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CRIME BILL

PHOTOCOPY
PRESERVATION



SCOTT MARSHBARGER
ATTORNEY GENERAL

(617) 727-2200

The Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place,
Boston, MA 02108-1698

October 5, 1993

Honorable Janet Reno
Attorney General of the United States
Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
224 Senate Dirksen Office Building
Washington, D.C. 20510-6275

Dear Attorney General Reno and Chairman Biden:

We, the undersigned Attorneys General write to commend you for the "hands on" leadership you have provided with respect to the President's anti-crime package.

As the chief law enforcement officers in our respective states, we believe that the filing of this bill is an important step in addressing the problem of crime which plagues our society. We applaud you for recognizing that state and local law enforcement officials must be provided with additional resources in order to effectively combat the violence which pervades so much of our daily lives. We therefore wholeheartedly support provisions in the bill which will put 50,000 more police officers on the street, and provide state and local law enforcement authorities with \$2.4 billion in FY 1994 for criminal enforcement and prevention programs including improved prison-based drug treatment and the creation of boot camps for young, non-violent offenders. We welcome the specific focus in the bill on gang violence, safe schools, sexual violence, child abuse and gun crimes.

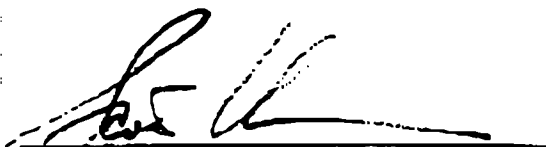
We also appreciate your efforts to develop a habeas corpus reform proposal which seeks to embody the twin concepts of finality and fairness which are essential to an effective system of criminal justice in America. The language incorporated into the President's anti-crime package is a substantial improvement over the provision appearing in the 1991 crime bill conference report which many of us opposed. The current version, which applies to capital and non-capital cases, establishes a six-month filing deadline for habeas petitions in most cases; ensures, consistent with Teague v. Lane, that petitions for habeas corpus are judged by the constitutional standards that prevailed at the time of the convictions; sharply curtails the abuse occasioned by successive petitions including mandating an expeditious review of any successive petition; preserves the Strickland v. Washington standard for claims of ineffective assistance of counsel; assures indigent capital defendants competent counsel paid for in part with new federal funds; and provides funding to states equal to that received by capital resource centers. All of these factors are of key importance to prosecutors and the victims of crime we represent. It is for those reasons that we support the habeas reform provisions.

While there are those of us who might wish for certain language changes in the habeas provisions, we recognize that the current version was the product of arduous negotiations over an extended period of time and reflects the tough compromises and difficult balances which are necessary to secure passage of effective anti-crime legislation. It is time for all of us to realize that a continuing stalemate over this issue will prevent the anti-crime package with all its laudable features from being enacted into law. We, like the American people, believe gridlock over the crime bill must end now.

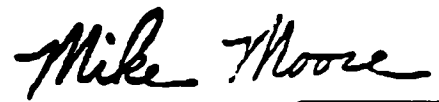
The issues contained in the anti-crime package are of enormous significance to many diverse groups. Other proposals have already been, or may be advanced which may have merit, or at the very least, should be discussed. We believe that public discussion (such as in the form of committee hearings) is essential so that all sides of the issues are aired freely and openly. We therefore urge Congress and the Administration to afford individual Attorneys General and other interested parties the opportunity to express their views on the various provisions and proposals.

We pledge to work with you and members of Congress in making effective anti-crime legislation a reality.

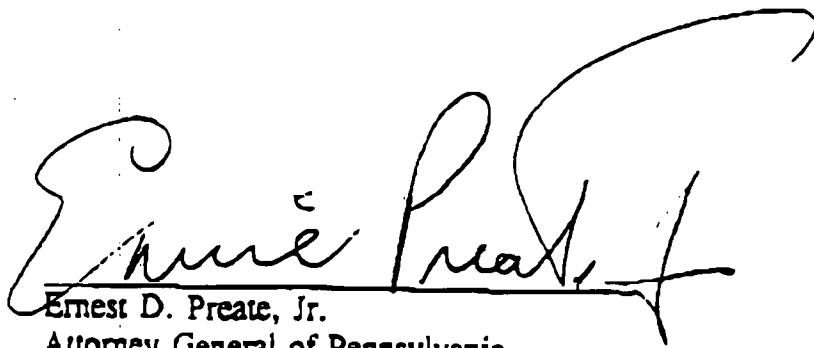
Sincerely,



Scott Harshbarger
Attorney General of Massachusetts



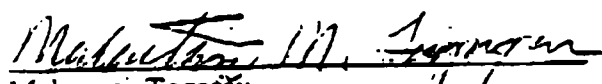
Mike Moore
Attorney General of Mississippi



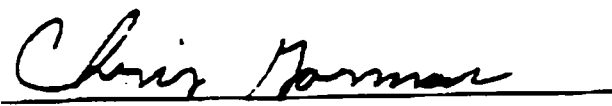
Ernest D. Preate, Jr.
Attorney General of Pennsylvania



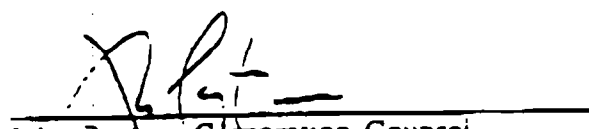
Charles M. Oberly, III
Attorney General of Delaware



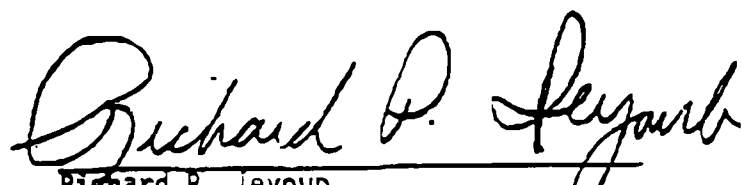
Malaetasi Togafāu
Attorney General of American Samoa



