Judge Parker in March 1958, the proponents of the measure became discouraged about the prospects of its passage at any time in the near future.

In view of this situation, the Judicial Conference of the Federal Judiciary at its annual meeting in 1958, appointed a new special Committee to re-examine the problem with Federal Circuit Judge Orie L. Phillips as Chairman, and five other Circuit Judges as members, including the Honorable Simon E. Sobeloff of the Fourth Circuit Court of Appeals.<sup>20</sup> This Committee, known as the *Phillips Committee*, recommended to the Judicial Conference at its annual meeting in 1959 the approval of a bill known as the *Phillips bill*. This bill differed greatly from the *Parker bill* in that it retained jurisdiction of lower federal courts to review state judgments in criminal cases under the writ, but restricted the procedure by limiting the number of applications where there had been an adjudication on a previous application, provided that a ruling of the Supreme Court on certiorari should be conclusive on all matters actually adjudicated, further provided that the writ should be processed by a preliminary examination by the federal judge with whom it was filed; and also provided that if he decided to issue the writ the matter would then be heard by a three-judge federal court consisting of one circuit judge.

The bill further stated that an appeal would lie from a denial of the writ by the judge conducting the preliminary examination to the Circuit Court of Appeals and on to the United States Supreme Court. A decision of the three-judge court would be reviewable only by certiorari to the Supreme Court. These recommendations were adopted by the Federal Judicial Conference in 1959 and introduced in the 86th Congress that same year.<sup>21</sup> However, the Conference of Chief Justices of the States, and the National Association of Attorneys-General were not in agreement and requested the Committee of the Federal Judicial Conference to amend the *Phillips bill* so as to make the findings of fact by state courts conclusive on the federal courts.

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<sup>18</sup>See Report, Habeas Corpus Comm. Jud. Conf. 1963 annual meeting, 33 F.R.D. 371 (1963).

<sup>19</sup>See Report No. 2228, Jud. Comm. U.S. Senate 85th Cong., p. 4 (1957).

<sup>20</sup>See Report, Annual Meeting, Jud. Conf. 1958).

<sup>21</sup>Hearings Before the House Committee on the Judiciary on H.R. Rep. No. 6742, 86th Cong., Sub-Comm. 3 (1959). Also H.R. Rep. No. 3216 in lieu of H.R. Rep. No. 6742.

This the Committee refused to do.<sup>22</sup> Nevertheless, the bill passed the House and failed the Senate in 1960, for the third time, because of the lack of sufficient interest and support.<sup>23</sup> The matter was not pressed in the 87th Congress, 1961-62.

In 1963, Congressman Smith of Virginia introduced a bill in the 88th Congress which incorporated most of the principal provisions of the *Parker bill*.<sup>24</sup> However, later in the session, at the urging of the Phillips Committee, he amended the bill by deleting the principal provisions of the *Parker bill*, and substituting the provisions of the *Phillips bill* with two amendments, one providing that in order for a previous habeas ruling to be grounds for dismissing a subsequent application there must have been an actual hearing, and second, a provision whereby the findings of fact by a state court would be presumed correct unless one or more of seven enumerated conditions were established by the applicant.<sup>25</sup> The Conference of Chief Justices of the States at their annual meeting in 1964, after considerable debate and reaffirmance of their consistent position in support of the *Parker bill* since 1955, reluctantly approved the *Amended Phillips bill*.

In adopting this qualified approval, the Conference took occasion to point out that while the bill did not provide the procedural corrections they deemed necessary, nevertheless, since it appeared their prior recommendations would probably not be adopted by the Congress in the foreseeable future and that the proposed bill was an improvement over existing procedure, they deemed it advisable to support it.<sup>26</sup> However, in accordance with the Congressional fate heretofore inflicted upon previous bills, the *Amended Phillips bill* likewise passed the House but died in the Senate in 1964, for the fourth time.

In March of this year, Congressman Smith again introduced another bill on the subject in the 89th Congress. The provisions of this bill are substantially the same as the *Amended Phillips bill* in the preceding 88th Congress, except the presumption of correctness of the findings of fact by a state court is to prevail unless one of *two* rather than *seven* conditions are established by the applicant.<sup>27</sup> Congressman Smith stated that he had been advised by representatives of the Conference of Chief Justices that their habeas corpus committee

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<sup>22</sup>See Report, Habeas Corpus Comm. Jud. Conf., 33 F.R.D. 376 (1963).

