

# Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001.	Ron Klain to POTUS re: Habeas Corpus Reform (4 pages)	06/25/93	P5

### COLLECTION:

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Domestic Policy Council  
Bruce Reed (Crime)  
OA/Box Number: 8413

### FOLDER TITLE:

Habeas Reform

rs11

### RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



reasonably available at an earlier point, and the new evidence establishes a high likelihood of factual innocence; (2) limiting the time for seeking collateral relief in federal court -- but with exceptions for cases where the factual basis of the claim was not reasonably available at an earlier time; and (3) establishing a more deferential standard of review (essentially a reasonableness standard) for review of state court decisions by federal courts in habeas corpus proceedings.

Here as well, the remedies remain available, though subject to more stringent limitations than under prior law, and exceptions are recognized where a claim is based on newly discovered evidence -- such as DNA evidence initially developed after trial -- which may cast doubt on a person's factual guilt.

*Crime -  
Habeas Reform*

EXECUTIVE OFFICE OF THE PRESIDENT

23-Apr-1996 03:45pm

TO: Todd Stern  
FROM: Bruce N. Reed  
Domestic Policy Council  
SUBJECT: Habeas language in signing stmt

Todd --

The habeas language that Chris Cerf inserted in the statement goes into far more detail than seems appropriate here. I realize this is a controversial issue, but it is also one that could get us in trouble if we say more than necessary.

I would suggest the following edits to the habeas section:

First, we should say upfront that "I have long sought to streamline federal appeals for convicted criminals sentenced to the death penalty. For too long, in too many cases, endless death-row appeals have stood in the way of justice being served."

Second, we should drop the sentence "I am advised that one provision of this important bill could be interpreted in a manner that would undercut meaningful federal habeas corpus review and raise profoundly troubling constitutional issues." This sentence could be used against us, and doesn't add anything, since we later say we don't think it will be interpreted this way.

The rest of that graph and the next graph are fine. But I would drop the graph that begins "Section 104 limits evidentiary hearings", which looks exactly like what it is -- an abstruse and unconvincing effort to spin the courts. The more flanks we expose on the issue, the more likely our opponents will find some way to use it against us (especially since they're spending all their time blasting us with the charge that our supposedly liberal judges will be a bonanza for criminals' rights if the President is re-elected).

Thanks.

*Crime-Habeas*

May 12, 1995

TO: Bruce Reed

From: Chris Cerf *CC*

Re: Habeas

As we had discussed, attached is a memo reflecting some preliminary thinking on habeas. Ab has suggested a meeting to try to get a sense of where we are on this. Shall I try to set it up?

Incidentally, DOJ's recommendation, per Seth Waxman, appears to be generally in accord with mine.

One new item: The (Democratic) Attorney General of Oklahoma called yesterday to inform us that he and 15 other AGs have written a letter to the President urging him to address habeas reform in the context of the counterterrorism bill. I'll send you a copy when I receive it.

I'd be grateful if you could keep Ab or me informed of any further developments on this. Thanks.

THE WHITE HOUSE

WASHINGTON

May 5, 1995

MEMORANDUM FOR ABNER J. MIKVA  
JAMES CASTELLO

FROM: CHRIS CERF *CAC*

SUBJECT: Proposed Habeas Legislation

At least four versions of habeas reform legislation are currently making their way through Congress: (1) S.735 ("Hatch/Dole") was introduced last Friday as part of the "Comprehensive Terrorist Act of 1995; (2) H.R. 729 began life as part of the "Contract's" omnibus crime legislation, but was passed by the House as a separate bill; (3) S.3 is the Senate version of an omnibus crime bill and contains perhaps the most radical habeas reform provisions, *i.e.*, a federal court must defer to a state ruling if the defendant had a "full and fair" hearing on the issue; and (4) Title III of S.1607 (the "Biden bill"), was introduced in the 103rd Congress, and is frequently cited by the Administration as reflecting its preferred approach.

While this memo focuses on the Hatch/Dole bill, some familiarity with the other bills may be useful in evaluating our legislative options.

I. Overview of Proposed Habeas Legislation

A. Hatch/Dole

Although it would effect a dramatic reorientation and curtailment of habeas, the Hatch/Dole bill is in some respects less radical than the other Republican alternatives. Its key provisions are as follows:

\* Imposes a one-year period for filing habeas petition, with the period running from the latest of (a) the conclusion of direct review, (b) the date on which the constitutional right was recognized by the Supreme Court "and made retroactively applicable," or (c) the date on which the factual predicate of the claim could have been discovered. (The one-year period is tolled during the pendency of any state collateral review proceeding.)

\* Permits appeals of District Court decisions denying a writ only upon the issuance of a "Certificate of Appealability"

Such a certificate may only issue if the applicant has made a "substantial showing of a denial of a constitutional right." (Under current law, an appeal can be taken if the appropriate judge issues a "certificate of probable cause.")

\* Tightens up exhaustion requirements, e.g., by providing that states shall not be found to have waived exhaustion absent an express waiver; also permits courts to deny writ on the merits notwithstanding failure to exhaust.

\* Authorizes issuance of writ in § 2254 cases only if state decision "was contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in an unreasonable interpretation of facts" presented in state court. This is another approach to the deference notion that has been kicking around since Stone v. Powell. While it is different from the "full and fair adjudication" rule, it is intended to encourage deference to state decisionmaking in close cases. It represents a very significant incursion into traditional habeas law in at least three ways:

1) Most importantly, it would appear to require substantial deference in the case of so-called "mixed questions" -- issues that turn on the application of law to fact. The Supreme Court has long held that such mixed questions warrant de novo review on habeas. See Miller v. Fenton. Justice Thomas, joined only by the Chief Justice and Justice Scalia, attempted to overrule this principle in Wright v. West, prompting an unusually stinging response from (remarkably) Justice O'Connor joined (more predictably) by Justice's Stevens and Blackmun. (Justice Kennedy also rejected Thomas's reasoning.)

2) The meaning of "clearly established" is murky at best, as evidenced by qualified immunity law from which this language seems to have been borrowed.

3) It is also significant that the federal rule must have been announced by the Supreme Court. As you know, many significant and often uncontroversial constitutional rulings are made at the Court of Appeals level and never receive Supreme Court attention.

\* Substantially increases federal deference to state court findings of fact. Under current law, the "presumption of correctness" can be rebutted, inter alia, upon a showing that the predicate facts were not adequately developed in state court or the district court independently concludes that the factual determination was not "fairly supported by

the record." Moreover, the presumption only applies to findings made "after a hearing." Under the proposed change, the presumption of correctness always applies -- whether or not there was a hearing -- unless the applicant rebuts it by clear and convincing evidence. Since, as the following paragraph explains, he would virtually never be entitled to a hearing, as a practical matter a habeas applicant could never carry this burden.

\* Significantly curtails power of federal court to conduct evidentiary hearing. If the applicant failed to develop the factual basis of the claim in state court, he is only entitled to a federal evidentiary hearing in limited circumstances, e.g., the factual predicate of the claim could not previously have been discovered and the facts underlying the claim establish "by clear and convincing evidence that but for constitutional error no reasonable factfinder would have found the applicant guilty of the underlying offense."

Under current law, a prisoner who fails to develop a factual claim in state court is entitled to a federal habeas hearing only if he can meet the same "cause and prejudice" standard that applies in the case of failure to raise a legal claim in prior state proceedings. Keeney v. Tamayo-Reyes (overruling Townsend v. Sain's adoption of "deliberate bypass" test in this context). Keeney was another 5-4 decision that also prompted a stinging O'Connor dissent.

This provision in the Hatch/Dole bill does more than merely codify Keeney. Both prongs of the test it articulates appear to be even more stringent than the already highly restrictive "cause" and "prejudice" standard. For all practical purposes, the adoption of this provision -- in conjunction with the "presumption of correctness" provision -- would eliminate federal habeas hearings.

\* Tacitly, but unquestionably, repeals 21 U.S.C. §848(g), which requires the appointment of counsel in any capital case brought under either §2254 and §2255.

\* Imposes significant new limits on the ability to pursue a second or successive petition. Under current law, a court must hear a successive petition unless it determines that the applicant has deliberately "withheld the newly asserted ground" from his/her previous filing. Under the proposed law, a new claim must be dismissed unless (a) the applicant relies on a new and retroactively applicable rule of law or (b) the factual predicate for the claim could not have been

known and, if proven, would establish by clear and convincing evidence that he is actually innocent of the charges. Even then, a second or successive petition may not be entertained by the district court unless the applicable Court of Appeals concludes that the applicant has made a prima facie showing under this standard.

\* Creates special procedures applicable to capital cases:

- State may have benefit of these procedures only if it establishes a "mechanism" for the mandatory appointment and compensation of "competent" counsel in state post-conviction proceedings. (Note the absence of a similar requirement for direct appeals or competency standards for defense counsel at trial)

- Upon appointment of counsel pursuant to above provision, applicant gets automatic stay of execution pending timely filing and resolution of § 2254 petition. (Stay can be lifted if applicant fails to make a "substantial showing of the denial of a federal right.")

- No further stay of execution will be granted unless Court of Appeals approves filing of second or successive petition.

- § 2254 petition must be filed within 180 days of affirmance of conviction on direct appeal, such period being tolled during pendency of cert petition (from direct appeal) or state post-conviction proceeding. (Note: period does not toll during pendency of cert petition from state post-conviction proceeding.)

- Limits federal habeas review to claims that "were raised and decided" in prior state proceedings unless based on subsequently discovered evidence or "Supreme Court recognition of a new Federal right."

- Obligates federal courts to "give priority" to capital cases and to adjudicate habeas claims on an accelerated schedule. e.g., district courts must rule on all habeas petitions within 180 days of filing and Courts of Appeals must rule within 120 days after filing of last brief. (A district court's failure to adhere to the 180 rule is subject to mandamus, which petition must be resolved by the Court of Appeals within 30 days.)

B. S.3 (Part of Senate Omnibus Crime Bill)

S.3 is substantially identical to Hatch/Dole, with one important exception. Incorporating the approach of Stone v. Powell, S.3 provides:

"An application for a writ of habeas corpus on 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."

In contrast, the standard for leave to file an appeal from the denial of a habeas petition is slightly easier to meet in all cases and need not be met at all in capital cases.

C. H.R. 729 (Part of "Contract" Crime Bill).

In most important details, H.R. 729 is similar to both the Hatch/Dole bill and S.3. Its approach to "deference," however, is closer to that of Hatch/Dole. Carefully avoiding the red flag of a "full and fair" standard, it nonetheless forbids district courts from granting a writ unless (a) the state court's decision was based on an arbitrary or unreasonable interpretation of clearly established Federal law, (b) resulted in a decision that was based on an arbitrary or unreasonable application of facts to clearly established Federal law, or (c) resulted in a decision that was based on an arbitrary or unreasonable finding of fact.

D. The Biden Bill (S.1607).

Like the various Republican bills, the Biden bill incorporates numerous efficiency enhancing mechanisms, such as filing deadlines (180 days), limits on successive petitions, etc. In general, however, these mechanisms are less restrictive than their Republican counterparts. For example, a court may permit the filing of an out-of-time petition if it concludes that the applicant had adduced new evidence sufficient to "undermine that court's confidence in the factfinder's determination of guilt." (Indeed, the bill specifically provides (contrary to Herrera) that claims of factual innocence are cognizable on habeas and are not subject to the otherwise applicable rules governing successive petitions.) In addition, the bill provides that in capital cases an unsuccessful petitioner may file an appeal without the need to obtain a certificate of probable cause.

In addition to these relatively minor distinctions, there are three important differences between the Biden bill and the Republican bills described above:

First, the Biden bill provides in unambiguous terms that (with the sole exception of Fourth Amendment claims) "federal courts shall review de novo the rulings of state courts on

matters of federal law regardless of whether the opportunity for a full and fair hearing has been provided in the State court."

Second, the bill prescribes in painfully elaborate detail mandatory competency standards for counsel in all phases of a capital case, including trial, appeal, state post-conviction review, and cert petitions. After "finding" that inadequate representation in capital cases "increases unacceptably the risk of constitutional and factual error," the bill invokes Congress's power under Section 5 of the Fourteenth Amendment. Thus armed, the bill:

- \* Requires states to establish a "counsel certification authority" within 180 days and creates a private cause of action to enforce any failure to do so.

- \* Requires this entity to maintain a roster of individuals who meet specified "minimum counsel standards." For example, to be certified as trial counsel the individual must have two of the four qualifications set out in subpart A (e.g., 12 jury, including five criminal, trials in the past 10 years) and one of the qualifications set out in subpart B (e.g., co-counsel in no fewer than two capital cases, one of which occurred in the past five years, that were tried through sentencing.)

- \* Requires courts to appoint at least two attorneys from the roster at trial, and one at every subsequent stage.

- \* Provides that in a capital case in which the state fails to follow these procedures, a federal habeas court "shall not" (a) presume state court findings to be correct or (b) refuse to consider a claim on the ground that it was not raised previously. In addition, the 180 day limitations period for filing a first federal habeas petition is tolled until the state appoints qualified counsel under these procedures.