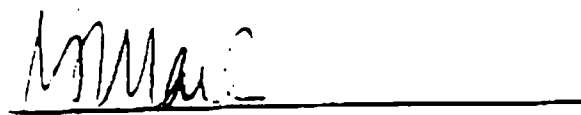
Chris Gorman
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John Payton, Corporation Counsel
District of Columbia



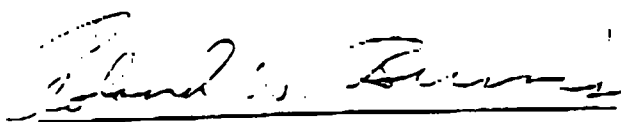
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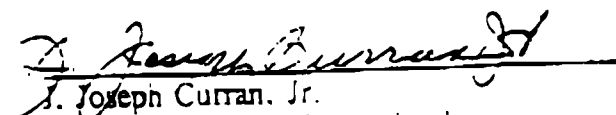
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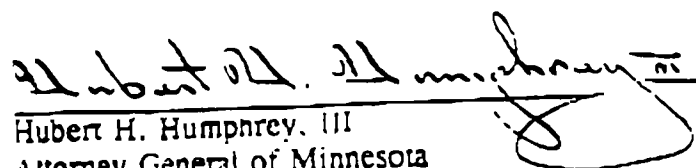
Roland W. Burnis
Attorney General of Illinois



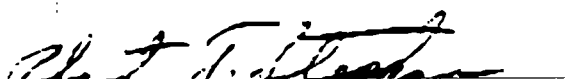
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Attorney General of Maryland



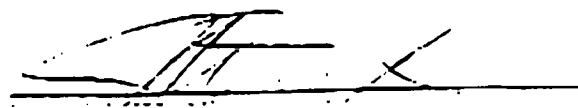
Pamela Fanning Carter
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Hubert H. Humphrey, III
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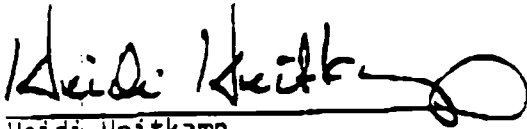
Robert T. Tate



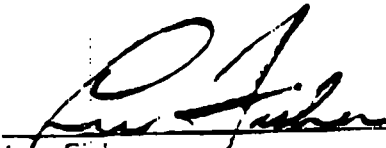
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Fred DeVesa
Acting Attorney General
State of New Jersey



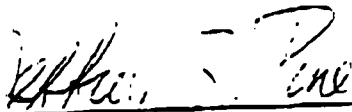
Heidi Heitkamp
Attorney General of North Dakota



Lee Fisher
Attorney General of Ohio



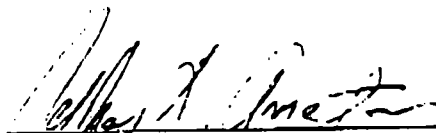
Pedro R. Pierluisi
Attorney General of Puerto Rico



Jeffrey B. Pine
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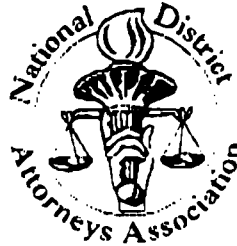
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*Office of the President***August 5, 1993**

**Honorable Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275**

Dear Senator Biden:

Six weeks ago when you and Attorney General Janet Reno asked the National District Attorneys Association to work with you in redrafting a federal habeas corpus reform package, we were hopeful but frankly not optimistic. As you know, for years, there was a widely held consensus that reform was needed to curtail abuse of habeas procedure by reducing unnecessary delay and avoiding endlessly repetitive litigation. There was, however, broad disagreement on how to accomplish these goals.

After meeting with you personally and after extensive work by staff, I am pleased that we can announce together today that the NDAA, you as Chairman of the Senate Judiciary Committee, and the Office of the Attorney General of the United States, have agreed upon a reform package that we all believe meets the goals outlined above.

We believe the proposal improves the administration of justice and is worthy of support. In the NDAA's view, the proposal's potential for reducing delay and repetitious litigation in both capital and non-capital cases is so significant that it outweighs the objections many have to mandatory counsel standards in death penalty cases. In short, we believe the proposal is fair to defendants while at the same time promoting finality of convictions so that victims and their families will not continue to be victimized.

I join with District Attorney Robert Macy of Oklahoma City, Oklahoma, Chairman of our Board, in looking forward to working with you in gaining passage of this breakthrough reform measure.

Sincerely,

William C. O'Malley
William C. O'Malley
President

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-8275

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TITLE II - HABEAS CORPUS REFORM

SEC. 201. SHORT TITLE.

This title may be cited as the "Habeas Corpus Reform Act of 1993".

SEC. 202. FILING DEADLINES

Section 2242 of title 28, United States Code, is amended --

(1) by substituting for the existing heading the following: "Filing of habeas corpus petition; time requirements; tolling rules";

(2) by inserting "(a)(1)" before the first paragraph, "(2)" before the second paragraph, "(3)" before the third paragraph, and "(4)" before the fourth paragraph; and

(3) by amending the third paragraph as follows:

"Leave to amend or supplement the petition shall be freely given, as provided in the rules of procedure applicable to civil actions."

(4) by adding at the end the following:

"(b) Any application for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after --

"(1) the last day for filing a petition for writ of certiorari in the United States Supreme Court on direct appeal or unitary review of the conviction and sentence, if such a petition has not been filed within the time limits established by law; or

"(2) the date of the denial of a writ of certiorari, if a petition for a writ of certiorari to the highest court of the State on direct appeal or unitary review of the conviction and sentence is filed, within the time limits established by law, in the United States Supreme Court; or

"(3) the date of the issuance of the mandate of the United States Supreme Court, if on a petition for a writ of certiorari the Supreme Court grants the writ and disposes of the case in a manner that leaves the sentence undisturbed.