<sup>23</sup>Ibid.

<sup>24</sup>Original H.R. Rep. No. 1835, 88th Cong. (1963).

<sup>25</sup>Report, Habeas Corpus Comm. Jud. Conf. (1963), 33 F.R.D. 376 (1963).

<sup>26</sup>See Report, Annual Meeting Conf., Chief Justices, 1964 (60th).

<sup>27</sup>H.R. Rep. No. 5958, 89th Cong., 1st Sess. (1964).

would probably approve the new bill. However, he further stated that very recently he had also been notified that the Committee of the Judicial Conference of the Federal Judiciary had now decided to withdraw its previous support for one of the material features of the bill, the three-judge court, is unworkable.

It is obvious from this chronology of events that representative organizations of both the federal and state judiciaries, and the federal and state prosecuting authorities, as well as the national association of the legal profession have been seriously concerned with this procedural problem for the past ten years and have changed their positions in respect to it considerably and often during that time. Mr. William Foley, General Counsel to the Judiciary Committee of the House, said the subject has been the most considered measure to come before that very active Committee in the last fifteen years. So much for the extensive history and present status of the matter.

The principal criticism of present habeas corpus procedure is the resulting delay, and is that it provides a state prisoner with what is in effect a second system of appeals whenever he can find the opportunity to claim a violation of some right under the Constitution—usually involving some matter under the ever-expanding interpretations of the due process clause, as evidenced by the recent Supreme Court decisions in *Mapp*, *Gideon*, *White*, *Haynes*, *Escobedo*, and *Massiah* cases.<sup>28</sup> An equally important factor in the delay is the extension in the use of the writ through the Court's interpretation of federal statutes dealing with procedure under it. For example, in 1963, the Supreme Court handed down three very significant decisions in this respect. In *Townsend v. Sain*,<sup>29</sup> it held, under the provisions of the statute dealing with hearing procedure under the writ,<sup>30</sup> that a plenary hearing of the facts should be held by the federal court in every case where that court determined that the state court had not reliably found the facts, thereby vesting a broad discretion in the federal court as to whether such hearing should be conducted. In *Fay v. Noia*,<sup>31</sup> the Court held that a state prisoner could apply for federal habeas corpus virtually at any time during his imprisonment, irrespective of whether he had previously pursued the state remedies available to him, and that the

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<sup>28</sup>*Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *White v. Maryland*, 373 U.S. 59 (1964); *Haynes v. Washington*, 373 U.S. 503 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964).

<sup>29</sup>372 U.S. 293 (1963).

<sup>30</sup>Habeas Corpus Act, 28 U.S.C. § 2243 (1964).

<sup>31</sup>372 U.S. 391 (1963).

statute requiring him to exhaust state remedies before applying for federal habeas corpus<sup>32</sup> meant only state remedies available at the time of his application for the federal writ. In *Saunders v. United States*,<sup>33</sup> the ruling was that the statute relating to successive applications for federal habeas corpus<sup>34</sup> did not prohibit a federal court from considering successive applications, even where the same grounds had been rejected by a federal court in an earlier application, if the court considering the subsequent application determines the ends of justice would be served by a redetermination. This ruling further held that the statute did not prohibit successive applications on new grounds even if such grounds had not been asserted in any previous proceeding in the state court. The effect of this holding is to allow almost endless successive applications, limited only by the discretion of the lower federal court.

In notable cases throughout the country involving capital punishment the delays attributable to the use of federal habeas corpus have been serious, although in none did it account for all of the delay. For instance, in the famous *Caryl Chessman* case in California, twelve years elapsed between the conviction and execution of the defendant. After his conviction and sentence had been affirmed by the Supreme Court of California and certiorari denied by the Supreme Court of the United States, Chessman petitioned the United States District court for review on habeas corpus on five separate occasions. Certiorari to the United States Supreme Court was denied on two occasions, and granted on two. Seven of the twelve years' delay were occupied with federal habeas corpus proceedings.<sup>35</sup> Chessman was able to have the press report his case extensively and the publicity concerning delay nearly resulted in a national scandal. A Louisiana case against Labat and Poret now pending will probably involve even greater delay than the *Chessman* case. These defendants were convicted of rape and sentenced to death by a Louisiana state court in 1953. The decision was affirmed by the Supreme Court of Louisiana in 1954. Seven of the twelve years' delay since conviction have been consumed with federal

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<sup>32</sup>Habeas Corpus Act, 28 U.S.C. § 2254 (1964).