- \* Authorizes grants to fund these procedures. (Funding to states would be equal to federal funding to Capital Resource Centers.)

Third, the 180 day filing deadline does not apply in both capital and non-capital cases unless the state provides counsel during state post-conviction proceedings.

## II. Prior Statements of Administration Position on Habeas

To date, the administration's position has been to endorse the broad "objectives" of the various Republican bills, while

stating a strong preference for the particular approach taken in the Biden bill. In particular, the administration favors:

\* Making the strict filing deadline conditional on appointment of counsel in state post-conviction proceedings (for both capital and non-capital cases.)

\* Requiring states to appoint counsel meeting minimum competency standards in all phases of a capital case.

Other than the counsel-related provisions, the administration has spoken only in broad generalities. Thus, while generally endorsing an approach in which defendants have only "one bite at the apple," the administration has not taken a direct position on the degree of deference federal courts should afford prior state proceedings. Nor has the administration addressed the merits of the significant curtailment of the right to a plenary habeas hearing that would be effected by the Republican bills.

### III. Legislative Options

There are three basic options:

Option 1: Work aggressively to unbundle habeas from the counterterrorism bill and deal with it instead in the context of the omnibus crime bill. One variant of this is to unbundle habeas from counterterrorism, but agree to modifications to §2255 -- the theory being that the Oklahoma terrorists (and all terrorists) would be tried in federal rather than state court.

Option 2: Agree to bundle habeas with counterterrorism provided that the Republicans retreat from their bill and accept a variant of the Biden bill.

Option 3: Agree to endorse Hatch/Dole with four modifications:

1) Delete of the Section 704(d), which adopts the Wright v. West standard of review.

2) Delete or modify Section 704(e)(2), which covers the availability of a plenary evidentiary hearing.

3) Delete Section 704(f), which effectively repeals the existing statutory entitlement to counsel in federal habeas proceedings arising out of a capital case.

4) Add a section that would condition these new procedures on an appropriate mechanism for assuring competent counsel at all phases of a capital case. This mechanism would

endorse the spirit of the Biden bill, but not its extraordinarily elaborate detail.

#### IV. Analysis

If achievable, the preferred outcome is Option 3. If Senator Hatch is prepared to adjust his bill as indicated, this would have the effect of (a) resolving the contentious habeas-reform issue in a matter that appears closest to the President's position; (b) result, on balance, in a meaningful improvement in habeas law by making it both swifter (because of the filing deadlines) and fairer (because it would assure competent counsel during all phases of a capital cases); (c) avoid the risk of an even worse habeas bill down the road (e.g., "full and fair") and (d) unbundle habeas from the crime bill, which may well have the effect of taking the steam out of the Republican effort in this area. The pitch to Senator Hatch would be: "We're giving you 90% of what you are asking for. Make these relatively modest concessions, and we'll give up on the Biden bill and resolve this divisive issue once and for all."

If, however, Hatch is unwilling to accept these modifications -- especially those mandating competent counsel -- we should fall back on Option 1. This, however, is far from an optimal outcome. My sense from talking to both Justice and legislative affairs is that the habeas train is coming down the track and is unstoppable -- especially after the President's comments on Sixty Minutes. We do not want to put the President in the position of having to accept highly objectionable habeas provisions merely because they are tied to the counterterrorism bill. Thus, it would be far better to get Hatch to agree to modify his bill than to fight for -- and fail to achieve -- a complete unbundling of habeas from the counterterrorism bill.

Nor am I at all persuaded that an agreement to modify only §2255 would have any significant effect. Hatch would rightly see this as a transparent ploy since there is relatively little in §2255 law that needs fixing. Moreover, he would surely insist on all of the "bad" provisions in the context of § 2255 petitions that we would want to resist in the state context down the road. We would have no prospect of winning that important fight if we have already given up the store under §2255.

Option 2 warrants only brief comment. Everyone, including Senator Biden (I'm told) considers the Biden bill dead on arrival. While we should try to salvage its most important dimension -- counsel competency standards in capital cases -- we should not put our money on an otherwise losing proposition.

#### V. Conclusion

I recommend Option 3 as set out above.

THE WHITE HOUSE

WASHINGTON

May 12, 1995

MEMORANDUM TO BRUCE REED

FROM: ABNER J. MIKVA *AJM*

RE: Habeas Reform

My sense is that the effort to evaluate our options pertaining to habeas corpus reform could profit from a higher level of coordination. My office, legislative affairs, the DPC and DOJ are all working on the issue. Perhaps a meeting would be useful to evaluate where we are on this.

THE WHITE HOUSE  
WASHINGTON

*Crime-  
Habeas*

DATE: 5/12/95

TO:

*Bruce Reed*

FROM:

*Chris CEF*  
White House Counsel  
Room 136, OEOB, x6-6229

- FYI
- Appropriate Action
- Let's Discuss
- Per Our Conversation
- Per Your Request
- Please Return
- Other

May 10, 1995

The Honorable Bill Clinton  
The President of the United States  
The White House  
Washington, D.C. 20500

Dear President Clinton:

As a bi-partisan group of Attorneys General from our respective states, we would like to express our support for your efforts to bring the American people together in a common expression of support for those who have suffered from the tragic events in Oklahoma City. We also appreciate your clear expression of support for the rule of law, at a time when these acts of lawlessness have brought about such human tragedy.

In this regard, your comments on CBS' 60 Minutes program regarding the need for the reform of federal habeas corpus procedures is most appropriate. In our own states, we continue to experience endless appeals and continuous delay. We believe that such abuse of the criminal justice system produces a disrespect for the law, and serves to undermine deterrence.

This is particularly true with respect to the enforcement of the death penalty. As the Powell Committee Report noted:

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 the 37 states.

This accurately describes the current status of capital punishment in the states and unfortunately portends a similar fortune for the recently enacted death penalty provisions of Title VI of the Violent Crime Control and Law Enforcement Act of 1994. Motions under current Title 28 U.S.C. § 2255 will produce the same morass of endless delay and procedural manipulation that the states have encountered under Title 28 U.S.C. § 2254. Thus, if we are to have an effective death penalty on the state and federal levels, legislative action is necessary.

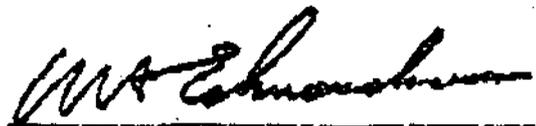
In this regard, expedited consideration of such legislation in the context of the anti-terrorism bill is entirely appropriate. Unless habeas corpus reform is enacted, capital sentences for such acts of senseless violence will face endless legal obstacles. This will undermine the credibility of the sanctions, and the expression of our level of opprobrium as a nation for acts of terrorism.

The Honorable Bill Clinton  
May 10, 1995  
Page 2

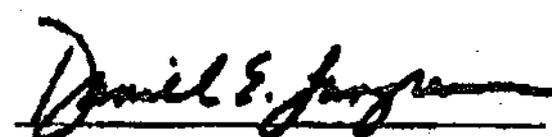
It is our belief that S. 623, the Habeas Corpus Reform Act of 1995, is the appropriate vehicle to bring about an effective and enforceable death penalty with respect to both state and federal levels of jurisdiction. The enactment of these provisions is essential to our states, and critical to Federal anti-terrorism legislation, if the maximum sanction our society has to offer will have real meaning.

We again, offer our support for your efforts to lead the nation out of the abyss of a terrible tragedy. We also offer our commitment to help deliver legislation to the American people that will provide an enforceable death penalty for the most heinous crimes against our citizens. Thank you again for your consideration.

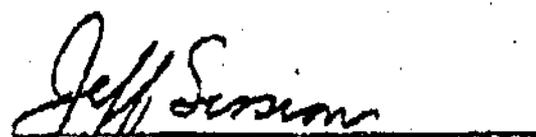
Sincerely,

  
W.A. DREW EDMONDSON  
Attorney General of Oklahoma

  
ERNEST D. PREATE, JR.  
Attorney General of Pennsylvania

  
DANIEL E. LUNGREN  
Attorney General of California

  
DAN MORALES  
Attorney General of Texas

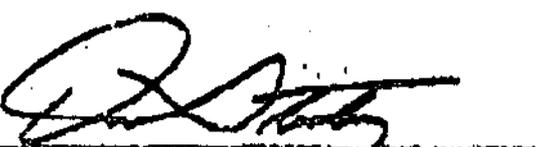
  
JEFF SESSIONS  
Attorney General of Alabama

  
GALE A. NORTON  
Attorney General of Colorado

The Honorable Bill Clinton  
May 10, 1995  
Page 3

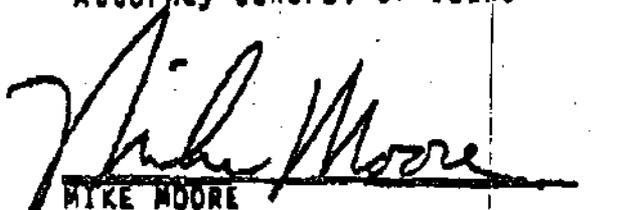
  
JOSEPH P. HAZUREK  
Attorney General of Montana

  
GRANT WOODS  
Attorney General of Arizona

  
DON STENBENS  
Attorney General of Nebraska

  
ALAN G. LANCE  
Attorney General of Idaho

  
RICHARD P. IEYOUB  
Attorney General of Louisiana

  
MIKE MOORE  
Attorney General of Mississippi

THE WHITE HOUSE  
WASHINGTON

May 3, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: BRUCE REED

SUBJECT: Habeas Reform



LEON  
Am OK on GOP bill  
as you describe it except  
to win some consensus  
stand alone

**I. Background**

Attached is a Justice Department analysis of the habeas reform proposal that Senate Republicans have introduced as part of their anti-terrorism bill. It is largely similar to habeas provisions the House passed as part of its crime bill in March.

The Administration and the Justice Department have been strong and vocal supporters of habeas reform. The average delay from sentence to execution in capital cases now stands at nine years.

In August 1993, the Attorney General and Senator Biden won the district attorneys' support for a one-year, one-appeal reform proposal. Biden and Hatch eventually decided to drop habeas from the crime bill, because Hatch was afraid a Democratic crime bill would undermine recent Supreme Court decisions that have strengthened prosecutors' hands, and Biden was convinced that Republicans had enough support from Southern Democrats to adopt their tougher version of habeas on the floor.

Republicans clearly have the votes in the new Congress, and their bill will attract enthusiastic bipartisan support from state and local prosecutors. Biden would prefer to see habeas taken up as a stand-alone measure, rather than as part of the anti-terrorism bill. Although he is aware that the Administration may accept what the Republicans pass, he will not be happy about it.

For the moment, Republicans see habeas as an opportunity to turn the anti-terrorism debate to their advantage, although it is not clear whether they will insist that it be included. Biden and Daschle have let the Republicans know that if habeas remains part of the anti-terrorism bill, Democrats will start adding anti-gun amendments, such as a moratorium on repealing the assault ban and a stiffer ban on cop-killer bullets.

**II. Major Issues**

The Administration and congressional Republicans are in agreement on the one aspect of habeas reform that most people can understand, which is limiting death-penalty

appeals to one year and one bite at the apple. Although there is deep disagreement among Democrats and within the Administration about other important details, there is no disagreement among prosecutors, who strongly supported the House Republican bill and will strongly support the Senate Republican version.

In broad terms, the major issues involve: 1) counsel standards; 2) how much deference to give state courts; and 3) habeas for federal prisoners.

**1. Counsel Standards:** The Biden bill would require states to impose higher counsel standards than the current federal ones in exchange for curbing habeas appeals; the Republican bills leave standards up to the states. The Justice Department believes we may be able to persuade the Republicans to accept some kind of standards that ensure the quality of lawyering, on the grounds that it is in everybody's interest to have sound counsel standards that help ensure finality. A related issue is federal funding for prosecutors and defense counsel to handle habeas litigation.

**2. Deference to State Courts:** The Republican bills would essentially codify several recent Supreme Court decisions which require deference to state courts on questions of fact, law, and applications of law to fact. The Biden bill would allow for independent review of those questions. Many prosecutors argue that the Biden bill would weaken current law; the prosecutors' groups supported it last year because they were afraid a Democratic Congress might go even further, as it had done in 1992. In the current atmosphere, we will have a hard time getting any changes in this area.

*Call - TM SCK  
can get Don  
Court. Guide.*

**3. Habeas for Federal Prisoners:** The Republican bills limit collateral appeals by federal prisoners under 28 U.S.C. 2255. The Biden bill only addresses appeals by state prisoners. This means that the Biden bill would not affect the case of Timothy McVeigh. We should go along with some form of limits on appeals by federal prisoners.

*→ agree*

### III. How to Proceed

The Attorney General would be willing to accept a tougher bill than she and Biden put forward. The White House counsel's office would rather see the issue go away.