"(c) In cases in which a sentence of death has been imposed, the time requirements established by section (b) shall be tolled --

"(1) during any period in which the State has failed to appoint counsel as required in section 2258 of this chapter;

"(2) during a period, not inconsistent with state law and not to exceed 180 days, for appointed counsel to prepare the initial petition for state post-conviction relief;

"(3) during any period in which an initial petition for post-conviction relief is pending before a state court of competent jurisdiction. For the purposes of this section, the initial petition shall not include a petition that is dismissed without prejudice to the petitioner;

"(4) during any period in which the state has not provided notice, following direct appeal or after the time for filing an appeal has expired, to the defendant of the time requirements established by section (b) and of the defendant's options under subsections (c)(1) and (2);

"(5) during any period in which the petitioner is incompetent;

"(6) during an additional period not to exceed 60 days, if, upon motion for the extension, counsel makes a showing of good cause for the inability to file the habeas corpus petition within the period established by this section."

"(d)(1) Notwithstanding the filing deadline imposed by subsection (b), if a petitioner under a sentence other than death has filed either --

"(A) a petition for post-conviction review in state court; or

"(B) a request for counsel for post-conviction review,

before the expiration of the period described in section (b), the petitioner shall have an additional 180 days to file a petition under this chapter upon completion of the

state court review.

"(2) The time requirements established by section (b) shall not apply in cases in which a sentence other than death has been imposed unless --

"(A) the state has provided notice to the petitioner of the time requirements established by this section and of the availability of counsel as described in subparagraphs (B) and (C). Such notice shall be provided orally at the time of sentencing and in writing at the time the petitioner's conviction becomes final, except that in cases in which the petitioner's conviction becomes final within 30 days of sentencing, the state may provide both the oral and the written notice at sentencing. In all cases, the written notice to petitioner shall include easily understood instructions for filing a request for counsel for state post-conviction review;

"(B) the state provides counsel to the petitioner upon the filing of a request for counsel for state post-conviction review; and

"(C) the state provides counsel to the petitioner, if a request for counsel for state post-conviction review is not filed, upon the filing of a petition for post-conviction review.

"(3) The time requirements established by section (b) shall be tolled in cases in which a sentence other than death has been imposed --

"(A) during any period in which the petitioner is incompetent; and

"(B) during an additional period, not to exceed 60 days, if the petitioner makes a showing of good cause."

SEC. 203. STAYS OF EXECUTION IN CAPITAL CASES.

Section 2251 of title 28, United States Code, is amended --

(1) by inserting "(a)(1)" before the first paragraph and "(2)" before the second paragraph; and

(2) by adding at the end the following:

"(b) In the case of a person under sentence of death, a warrant or order setting an execution shall be stayed upon application to any court that would have jurisdiction over a

habeas corpus petition under this chapter. The stay shall be contingent upon reasonable diligence by the applicant in pursuing relief with respect to such sentence and shall expire if --

"(1) the applicant fails to file for relief under this chapter within the time requirements established by section 2242(b);

"(2) upon completion of district court and court of appeals review under section 2254 of this chapter, the application is denied and --

"(A) the time for filing a petition for a writ of certiorari expires before a petition is filed;

"(B) a timely petition for a writ of certiorari is filed and the Supreme Court denies the petition; or

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

"(3) before a court of competent jurisdiction, in the presence of counsel, where the applicant is indigent, and after being advised of the consequences of the decision, the applicant competently and knowingly waives the right to pursue habeas corpus relief under this chapter.

"(c) If any one of the conditions in subsection (b) has occurred, no federal court thereafter shall have the authority to enter a stay of execution unless the applicant has filed a habeas corpus petition that satisfies, on its face, section 2244(b). A stay granted pursuant to this subsection shall expire if, after the grant of the stay, one of the conditions specified in subsection (b)(2) or (3) occurs."

SEC. 204. LIMITS ON NEW RULES

(1) Chapter 153 of Title 28, United States Code, is amended by adding at the end the following:

"Sec. 2257. Law applicable.

"(a) Except as provided in paragraph (b), in cases subject to this chapter, the court shall not announce or apply a new rule to grant habeas corpus relief.

"(b) A court considering a claim under this chapter shall apply a new rule when --

"(1) the new rule places a class of individual conduct beyond the power of the criminal law-making authority to proscribe, or prohibits the imposition of a certain type of punishment for a class of persons because of their status or offense; or

"(2) the new rule constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

"(c) As used in this section, a "new rule" is a rule that changes the constitutional or statutory standards that prevailed at the time the petitioner's conviction and sentence became final on direct appeal."

(2) Section 2254(a) of title 28, United States Code, is amended by adding at the end the following:

"Except as to claims arising under the Fourth Amendment to the Constitution, the federal courts, in reviewing an application under this section, shall review de novo the rulings of a state court on matters of federal law, including the application of federal law to facts, regardless of whether the opportunity for a full and fair hearing on such federal questions has been provided in the state court. In the case of a violation that can be harmless, the state shall bear the burden of proving harmlessness."

SEC. 205 - LIMITS ON SUCCESSIVE PETITIONS

Section 2244(b) of title 28, United States Code, is amended to read as follows:

"(b) a claim presented in a habeas corpus petition that was not timely presented in a prior petition shall be dismissed unless --

"(1) the petitioner shows that --

"(A) the failure to raise the claim previously was the result of interference by state officials with the presentation of the claim, in violation of the Constitution or laws of the United States;

"(B) the claim relies on a new rule that is applicable under section 2256 and was previously unavailable; or

"(C) the factual predicate for the claim could not have been discovered previously through the exercise of reasonable diligence; and

"(2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to --

"(A) undermine the court's confidence in the factfinder's determination of the applicant's guilt of the offense or offenses for which the sentence was imposed; or

"(B) demonstrate that no reasonable sentencing authority would have found an aggravating circumstance or other condition of eligibility for a capital or non-capital sentence, or otherwise would have imposed a sentence of death."

SEC. 206. NEW EVIDENCE.