<sup>33</sup>373 U.S. 1 (1963).

<sup>34</sup>Habeas Corpus Act, 28 U.S.C. § 2244 (1964).

<sup>35</sup>*People v. Chessman*, 35 Cal. 2d 455, 218 P.2d 769 (1950) (motion to augment, correct, and certify record denied), cert. denied 340 U.S. 840 (1950). Conviction affirmed 38 Cal. 2d 242, 238 P.2d 1001 (1951), cert. denied 343 U.S. 915 (1952). Petition for federal habeas corpus denied 1952, aff'd 205 F.2d 128 (1953), cert. denied 346 U.S. 916 (1953). Second petition for habeas corpus denied 128 F. Supp. 600 (1955), aff'd 221 F.2d 276 (1955), cert. granted 350 U.S. 3 (1953). Third petition for habeas corpus denied 138 F. Supp. 761 (1956), aff'd 239 F.2d 205 (1956), cert. granted 354 U.S. 156 (1957). Fourth petition for habeas corpus denied, affirmed on appeal, cert. denied 361 U.S. 925 (1959). Fifth petition denied, aff'd 275 F.2d 604 (1960).

habeas corpus proceedings. The case is now pending in the Circuit Court of Appeals and will likely be delayed for several more months.<sup>36</sup> In the *Townsend* case in Illinois, the accused was convicted of murder and sentenced to death in 1955. The case is now pending on his third application for certiorari to the Supreme Court of the United States. Of the ten years' delay, seven years have been occupied with habeas corpus proceedings in the federal courts.<sup>37</sup> In New Jersey, Edgar W. Smith was convicted of murder and sentenced to death by the state court in 1957 and the case is still pending. Of the eight years since conviction, half of the time has been consumed with federal habeas corpus procedure. The prosecutor for Bergen County predicts at least another two years will be occupied in the federal courts before the sentence is executed.<sup>38</sup> One of the most extreme cases in Maryland is that of Johnnie Brown who killed a policeman, was convicted of murder and sentenced to death in the Second Judicial Circuit in 1960, and whose sentence is still unexecuted although the Chief of Police, who was one of the principal witnesses for the state, has passed away in the meantime. Of the five years' delay in this case, more than half of that time has been occupied with federal habeas corpus proceedings. Brown has applied to the Supreme Court of the United States for certiorari three separate times.<sup>39</sup> Many cases in other jurisdictions could

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<sup>36</sup>Conviction affirmed *State v. Labat*, 226 La. 201, 75 So. 2d 333 (1954), cert. granted 348 U.S. 950 (1955), conviction aff'd 350 U.S. 91 (1955), rehearing denied 350 U.S. 955 (1956). The case was heard by the supreme Court of Louisiana in 1957 after the United States District Court required exhaustion of state remedies. This petition for habeas corpus was denied, cert. denied 355 U.S. 60, 879 (1957). Habeas corpus denied 162 F. Supp. 574 (1958), aff'd 267 F.2d 307 (1959), cert. granted 361 U.S. 375 (1960) (judgment vacated and case remanded).

<sup>37</sup>Conviction affirmed *People v. Townsend*, 11 Ill. 2d 30, 141 N.E.2d 729 (1957), cert. denied 355 U.S. 850 (1957), rehearing denied 355 U.S. 886 (1957), cert. denied 358 U.S. 887 (1958). Petition for federal habeas corpus denied, aff'd 265 F.2d 660 (1958), cert. granted 359 U.S. 64 (1959) (judgment of Court of Appeals vacated and case remanded). Petition for habeas corpus denied, aff'd 276 F.2d 324, cert. granted 365 U.S. 866 (1961), rev'd and remanded for plenary hearing 372 U.S. 293 (1963). Petition granted by District Court, rev'd 334 F.2d 837 (1964). Motion in District Court to amend petition to set up new constitutional grounds March, 1965; motion denied; appeal pending in 7th Circuit.