For now, we can continue to argue that we would be happy to take up habeas as a stand-alone measure after the terrorism bill passes, but this is no time to bring up divisive issues for partisan advantage. Dole and Hatch may put off habeas to avoid confrontations over guns. If not, we can try to extract some improvements in return for going along with it in the bill. In the meantime, we will keep meeting with them on a bipartisan basis to reach agreement on other elements of the anti-terrorism legislation.

(1)

Analysis of the Specter-Hatch Habeas Proposal (S. 623)

S. 623 contains the current Specter-Hatch habeas proposal. The major features of this proposal are largely parallel to those of the habeas proposal in S. 3, but it corrects many of the formulation problems and idiosyncratic features in the earlier version. It is also closer in several respects to the House-passed habeas bill (H.R. 729).

The current proposal is sufficiently improved in comparison with S. 3, and sufficiently similar to the House bill, that it will almost certainly enjoy the general support of prosecutors. Hence, the Senate will probably pass this proposal or something very close to it. The Senate passed similar reforms in two earlier Congresses by large margins (in S. 1241 of the 102d Congress and in S. 1763 of the 98th Congress).

I. General Habeas Reforms

Sections 2 through 7 of the bill contain general habeas reforms that would apply to all types of cases (not just capital cases). The specific features are as follows:

Section 2 -- habeas filing time limit. Section 2 proposes a general one-year time limit for federal habeas filing. The time limit would generally run from the end of direct review, unless the petitioner could show cause for filing at a later time (i.e., previous unavailability of the legal or factual basis of a claim or unlawful state interference with filing). The limitation period would be tolled while the petitioner was pursuing state collateral remedies. This is essentially the same as the time limitation rule for filing in the House-passed habeas bill (H.R. 729).

Sections 3 and 4 -- appeal of denial of collateral relief. These sections strengthen in some respects the requirement that a petitioner must obtain a certificate of probable cause to appeal a district court's denial of a writ of habeas corpus. The requirement of obtaining such a certificate is extended to federal prisoners who are denied collateral relief by district courts (in § 2255 motion proceedings), and a requirement is added that a judge issuing such a certificate shall indicate which specific issue or issues it relates to. The sections refer to "certificates of appealability" rather than "certificates of probable cause," but this change is purely terminological. The standard for granting such a certificate -- substantial showing of the denial of a constitutional right -- would remain the same as in current law. Similar amendments appear in the House habeas bill.

Section 5 -- amendments to 28 U.S.C. 2254. This section contains several amendments to 28 U.S.C. 2254 relating to exhaustion of state remedies, the scope of habeas review, and counsel in habeas proceedings.

With respect to exhaustion of state remedies, section 5 provides that a habeas application may be denied on the merits notwithstanding the failure of the applicant to exhaust state remedies, and that a state shall not be deemed to have waived the exhaustion requirement (as a precondition for granting habeas relief) unless it does so expressly. The same reforms appear in the House habeas bill.

Like the House bill, section 5 in this bill contains provisions which are apparently intended to provide for deference on federal habeas review to reasonable state court determinations of a petitioner's claims. The proposed standard of review breaks down as follows:

With respect to questions of law, a judgment would not be overturned on the basis of a state court determination unless it was contrary to clearly established federal law as determined by the Supreme Court. Under the rule of Butler v. McKellar, 494 U.S. 407 (1990), federal habeas courts currently do not overturn judgments on the basis of a state court determination of a question of law that reflected a reasonable interpretation of Supreme Court precedent at the time the judgment became final. This is also expressed by saying that a judgment is not to be overturned (under the current standards) unless a rule of law contrary to the state court's determination was dictated by Supreme Court precedent at the time of finality. The proposal on this point in section 5 of the Specter-Hatch bill could readily be interpreted as meaning practically the same thing as the current standard under Butler v. McKellar.

With respect to questions of application of law to fact ("mixed questions"), a judgment would not be overturned on the basis of a reasonable state court determination of such a question. Under current standards, federal habeas courts have exercised independent judgment on mixed questions. However, in Wright v. West, 112 S.Ct. 2482 (1992), the state argued that reasonable applications of law to fact by state courts should be entitled to deference, considering that the standards for reviewing state court determinations of purely legal questions (under Butler v. McKellar) and purely factual questions (under 28 U.S.C. 2254(d)) are already deferential. The Supreme Court found it unnecessary to resolve this issue under the facts of the case. The provision in the Specter-Hatch bill would resolve this issue in the manner urged by the state in Wright v. West.

With respect to questions of fact, section 5 of the bill makes two changes. First, it provides as part of its general standard of review that a judgment is not to be overturned on the basis of a state court determination of a factual question, unless the determination was unreasonable in light of the evidence presented to the state court. Second, it provides that state court fact-finding is presumed to be correct, and that the

petitioner has the burden of rebutting this presumption by clear and convincing evidence -- strengthening current 28 U.S.C. 2254(d), which conditions the presumption of correctness for state court fact-finding on several specifications concerning the state proceedings. The practical effect of these changes is limited, since application of 28 U.S.C. 2254(d) normally leads to deference by the habeas court to reasonable state court resolutions of factual questions under the existing standards.

Section 5 also states that a habeas court may not hold an evidentiary hearing on a claim whose factual basis was not developed in state court proceedings, unless cause is shown and the underlying facts of the claim would establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty. This is apparently intended to enact a strengthened version of the rule of Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992), under which a petitioner is generally not allowed to present additional evidence in federal habeas proceedings relating to a claim rejected by the state courts unless he can show cause and prejudice. However, the formulation of the proposed standard on this point in section 5 is inadequate. As drafted, the language is unclear as to whether it is supposed to govern evidentiary hearings on claims that were never raised or were procedurally defaulted in state court, or to govern taking additional evidence on claims that were decided on the merits by state courts (or both).

Finally, section 5 provides that appointment of counsel for indigents in federal habeas proceedings is to be governed by Criminal Justice Act (18 U.S.C. 3006A) standards, except as otherwise provided by rules promulgated by the Supreme Court. This preserves mandatory appointment of counsel as required by rule -- e.g., as provided in Rule 8(c) of the § 2254 Rules for cases in which an evidentiary hearing is held -- but would otherwise condition appointment on the court's determination that the interests of justice require appointment. This is consistent with the current approach for non-capital cases, but inconsistent with the provisions of 21 U.S.C. 848(q) that require the routine appointment of counsel for indigents in federal habeas review of capital cases.

Section 6 -- section 2255 amendments. Section 6 proposes a one-year time limit for applications for collateral relief by federal prisoners (§ 2255 motions), which is parallel to the time limit proposed for federal habeas filing by state prisoners in section 2 of the bill. The House habeas bill includes the same time limitation rule for applications for collateral relief by federal prisoners, except that the basic limitation period in the House bill is two years for federal prisoners' motions rather than one. Both bills provide for deferral of the start of the limitation period on a showing of cause.

Section 6 also includes provisions which are evidently intended to tighten the standards for bringing second and successive § 2255 motions, parallel to the bill's proposal for limiting second and successive habeas petitions by state prisoners (see discussion of section 7 below). However, the language on this point in section 6 is inadequate, and tends to conflate the § 2255 motion remedy with the remedy for presenting claims of newly discovered evidence under Fed.R.Crim.P. 33.

Section 7 -- limits on second and successive petitions.

Section 7 tightens the standards for bringing second and successive federal habeas petitions by uniformly requiring that the petitioner raise a claim that was not previously presented and show cause for not having raised it earlier, and by requiring that the underlying facts of the claim must be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty. This is substantially the same as the standard proposed in the House bill for successive petitions in capital cases under the "Powell Committee" provisions.

Section 7 also provides that a successive petition must be initially presented to an appellate panel for a determination whether the petitioner has made a prima facie showing of satisfaction of the successive petition standard. The effectiveness of this approach as a screening mechanism is questionable, and it will take up additional time by running this threshold issue before appellate panels. However, the current version of this proposal in section 7 states that the appellate panel must make the required determination within 30 days of the filing of the motion. Hence, any delay resulting from this provision would be limited.

II. "Powell Committee" Procedures for Capital Cases

Section 8 contains the bill's version of the "Powell Committee" proposal, under which states have the benefit of stronger finality rules on federal habeas review if they extend appointment of counsel for indigents in capital cases to state collateral proceedings, and set standards of competency for such counsel.

Most of the features of this proposal are the same as or very similar to the corresponding features of the "Powell Committee" provisions in the House bill: Both bills propose a general 180 day time limit for federal habeas filing under these procedures, subject to tolling while state collateral review is taking place. Both bills provide for an essentially automatic stay of execution, continuing until the end of state collateral review. Both bills condition successive petitions on the satisfaction of the same restrictive standard (see discussion of section 7 above).

Like the House bill, section 8 of the current Specter-Hatch proposal sets time limits for concluding the litigation of capital habeas petitions that are subject to the "Powell Committee" procedures, but its specific standards on this point are different. Under section 8, a district court would have to decide a petition within 180 days of filing, subject to a possible 30 day extension, and 120 days would generally be allowed for a court of appeals' decision, following the conclusion of briefing. Like S. 3, section 8 lists criteria for the district court to consider in deciding whether to grant an extension of time which are in some respects unclear or of dubious relevance. However, since the application of these criteria could at most result in the extension of a basic 180 period by 30 days, their practical significance is limited.

Finally, section 8 provides that a habeas petition subject to the "Powell Committee" procedures cannot be amended after the state files its answer, except on grounds that would justify entertaining a successive petition.

III. Other Matters

Section 9 makes changes in 21 U.S.C. 848(q) which are evidently intended as conforming changes to certain amendments in section 5 (see the final paragraph in the discussion of section 5 above).

Section 9 also provides that ex parte requests to the court to authorize payment for expert and investigative services shall not be allowed unless a proper showing is made concerning the need for confidentiality. According to prosecutors, counsel representing state capital defendants in federal habeas proceedings currently use these ex parte proceedings to establish a relationship with the court and to pitch their cases before the state has had any contact with the court or an opportunity to respond. This part of section 9 evidently responds to that concern.

Finally, section 10 states a general severability rule for the bill.

THE WHITE HOUSE

WASHINGTON

May 3, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: BRUCE REED

SUBJECT: Habeas Reform

**I. Background**

Attached is a Justice Department analysis of the habeas reform proposal that Senate Republicans have introduced as part of their anti-terrorism bill. It is largely similar to habeas provisions the House passed as part of its crime bill in March.

The Administration and the Justice Department have been strong and vocal supporters of habeas reform. The average delay from sentence to execution in capital cases now stands at nine years.

In August 1993, the Attorney General and Senator Biden won the district attorneys' support for a one-year, one-appeal reform proposal. Biden and Hatch eventually decided to drop habeas from the crime bill, because Hatch was afraid a Democratic crime bill would undermine recent Supreme Court decisions that have strengthened prosecutors' hands, and Biden was convinced that Republicans had enough support from Southern Democrats to adopt their tougher version of habeas on the floor.

Republicans clearly have the votes in the new Congress, and their bill will attract enthusiastic bipartisan support from state and local prosecutors. Biden would prefer to see habeas taken up as a stand-alone measure, rather than as part of the anti-terrorism bill. Although he is aware that the Administration may accept what the Republicans pass, he will not be happy about it.

For the moment, Republicans see habeas as an opportunity to turn the anti-terrorism debate to their advantage, although it is not clear whether they will insist that it be included. Biden and Daschle have let the Republicans know that if habeas remains part of the anti-terrorism bill, Democrats will start adding anti-gun amendments, such as a moratorium on repealing the assault ban and a stiffer ban on cop-killer bullets.

**II. Major Issues**

The Administration and congressional Republicans are in agreement on the one aspect of habeas reform that most people can understand, which is limiting death-penalty

appeals to one year and one bite at the apple. Although there is deep disagreement among Democrats and within the Administration about other important details, there is no disagreement among prosecutors, who strongly supported the House Republican bill and will strongly support the Senate Republican version.

In broad terms, the major issues involve: 1) counsel standards; 2) how much deference to give state courts; and 3) habeas for federal prisoners.

**1. Counsel Standards:** The Biden bill would require states to impose higher counsel standards than the current federal ones in exchange for curbing habeas appeals; the Republican bills leave standards up to the states. The Justice Department believes we may be able to persuade the Republicans to accept some kind of standards that ensure the quality of lawyering, on the grounds that it is in everybody's interest to have sound counsel standards that help ensure finality. A related issue is federal funding for prosecutors and defense counsel to handle habeas litigation.

**2. Deference to State Courts:** The Republican bills would essentially codify several recent Supreme Court decisions which require deference to state courts on questions of fact, law, and applications of law to fact. The Biden bill would allow for independent review of those questions. Many prosecutors argue that the Biden bill would weaken current law; the prosecutors' groups supported it last year because they were afraid a Democratic Congress might go even further, as it had done in 1992. In the current atmosphere, we will have a hard time getting any changes in this area.

**3. Habeas for Federal Prisoners:** The Republican bills limit collateral appeals by federal prisoners under 28 U.S.C. 2255. The Biden bill only addresses appeals by state prisoners. This means that the Biden bill would not affect the case of Timothy McVeigh. We should go along with some form of limits on appeals by federal prisoners.