Chapter 153 of title 28, United States Code, is amended by adding the following:

"Sec. 2256. Capital cases; actual innocence

"For purposes of this chapter, a claim arising from a violation of the Constitution, laws, or treaties of the United States shall include a claim by a person under sentence of death that is based on facts which, if proven and viewed in light of the evidence as a whole, would be sufficient to demonstrate that a reasonable fact finder would not have found the petitioner guilty of the offense, or that a reasonable sentencing authority would not have found an aggravating circumstance or other condition of eligibility for the sentence. Such a claim may not be presented if the facts underlying the claim were actually known to the petitioner during the litigation of a prior petition

in which the claim was not raised. In all other respects, the claim shall be subject to the rules applicable to claims under this chapter, except for section 2244(b)."

SEC. 207. CERTIFICATES OF PROBABLE CAUSE

The third paragraph of section 2253, title 28, United States Code, is amended by adding at the end the following:

"However, an applicant under sentence of death shall have a right of appeal without a certificate of probable cause, except after denial of a habeas corpus petition filed under section 2244(b).".

Sec. 208. PROVISION OF COUNSEL.

(a) In General. Chapter 153 of title 28, United States Code, is amended by adding at the end the following:

"Sec. 2258. Counsel in capital cases; State court

"(a) Counsel. A State in which a sentence of death may be imposed under state law shall provide legal services to --

"(1) indigents charged with offenses for which capital punishment is sought;

"(2) indigents who have been sentenced to death and who seek appellate, post-conviction, or unitary review in State court; and

"(3) indigents who have been sentenced to death and who seek certiorari review of State court judgments in the United States Supreme Court.

"(b) Counsel Certification Authority. A State in which a sentence of death may be imposed under state law shall, within 180 days after the effective date of this Act, establish a state counsel certification authority, which shall be comprised of members of the bar with substantial experience in, or commitment to, the representation of criminal defendants in capital cases, and shall include balanced representation from each segment of the state's criminal defense bar, such as a statewide defender organization, a capital case resource center, local public defender's offices and the private criminal defense bar.

"(c) Duties of Authority; Certification of Counsel. The counsel certification authority shall --

- "(1) establish and publish standards governing the qualification of counsel, which shall include:
 - "(A) knowledge and understanding of pertinent legal authorities regarding issues in capital cases;
 - "(B) skills in the conduct of negotiations and litigation in capital cases, the investigation of capital cases and the psychiatric history and current condition of capital clients, and the preparation and writing of legal papers in capital cases;
 - "(C) the minimum qualifications required by subsection (d); and
 - "(D) any additional qualifications relevant to the representation of capital defendants;
- "(2) establish application and certification procedures for attorneys who possess the qualifications established pursuant to subparagraph (1);
- "(3) establish application and certification procedures for attorneys who do not possess all the qualifications established pursuant to subparagraph (1), but who possess, in addition to the minimum qualifications required by subsection (d), additional resources (such as an affiliation with a publicly funded defender organization) and experience which enable them to provide quality legal representation comparable to that of an attorney possessing the qualifications established pursuant to subparagraph (1);
- "(4) establish application and certification procedures, to be used on a case by case basis, for attorneys who do not necessarily possess the minimum qualifications required by subsection (d), but who possess other extraordinary experience and resources which enable them to provide quality legal representation comparable to that of an attorney possessing the qualifications established pursuant to subparagraph (1);
- "(5) publish a current roster of attorneys certified pursuant to subparagraphs (2) or (3) to be

appointed in capital cases;

"(6) establish and publish standards governing the performance of counsel in capital cases, including standards which proscribe abusive practices and mandate sound practices in order to further the fair and orderly administration of justice;

"(7) monitor the performance of attorneys certified pursuant to this subsection; and

"(8) delete from the roster any attorney who fails to meet the qualification or performance standards established pursuant to this subsection."

"(d) Minimum Counsel Standards. All counsel certified pursuant to subparagraphs (2) or (3) of subsection (c) or appointed pursuant to subsection (f) shall possess, in addition to any qualifications required by State or local law, the following minimum qualifications:

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FLEXIBILITY, WHERE NECESSARY

"(1) familiarity with the performance standards established by the counsel certification authority;

"(2) familiarity with the appropriate court system, including the procedural rules regarding timeliness of filings and procedural default; and

"(2) in the case of counsel appointed for the trial or sentencing stages, 5 years litigation experience as a member of a bar, consisting of:

"(A) prior experience as lead or sole counsel in no fewer than --

"(i) 10 criminal jury trials; or

"(ii) 20 jury trials, of which no fewer than five were criminal jury trials

which were tried to a verdict or to a deadlocked jury; and

"(B) prior experience as lead or sole counsel in no fewer than five criminal jury trials involving crimes of violence against persons, punishable by imprisonment of over one year, which were tried to a verdict or to a

deadlocked jury; and

"(C) prior experience as --

"(i) lead or sole counsel in the trial of at least fewer than one capital case; or

"(ii) co-counsel in the trial of no fewer than two capital cases

which were tried through sentencing;

"(3) in the case of counsel appointed for appellate or unitary review, 3 years litigation experience as a member of a bar, consisting of:

"(A) prior experience as lead or sole counsel in no fewer than 10 appeals, of which no fewer than five were criminal felony appeals, which were fully briefed; and

"(B) prior experience as lead or sole counsel in no fewer than five oral arguments in criminal felony appeals; and

"(C) prior experience as --

"(i) lead or sole counsel in the appeal or unitary review of at least one capital case; or

"(ii) co-counsel in the appeal or unitary review of no fewer than two capital cases;

"(4) in the case of counsel appointed for post-conviction proceedings, 3 years litigation experience as a member of a bar, consisting of:

"(A) prior experience as lead or sole counsel in no fewer than --

"(i) 10 full evidentiary hearings in criminal cases, no less than two of which occurred during post-conviction review; or

"(ii) five appeals in criminal felony cases;

"(C) prior experience as --

"(i) lead or sole counsel in the trial

(through sentencing), appeal or post-conviction review of at least one capital case; or

"(ii) co-counsel in the trial (through sentencing), appeal or post-conviction review of no fewer than two capital cases.

