

United States Senate  
Committee on the Judiciary  
Hon. Arlen Specter, Chairman

**Hearing on Habeas Reform:  
the Streamlined Procedures Act of 2005**

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Testimony of  
Ronald Eisenberg  
Deputy District Attorney  
Philadelphia, Pennsylvania

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify before you today.

I have served as a prosecutor for 24 years. I am the supervisor of the Law Division of the Philadelphia District Attorney's Office, a group of 60 lawyers. Many of those lawyers handle regular appeals in the Pennsylvania appellate courts. But more and more of our attorneys must devote themselves full time to federal habeas corpus litigation. In the last decade, the number of lawyers employed exclusively on habeas work has increased 400%. Despite the limits supposedly imposed by law, the only certain limit on the federal habeas process as it is currently administered is the expiration of the defendant's sentence.

But that leaves ample opportunity and motivation for litigation, because the cases that reach federal habeas review involve the most dangerous criminals who receive the most serious sentences – not just death penalties, but non-capital murders, rape, violent robberies and burglaries, brutal beatings and shootings.

Too often, discussion of the proper scope of federal habeas corpus review is really just a debate about the value of the death penalty, and the justness of imprisonment and punishment generally. To be sure, many federal courts seem flatly unwilling to affirm capital sentences. In Pennsylvania, for example, almost every single contested death sentence litigated on habeas – over 20 cases in the last decade – has been thrown out by federal judges; only one has been upheld.

But the primary problem is one of process, not results. The truth is that, whether or not they end up reversing a conviction, federal habeas courts drag out

litigation for years of utterly unjustifiable delay, creating exorbitant costs for the state and endless pain for the victims.

### **Nationwide obstruction**

I am aware of the view that the federal habeas corpus review process is not in need of reform, that the problems, if any, are localized in jurisdictions such as the 9<sup>th</sup> Circuit Court of Appeals. Of course the 9<sup>th</sup> Circuit is quite a large locality, certainly worthy of Congressional attention in and of itself. But it is by no means unique when it comes to the gyrations imposed by current federal habeas corpus practice.

My experience has all been in the 3<sup>rd</sup> Circuit, where we face almost exactly the same issues as my colleagues in states such as Arizona and California. I also serve on the board of a national capital prosecutors organization and I meet regularly with lawyers from all over the country. We're all fighting the same habeas battles – over procedural default and exhaustion and filing deadlines and certificates of appealability and a dozen other habeas concepts that ought to be straightforwardly resolved but seldom are.

In a recent case from my office before the Supreme Court, for example, the question concerned the statutory section providing that the habeas time bar can be tolled by a state court filing only where that filing was considered “proper.” Most of the authority against our position came not just from the 9<sup>th</sup>, but from the 5<sup>th</sup> and 11<sup>th</sup> Circuits. Those courts had held that federal judges were free to make their own judgments about whether state court filings were proper, and

they had devised increasingly complex legal standards for doing so. But for the fortuitous grant of certiorari, states throughout the South and West would still be struggling to apply these judge-made standards in habeas cases that should have been over and done with under the statute.

Of course, most habeas questions never reach the Supreme Court. When circuit court decisions gum up the habeas statute, we are generally stuck with them.

### **Capital and non-capital quagmire**

Another argument against habeas reform is that, to the extent problems exist in the administration of the statute, they are limited to the litigation of capital cases. That again is not my experience. To be sure, capital habeas litigation consumes a hugely disproportionate share of habeas resources, and it is the engine that drives the development of convoluted, circuitous application of the habeas statute. Once these extra-statutory interpretations are developed, however, they cannot be confined to the capital context.

So, for example, federal judges invented the “stay and abey” procedure to allow defendants to get their foot in the door in federal court while returning to state court in an effort to litigate new claims that were not properly raised previously. “Stay and abey” permits circumvention of both the habeas exhaustion requirement and the one-year habeas filing deadline. The practice was originally devised for eve-of-execution cases. The Supreme Court has recently attempted to place some limitation on “stay and abey.” Now that the

procedure exists, however, it cannot be restricted to capital cases. Any defendant, capital or non-, is free to engage in such stay litigation; and if he is successful he can put his habeas petition on hold indefinitely while he files yet another appeal (usually, this will be at least his *third* appeal) in state court.