### III. How to Proceed

The Attorney General would be willing to accept a tougher bill than she and Biden put forward. The White House counsel's office would rather see the issue go away.

For now, we can continue to argue that we would be happy to take up habeas as a stand-alone measure after the terrorism bill passes, but this is no time to bring up divisive issues for partisan advantage. Dole and Hatch may put off habeas to avoid confrontations over guns. If not, we can try to extract some improvements in return for going along with it in the bill. In the meantime, we will keep meeting with them on a bipartisan basis to reach agreement on other elements of the anti-terrorism legislation.

(1)

Analysis of the Specter-Hatch Habeas Proposal (S. 623)

S. 623 contains the current Specter-Hatch habeas proposal. The major features of this proposal are largely parallel to those of the habeas proposal in S. 3, but it corrects many of the formulation problems and idiosyncratic features in the earlier version. It is also closer in several respects to the House-passed habeas bill (H.R. 729).

The current proposal is sufficiently improved in comparison with S. 3, and sufficiently similar to the House bill, that it will almost certainly enjoy the general support of prosecutors. Hence, the Senate will probably pass this proposal or something very close to it. The Senate passed similar reforms in two earlier Congresses by large margins (in S. 1241 of the 102d Congress and in S. 1763 of the 98th Congress).

I. General Habeas Reforms

Sections 2 through 7 of the bill contain general habeas reforms that would apply to all types of cases (not just capital cases). The specific features are as follows:

Section 2 -- habeas filing time limit. Section 2 proposes a general one-year time limit for federal habeas filing. The time limit would generally run from the end of direct review, unless the petitioner could show cause for filing at a later time (i.e., previous unavailability of the legal or factual basis of a claim or unlawful state interference with filing). The limitation period would be tolled while the petitioner was pursuing state collateral remedies. This is essentially the same as the time limitation rule for filing in the House-passed habeas bill (H.R. 729).

Sections 3 and 4 -- appeal of denial of collateral relief. These sections strengthen in some respects the requirement that a petitioner must obtain a certificate of probable cause to appeal a district court's denial of a writ of habeas corpus. The requirement of obtaining such a certificate is extended to federal prisoners who are denied collateral relief by district courts (in § 2255 motion proceedings), and a requirement is added that a judge issuing such a certificate shall indicate which specific issue or issues it relates to. The sections refer to "certificates of appealability" rather than "certificates of probable cause," but this change is purely terminological. The standard for granting such a certificate -- substantial showing of the denial of a constitutional right -- would remain the same as in current law. Similar amendments appear in the House habeas bill.

Section 5 -- amendments to 28 U.S.C. 2254. This section contains several amendments to 28 U.S.C. 2254 relating to exhaustion of state remedies, the scope of habeas review, and counsel in habeas proceedings.

With respect to exhaustion of state remedies, section 5 provides that a habeas application may be denied on the merits notwithstanding the failure of the applicant to exhaust state remedies, and that a state shall not be deemed to have waived the exhaustion requirement (as a precondition for granting habeas relief) unless it does so expressly. The same reforms appear in the House habeas bill.

Like the House bill, section 5 in this bill contains provisions which are apparently intended to provide for deference on federal habeas review to reasonable state court determinations of a petitioner's claims. The proposed standard of review breaks down as follows:

With respect to questions of law, a judgment would not be overturned on the basis of a state court determination unless it was contrary to clearly established federal law as determined by the Supreme Court. Under the rule of Butler v. McKellar, 494 U.S. 407 (1990), federal habeas courts currently do not overturn judgments on the basis of a state court determination of a question of law that reflected a reasonable interpretation of Supreme Court precedent at the time the judgment became final. This is also expressed by saying that a judgment is not to be overturned (under the current standards) unless a rule of law contrary to the state court's determination was dictated by Supreme Court precedent at the time of finality. The proposal on this point in section 5 of the Specter-Hatch bill could readily be interpreted as meaning practically the same thing as the current standard under Butler v. McKellar.

With respect to questions of application of law to fact ("mixed questions"), a judgment would not be overturned on the basis of a reasonable state court determination of such a question. Under current standards, federal habeas courts have exercised independent judgment on mixed questions. However, in Wright v. West, 112 S.Ct. 2482 (1992), the state argued that reasonable applications of law to fact by state courts should be entitled to deference, considering that the standards for reviewing state court determinations of purely legal questions (under Butler v. McKellar) and purely factual questions (under 28 U.S.C. 2254(d)) are already deferential. The Supreme Court found it unnecessary to resolve this issue under the facts of the case. The provision in the Specter-Hatch bill would resolve this issue in the manner urged by the state in Wright v. West.

With respect to questions of fact, section 5 of the bill makes two changes. First, it provides as part of its general standard of review that a judgment is not to be overturned on the basis of a state court determination of a factual question, unless the determination was unreasonable in light of the evidence presented to the state court. Second, it provides that state court fact-finding is presumed to be correct, and that the

petitioner has the burden of rebutting this presumption by clear and convincing evidence -- strengthening current 28 U.S.C. 2254(d), which conditions the presumption of correctness for state court fact-finding on several specifications concerning the state proceedings. The practical effect of these changes is limited, since application of 28 U.S.C. 2254(d) normally leads to deference by the habeas court to reasonable state court resolutions of factual questions under the existing standards.

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Section 6 -- section 2255 amendments. Section 6 proposes a one-year time limit for applications for collateral relief by federal prisoners (§ 2255 motions), which is parallel to the time limit proposed for federal habeas filing by state prisoners in section 2 of the bill. The House habeas bill includes the same time limitation rule for applications for collateral relief by federal prisoners, except that the basic limitation period in the House bill is two years for federal prisoners' motions rather than one. Both bills provide for deferral of the start of the limitation period on a showing of cause.

Section 6 also includes provisions which are evidently intended to tighten the standards for bringing second and successive § 2255 motions, parallel to the bill's proposal for limiting second and successive habeas petitions by state prisoners (see discussion of section 7 below). However, the language on this point in section 6 is inadequate, and tends to conflate the § 2255 motion remedy with the remedy for presenting claims of newly discovered evidence under Fed.R.Crim.P. 33.

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Section 7 tightens the standards for bringing second and successive federal habeas petitions by uniformly requiring that the petitioner raise a claim that was not previously presented and show cause for not having raised it earlier, and by requiring that the underlying facts of the claim must be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty. This is substantially the same as the standard proposed in the House bill for successive petitions in capital cases under the "Powell Committee" provisions.

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Section 8 contains the bill's version of the "Powell Committee" proposal, under which states have the benefit of stronger finality rules on federal habeas review if they extend appointment of counsel for indigents in capital cases to state collateral proceedings, and set standards of competency for such counsel.

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Like the House bill, section 8 of the current Specter-Hatch proposal sets time limits for concluding the litigation of capital habeas petitions that are subject to the "Powell Committee" procedures, but its specific standards on this point are different. Under section 8, a district court would have to decide a petition within 180 days of filing, subject to a possible 30 day extension, and 120 days would generally be allowed for a court of appeals' decision, following the conclusion of briefing. Like S. 3, section 8 lists criteria for the district court to consider in deciding whether to grant an extension of time which are in some respects unclear or of dubious relevance. However, since the application of these criteria could at most result in the extension of a basic 180 period by 30 days, their practical significance is limited.

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Finally, section 10 states a general severability rule for the bill.

Crime - Habeas Reform

SUBJECT: Provisions Affecting Federal Prisoners in the Pending Habeas Corpus Reform Proposals

The collateral remedy for federal prisoners is the motion remedy under 28 U.S.C. § 2255. This remedy plays essentially the same role in federal cases as state collateral remedies in state cases. Following the conclusion of direct review, a federal prisoner can collaterally attack his conviction and sentence by filing a § 2255 motion in the district court that sentenced him.

The § 2255 motion remedy provides an avenue for prolonging litigation almost indefinitely, since there is no time limit on filing, and the rejection of an initial motion does not necessarily bar the prisoner from filing later motions relating to the same judgment. The potential effects are particularly acute in capital cases, because the sentence cannot be carried out while litigation continues.

The Biden habeas proposal (in S. 1607 of the 103d Congress), which the Department has supported, is almost exclusively concerned with habeas corpus litigation by state prisoners, and incorporates no measures to limit delay or repetitive litigation by federal prisoners. However, both the current House-passed habeas bill (H.R. 729) and the current Specter-Hatch habeas bill in the Senate (S. 623) contain provisions limiting § 2255 motions by federal prisoners. The proposed changes are as follows:

I. Time Limits for Filing

S. 623 sets a one year time limit for filing § 2255 motions, normally running from the time when the judgment becomes final (i.e., the end of direct review). The start of the limitation period would be deferred if the offender could show cause for not filing earlier -- in essence, in case the legal or factual basis of the claim was not previously available or in case of unlawful governmental interference with filing. The House bill, H.R. 729, has substantially the same provision, but with a two year limitation period. Under current law, there is no time limit on filing § 2255 motions.

II. Limitation of Successive Motions

S. 623 also generally limits second or successive § 2255 motions to cases where the legal basis of the claim was not previously available, or the factual basis of the claim was not previously available and the newly discovered facts would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense. There is no comparable provision in the House bill affecting § 2255 motions. The Senate bill provision is more restrictive than existing standards, which generally just require a showing of cause and prejudice to justify bringing a second or successive motion.

- 2 -

III. Special Expedition Requirements and Time Limits for Concluding the Litigation of § 2255 Motions in Capital Cases

Both S. 623 and H.R. 729 provide that § 2255 motions by prisoners under sentences of death must be given priority by the district court and by the court of appeals over all noncapital matters. The House bill also apparently makes applicable to § 2255 motions in capital cases definite time limits for deciding the motion -- generally 60 days after final argument in the district court and 90 days after the conclusion of briefing in the court of appeals. There are no comparable provisions under existing law.

IV. Requiring a Certificate of Probable Cause to Appeal the Denial of a § 2255 Motion

Both S. 623 and H.R. 729 provide that a district court's denial of a § 2255 motion cannot be appealed unless a judge issues a certificate of probable cause (certifying that the movant has made a substantial showing of the denial of a federal right). This extends a limitation on appeals of denial of collateral relief which, under current law, only applies to habeas corpus petitions by state prisoners.

Analysis of the Specter-Hatch Habeas Proposal (S. 623)

S. 623 contains the current Specter-Hatch habeas proposal. The major features of this proposal are largely parallel to those of the habeas proposal in S. 3, but it corrects many of the formulation problems and idiosyncratic features in the earlier version. It is also closer in several respects to the House-passed habeas bill (H.R. 729).

The current proposal is sufficiently improved in comparison with S. 3, and sufficiently similar to the House bill, that it will almost certainly enjoy the general support of prosecutors. Hence, the Senate will probably pass this proposal or something very close to it. The Senate passed similar reforms in two earlier Congresses by large margins (in S. 1241 of the 102d Congress and in S. 1763 of the 98th Congress).

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petitioner has the burden of rebutting this presumption by clear and convincing evidence -- strengthening current 28 U.S.C. 2254(d), which conditions the presumption of correctness for state court fact-finding on several specifications concerning the state proceedings. The practical effect of these changes is limited, since application of 28 U.S.C. 2254(d) normally leads to deference by the habeas court to reasonable state court resolutions of factual questions under the existing standards.

Section 5 also states that a habeas court may not hold an evidentiary hearing on a claim whose factual basis was not developed in state court proceedings, unless cause is shown and the underlying facts of the claim would establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty. This is apparently intended to enact a strengthened version of the rule of Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992), under which a petitioner is generally not allowed to present additional evidence in federal habeas proceedings relating to a claim rejected by the state courts unless he can show cause and prejudice. However, the formulation of the proposed standard on this point in section 5 is inadequate. As drafted, the language is unclear as to whether it is supposed to govern evidentiary hearings on claims that were never raised or were procedurally defaulted in state court, or to govern taking additional evidence on claims that were decided on the merits by state courts (or both).

Finally, section 5 provides that appointment of counsel for indigents in federal habeas proceedings is to be governed by Criminal Justice Act (18 U.S.C. 3006A) standards, except as otherwise provided by rules promulgated by the Supreme Court. This preserves mandatory appointment of counsel as required by rule -- e.g., as provided in Rule 8(c) of the § 2254 Rules for cases in which an evidentiary hearing is held -- but would otherwise condition appointment on the court's determination that the interests of justice require appointment. This is consistent with the current approach for non-capital cases, but inconsistent with the provisions of 21 U.S.C. 848(q) that require the routine appointment of counsel for indigents in federal habeas review of capital cases.

Section 6 -- section 2255 amendments. Section 6 proposes a one-year time limit for applications for collateral relief by federal prisoners (§ 2255 motions), which is parallel to the time limit proposed for federal habeas filing by state prisoners in section 2 of the bill. The House habeas bill includes the same time limitation rule for applications for collateral relief by federal prisoners, except that the basic limitation period in the House bill is two years for federal prisoners' motions rather than one. Both bills provide for deferral of the start of the limitation period on a showing of cause.