"(e) Appointment of Certified Counsel. The State court shall appoint at least two attorneys to represent an indigent at trial, and at least 1 attorney to represent an indigent at the appellate, unitary or post-conviction review stage, including --

"(1) a lead counsel who is on the roster published pursuant to subsection (c)(5);

"(2) a defender organization or resource center which shall designate appropriate attorneys affiliated with the organization, including a lead counsel who is on the roster; or

"(3) a lead counsel certified pursuant to subsection (c)(4).

The State court may appoint additional attorneys upon a showing of need.

"(f) If there is no roster of attorneys published pursuant to subsection (c)(5), or if no attorney on the roster can accept the appointment, and if no attorney certified pursuant to subsection (c)(4) has been appointed, the State court shall appoint at least 2 attorneys to represent an indigent at trial, and at least 1 attorney to represent an indigent at the appellate, unitary or post-conviction review stage, including --

"(1) a lead counsel who possesses the minimum qualifications required by subsection (d); or

"(2) a defender organization or resource center which shall designate appropriate attorneys affiliated with the organization, including a lead counsel who possesses the qualifications required by subsection (d).

No attorney shall be appointed pursuant to this subsection unless the State court has first conducted an evidentiary hearing on the record wherein the court determines, after the lawyer gives sworn testimony and

presents documentary proof that the lawyer possesses each of the qualifications required by subsection (d), that the lawyer possesses the requisite qualifications. In making its determination, the Court must, as to each qualification required by subsection (d), make a specific finding on the record that the attorney possesses the qualification.

- "(g) Prior to appointing counsel pursuant to this section, the State court shall inquire as to whether counsel maintains a workload which, by reason of its excessive size, will interfere with the rendering of quality representation or create a substantial risk of a breach of professional obligations.
- "(h) If an individual entitled to an appointment of counsel declines to accept an appointment, the State court shall conduct, or cause to be conducted, a hearing, at which the individual and counsel proposed to be appointed shall be present, to determine the individual's competence to decline the appointment, and whether the individual has competently and knowingly declined it.
- "(i) If a state court fails to appoint counsel in a proceeding specified in subsection (a), or if a state court in a proceeding described in subsection (a) --
- (i) appoints counsel whose name is not on the roster published pursuant to (c)(5); or
 - (ii) appoints counsel who has failed to present a certification issued pursuant to (c)(4); or
 - (iii) when subsection (f) applies, fails to hold the hearing, receive the requisite testimony and proof, or make the determination required by subsection (f) --

a Federal court, in an action under this chapter, shall neither presume findings of fact made at such proceeding to be correct nor decline to consider a claim on the ground that it was not raised in such proceeding at the time or in the manner prescribed by state law. In no circumstances other than those described in this subsection shall a determination of non-compliance with this section provide a basis for relief to a petitioner proceeding under this chapter.

- "(j) No attorney appointed to represent a prisoner in State post-conviction proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made, unless the prisoner and attorney expressly request continued representation.
- "(k) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the highest State court with jurisdiction over criminal cases shall, after notice and comment, establish hourly rates for the compensation of attorneys appointed pursuant to this section that are reasonable in light of the qualifications of attorneys appointed and the local practices for legal representation in cases reflecting the complexity and responsibility of capital cases. For each attorney appointed pursuant to this section, the State court shall separately order compensation at the rates set by the highest State court for the hours the attorneys reasonably expended on the case and for reasonable expenses paid for investigative, expert, and other reasonably necessary services.
- "(l) The ineffectiveness or incompetence of counsel appointed pursuant to this section during State or Federal post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 of this title. This limitation shall not preclude the appointment of different counsel at any phase of State or Federal post-conviction proceedings.
- "(m) Nothing in this section changes the constitutional standard governing claims of ineffective assistance of counsel pursuant to the sixth amendment to the Constitution of the United States. A determination of noncompliance with this section (as opposed to the facts which support such a determination) shall not provide a basis for a claim of constitutionally ineffective assistance of counsel."

add effective date

SEC. 209. CAPITAL LITIGATION FUNDING

Title 42, United States Code, is amended by adding the following:

"Sec. 3765. Capital Litigation funding.

"(a) Notwithstanding any other provision of this title, the Director shall provide grants to the States for the purpose of supporting litigation pertaining to Federal habeas corpus petitions in capital cases. The total funding available for such grants within any fiscal year shall be equal to the funding provided to capital resource centers, pursuant to Federal appropriation, in the same fiscal year.

"(b) Specific funding provision to come

SEC. 210. TABLE OF SECTIONS

OUTLINE OF HABEAS DEAL WITH DAS

STATUTE OF LIMITATIONS

-- 180 day statute in capital and non-capital cases where state has offered counsel for state habeas proceedings.

Capital: To run from end of direct appeal with tolling provisions during state habeas.

-- 6 months for state habeas lawyer to prepare petition

-- tolled during pendency of state habeas petition

-- additional 60 days upon showing of good cause

-- amendments to petitions to be freely given, per civil procedure rules

Non-capital: only applies where state offers lawyer for state habeas.

-- when sentence final, state provides notice of statute and written notice of right to counsel, including easily understood instructions for filing request for counsel, for state habeas

-- non-capital petitioner files either state habeas petition or request for counsel w/in 6 months after conviction final

-- federal, 180 day statute starts running at conclusion of state habeas

-- additional 60 days upon showing of good cause

STAYS OF EXECUTION

-- automatic through first federal habeas

-- in successive petitions, if petition on its face satisfies requirements

RETROACTIVITY/NEW RULES

-- Court not to announce or apply new rule.

Definition: "new rule" is a rule that changes the constitutional or statutory standards that prevailed at the time the petitioner's conviction and sentence became final on direct appeal.