### **Post-AEDPA problems**

Of the usual arguments against habeas reform, perhaps the most ironic is that we don't need any more, because AEDPA – with the help of federal judges – has now fixed everything. The reasoning goes that AEDPA, when it was originally enacted, disrupted settled habeas law, and required years for the courts to reestablish the status quo. Now that the statute has been “shaken out,” the law is stable again, and habeas litigation will move along swimmingly – unless new reform unwisely upsets the apple cart one more time.

What matters most, however, is *how* questions under AEDPA are resolved – not how long it takes to resolve them. Take, for example, the doctrine of “equitable tolling.” In AEDPA Congress created a one-year filing deadline for habeas petitions, with various exceptions spelled out specifically in the statute. Contrary to statutory construction rules, the federal courts then decided that they could create their own exceptions to the statutory bar, as “equity” moved them to do so. Every circuit has accepted this general principle; the matter is as settled as most habeas questions can be.

But it would be cynical fiction to suggest that equitable tolling has therefore streamlined habeas corpus review. Just the opposite is true. There is

absolutely no certainty in application of what was intended as a clear-cut deadline, because at any moment the court might decide to invent a new equitable tolling exception. Even worse, these new exceptions often require extensive factual inquiry in individual cases. A whole cottage industry of equitable tolling evidentiary hearings has been born. Thus was the time bar transformed from a limitation on litigation into an invitation to litigate.

AEDPA jurisprudence reveals many similar developments. They were *in reaction to*, not in explication of, the new statute. In addition to the “stay and abey,” “proper filing,” and “equitable tolling” issues discussed above, we have seen, for example, the growth of “inadequacy” review to undermine procedural default, the indulgence of excessive litigation on certificates of appealability, and the use of “claim-splitting” and other means of avoiding the statutory deference requirement.

Congress is not somehow stuck with such misapplication of its original habeas reform effort. Further legislation is appropriate.

### **The state chief justices**

In recent months, much has been made of a resolution passed by the association of state court chief justices, which calls for delay of any additional reform to the federal habeas system.

It is unclear whether such a resolution is representative of the views of state judges generally, not to mention those of the executive officials who actually have the duty to defend state criminal judgments. It is fair to say,

however, that state judges are, by definition, not experts on the intricacies of federal habeas corpus practice. The resolution does not purport to assess the wisdom of modifying the cause and prejudice standard, for example, or of any other provision of the Streamlined Procedures Act. It would be anomalous to defer to the non-specific views of unspecified state judges on the need for federal habeas reform when so many federal judges are so unwilling to give deference to the actual work product of our state court systems.

### **The Administrative Office of United States Courts**

Opponents of habeas reform have also taken refuge recently in the position of the administrative arm of the federal courts. But it is hardly surprising if federal judges do not appreciate the prospect of further limitations on their power. No one likes limitations on their own power; that is why we have a government of checks and balances.

To the extent the Administrative Office professes an objective basis for its policy preferences, the numbers just don't add up. The AO has released statistics purporting to show that the federal courts are disposing of habeas petitions as fast as they are filed, and therefore that there is no such thing as undue habeas delay under AEDPA.

But the AO's own data appear to contradict this claim. Over the last six years, the time to dispose of a capital case has increased by half in the circuit courts, and has nearly *doubled* in the district courts.<sup>1</sup> The Administrative Office

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<sup>1</sup> The median time from filing in district court to disposition for state capital habeas corpus cases was 13 months in 1998 and rose by 2004 to 25.3 months. The

points with apparent pride to its claim that disposition time for *non*-capital cases has remained relatively constant.<sup>2</sup> But under AEDPA there can be no justification for such a growing disparity between capital and non-capital disposition rates. According to the federal courts, not one state has qualified for special treatment of its capital habeas cases; thus there is no legal difference in the procedures for handling capital and non-capital cases. Disposition rates should have risen or fallen in conjunction.