Section 6 also includes provisions which are evidently intended to tighten the standards for bringing second and successive § 2255 motions, parallel to the bill's proposal for limiting second and successive habeas petitions by state prisoners (see discussion of section 7 below). However, the language on this point in section 6 is inadequate, and tends to conflate the § 2255 motion remedy with the remedy for presenting claims of newly discovered evidence under Fed.R.Crim.P. 33.

Section 7 -- limits on second and successive petitions.  
Section 7 tightens the standards for bringing second and successive federal habeas petitions by uniformly requiring that the petitioner raise a claim that was not previously presented and show cause for not having raised it earlier, and by requiring that the underlying facts of the claim must be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty. This is substantially the same as the standard proposed in the House bill for successive petitions in capital cases under the "Powell Committee" provisions.

Section 7 also provides that a successive petition must be initially presented to an appellate panel for a determination whether the petitioner has made a prima facie showing of satisfaction of the successive petition standard. The effectiveness of this approach as a screening mechanism is questionable, and it will take up additional time by running this threshold issue before appellate panels. However, the current version of this proposal in section 7 states that the appellate panel must make the required determination within 30 days of the filing of the motion. Hence, any delay resulting from this provision would be limited.

II. "Powell Committee" Procedures for Capital Cases

Section 8 contains the bill's version of the "Powell Committee" proposal, under which states have the benefit of stronger finality rules on federal habeas review if they extend appointment of counsel for indigents in capital cases to state collateral proceedings, and set standards of competency for such counsel.

Most of the features of this proposal are the same as or very similar to the corresponding features of the "Powell Committee" provisions in the House bill: Both bills propose a general 180 day time limit for federal habeas filing under these procedures, subject to tolling while state collateral review is taking place. Both bills provide for an essentially automatic stay of execution, continuing until the end of state collateral review. Both bills condition successive petitions on the satisfaction of the same restrictive standard (see discussion of section 7 above).

Like the House bill, section 8 of the current Specter-Hatch proposal sets time limits for concluding the litigation of capital habeas petitions that are subject to the "Powell Committee" procedures, but its specific standards on this point are different. Under section 8, a district court would have to decide a petition within 180 days of filing, subject to a possible 30 day extension, and 120 days would generally be allowed for a court of appeals' decision, following the conclusion of briefing. Like S. 3, section 8 lists criteria for the district court to consider in deciding whether to grant an extension of time which are in some respects unclear or of dubious relevance. However, since the application of these criteria could at most result in the extension of a basic 180 period by 30 days, their practical significance is limited.

Finally, section 8 provides that a habeas petition subject to the "Powell Committee" procedures cannot be amended after the state files its answer, except on grounds that would justify entertaining a successive petition.

III. Other Matters

Section 9 makes changes in 21 U.S.C. 848(q) which are evidently intended as conforming changes to certain amendments in section 5 (see the final paragraph in the discussion of section 5 above).

Section 9 also provides that ex parte requests to the court to authorize payment for expert and investigative services shall not be allowed unless a proper showing is made concerning the need for confidentiality. According to prosecutors, counsel representing state capital defendants in federal habeas proceedings currently use these ex parte proceedings to establish a relationship with the court and to pitch their cases before the state has had any contact with the court or an opportunity to respond. This part of section 9 evidently responds to that concern.

Finally, section 10 states a general severability rule for the bill.

6

## Summary of H.R. 729 as Passed by the House of Representatives

The House of Representatives passed H.R. 729 on February 8 by a vote of 297 to 132 (Cong. Rec. H1433-34). Title I of the bill contains habeas corpus reforms. Title II contains a change in federal death penalty procedures that the Department supports.

### I. Habeas Corpus Reform

Title I of H.R. 729 contains reforms affecting federal habeas corpus review of state criminal judgments and collateral review in federal criminal cases. It is generally designed to increase finality of judgments and reduce delay and repetitive litigation through time limitation rules, restrictions on successive petitions, and funding measures.

Subtitle A of title I contains general habeas corpus reforms, based on habeas reform proposals passed by the Senate in the 98th Congress and the 102d Congress. Subtitle B of title I contains a version of the "Powell Committee" recommendations for capital collateral litigation; somewhat different versions of this proposal were passed by the Senate in the 102d Congress, and by the House of Representatives in the 101st Congress. Subtitle C of title I requires funding for the states for capital habeas litigation (from discretionary Byrne Grant funds) in an amount equal to federal appropriations for capital resource centers. This provision was passed by both the Senate and the House in the 102d Congress, and was included in Senator Biden's habeas proposal that the Department supported in the 103d Congress. Finally, the House adopted two floor amendments to the bill, which are described below.

#### A. General Habeas Corpus Reform

Section 101 in subtitle A of title I of the bill contains a general one year time limitation rule for federal habeas filing. The limitation period would normally run from the end of direct review. However, the start of the period would be deferred in case of unlawful state interference with filing or the unavailability of the factual or legal basis of a claim at an earlier time, and the running of the limitation period would be tolled during state court review of the pertinent judgment or claim. Section 105 contains a comparable time limitation rule for collateral motions by federal prisoners. The reforms in these sections are intended to curb the lengthy delays in filing that now often occur in federal collateral litigation, while preserving the availability of review when a prisoner seeks review in a timely manner or can show cause for failing to apply earlier.

Sections 102 and 103 of the bill vest exclusive authority in the judges of the courts of appeals to issue certificates of probable cause to appeal a district judge's denial of a writ of habeas corpus. The objective is to reduce inefficiencies of the

7

- 2 -

current rules under which a petitioner is afforded duplicative opportunities to persuade first a district judge and then an appellate judge that an appeal is warranted, and under which an appellate court is required to entertain an appeal on a district judge's certification, even if the appellate judges believe that the certificate was improvidently granted. These sections also create a similar certificate requirement for appeals of denials of federal prisoners' collateral motions.

Section 104 provides that an application for a writ of habeas corpus may be denied on the merits despite the applicant's failure to exhaust state remedies. The objective is to avoid the waste of federal and state resources that now results when a prisoner presenting a hopeless petition to a federal court is sent back to the state courts to exhaust state remedies.

#### B. Special Procedures for Collateral Proceedings in Capital Cases

Subtitle B of title I contains a version of the recommendations for capital collateral litigation that were presented in the Report of the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases (Aug. 23, 1989) (the "Powell Committee" proposal).

In essence, the Powell Committee proposal provides for a quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening counsel rights for indigent capital defendants. States that want the benefit of the stronger finality rules would be required to appoint counsel to represent such defendants in state collateral proceedings, and to set competency standards for such counsel. This would fill the major gap in representation under existing law, since appointment of counsel is constitutionally required for the state trial and direct appeal, and appointment of counsel for indigents in federal habeas review of capital cases is required by 21 U.S.C. 848(q)(4)(B).

In states that meet this condition, the filing of federal habeas petitions in capital cases would be subject to a general 180 day time limit, and the filing of a second or successive federal habeas petition would be limited to situations in which: (1) cause is shown for failing to raise a claim in earlier proceedings, and (2) the alleged facts underlying the claim would cast doubt on the petitioner's guilt of the offense for which the capital sentence was imposed.

The version of the Powell Committee proposal in H.R. 729 preserves these essential features and incorporates some additional provisions. Like both the earlier Senate-passed version and the earlier House-passed version, it includes a provision (proposed 18 U.S.C. 2261) that enables the proposed procedures to be applied in states with unitary review systems,

- 3 -

such as California, in which direct review and collateral review are carried out concurrently in capital cases.

Like the earlier Senate-passed version, the version in this bill provides additional safeguards against delay by including time limits for concluding the litigation of capital habeas petitions in federal district courts and courts of appeals (proposed 28 U.S.C. 2262). Under the current bill's formulation, general time limits of 60 days and 90 days respectively would be set for decision by the district court and the court of appeals following the conclusion of final argument or briefing, subject to a possible 20 day extension for good cause.

In defining the class of claims that may be raised in a successive capital habeas petition on a showing of cause (proposed 28 U.S.C. 2257(c)(3)), the proposal in H.R. 729 limits successive petitions to claims whose underlying facts would be sufficient to show (clearly and convincingly) that, but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the capital offense. This is more definite and arguably more restrictive than the original Powell Committee proposal, which limited successive petitions to claims whose underlying facts, if proven, would be sufficient to undermine the court's confidence in the determination of the petitioner's guilt of the capital offense.

H.R. 729 also incorporates a provision (proposed 28 U.S.C. 2257(d)) that would generally limit the authority to grant a stay or other relief on a successive petition to the district judge and appellate panel that decided the initial petition, and to the en banc court of appeals. The object is to avoid the last-minute judge-shopping and litigation over stays that now often occurs.

#### C. Funding for Litigation of Federal Habeas Corpus Petitions in Capital Cases

Subtitle C of title I requires funding for the states for capital habeas litigation (from discretionary Byrne Grant funds) in an amount equal to federal appropriations for capital resource centers in the same year. Currently, the federal government provides substantial assistance to defense efforts in capital habeas litigation through the resource centers, but provides no support for prosecution efforts in such litigation.

#### D. Floor amendments

The House of Representatives adopted two amendments to H.R. 729 in the course of floor debate:

The Smith Amendment. One of the amendments, offered by Rep. Smith of Texas, amends the proposed Powell Committee procedures for capital cases. As reported by the Judiciary Committee, the

9

- 4 -

procedures involved an automatic stay of execution continuing through state court review and the litigation of an initial federal habeas corpus petition. The amendment changes this to provide that the automatic stay terminates if the defendant fails to make a substantial showing of the denial of a federal right in the federal district court or at any subsequent stage of review.

As amended, the procedures remain more favorable to defendants on this point than current law, since the defendant is entitled to a stay through the end of state court review (including the initial round of state collateral review). However, in relation to federal court review, the amendment would perpetuate the current approach of requiring the defendant to show grounds which justify the granting of a stay.

The amendment also makes a change in the proposed standards for obtaining appellate review of a district court's denial of a federal habeas corpus petition in a capital case that is subject to the Powell Committee procedures. As reported by the Judiciary Committee, the procedures waived the requirement of obtaining a certificate of probable cause in order to appeal the denial of an initial federal habeas petition. In contrast, the amendment perpetuates the approach of current law, under which the petitioner must obtain a certificate of probable cause (premised on a substantial showing of the denial of a federal right) in order to appeal a district court's denial of the writ.

The House passed the Smith amendment by a vote of 241 to 189 (Cong. Rec. H1432-33, Feb. 8, 1995).

The Cox Amendment. The second amendment adopted by the House (offered by Rep. Cox) requires deference on federal habeas review to a prior state court determination of a petitioner's claims, if the state court determination reflected a reasonable interpretation and application of federal law and a reasonable determination of the pertinent facts in light of the evidence presented in state proceedings. In relation to review of questions of law and questions of fact, this is little change from the status quo, since reasonable state court resolutions of legal and factual issues are generally accorded deference on federal habeas review under existing standards. The innovative feature of the amendment is the extension of deferential review under a reasonableness standard to questions of application of law to fact ("mixed questions of law and fact").

Under current law, the rule of Butler v. McKellar, 494 U.S. 407 (1990), effectively requires federal habeas courts to defer to state court decisions of questions of law that reflected reasonable interpretations of Supreme Court precedent at the time the judgment became final. The standard of review for questions of law under the Cox amendment is practically the same as the current rule.

- 5 -

Under current law, 28 U.S.C. 2254(d) creates a presumption of correctness for state court factual determinations on federal habeas review if a number of conditions are satisfied. The requirement under the Cox amendment that the state court factual determination must be reasonable in light of the evidence presented is comparable to the condition in 28 U.S.C. 2254(d) (8) that the state court factual determination must be "fairly supported by the record." The Cox amendment's rule concerning deference to state court factfinding is stronger in some respects than the current rule because (1) it does not include counterparts to a number of conditions that appear in 28 U.S.C. 2254(d), and (2) it unqualifiedly requires deference to reasonable state court determinations of factual matters -- assuming that the state court was also reasonable in its interpretation and application of the law -- rather than just creating a presumption of correctness. However, the practical effect of this change is limited, since application of the standards of 28 U.S.C. 2254(d) normally results in deference to reasonable state court factfinding.

The question whether review of mixed questions of law and fact should also be deferential was raised in the case of Wright v. West, 112 S.Ct. 2482 (1992). Under current standards, federal habeas courts have exercised independent judgment on such questions. However, the state argued that the discrepancy between de novo review for questions of application of law to fact and deferential review for purely legal and factual questions was unjustified. The Court found it unnecessary to resolve this issue under the facts of the case. The Cox amendment would resolve the issue in the manner urged by the state in Wright v. West.

The House passed the Cox amendment by a vote of 291 to 140 (Cong. Rec. H1427-28, Feb. 8, 1995). The Senate has previously passed by large margins substantially similar habeas reform provisions (in S. 1763 of the 98th Congress and S. 1241 of the 102d Congress).