-- two Teague traditional exceptions to non-retroactivity: decriminalization of conduct; watershed rule of criminal procedure

-- explicit rejection of full and fair: review of state court rulings re: law and law as applied to fact shall be de novo.

-- Where violation can be harmless, state bears burden of proving harmlessness

SUCCESSIVE PETITIONS

-- applies both to capital and noncapital

Petitioner must show:

-- cause: factual predicate could not have been discovered previously through reasonable diligence; or new rule; or official misconduct.

and

-- prejudice:

-- guilt: court's confidence in determination of guilt undermined

-- sentence: applies both to aggravating and mitigating. No reasonable sentencing authority would have found aggravating circumstance or other condition of eligibility, or otherwise would have imposed sentence of death.

NEW EVIDENCE

Federal habeas relief for claim by death-sentenced petitioner if based on facts which would demonstrate that reasonable fact finder would not have found petitioner guilty, or would not have found aggravating circumstance or other condition of eligibility for sentence.

COUNSEL STANDARDS

-- state to establish certification authority, comprised of defense lawyers. Authority to develop qualification and performance standards, publish roster of attorneys qualified to be appointed.

-- judge to appoint from roster; if no roster attorneys available, to appoint lawyer possessing certain specific baseline qualifications.

-- 2 lawyers at trial; 1 for appeal, post-conviction.

-- penalty: habeas relief (no presumption of correctness re: facts, no procedural default) if judge fails to appoint lawyer from roster, or lawyer who fails to meet base-line qualifications (to be determined at evidentiary hearing prior to appointment).

-- state high court, after notice and comment, to set reasonable hourly rates. Lawyers to be compensated for hours reasonably expended and for investigative, expert and other reasonably necessary services.

-- Federal declaratory or injunctive action for establishment of counsel certification authority and establishment by high court of hourly rates and reasonableness of rates.

-- Federal funding for portion of increased costs on states as result of counsel provisions.

Date: 03/29/95 Time: 08:50

State Attorneys General Back Bill Limiting Death Row Appeals

WASHINGTON (AP) A Senate proposal to limit federal appeals by death row inmates of their state sentences is garnering support from attorneys general from four states and a Democratic senator.

Texas Attorney General Dan Morales said the bill ``will go a long way toward restoring public confidence in our legal system.''
``Justice should be more than fair and impartial; it should also be swift and certain,' ' Morales, a Democrat, said Tuesday at a Senate Judiciary Committee hearing.

Expressing similar views were Attorneys General Daniel Lungren of California, Gale Norton of Colorado and Don Stenberg of Nebraska, all Republicans.

The bill, authored by Senate Judiciary Committee Chairman Orrin Hatch, R-Utah, and Sen. Arlen Specter, R-Pa., aims to reduce the filing of repetitive death row petitions. They said their bill would enable the carrying out of most death sentences, if they are upheld in court, within two years of final state court action.

Hundreds of some 3,000 people on death rows in this country have been awaiting execution for more than a decade.

Sen. Edward Kennedy, D-Mass., said the new bill improves on a measure passed by the House last month by allowing federal courts to correct state court decisions that are contrary to federal law.

``I hope we can continue to improve this legislation as it moves through the Senate,' ' Kennedy said. ``There is ... a serious concern that innocent people will be executed. No system of justice, however wise its judges and juries, can eliminate this possibility.

``Congress should not rush to discard centuries of Anglo-American legal history simply because current public opinion polls report that the death penalty is popular,' ' he said.

The House bill, part of the Republicans' big anti-crime package, would impose a one-year limit for death row inmates to file appeals of their state sentences and would require juries to impose death sentences in certain circumstances.

The Senate version would impose a six-month limit in cases in which the state provided defense attorneys. It also would restrict the filing of repetitive petitions by requiring that any second petition be approved by a U.S. Court of Appeals for filing in federal district courts.

Attempts to limit such habeas corpus appeals were dropped from last year's \$30 billion crime law as proponents of various versions shied away from the controversial issue that killed a major crime bill three years ago.

On Monday, the Supreme Court turned down the appeal of Texas killer Clarence Allen Lackey, who's been on death row for 17 years. Lackey had contended that executing him now, after all his years on death row, would be cruel and unusual punishment.

Justice John Paul Stevens, in a two-page essay accompanying the court's order, urged judges across the nation to study the sweeping death-penalty issue.

APNP-03-29-95 0855EST

17028



Jose Carda

Office of Policy Development
United States Department of Justice
10th and Constitution Ave. NW
Washington, D. C. 20530

TO:

Ron Jones

FAX: ()

FROM:

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Total Pages (excluding this cover):

7

Additional Messages:

Give me any comments

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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.

from
views
Mr. { 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.

*from views
fr.* 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

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

*from
S. 1607
H.R.*

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

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 more effectively maintain and strengthen the role of federal habeas corpus in the protection of the federal constitutional rights of all the people.

U.S. HOUSE OF REPRESENTATIVES**COMMITTEE ON THE JUDICIARY****SUBCOMMITTEE ON CRIME AND CRIMINAL JUSTICE**

362 Ford House Office Building
Washington, D.C. 20515

DATE: 4-27
TIME: 1:45

PLEASE DELIVER THE FOLLOWING FAX TRANSMITTAL:

TO: Jose Carda

FROM: Andy Fois

TOTAL NUMBER OF PAGES, INCLUDING COVER SHEET: ?

COMMENTS: A little on habeas plot on
3 figures targeted to enterprise 20-cs
List of mail items to follow.

IF YOU DO NOT RECEIVE TOTAL TRANSMISSION, PLEASE CONTACT THE
SUBCOMMITTEE ON CRIME AND CRIMINAL JUSTICE
(202) 226-2406, FAX (202) 225-3788

This facsimile was transmitted from a Xerox Telecopier 7020.