<sup>38</sup>Conviction affirmed *State v. Smith*, 27 N.J. 433, 142 A.2d 890 (1958), cert. denied 361 U.S. 861 (1959). Petition for habeas corpus denied 201 F. Supp. 272 (1962), aff'd 322 F.2d 810 (1963), cert. denied 376 U.S. 928 (1963). Petition to trial court for post conviction relief denied, aff'd 43 N.J. 67, 202 A.2d 669 (1964).

<sup>39</sup>Conviction affirmed *Brown v. State*, 225 Md. 349, 170 A.2d 300 (1961), cert. denied 372 U.S. 960 (1963). Post conviction relief denied, 230 Md. 629, 186 A.2d 595 (1962). Petition for federal habeas corpus denied 217 F. Supp. 547 (1963), aff'd 334 F.2d 9 (1964), cert. denied 379 U.S. 917 (1964). Second petition for federal habeas corpus denied, aff'd 346 F.2d 149 (1965). The defendant was allowed until August 11, 1965 to apply for certiorari to the United States Supreme Court.

be cited involving delays of equal duration which are caused in great part by this second system of review, but it is believed no useful purpose would be served here by doing so. Furthermore, delays of equal duration are caused in a corresponding number of criminal cases where the sentence is imprisonment. In these cases the delay likewise interferes with the orderly and prompt administration of criminal justice since the validity of the state judgment, although effective in the interim, is kept in doubt for the duration of the review by federal habeas corpus. The office of the Attorney General of Maryland estimates that the average contested habeas corpus proceeding involving a full evidentiary hearing in the District Court, a subsequent appeal to the Circuit Court of Appeals and review on application for certiorari by the Supreme Court, usually involves about two years. However, many of the petitions do not involve an evidentiary hearing and accordingly are summarily and promptly concluded.<sup>40</sup>

I shall not here elaborate on other serious criticisms directed at this procedure; namely, (1) the creation of friction between the Federal and State judiciary, and (2) the increased workload placed upon the federal courts. However, it is a well known fact that the procedure does create friction between the Federal and State judiciary,<sup>41</sup> and the statistics of the Administrative Office of the United States Courts clearly establish that habeas corpus proceedings in the lower federal courts by state prisoners have increased at an alarming rate since the recent decisions by the Supreme Court greatly expanding the rights of an accused under the due process clause of the Fourteenth Amendment.<sup>42</sup>

Assuming, therefore, that some corrective measures are needed concerning this procedure, let us consider the comparative merits of the various proposals. The original *Parker bill* appears to constitute a sound and direct approach to the problems which will accomplish the desired results both from the standpoint of the effective administration of criminal justice, and the protection of the constitutional rights of an accused. The validity of this conclusion is evidenced by the unprecedented and unanimous endorsement it received from all professional groups when first introduced. The later objection by members of the Supreme Court, that the proposed bill would likely create an undue work load of petitions for certiorari, does not appear to be supported in the findings of the Judiciary Committee of the

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<sup>40</sup>Letter of Robert C. Murphy, Esq., Dep. Att'y Gen. of Md. June 1965.

<sup>41</sup>Hearings Before the House Committee on the Judiciary on H.R. Rep. No. 5649, 84th Cong., 1st Sess., Sub-Comm. 3, at 6, 8 (1955) .

<sup>42</sup>Statistics by Mr. Luck, Office Admr. of U.S. Courts, June, 1965.

United States Senate. In reporting favorably on a bill identical to the *Parker bill*, in the 85th Congress, the committee stated:

After this bill had passed the House of Representatives some objections were raised against the bill from certain quarters of the Federal judiciary. Among the criticisms raised against the bill was that it will throw an undue burden of work on the Supreme Court. . . . The committee after studying the matter, is of the opinion that the Supreme Court could without too much burden, handle any additional workload and therefore is of the opinion that this legislation should be favorably considered.<sup>43</sup>