## II. Federal Death Penalty Procedures Reform

Title II of H.R. 729 amends the death penalty provisions enacted by the Violent Crime Control and Law Enforcement Act of 1994 to direct the jury to impose a capital sentence if it finds that the aggravating factors in the case outweigh any mitigating factors. In our communication to the 103d Congress crime bill conference committee (Detailed Comments at 3), we endorsed this approach as providing "more effective safeguards against inconsistency in capital sentencing by providing better guidance for the jury concerning the circumstances in which a capital sentence should or should not be imposed." This position was reiterated in our views letter to the House Judiciary Committee on H.R. 3 (at p. 5).

(11)

## TITLE III - HABEAS CORPUS REFORM

Section 302 -- Filing Deadlines. This section imposes a 180-day limitations period for the filing of federal habeas corpus petitions. The limitations period applies in both capital cases and noncapital cases in which the State has offered the petitioner the assistance of counsel on State post-conviction review. The 180-day period begins to run from the time the petitioner's conviction becomes final on State direct review. It is generally tolled while the petitioner pursues State postconviction remedies, unless the petitioner fails to initiate postconviction review within 270 days in capital cases or 180 days in noncapital cases. A one-time 60-day extension of the period is available upon a showing of good cause.

Section 303 -- Stays of Execution in Capital Cases. This section provides a stay of execution in capital cases through the consideration of the first federal habeas corpus petition. Thereafter, a stay of execution may be granted only if the habeas petition on its face satisfies the requirements for successive petitions in section 305.

Section 304 - Limits on New Rules: Standard of Review. Section 304 prohibits the federal court from announcing or applying a new rule to grant relief to a habeas corpus petitioner. Rather, the petition must be considered under the prevailing legal standards at the time the conviction became final. Section 304 accordingly defines a new rule as one that changes the constitutional or statutory standards that prevailed at the time the petitioner's conviction and sentence became final on direct appeal. The section preserves the two narrow traditional exceptions for application of new rules that either constitute a watershed rule of criminal procedure or recognize that the State may not criminalize the petitioner's conduct.

Section 304 makes clear that federal courts generally are to undertake an independent review of claims of federal law. It also specifies that the State bears the burden of proving harmless error in federal habeas corpus review of state criminal convictions.

Section 305 - Limits on Successive Petitions. This section provides that in capital and noncapital cases, prisoners can bring a second or subsequent petition only if they show cause for not having brought the claim before and prejudice if their claim is not heard. To establish cause, a petitioner must show that the claim could not have been discovered previously through reasonable diligence or was unavailable as a result of official misconduct. To establish prejudice, a prisoner must show that the claim undermines confidence in his or her guilt or would have persuaded any reasonable sentencer not to impose the death penalty.

(12)

Section 306 - New Evidence. Section 306 allows prisoners in capital cases to present claims of actual innocence based on newly discovered evidence that the petitioner did not previously know about. The section authorizes relief if the prisoner presents factual allegations which, if proven and viewed in light of the evidence as a whole, would demonstrate that no reasonable fact finder would have found the petitioner guilty or eligible for the death penalty.

Section 307 -- Certificates of Probable Cause. Section 307 provides that a capital petitioner may appeal denial of relief in an initial habeas corpus petition without having to obtain a certificate of probable cause from the court of appeals.

Section 308 -- Provision of Counsel. This section sets standards and procedures for the provision of counsel to indigent defendants in capital cases. It provides for qualified counsel for state capital defendants throughout the litigation in state court -- two lawyers at trial, and one lawyer on appeal and in state postconviction review.

Section 308 establishes baseline standards of knowledge and experience for counsel to indigent defendants at all stages of state litigation. Those standards may be supplemented by a counsel certification authority, which will be established by the State and made up of lawyers with experience in capital defense.

The counsel certification authority will create a roster of qualified lawyers eligible to be appointed by the court for representation of indigent capital defendants. If no roster lawyers are available, the court may appoint any lawyer who meets the baseline standards established in section 308. The lawyers will be paid reasonable hourly fees, to be set by the State's highest court.

If the state court fails to appoint a lawyer from the roster (or a lawyer meeting the baseline standards if no roster lawyer is available), then the federal court on habeas review will not presume findings of fact made in the state court to be correct nor decline to consider a claim on the ground that it was not raised before the state court in the manner prescribed by state law.

Finally, section 308 authorizes the federal court to grant declaratory or injunctive relief in the event the State fails to establish a counsel certification authority of the State's highest court fails to establish reasonable fees to lawyers to indigent capital defendant.

Section 309 -- Capital Litigation Funding. Section 309 provides for matching grants to the States to fund the provision of counsel pursuant to section 308. The section authorizes federal grants of up to 75% of the additional costs imposed by section 308 during the first three years following enactment of

the Title, and 50% thereafter. Section 309 also provides for matching grant to the State to fund capital litigation prosecution in an amount equal to that allocated to capital resources centers.



# Department of Justice

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STATEMENT

OF

KEVIN DIGREGORY

DEPUTY ASSISTANT ATTORNEY GENERAL

CRIMINAL DIVISION

TO THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

FEDERAL HABEAS CORPUS REFORM

PRESENTED ON

MARCH 28, 1995

Mr. Chairman and Members of the Committee:

Thank you for allowing me the opportunity to present the views of the Department of Justice and the Administration concerning the habeas corpus reform provisions of S. 3 (§§ 508-10), and, although we have not had much time to study it, a revised version of this proposal which has recently been introduced as S. 623 by Senator Specter and Chairman Hatch.

We fully share the objectives of curbing the abuse of habeas corpus and other collateral remedies -- including particularly the acute problems of delay and prolonged litigation in capital cases. Habeas litigation, particularly of capital cases, takes too long and is fraught with abuse. For example, the average delay between sentence and execution in capital cases between 1977 and 1993 was 94 months -- almost eight years. Moreover, in the most recent years for which complete data are available, 1992 and 1993, the average delays from sentence to execution were 114 months and 113 months respectively -- over nine years. The most recent study providing information on the frequency of grants of relief in capital habeas cases found that relief was granted in 15% of all cases or, excluding the Ninth Circuit, in eight percent of habeas cases. [Kent S. Scheidegger, Overdue Process at A-13 (1995).]

The Department for many years has advocated habeas corpus reform that would reduce the delays that plague the current regime and erode the public's confidence in the criminal justice system while generally limiting petitioners to one round of habeas appeals. The Department remains strongly committed today to habeas corpus reform. The delays that plague the current system, particularly in capital cases, have no rational justification, they visit agony on victims' families, and they corrode public confidence in the criminal justice system. There can be no disagreement on the urgent need to curb delay.

The Department is on record as supporting the reforms proposed in title III of S. 1607 of the 103d Congress which, like S. 3 and S. 623, would reduce delay and redundancy in collateral litigation, primarily by imposing time limits for federal habeas filing, and by limiting successive habeas filings following the federal courts' rejection of an initial petition. S. 1607, unlike S. 3 and S. 623, includes provisions that will improve this process further, promoting both fairness and finality by ensuring qualified legal representation for defendants.

For example, under the provisions of S. 1607, the creation of a time limitation rule for federal habeas filing in non-capital cases is contingent on a state's appointment of counsel to represent defendants pursuing state collateral remedies. In contrast, the proposals in the current bills simply impose a

general one-year time limit for federal habeas filing, and do not prescribe any correlative obligation on states to go beyond current practices in providing representation for defendants.

Similarly, S. 1607 prescribes necessary minimum counsel standards for the representation of capital defendants in state proceedings; otherwise, a defendant could be put on trial for his life with limited appeal rights and with only an inexperienced, recent law school graduate to provide a defense. In contrast, S. 3 and S. 623 do not prescribe any counsel standards for the states in capital cases. They do provide an incentive for states to extend appointment of counsel to collateral proceedings in capital cases -- and to set some type of competency standards for such counsel -- by affording states which do so stronger finality rules on federal habeas review. However, at the end of the day, states are free to decide whether they wish to accept this "deal" at all -- removing any "mandate" from the states. We commend the proponents of S. 3 and S. 623 for proposing this incentive, but this alone is not enough.

The problem of delay in capital litigation has two fundamental causes, and a sensible approach to habeas corpus reform must target both of them. The first is repetitive and abusive habeas corpus petitions. The safeguards in S. 1607, and those in S. 3 and S. 623, would do much to attack this problem and generally ensure that petitioners get only "one bite at the

4

apple" -- one round of federal habeas review. We believe that the round of federal court review must be prompt, fair, and effective. Shortening the habeas corpus process need not mean giving short shrift to constitutional claims. This concept of "one bite at the apple" is an important reform. We support streamlining the process while preserving the traditional role of the federal courts by having one full round of federal habeas review.

The second major cause is error in state capital trials, which may result in federal habeas corpus relief many years down the line, sometimes at a point too late to allow effective retrial. The most effective safeguard against this problem is the representation of capital defendants by experienced and well-qualified counsel. Thus, improving counsel standards at the original trial and appeal is a critical measure to reduce delay and keep the trial "the main event" in the system.

S. 1607 includes counsel standards that will attack this fundamental problem by ensuring a minimum level of qualification and experience of counsel in state capital trials. S. 3 and S. 623, by contrast, do essentially nothing to address this part of the habeas corpus problem, providing no standards for counsel at trial and on appeal. The only measure in these bills to improve counsel is an incentive for states to extend appointment of counsel for indigent capital defendants to state collateral

proceedings, and to set some type of competency standards for appointed counsel at that stage. This simply does not address the need to provide effective representation at the most critical stage of the proceedings -- the trial.

I would emphasize again that effective counsel at the primary stages of litigation promotes error-free proceedings, and reduces the likelihood that reversible error will be found at later stages, potentially after years of protracted litigation. Conversely, a failure to provide effective representation for the defendant at the initial, critical stages is a false economy that complicates and undermines the proceedings, and jeopardizes the finality of any resulting judgment on review. The proposal of S. 1607 embodies a highly effective approach to minimizing the likelihood of error and resulting jeopardy to the integrity of judgments through provision of effective counsel at trial and on appeal, while the proposals in S. 3 and S. 623 do not move beyond existing law and practice in this area.

Moreover, the counsel standards embodied in S. 1607 serve fairness as well as finality concerns. Prosecutors agree that the criminal justice process is aided -- not hampered -- by qualified defense counsel. Qualified counsel help ensure fair and accurate determinations of which defendants should receive the death penalty.

6

Finally, S. 1607 is preferable for reasons of equity in funding for capital habeas litigation. The proposal in S. 1607 requires funding for the states for capital habeas litigation (from discretionary Byrne Grant funds) in an amount equal to federal appropriations for capital resource centers. The same provision has been passed by the Senate in § 4923 of S. 1241 in the 102d Congress, and by the House of Representatives in § 1108 of the first version of H.R. 3371 in the 102d Congress, in § 208 of the conference committee version of H.R. 3371 in the 102d Congress, and in § 121 of H.R. 729 in the current Congress. This reform is responsive to an imbalance in litigation resources that has resulted from one-sided federal funding of defense efforts in capital habeas litigation. However, this standard element of habeas reform proposals in recent Congresses has been omitted from S. 3 and S. 623.

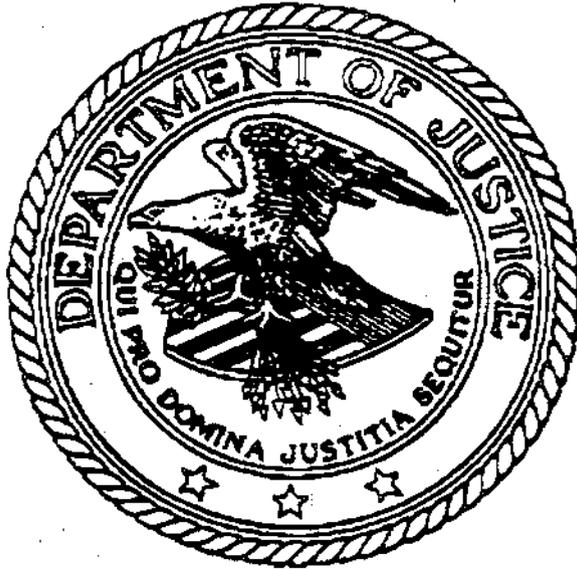
Prior to coming to the Justice Department, I served as a Chief Assistant to then State Attorney Janet Reno in Dade County, Florida. In that position, I tried many capital cases. I also supervised trial lawyers who litigated capital cases. It is simply a fact that those cases pose unique challenges for prosecutors and defense counsel. I can tell you that it is a prosecutor's nightmare to have as the opposition in a capital case an unqualified lawyer. It is an equally frightening prospect to consider that a vicious murderer who is plainly guilty and has been lawfully sentenced to death might be able to

7

drag out the imposition of sentence -- and the closure that sentence brings for the family members of the victim -- for eight or nine years or even longer.

Qualified defense counsel in capital cases not only serve fairness to defendants, but to the families and friends of murder victims as well. Qualified defense counsel at trial and on appeal will go a long way to reduce the potential agony victims' families suffer by reliving the horror and grief of the murder of a loved one at a second trial.

