IMPACT OF FEDERAL HABEAS CORPUS LIMITATIONS ON DEATH PENALTY APPEALS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

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Report entitled "Final Technical Report: Habeas Litigation in U.S. District Courts." This report is available at the Subcommittee and can be accessed at:
http://law.vanderbilt.edu//article-search/article-detail/download.aspx?id=1639

IMPACT OF FEDERAL HABEAS CORPUS LIMITATIONS ON DEATH PENALTY APPEALS

TUESDAY, DECEMBER 8, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:15 p.m., in room 2237, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Scott, Johnson, Jackson Lee, Chu, Sensenbrenner, King, Gohmert, and Jordan.

Staff Present: (Majority) David Lachmann, Subcommittee Chief of Staff; Keenan Keller, Counsel; Michelle Millben, Counsel; Reuben Goetzl, Staff Assistant; (Minority) Paul Taylor, Counsel; Caroline Lynch, Counsel; and Demelza Bare, Clerk.

Mr. NADLER. Good afternoon. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. We will begin by recognizing myself for 5 minutes for an opening statement.

Today's hearing examines the impact of the Federal habeas corpus rules on the application of the death penalty in the United States. It is incumbent upon those who support the application of the death penalty to ensure that it is administered fairly and that every risk of error is wrung out of the system.

The right to petition for a writ of habeas corpus is really the last line of defense against error and injustice in our legal system. While executive clemency is still a possibility, it is subject to the political winds in ways that the independent judiciary is, hopefully, not.

In recent years, the right of habeas corpus has been the object of derision and subject to attack. The "Antiterrorism and Effective Death Penalty Act of 1996" was an especially egregious example of the extent to which some have been willing to go to expedite the use of capital punishment. Its main flaw is that it sets strict time limits for habeas petitions: 1 year generally and, if a State qualifies, 6 months in capital cases.

The standard is even more disturbing. It gives extreme deference to State court decisions. It prohibits the court from granting relief for any claim adjudicated on the merits in State court unless the State decision rejecting the claim is, quote, "contrary to or involved an unreasonable application of clearly established Federal laws as

determined by the Supreme Court of the United States," unquote, or is, quote, "based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings," unquote.

At the same time, resources to assist defendants in State court proceedings have diminished. In many ways, we have made a mockery of the administration of justice and the search for the truth.

What is really ironic about all of this is that, while these changes were sold to Congress as a way to move the cases and make the system more efficient and bring closure more rapidly, in fact it has had the opposite effect. The time it takes for these petitions to move through the process has increased substantially. Since the "Antiterrorism and Effective Death Penalty Act of 1996" and the restrictions on the Great Writ, the time for moving through the process has increased substantially and confusion about existing legal standards has been widespread.

I want to commend our colleague, the gentleman from Georgia, for introducing legislation to correct this situation. I am pleased to be an original cosponsor, and I look forward to working with him to bring reason and justice back to this important process.

While there is always a push to move faster with executions, the record indicates that this rush to execute has called into question the fairness and accuracy of our machinery of death. We stand alone in the industrialized world in our commitment to capital punishment. Even Russia has a longstanding moratorium on executions. It is a disgrace, and the limitations on the Great Writ only exacerbate the problem.

I think we would do well to remember Justice Blackmun's observation in his opinion dissenting from the Supreme Court's decision denying review in a Texas death penalty case, Callins v. Collins, in 1994, when he stated, "Twenty years have passed since this court declared that the death penalty must be imposed fairly and with reasonable consistency or not at all. And despite the effort of the States and courts to devise legal formulas and procedural rules to meet this challenge, the death penalty remains fraught with arbitrariness, discrimination, and mistake.

"From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years, I have endeavored to develop rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the court's delusion that the desired level of fairness has been achieved, I feel obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules and substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.

"Perhaps one day this court will develop procedural rules of verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic that such a day will come.

"I am more optimistic, though, that this court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness in the infliction of death is so plainly doomed to failure

that it and the death penalty must be abandoned altogether. I may not live to see that day, but I have faith that eventually it will arrive. The path the court has chosen lessens us all," close quote.

If anything, after years of exonerations of death row inmates because of DNA evidence, and in other areas of the criminal law and notorious decisions like the Fifth Circuit's, in which the court held that an attorney sleeping through a capital trial is not reversible error, is not the ineffective of assistance of counsel, Justice Blackmun's admonition rings truer today than it did a decade and a half ago. And the restrictions on post-conviction review imposed by the 1996 act look not only like a failure in terms of shortening the process—they have, as I said, gravely lengthened the process—but look even more dangerous in terms of restricting the availability of constitutional rights and the vindication of the actual right of innocence.

I look forward to the testimony of the witnesses on this very important and timely subject.