But there is a more important point: *AEDPA was supposed to speed things up*. Significant new provisions like the time bar, if honestly applied, should have *reduced* disposition times, *especially* for non-capital cases. If, as the Administrative Office says, we are seeing at best a holding action for non-capital cases, and for capital cases a significant slowdown, then there can be no clearer proof that habeas reform, as interpreted by the federal courts, has not succeeded.

### **Some continuing roadblocks to reform**

The Streamlined Procedures Act as originally formulated was an important step forward for the victims of crime who suffer through the endless relitigation of their cases. The version of the legislation currently before the Committee still contains many positive provisions and will have meaningful impact. Some problem areas, however, were not addressed in the original bill or were subject to

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median time from filing of notice of the appeal to disposition for state capital habeas corpus appeals was 10 months in 1998 and rose by 2004 to 15 months. Explanation of Views: Positions Adopted by the Judicial Conference of the United States on September 20, 2005, Regarding the "Streamlined Procedures Act of 2005, pp. 2-3

<sup>2</sup> *Id.* at 2

changes in later revisions that may undermine the habeas reform effort. For example:

- The SPA originally limited review of state court **harmless error** determinations. That provision is now gone from S. 1088. As a result, even after adoption of SPA we would continue to see quibbling by federal courts about inherently factual, intensively record-based judgments concerning the weight of evidence presented in support of state court convictions. Yet federal judges possess no special insight into the minds of state court juries. On the contrary, at so far a remove they can be expected to have if anything less ability to engage in such second-guessing of the fact finder. The abandonment of this provision is a setback for victims of state crimes.

- The bill in both original and current form places **time limits on appellate habeas decisions**. Delay in this area is endemic and a correction is long overdue. As formulated, however, the provision may be of small use, because the time limits run only from the filing of appellate briefs. In reality, much of the delay occurs even *before* briefs are filed, while appellate courts spend inordinate time on preliminary matters such as motions to grant or expand certificates of appealability. In my jurisdiction, for example, a habeas decision cross-appealed by both parties has been sitting for four years, and to date the court has not even issued a briefing schedule. Effective appellate time limits must be reformulated to address such periods of delay, especially with respect to certificates of appealability.

- The SPA commendably attempts to remove delays arising from interpretations of § 2244(d)(2) of the habeas statute, concerning tolling for **"properly filed" state post-conviction petitions**. In its current language, however, the legislation would amend the existing reference in (d)(2) to state court "judgments or claims." This change could unintentionally jeopardize a recent ruling making clear that state post-conviction petitions are not properly filed, and do not toll the federal habeas deadline, unless they are timely. That would be a setback in the effort to expedite federal habeas litigation.
- The substitute bill before the committee contains new provisions creating an independent federal statutory right to **DNA testing**, not just for capital cases qualifying for special review under Chapter 154, but for all state convictions generally. The impulse to protect innocence is a commendable one. But even before Congress first began debating the issue in relation to its "Innocence Protection Act," the states had already been acting on that impulse. Virtually every state now has its own post-conviction DNA testing procedures. The new federal DNA provision would completely preempt the states' efforts, rendering their statutes null and void for federal habeas corpus purposes. It would be the ultimate irony if this bill -- which is ostensibly designed to assist victims and respect state court judgments -- in fact throws out state court testing decisions automatically, and requires victims to relive the incredible strain of yet another post-conviction challenge to their credibility.
- The original SPA appropriately made its provisions applicable to pending cases. The current version substitutes a maze of effective dates that vary

section by section. All of these new effective dates, however, will substantially postpone the benefits of the legislation -- in some cases for many years. Given the glacial pace of federal habeas determinations, it is again ironic that a bill intended to fight delay will instead sanction such delay for at least one more generation -- perhaps half a decade -- of habeas litigation.

There is an inherent imbalance in the exercise of federal habeas review over state criminal convictions. Federal habeas courts have great power, simply because they are last in line. But they have little responsibility, because they are so far removed in time and space from the circumstances of the crime and the subtleties of the state proceedings. Accordingly, they have small motive to act expeditiously or efficiently, to give credit to the judgments of their brethren in state courts, or to consider the needs of crime victims.

The only way that balance can be restored is by Congressional statute. I respectfully urge the Committee to endorse such legislation.

Thank you.