Hence, since we believe that sound reforms should effectively further all the important objectives in this area -- increased finality and assurance of fairness to defendants -- we recommend that habeas reform provisions including counsel standards like those proposed in S. 1607 be enacted. This will more effectively maintain and strengthen the role of federal habeas corpus in the protection of the federal constitutional rights of all the people.



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HABEAS PART II

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95-2

March 11, 1995

**RESOLUTION**

**HABEAS CORPUS REFORM**

**WHEREAS**, the National District Attorneys Association is composed of local prosecutors throughout the United States; and

**WHEREAS**, the National District Attorneys Association agrees with the conclusions of the Powell Committee Report that the current federal habeas procedures have "led to piecemeal and repetitious litigation and years of delay between sentencing and judicial resolution as to whether the sentence was permissible under the law. The resulting lack of finality undermines confidence in our criminal justice system;" and

**WHEREAS**, the current system of federal habeas corpus review in the federal courts has inflicted additional injury on victims of crime and on our communities; and

**WHEREAS**, the National District Attorneys Association had previously supported Senate 1607 despite serious concerns about key provisions because it represented the most effective reforms with some opportunity to be adopted in 1993; and

**WHEREAS**, current proposals in the Congress, H.R. 729 in particular, offer a vastly superior opportunity to remedy the abuses of federal habeas corpus review;

**NOW, THEREFORE BE IT RESOLVED** that the National District Attorneys Association by a unanimous vote of its Board of Directors:

A. Supports habeas corpus legislation, such as H.R. 729, which includes the following elements:

1. A standard of deference by the federal courts for state court adjudications which are reasonable in their interpretation and application of federal law as articulated by the United States Supreme Court. The National District

(2)

Attorneys Association finds no justification for the federal courts to relitigate such claims.

2. Provisions which strengthen the abuse of the writ doctrine, and reasonable restrictions on the filing of second or successive habeas corpus petitions. As the Powell Committee recognized, legislation should require that the underlying guilt or innocence of the petitioner be an element of any such claim.
  3. A 180 day time limitation for the filing of a capital habeas petition in federal court with up to a 60 day extension for showing of good cause.
  4. A provision for time limits on federal court consideration of capital habeas petitions with an express provision that federal courts shall give priority to capital cases.
  5. Provisions which preclude last minute stays in capital cases by individual judges who did not serve on the original appellate panel.
  6. A provision for equal funding to states which already receive federal funds for capital resources centers. This will enhance the quality of representation by providing the same funding for the state and defense counsel in capital cases under habeas corpus review.
  7. An appointment of counsel mechanism for trial and the post-conviction process which recognizes principles of federalism by giving the states wide latitude to establish their own mechanism for competency of counsel.
  8. The adoption of general habeas corpus provisions for non-capital cases which establish time limits and other measures which provide greater finality in the criminal justice system.
- B. The National District Attorneys Association also supports legislative reform to curtail the abuse of 21 U.S.C. 848(q). In particular, legislation should address the problems relating to ex parte proceedings and the lack of accountability concerning investigative expenses.
- C. The National District Attorneys Association will support additional reforms that further reduce the abuses in federal habeas corpus review processes.
- D. The National District Attorneys Association opposes changes in the habeas corpus statute which would:
1. Impose new mandatory counsel requirements or standards on the states beyond those required by the United States Constitution.

(2)

2. Repeal the requirement that claims must first be exhausted in state courts prior to being considered by the federal habeas corpus except for the provisions in H.R. 729 authorizing dismissal of a petition on the merits without remanding to the state courts.
  3. Establish additional avenues for new evidence claims notwithstanding opportunities for such claims to be raised in the state judicial system, and expand habeas review beyond violations of the U.S. Constitution contrary to long established judicial precedent.
  4. Require the imposition of uniform state appellate procedures on the states, such as a unitary review system, as an element of the "opt-in" feature of the capital habeas provisions. The states have sufficient incentive to adopt reform of their own judicial procedures and oppose any federal legislative mandate with regard to this issue.
  5. Repeal, restrict, or weaken the non-retroactivity doctrine of *Teague v. Lane*, *Burder v. McKeller* and other related cases.
- E. The National District Attorneys Association states that any previous support for proposals, such as S. 1607, inconsistent with the elements of H.R. 729, described in paragraph A, above, is formally withdrawn.

Adopted by the Board of Directors, March 11, 1995 (Kiawah Island, South Carolina)

**HABEAS CORPUS**Summary of Current Status:

The crime legislation passed by the House last month includes a title on habeas corpus reform, a summary of which is attached. In brief, the proposal includes strong delay-reduction measures, very little in the way of counsel provisions (only an incentive to provide some lawyer in state collateral proceedings), and a provision to preclude review of state court judgments on habeas corpus unless the state court determination was arbitrary or unreasonable. The habeas corpus provisions in the Senate Crime Bill, S.3, are, in broad strokes, the equivalent of the House legislation. Although negotiations now underway between Senators Hatch and Specter may produce a somewhat more moderate proposal in the Senate, it is likely that the Congress will pass a habeas corpus reform package along the lines of the proposal passed by the House.

The Department to date has maintained its support for the "Biden Bill," S.1607, which we helped negotiate with state and local prosecutors and congressional leaders in the 103rd Congress. In brief, the Biden bill combines strong delay-reduction measures with detailed provisions to ensure qualified counsel in state capital trials and direct appeals. The Biden bill also maintains independent, as opposed to deferential, federal court review of most state court decisions, and permits petitioners to bring claims of "factual innocence" on federal habeas corpus. The Biden bill drew fire from all sides, but particularly the right, and eventually was pulled from consideration.

2

Summary of Habeas Corpus Reform Provisions of H.R. 729

The House of Representatives passed H.R. 729 on February 8 by a vote of 297 to 132 (Cong. Rec. H1433-34). Title I of the bill contains habeas corpus reforms.

Subtitle A of title I of H.R. 729 contains general habeas corpus reforms -- applicable to both non-capital and capital cases -- that aim at reducing repetitive litigation and delay. Specific reforms include (1) a general one year time limit for federal habeas filing by state prisoners and a comparable time limitation rule for collateral motions by federal prisoners, (2) a rule of deference on federal habeas review under which federal courts would not review state court decisions that are not arbitrary or unreasonable, and (3) reforms relating to exhaustion of state remedies and appeals of district courts' denials of habeas corpus relief that are designed to promote more efficient litigation.

Subtitle B of title I contains a version of the "Powell Committee" proposal for capital collateral litigation, which provides stronger finality rules for states that extend appointment of counsel for indigent capital defendants to state collateral proceedings and set competency standards for such counsel. Specific features of this proposal in H.R. 729 include (1) an essentially automatic stay of execution through the end of state court review, (2) a general 180 day time limit for federal habeas filing, (3) a limitation of second and successive federal habeas petitions to cases where the petitioner can show cause for failing to raise a claim at earlier stages, and the underlying facts of the claim would show clearly and convincingly that (but for constitutional error) no reasonable factfinder would have found the petitioner guilty of the capital offense, and (4) specific time limits for federal district and appellate courts to decide capital habeas petitions following the conclusion of final argument or briefing.

Subtitle C of title I requires funding for the states for capital habeas litigation (from discretionary Byrne Grant funds) in an amount equal to federal appropriations for capital resource centers in the same year.

The habeas corpus reform proposal in S. 1607 of the 103d Congress that we have supported includes the same equal funding provision as subtitle C of title I of H.R. 729, but differs significantly on other matters. Two distinctions are particularly noteworthy: First, S. 1607 contains extensive counsel requirements and provisions, designed to ensure effective representation for defendants at all stages of adjudication and review. In contrast, H.R. 729 incorporates only a requirement of extending appointed counsel and setting some type of competency standards in state collateral proceedings in capital cases as a condition of the stronger "Powell Committee" finality rules.

- 2 -

Second, S. 1607 provides explicitly for the exercise of independent judgment by federal habeas courts on questions of law and questions of application of law to fact. In contrast, H.R. 729 forbids a court to grant the writ with respect to any claim that was decided on the merits in the State proceedings unless the state court decision was arbitrary or unreasonable.

SUMMARY AND ANALYSIS OF H.R. 729  
(HOUSE REPUBLICAN HABEAS CORPUS BILL)

This memorandum provides a brief summary of H.R. 729, which passed the House of Representatives on February 8 by a vote of 297-132.

I. Habeas Corpus Reform

Title I contains reforms affecting federal habeas corpus review of state criminal judgments and collateral review in federal criminal cases. It is generally designed to increase finality of judgments and reduce delay and repetitive litigation through time limitation rules, restrictions on successive petitions, and funding measures.

A. General Habeas Corpus Reform Section 101 in subtitle A of title I of the bill contains a general one year time limitation rule for federal habeas filing. The limitation period would normally run from the end of state court direct and collateral review, but the start of the period would be deferred in case of unlawful state interference with filing or the unavailability of the factual or legal basis of a claim at an earlier time. Section 105 contains a comparable time limitation rule for collateral motions by federal prisoners. These provisions are intended to curb the lengthy delays in filing that now often occur in federal collateral litigation.

Sections 102 and 103 of the bill vest exclusive authority in the judges of the courts of appeals to issue certificates of probable cause to appeal a district judge's denial of a writ of habeas corpus. The objective is to reduce inefficiencies of the current rules under which a petitioner is afforded duplicative opportunities to persuade first a district judge and then an appellate judge that an appeal is warranted, and under which an appellate court is required to entertain an appeal on a district judge's certification, even if the appellate judges believe that the certificate was improvidently granted. These sections also create a similar certificate requirement for appeals of denials of federal prisoners' collateral motions.

Section 104 provides that an application for a writ of habeas corpus may be denied on the merits despite the applicant's failure to exhaust state remedies. It provides an exception, in other words, to the normal rule under which federal courts will require a petitioner to exhaust state remedies before hearing a federal habeas corpus petition. The idea behind this provision is to permit more expeditious resolution of collateral review of apparently meritless petitions.

B. Special Procedures for Collateral Proceedings in Capital Cases

Subtitle B of title I contains a version of the recommendations for capital collateral litigation that were

presented in the Report of the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases (Aug. 23, 1989) (the "Powell Committee" proposal).

In essence, subtitle B offers strong delay reduction measures to states that provide indigent capital defendants with competent counsel in state collateral proceedings.<sup>1</sup> (Most indigent capital defendants are currently provided counsel for state collateral proceedings, but it is not required under Federal law.) In states that meet this condition, the filing of federal habeas petitions in capital cases would be subject to a general 180-day time limit, and the filing of a second or successive federal habeas petition would be limited to situations in which: (1) cause is shown for failing to raise a claim in earlier proceedings, and (2) the alleged facts underlying the claim would be sufficient to show (clearly and convincingly) that, but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the capital offense.

The treatment of counsel standards in capital cases is the starkest contrast between H.R. 729 and the Biden proposal, which the Administration has supported. The Biden proposal includes fairly strong standards and requirements for counsel for indigent capital defendants in their trials and appeals. We have argued that, given the high rate of relief granted on constitutional grounds by federal habeas courts reviewing state capital proceedings, improved representation at the state trial and appeal is crucial both to delay reduction and fairness, and is a key to keeping the trial the "main event" in the system. H.R. 729, in contrast, includes no provision concerning counsel in capital trials and direct appeals.

The other noteworthy provision of this subtitle resorts to the unusual measure of imposing specific time limitations on federal courts. The provision generally requires the district court to issue a decision on a capital habeas petition within 60 days, and the court of appeals within 90 days, following the conclusion of final argument or briefing, subject to one possible 20-day extension for good cause.

Finally, subtitle B incorporates a provision (proposed 28 U.S.C. 2257(d)) that would generally limit the authority to grant a stay or other relief on a successive petition, at the district court and court of appeals levels, to the district judge and

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<sup>1</sup> Subtitle B also includes a provision that enables the proposed procedures to be applied in states with unitary review systems, such as California, in which direct review and collateral review are carried out concurrently in capital cases.

appellate panel that decided the initial petition, and to the en banc court of appeals. These requirements are designed to provide an orderly alternative to the judge-shopping and frantic last-minute litigation over stays that now occur when the execution of a capital sentence is imminent.

C. Habeas Litigation Funding Subtitle C in title I requires funding for the states for capital habeas litigation (from discretionary Byrne Grant funds) in an amount equal to federal appropriations for capital resource centers in the same year. This provision also appears in the Biden habeas proposal.

D. Floor Amendments to the Habeas Provisions in H.R. 729

The House of Representatives adopted two amendments to the habeas provisions in H.R. 729:

1. The Smith Amendment

As reported by the House Judiciary Committee, H.R. 729 combined its imposition of a filing deadline for federal habeas corpus petitions with a provision for an automatic stay of execution through state court review and the litigation of an initial federal habeas corpus petition in cases subject to the proposed Powell Committee procedures (i.e., in states that provide indigent capital defendants with competent counsel in state collateral proceedings). The Smith Amendment, which passed the House by a vote of 241-189, changes this feature to provide that the automatic stay terminates if the defendant fails to make a substantial showing of the denial of a federal right in the federal district court or at any subsequent stage of review. Current law includes neither a filing deadline nor an automatic stay of execution; without an automatic stay, a defendant is not guaranteed to receive as much time as the deadline permits because an execution may proceed before the filing deadline has expired.