Bob

Conference Rep does following on Habeas:

1. Limits time for filing a habeas petition to one year after conviction becomes final. Presently is no time limit.
2. Limits number of petitions allowed to one except for certain narrow exceptions such as newly discovered evidence or state interference. Present law has no limits on numbers of petitions.
3. Sets certain performance and qualifications standards for trial and appellate counsel representing indigents.
4. Narrows current Teague doctrine so that new rules are never applied retroactively. Teague allows certain retroactive applications. However, the bill goes back to a narrower, pre-Teague definition of new rule. Thus there are more "old rules" that will be applied retroactively under the bill than under current law.

Repl. bill has a Full and fair adjudication provision that has effect of gutting habeas. If state gave defendant a "full and fair" hearing, even if the result is wrong, federal court can do nothing.

Specter also has pushed and gotten Senate approval of strict time limits on the courts for deciding habeas petitions. Thus district court gets about 90 days, circuit court a certain number, etc. Courts hate it. It is unrealistic and elevates speed and finality above interest in correct and just result. Also would require courts to divert time and effort from other cases. Remember, habeas is all about appeals: these guys are all in prison by definition and have already been convicted. Specter would divert resources from trying and convicting new offenders - some of whom are on the streets. This is all about paperwork and papercuts.

- Andy

Amendment Number 7 - HYDE: HABEAS CORPUS

- Hyde amendment will be broken into three votes:
 - one to replace core habeas provisions
 - second to strike Berman race claims
 - third on funding for resource centers
- there will be 40 minutes of debate equally divided
- the major habeas issue is about federal review of state capital convictions. There are less than 2,500 prisoners on state death rows. It is those few cases that the debate centers on and how fast they will be executed. It is not uncommon for these cases to take 10 - 12 years from conviction to execution.
- Habeas is a highly political and rhetorical issue that has nothing to do with preventing crime or punishing offenders. ALL these defendants, capital or otherwise, are already convicted, sentenced and in jail.
- At the rate of one execution a day every day it would take seven years to execute all the prisoners on death row today.
- Approximately 40% of state capital cases are reversed on federal habeas review, usually because of ineffective assistance of trial counsel.
- Committee bill balances reform and habeas rights. Took recommendations from ABA, Powell Commission and Judicial Conference.
- The major issues involve limits on time periods for filing, successive petitions, retroactivity of new rules of law, competence of trial counsel, and the full and fair adjudication provision in Hyde amendment.

Highlights of the core bill and comparison to Hyde:

1. The bill sets deadline of one year from when state death sentence becomes final for filing Federal habeas petition. Present law has no deadline. (Hyde amendment says 180 days - even Judge Thomas says that may not be enough time.)
2. It severely limits petitioners' ability to bring successive petitions. Present law provides little restrictions. (Hyde amendment would not allow successive petition unless the claim went to actual guilt or innocence. Thus a petitioner could never bring second petition challenging propriety of death sentence even if it was based on newly discovered evidence.)
3. The bill eliminates last minute stays of execution.

4. The bill prohibits retroactive application of new rules of law in Federal habeas proceedings. Defines new rules as basic breaks in precedent that could not have been anticipated. So, only "old law" applies retroactively. State interest in finality is supported. This is the Teague issue and will be very controversial. Hyde amendment makes no change. Thus new rules, which are defined very broadly, are retroactively applicable in only two very narrow circumstances.

5. Ensures that states provide competent counsel throughout the capital litigation process and sets down modest qualification and performance standards. This is a key issue. Most cases that are reversed and delayed are due to incompetent counsel. Lots of horror stories. Reps. oppose any counsel competency requirements.

6. Retains present tough law on procedural default (ie if your lawyer goofs, you pay the price) and presumption of correctness of a state finding of fact.

7. Hyde puts tight time limits on judges' consideration of the petitions. Judges, of course, oppose that. Comm. bill does not restrict judges' consideration.

8. Hyde amendment bars Federal habeas review of any claim that has had "full and fair adjudication" in State court. He has added new language to this version that seeks to narrow the effect of this provision.

9. Hyde creates an opt-in system for Federal habeas review of State capital cases. Thus, a state gets to take advantage of the new provisions only if it provides counsel on state collateral review.

- The Berman provision allows prisoners on death row one year to file race-based claims and have them decided (designed to reach Batson claims about prosecutors using race to keep people off juries) if they have not been previously decided on the merits. This review will be notwithstanding other procedural bars and restrictions. Hyde amendment strikes this provision.

- Hyde amendment also revisits the issue of equal funding for prosecutors as for Federal capital resource centers. The Bryant amendment requires states to give the capital resources centers the same funding they provide to the prosecution of both state and federal habeas corpus petitions.

- Committee bill is a pretty tough version - in some ways more conservative than the final Hughes/Derrick bill that Dems offered on the floor last year. Strikes good balance between reform and restrictions and maintenance of federal habeas rights.

THE WHITE HOUSE

WASHINGTON

June 25, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: RON KLAIN *AK*
SUBJECT: HABEAS CORPUS REFORM

This memorandum outlines the major issues in the habeas reform debate and our options for resolving them.

I. BACKGROUND ON HABEAS REFORM

Prosecutors have been urging reform of federal habeas corpus proceedings for three decades. The reforms are of two sorts: substantive reforms, that limit the scope of federal court review of state death sentences; and procedural reforms, aimed at making these cases move more quickly and towards greater finality.

Until 1990, the defense bar resisted any reforms. For example, they rebuffed Justice Powell's reform plan, which would have provided free lawyers for habeas petitioners in exchange for procedural limits on such appeals (e.g., time limits on filing, and a strict "one-bite-at-the-apple" rule). Reform proposals from Senate moderates, like Bob Graham, were also rejected.

In 1989-90, a series of conservative Supreme Court rulings altered the dynamic on habeas reform. By making it harder for death row inmates to win habeas relief, the Court lessened pressure on the right to compromise to win legislative habeas reform -- and created interest on the left in seeing reform debated, as a vehicle for reversing the adverse Court decisions.