Furthermore, this objection would appear to be susceptible of partial solution, at least, by appointment of Commissioners to review or assist in reviewing these applications, or some similar arrangement. Such Commissioners are now used successfully to assist appellate state courts in several states, including Idaho, Kentucky, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, and Texas.<sup>44</sup> In any event, with the unusual endorsement that the bill originally received, it seems worth trying and if the burden of additional work on the Supreme Court becomes unmanageable, it is certainly not too much to expect Congress to correct it promptly. Furthermore, it seems reasonable to suppose that, with the right to the number of successive reviews materially reduced, the number of applications from state prisoners will probably undergo a corresponding substantial decline, since delay appears to be a major consideration prompting these applications. Justice Clark, dissenting in *Fay v. Noia*, in speaking of the corrective legislation which had been offered in Congress to limit the use of the writ for review of state criminal judgments said:

While I have heretofore opposed such legislation, I must now admit that it may be the only alternative in restoring the writ of habeas corpus to its proper place in the judicial system. The place is one of great importance—a remedy against illegal restraint—but it is not a substitute for or an alternative to appeal, nor is it a burial ground for valid state procedure.<sup>45</sup>

The provisions of the *Amended Phillips bill* in the 88th Congress were substantially similar to the *Smith bill* now pending in the 89th. Although this is unquestionably an improvement over existing procedure, the bill appears to be in the nature of a compromise and does not go far enough. While this legislation was originally endorsed

<sup>43</sup>See Report No. 2228, p. 4, Jud. Comm. U.S. Senate 85th Cong. at 4 (1957).

<sup>44</sup>Amer. Jud. Soc. Inform. Sheet No. 24 "Solutions for Appellate Court Congestion," pp. 6-8, (Sept. 17, 1963).

<sup>45</sup>372 U.S. 391, 448 (1963).

by the Committee of the Federal Judicial Conference, as previously stated, the Committee has now notified Congressman Smith of an intent to withdraw its support for one of the major features of it, the three-man court. The Conference of Chief Justices of the States has grudgingly endorsed it as not being what they believe to be needed to correct the problem. The National Association of Attorneys-General has recommended further study.<sup>46</sup> The Committee on Jurisprudence and Law Reform of the American Bar Association has endorsed it,<sup>47</sup> while the Section on Criminal Law has refused to endorse either proposal.<sup>48</sup> It is obvious, therefore, that there is great diversity and change of opinion as to the merits of this proposal, and under these circumstances it would seem unwise to endorse it simply because of a defeatist attitude that this is the best Congress will allow.

However, irrespective of which, if any, of these proposed measures you may be inclined to support, it seems obvious that the present procedure is unnecessary to protect the rights of an accused and is substantially interfering with the prompt and effective administration of criminal justice and therefore needs correction. In this day and time when the crime rate in our cities and metropolitan areas is skyrocketing to an all-time high; when things have reached the point where law-abiding citizens are actually afraid to walk the streets and enjoy the public parks after dark for fear they will be struck down and robbed or attacked; when, in short, the effective enforcement of the criminal law has broken down to an extent never before witnessed in this country, I ask you, is it not high time that something was done about it? Is it not high time that more emphasis was placed on the prompt and effective administration of criminal justice, rather than undue emphasis on constitutional procedural rights? Is it not abundantly clear that if our system of criminal justice is to continue to maintain the high confidence and respect of the public which it has enjoyed in the past we had better start putting our house in order? There is no good citizen, I am sure, who would not abhor the unfair treatment of any person accused of crime, and by the same token neither is there, I believe, any good citizen who does not equally abhor the frustration of prompt and effective justice by protracted, unnecessary delay. In this situation, it is now the duty of the bar to become interested and active in bringing about the correction of a procedural process, that is materially contributing to that frustration of justice by causing protracted and undue delay through an unnecessary dual

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<sup>46</sup>Report, Annual Meeting Nat. Ass'n of Attys. General, 1964.

<sup>47</sup>Report, A.B.A. Comm. Juris. & Law Reform, Mid-Winter Meeting, Feb. 1965.

<sup>48</sup>Ibid.

system of appeals, and to do so promptly. This procedure can be corrected if State Bar Associations throughout the country will take the lead in creating an informed and interested professional and public opinion for the correct solution of this problem, and in bringing that opinion to bear on Congress in general and the United States Senate in particular. I call your attention to the fact that corrective measures have passed the House of Representatives on four separate occasions only to die in the Senate each time, for lack of interest. It would appear, therefore, that with sufficient support in the upper-branch of the Congress, it is likely that some of this corrective legislation or similar measures could be promptly passed and made effective.