The amendment also makes a change in the proposed standards for obtaining appellate review of a district court's denial of a federal habeas corpus petition in a capital case that is subject to the Powell Committee procedures. As reported by the Judiciary Committee, the procedures waived the requirement of obtaining a certificate of probable cause in order to appeal of the denial of an initial federal habeas petition. In contrast, the amendment would require the petitioner to obtain a certificate of probable cause (premised on a substantial showing of the denial of a federal right) in order to appeal a district court's denial of the writ. Thus, as amended, H.R. 729, while imposing the strong delay-reduction measures not found in current law, nevertheless would, like current law, require the petitioner to obtain a certificate of probable cause in order to appeal the denial of an initial petition.

## 2. The Cox Amendment

The second, and far more noteworthy, amendment adopted by the House imposes a "standard of deference to state judicial decisions." In general, it precludes a federal court from granting a habeas corpus petition with respect to any claim decided by the state court unless the state court decision was "arbitrary or unreasonable." Thus, on federal habeas corpus review, even for review of mixed questions of law and fact (for which review is now fully independent), the question for the federal court would be not whether the state court decision was a correct interpretation of federal constitutional law, but rather whether it was an arbitrary or unreasonable one. This standard is akin to the highly deferential one that the courts apply in reviewing determinations of federal agencies. It therefore would represent a fundamental change in the law of habeas corpus.

The Cox amendment resurrects probably the most controversial element of prior habeas corpus reform proposals, which was the imposition of a "full and fair" regime of federal habeas corpus review (under which courts would deny review so long as the claim had received "full and fair" adjudication in the state courts). The House bill as introduced was noteworthy in not including a "full and fair" provision. (The Senate Bill, S.3, does contain such a provision.) The "full and fair" debate has been longstanding and particularly intense. Proponents of the measure argue that it is necessary to preserve comity and finality and that it would make the standards of habeas review the same for, on the one hand, mixed questions of law and fact and, on the other, for purely legal and for purely factual questions (under current law, the standard of review for mixed questions of law and fact is more searching than for the other types of questions). Opponents see it as a radical attack on the traditional principle of independent federal review of constitutional claims and point out that the category of mixed questions of law and fact is an extremely large and significant category. The Biden bill, which represents the Administration position, contains a repudiation of the "full and fair" position in favor of a general principle of one round of independent federal habeas corpus review.

The Cox amendment, which passed the House by a vote of 291-140, would appear to be even more far-reaching than other "full and fair" proposals in two respects. First, the Cox amendment requires that the decision be based on an arbitrary or unreasonable interpretation "of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States." This means, for example, that if a state court decision was directly contrary to the decisions of several federal courts of appeals on all fours with it and was supported by no federal court decision, it would nevertheless be unreviewable on federal habeas corpus. Second, the "arbitrary or

unreasonable" standard is at least arguably more deferential than the "full and fair" standard, particularly given the case law that has developed in the administrative law area where a similar regime applies.

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*Crimin Bill -  
Habeas Reform*

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HABEAS

\* 14 Democrats voted for full and fair in 1991:

BOREN  
BREAUX  
BUMPERS  
BYRD  
CAMPBELL (House)  
DECONCINI  
FORD  
HEFLIN  
HOLLINGS  
JOHNSTON  
LEIBERMAN  
NUNN  
REID  
SHELBY

They need to be made aware of the NDAA endorsement and of the support of many state AGs for the Biden habeas compromise

GUNS

BRADY BILL

\* 8 Democrats who voted against the Brady bill in 1991:

BAUCUS  
BREAUX  
CAMPBELL (House)  
DECONCINI  
DORGAN (House)  
HEFLIN  
HOLLINGS  
JOHNSTON  
LEAHY  
SHELBY

\* 3 Democrats who had other "anti-Brady" votes:

BRYAN  
CONRAD  
REID

ASSUALT WEAPONS

\* 11 Democrats who voted against DeConcini in 1991:

BAUCUS  
BINGAMAN  
BREAUX  
BRYAN  
EXON  
FORD  
HEFLIN  
HOLLINGS  
JOHNSTON  
REID  
SHELBY

**Key State Attorneys General to be called:**

**TO GAIN THEIR SUPPORT FOR THE BIDEN HABEAS REFORM BILL:**

**Robert Butterworth (Florida -- Florida DAs oppose the Biden bill)  
(904) 487-1863**

**Dan Morales (Texas -- said to be close to opposing the Biden bill)  
(512) 463-2191**

**Jimmy Evans (Alabama)  
(205) 242-7300**

**Winston Bryant (Arkansas)  
(501) 682-2007**

**Susan Loving (Oklahoma)  
(405) 521-3921**

**Michael J. Bowers (Georgia)  
(404) 656-4585**

# Crime Bill Says Condemned Get Hearing for New Facts

■ Law: Clinton package would reverse recent high court decision saying Death Row inmates are not entitled to review of new evidence by U.S. judge.

By DAVID G. SAVAGE  
TIMES STAFF WRITER

**WASHINGTON**—A little-noticed provision of President Clinton's anti-crime package would for the first time give Death Row inmates a right to a hearing before a federal judge if they can show strong new evidence that they are not guilty.

The proposed change in the federal Habeas Corpus Act would reverse a recent Supreme Court ruling that declared inmates facing execution are not entitled to an eleventh-hour hearing to submit "newly discovered evidence of actual innocence."

On a 5-4 vote, the high court said that federal judges can review legal issues but not factual questions involving alleged new evidence. Shortly after the January ruling, the Texas inmate who brought the case, Leonel Herrera, was put to death. State officials did not grant him a hearing to consider testimony from witnesses who claimed that Herrera's brother, not the defendant, had committed the murders.

Last year Roger Coleman, a Virginia coal miner who was convicted of murdering his sister-in-law, was also put to death without getting a hearing in federal court on his lawyers' claim that another man in the small town had confessed to the murder.

The issue also figures in the highly publicized case of Gary Graham, a Texas Death Row inmate who claims to be a victim of mistaken identity. Because federal courts cannot consider such claims, Graham's fate rests with state officials in Texas.

In recent years, the Supreme Court has moved to cut off federal appeals by state Death Row inmates. Prosecutors and crime victims complain that inmates should not be permitted to stretch out their appeals, a process that at times lasts for decades.

For the most part, Clinton's crime bill proposes to write these new restrictions into law. For example, the bill sets a 180-day time limit for state Death Row prisoners to raise appeals in the federal courts. After those appeals are considered and rejected, the inmate would be barred from filing new appeals.

But an exception is made if new evidence comes to light.

"This is an important development, and it is the first time it will be part of the habeas law," said Deputy Associate Atty. Please see **CRIME, A6**

## CRIME: Bill Says Condemned Get Hearings for New Facts

Continued from A5  
Gen. Harry Litman, who worked on the death penalty provisions of the crime package.

"It sets a high standard because we don't want to open it up for abuse. But it says if you are innocent, you can get a hearing," he said.

The legislation does not limit the number of such hearings an inmate can receive.

The death penalty proposals were introduced in the Senate earlier this month by Judiciary Committee Chairman Sen. Joseph R. Biden Jr. (D-Del.). They are part of a larger anti-crime package unveiled by Clinton on Aug. 11.

Besides revising the rules for handling appeals, the bill makes 47 more offenses—ranging from murdering a federal official to the terrorist killing of an American citizen abroad—punishable by a federal death penalty.

**B**iden and Administration aides hailed the death penalty proposals as a compromise after years of wrangling between state prosecutors and death penalty opponents.

While prosecutors want to halt seemingly endless appeals, opponents of capital punishment say that the long litigation often stems from the failure of accused mur-

derers to get well-trained lawyers in the first place.

Especially in rural Southern communities, death penalty opponents say, the appointed lawyers often fail to investigate the facts and lack basic knowledge of the law concerning capital cases. Years of appeals then follow because the defendant's rights were short-changed during the trial.

The crime bill would require states to provide attorneys who have experience investigating and defending clients in capital cases. As a trade-off, the states are promised that appeals will be limited.

"The theme is fairness and finality," Litman said. "You get qualified counsel up front," he said, but afterward defendants get just one chance to appeal in the federal system.

Although groups representing both prosecutors and defense lawyers have had some words of praise for the Administration's bill, neither side is entirely happy.

**R**ichard Dieter, executive director of the Death Penalty Information Center, which opposes capital punishment, says that the bill endorses the highly conservative decisions of the Supreme Court under Chief Justice William H.

Rehnquist.

"These decisions put severe restrictions [on appeals]. Why would you want to write that into law?" he asked.

On the other side, California Atty. Gen. Dan Lungren denounced the Administration plan, saying that it opens up too many loopholes for inmates to appeal.

If enacted, the bill will "promote more delay and litigation. Make no mistake about it, these provisions are worse than current law," Lungren declared.

Senate and House committees expect to begin hearings on the proposals in the fall.

*Crime - Warren's Veterans*

# U.S. Satellite Business May Be Grounded by Curbs on China

By RONE TEMPEST  
TIMES STAFF WRITER

**B**EIJING—The Clinton Administration's imposition of trade sanctions against Chinese aerospace and defense industries was intended as a slap against China for allegedly violating an international arms accord by supplying missile components to Pakistan.

Among the first likely to suffer from the sanctions, however, is not the Chinese government but the Los Angeles-based Hughes Aircraft Co. and its subsidiaries, which over the past two years have built a business of several hundred million dollars selling communications satellites to China and launching them into space on Chinese rockets.

It is precisely this satellite trade that was the focus of the narrow, two-year sanctions imposed Wednesday on China by the Administration. State Department spokesman Mike McCurry said the sanctions would primarily affect sales of satellites—possibly worth \$400 million to \$500 million—and transfers of satellite technology, both areas dominated by Hughes and other American companies.

"This is not going to help our business," complained Michael K. Sun, the Beijing-based vice president of Hughes Network Systems, a subsidiary with several major satellite communications contracts pending with the Chinese. "I have a big contract that I could lose because of this. Every time I meet with Chinese officials they give me a 15-minute lecture complaining about American policy. I support the American government, but sometimes you have to ask the question why you as an American company get hit more than anyone else."

Sun was not the only member of Beijing's American business community to complain.

"What I regret most," said another American attracted to China by the booming business climate, "is non-commercial issues spilling over and affecting our commercial environment."

**T**he partnership between Hughes Space and Communications, the world's largest producer of commercial satellites, and the state-owned China Great Wall Industry Corp., which makes the Long March 2-E rocket used to launch the satellites, is a great source of national pride for the Chinese.

Each launch is followed with the intensity that attended the initial space missions in the United States. Successful satellite missions are followed by celebratory banquets in grand hotels.

The partnership has also been a spectacular source of profit for Hughes, which hoped to benefit even more from China's ambitious goals to launch 20 more satellites by the year 2000.

But among the other products manufactured by the giant China Great Wall Industry Corp. are the short-range M-11 missiles and components that U.S. intelligence agencies say China is secretly selling to Pakistan. As a result, both the Clinton Administration and the George Bush Administration seized on the satellite trade as a weapon in their attempts to curb Chinese behavior on weapons proliferation and human rights.

Chinese Foreign Ministry spokesman Wu Jianmin on Thursday described the sanctions as "entirely unjustifiable."

The Chinese Embassy in Washington issued a statement denouncing the sanctions as "a wrong judgment based on inaccurate intelligence."

After the Tian An Men Square crackdown in June, 1989, President Bush froze all military sales to China. In May, 1991, citing Chinese exports of missile technology to Third World countries, Bush refused to grant waivers to American companies, including Hughes, that wanted to sell components for China's domestically produced satellite, Dong Fang Hong 3.

**B**ut Bush reversed himself 15 months later and granted waivers for the Dong Fang Hong 3 and five other satellite projects involving China.

Bush said the decision was based on assurances from Chinese authorities that they would adhere to the Missile Technology Control Regime guidelines limiting exports of missiles and missile technology.

In addition, State Department spokesman Richard Boucher justified allowing the satellite trade on national economic grounds. "These exports will help reduce our trade deficit with China and provide jobs for American workers," Boucher said.

In this improved business climate, Hughes Network Systems, a subsidiary specializing in digital communications equipment and closed satellite communication networks, was among many American and Western firms that opened offices in the high-rise complexes sprouting on the edges of Beijing.

In the past year, Hughes Network has negotiated contracts with the Chinese state oil ministry and state banking systems for interactive communication systems.

Among the other tenants in the office complex that houses Hughes executive Sun, an American citizen born in Beijing and raised in Taiwan, are Canadian and French firms vying for the same Chinese communication satellite business. In the wake of the latest in the series of U.S. sanctions, Sun is afraid they might get it.

"If U.S. policy continues to act like a yo-yo," Sun said, "it just gives another excuse for those who do not want to buy from us."