The 1991 Crime Bill Conference Report included a sweeping habeas reform provision, drafted by Democrats (Biden and Brooks). It limited the time for filing petitions to one year, and limited death row inmates to a single petition (with few exceptions), in exchange for free lawyers to prepare these petitions. It also gave death row inmates some relief from the adverse Supreme Court decisions. Largely because of this final provision, state and local prosecutors bitterly opposed the Conference Report.

II. CAMPAIGN STATEMENTS

During the campaign, you said you would have signed the Crime Bill Conference Report, but you did not separately endorse the habeas reform language in it.

On the habeas issue specifically, you called for "reforms on death row appeals," expressing interest in a range of proposals. In one statement on the issue, you spoke positively of several reform plans, "such as the ABA proposal and the Powell Report."

Because these proposals, while alike at a general level, have differences that are significant to practitioners in the field, there has been confusion over your position on habeas reform. This has fueled expectations, on the part of both the left and the right, that you would alter the Conference Report in a manner that either side would find more to its liking.

III. MAJOR HABEAS REFORM ISSUES

Most of the major reform plans being considered are of a like design at an abstract level: some limits are placed on the filing of habeas petitions in exchange for death row inmates getting free lawyers to file those petitions. Within this broad construct, five major issues are in dispute. They are:

A. Procedural Issues

- Time Limit: How much time will a prisoner have to file his petition? Current law has no time limit whatsoever. The ABA proposed a limit of 18 months; Justice Powell put it at 6 months; the Conference Report set the time at 12 months.
- Repeat Petitions: The current habeas statute sets no limit on multiple filings by death row inmates -- though Supreme Court case law makes repeat filings difficult. All reform proposals limit prisoners to a single petition, but all also contain some exceptions. The issue is: How broad are the exceptions? The ABA Report had a broad exception; the Powell Report had a narrow exception. The Conference Report tilted more towards the ABA approach.
- Counsel Standards: The reform plans all required states to provide lawyers to death row inmates for the preparation of habeas petitions; they differed on whether such lawyers must meet minimum competency standards. The Powell plan had no standards; the ABA plan had extensive standards. The Conference Report had modest competency standards, keyed on years of experience.

B. Substantive Issues

- Retroactivity: Before a 1989 Supreme Court case (Teague v. Lane) held otherwise, a prisoner could challenge his death sentence based on a favorable court ruling that post-dated his trial and appeal. The defense bar wants this right restored; prosecutors oppose a reversal of the this line of cases. The Conference Report sided with the defense bar, to some extent; this was its most controversial provision.

- "Full and Fair:" The cornerstone of the Bush habeas reform plan was a rule that death sentences could not be challenged if the defendant had a "full and fair" hearing in state court. This is the prosecutors' ultimate goal -- it effectively ends federal habeas review of state death sentences -- and passed the Senate in 1991.

IV. CURRENT OPTIONS

Though I have not been involved in this issue since the Transition, as I see it, you have six options:

- (1) Crime Bill Without Habeas Reform: You could propose a Comprehensive Crime Bill without any habeas reform provision. It would still have a Brady Bill, a death penalty, and a policing plan.
- (2) Adopt Conference Report Habeas Language: You could adopt the language of last year's Conference Report as "your" proposal. There is a logical reason for adopting this text (it is long-standing and well-known), but it is bitterly opposed by State Attorneys General and local DAs.
- (3) Back a "Biden-Prosecutor" Deal: Lengthy negotiations between Senator Biden and the Attorneys General are about to come to fruition; District Attorneys will be neutral, and at least some defense bar leaders will grudgingly accept the agreement. Our prompt endorsement of any agreement will help make it a consensus view.

The substance of this plan would be a six-month statute of limitations; a tough rule against multiple petitions; counsel standards akin to those in the Conference Report; and some relief (though not much) for the defense bar on the retroactivity issue.

- (4) Convene our Own Negotiations: You could direct the Attorney General to summon the parties to an administration-sponsored negotiation. This, however, is only likely to drag out the process of resolution, and is unlikely to produce results different from those in the Biden-Prosecutor talks.
- (5) Draft a Limited Reform Proposal: We could assemble our own, limited reform proposal -- one that would only address the least controversial habeas reform issues -- but would at least be some reform. For example, we could package a one-year limit on filing, linked with a moderate version of the single-petition rule -- in exchange for free lawyers with very minimal counsel standards. While no one would be excited about such a limited reform plan, no one would strongly oppose it.

(6) Draft a Comprehensive Reform Proposal: Finally, and most ambitiously, we could draft a comprehensive reform proposal that would address all the major issues. If we go this route, I would recommend a proposal positioned slightly to the right of last year's Conference Report text; namely:

- A one-year limit on filing petitions;
- Limit petitioners to a single filing, except where they have new evidence of innocence, or new evidence that their death sentence is unconstitutional;
- Provide counsel for filing habeas petitions, subject to experience-based competency standards;
- Have a very limited relief provision on the "retroactivity" question.

Such a "Clinton proposal" would anger both the left and the right, but could probably win support among neutral observers in this area (i.e., bar groups, editorialists, and the like).

V. RECOMMENDATION

I favor the third option above; i.e., getting behind the emerging agreement between Senate Democrats and the prosecutors. I do not think it is worth the effort or the expenditure of political capital to fashion our own reform plan, when we can more easily get behind a compromise plan assembled by others.

Why? Habeas corpus reform will never be the touchstone of a Clinton Crime Bill; our goal should be to get a **fast** and **plausible** resolution of this troublesome issue, and move ahead on a Crime Bill that advances those matters that are at the heart of your anti-crime agenda: passing a Brady Bill, putting 100,000 more police on the streets, restoring an enforceable death penalty, and launching innovative, new programs to prevent crime.

Thus, we should be looking for the resolution that gets us out of this issue as quickly and simply as possible -- and adopting a settlement negotiated by others is the option that best fits this objective.