The Chair now recognizes the distinguished Ranking Member of the Subcommittee for 5 minutes for his opening statement.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

As we consider the need to strike the right balance between finality in capital cases and confidence that only the guilty have been sentenced to death, it makes sense to first consider how the most significant measures Congress has passed in decades to protect the innocent have been implemented.

I am referring to the "Justice for All Act of 2004," which was enacted on an overwhelmingly bipartisan vote and unanimously in the Senate. I worked with colleagues on both sides of the aisle and on both sides of the Capitol to see that this legislation made it to the President's desk.

DNA samples can help to quickly apprehend offenders and solve crimes if law enforcement agencies have access to the most up-to-date testing capability. Additionally, DNA technology is increasingly vital to ensuring accuracy and fairness in the critical justice system. DNA can identify criminals with incredible accuracy when biological evidence exists, and DNA can be used to clear suspects and exonerate persons mistakenly accused or convicted of crimes.

The "Justice for All Act" was designed to provide the necessary funding to ensure that these critical programs include the equipment and training necessary to eliminate the backlog of DNA samples in need of testing and to provide greater access to potentially exculpatory evidence of those who have been wrongly convicted of crimes.

"Justice for All" legislation also provides that up to 25 percent of authorized grants to States can be used to provide training to defense attorneys for appellate representation and to establish a system of appointment of competent counsel in capital cases. It also provides that there shall be notification 180 days after any direct appeal of a conviction is complete before any biological evidence can be destroyed. This will ensure that the evidence in the case is preserved to benefit both the defendant and the government if the conviction is reversed.

In addressing concerns relating to DNA testing portions of the legislation, I considered that on one side of the debate there were

a group of people who wanted to have no time limit at all, such that a motion could be made for testing at any time as long as the defendant was still alive and in jail. On the other side of the debate, there were people who wanted to have a hard and fast limit and the shorter the limitation, the better, to prevent defendants from gaming the system and waiting until witnesses had died and the DNA had evaporated so that there would not be enough evidence to conduct a retrial.

The compromise that was worked out, I think, was a fair one. Under that compromise, for the first 5 years after conviction, there is a rebuttable presumption in favor of the DNA test. After 5 years, there is a rebuttable presumption against the DNA test. But the defendants can have their motion granted if the court finds that the applicant was incompetent at trial, there is newly discovered DNA evidence, or that denial of the motion to retest would result in manifest injustice or for good cause shown.

The legislation also struck a balance regarding the standard for obtaining a new trial by requiring that there be compelling evidence that a new trial would result in an acquittal. This represents a compromise between the preponderance of the evidence and clear and convincing evidence standards.

I mention this experience by way of example. I have no preconceived notions regarding the issues before us today, but if a searching analysis reveals that there is any need to amend the Federal habeas laws, I hope that similarly fair compromises can be reached.

The "Justice for All Act" is a vast improvement over what had prevailed prior to its enactment, but there is still room for improvement in its implementation. As the Department of Justice's inspector general explained last year, the Office of Justice Programs has been reluctant to exercise appropriate oversight over "Justice for All Act" programs. And that means that this Committee has also failed to exercise appropriate oversight over the last few years.

If this Committee is interested in exonerating the innocent and also in solving crimes that lead to the incarceration of very dangerous criminals, they could do no better than by strengthening the post-conviction DNA programs that the "Justice for All Act" has already put in place. I hope we can find the time to do that, and soon.

Let me say that I am going to have to leave this hearing now because I have a press conference on the Copenhagen conference over in the Capitol Visitor Center, but I will be interested in reading what the witnesses have to say.

And I thank the Chairman for giving me the time.

Mr. NADLER. I thank the gentleman.

And before the gentleman leaves, I would simply want to observe that most of the province of this hearing is to deal with the problem of when there is no DNA evidence. When there is DNA evidence, in some ways, it is simpler.

Thank you.

I will now recognize the distinguished Chairman of the full Committee for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Your constitutional wisdom, which was in your opening statement—not exhaustive but it was very fulsome—leads me with very little to add. And so I will submit my statement for the record, and add that Chairman Scott and I are looking toward ways that we can improve this legislation so that Chairman Johnson will still consider us among his best friends.

And I yield back the balance of my time.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

In 1996, when Congress passed the Antiterrorism and Effective Death Penalty Act, I expressed scepticism about whether the bill would have any realistic impact on the prosecution of terrorism. In light of the fact that we needed to pass sweeping legislation after the tragic World Trade Center attacks, my concerns appear vindicated. However, my concerns about the legislation's impact on death penalty jurisprudence were precisely on target. The bill re-wrote the law on Federal habeas corpus and appears to have unleashed a series of unintended consequences that we do not yet fully understand.

For that reason, I welcome today's hearing and look forward to a lively discussion with our witnesses.

The writ of habeas corpus is one of the most fundamental safeguards in our Constitution to prevent the imprisonment and execution of innocent people. The Constitution states that the "writ of habeas corpus shall not be suspended," except "in cases of rebellion or invasion" or when "the public safety may require it."

From the 1950s to the early 1970s, the Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to extend many of the procedural protections previously limited to federal court defendants to state criminal defendants. During this time, the Court also expanded the scope of habeas by allowing more opportunities for state prisoners to obtain federal relief when state police, prosecutors, and judges violated their constitutional rights. The confluence of these two developments produced an exponential increase in habeas filings.

First: The writ of habeas is most important in the context of death penalty cases. The death penalty is our society's most severe and permanent punishment. Putting aside my position about the fairness of the death penalty, as a procedural matter, before we permit the execution of an individual, we must have appropriate, constitutional due process.

In the past few decades, 139 people on death row have been exonerated based on their innocence. Some of these individuals died while in prison and were only exonerated posthumously. This is not only unacceptable, but it undermines the very integrity of our criminal justice system.

Second: I believe we should revisit the restrictions placed on the habeas petitions of death row inmates in the Antiterrorism and Effective Death Penalty Act of 1996. When we considered this Act over a decade ago, I raised the concern that this Act was over broad and could harm the administration of justice.

Through this Act, we created a 1 year statute of limitations for the filing of a habeas petition after the completion of a direct appeal and we created a highly deferential standard of review of state court findings by federal courts. Under this new standard of review, it is possible that some innocent people will not receive relief through the habeas process if a claim was adjudicated on the merits in state court. In these circumstances, a federal court can only overturn such a claim if it was contrary to clearly established federal law or based on an unreasonable factual determination.

The one year statute of limitations is also troubling. Many capital defendants are indigent and cannot afford an attorney to represent them in a habeas appeal, so it is particularly burdensome to have such a short statute of limitations for these individuals to file for habeas relief. This burden is made heavier by the fact that the process of filing a habeas petition is complex and requires the exhaustion of state court claims. Based on this statute of limitations, about 1 in 20 capital defendants have been denied any federal review of their case.

Third: Further, although our intention was to improve the efficiency of the criminal justice system, this has not occurred. In fact, an independent study commissioned by the Department of Justice demonstrates that the average

amount of time from the conviction of a capital defendant to the processing of their habeas petition now takes 6.3 years. Prior to this Act, the average amount of time for the processing of a capital defendant's habeas petition was 5 years.

While the case processing time has increased significantly over the past fifteen years, there are also fewer evidentiary hearings held to consider the issues raised in habeas petitions. Moreover, there are also fewer grants of habeas petitions at the district court level than prior to this Act.

These data collections issues are critical to determining the Committee's future action in this area. Consequently, I am very interested to hear from the witnesses today about their interpretation of the recent data on habeas petitions for capital defendants.

The United States continues to be the only western nation that actively pursues a program of capital punishment. Last week the Russia government announced that it has begun the process of abolishing the death penalty. When notable cases, raising the question of innocence arise, our criminal justice program is subject to worldwide scrutiny. The writ of habeas is one of the principle protections given to individuals and we must thoughtfully consider our role in regulating the process by which prisoners may seek redress, especially since habeas is the last step in our criminal justice system to ensure that an innocent person is not executed or wrongfully imprisoned.

Mr. NADLER. I thank the gentleman.

It is usually the custom of this Subcommittee that, after asking the Chairman and Ranking Member and the Chairman and Ranking Member of the full Committee, we ask other Members to put their statements into the record. But, in view of Mr. Johnson's sponsoring the legislation, I will ask Mr. Johnson if he wishes to make an opening statement.

Mr. JOHNSON. Yes, I do. And thank you, Mr. Chairman and Chairman Nadler.

And, also, whenever offered some help from the Committee Chairman, Chairman Conyers, I would be remiss not to be intrigued with how we can improve this bill. And so we will be working on it together, along with Congressman Scott and others who have voiced interest in this.

Today, we are here to discuss an issue that is near and dear to my heart, Federal habeas corpus reform. There is a whole lot more that needs to be done to restore the Great Writ to its intended purposes. This is just a small beginning, a humble beginning, which takes on the fact that, even if it is a DNA-based conviction, if the DNA is found after you are killed by the State, you know, it is just a theoretical matter at that point, and that is not fair.

Earlier this year, I introduced H.R. 3986, the "Effective Death Penalty Appeals Act." I was pleased to work with Chairman Nadler, Chairman Conyers, Chairman Scott, and Chairman Cohen, all of whom have cosponsored the legislation, to ensure that the bill addresses a key failing of the habeas system as it pertains to inmates on death row.

Congressman John Lewis of Atlanta, a tireless advocate for civil rights, was also closely involved in developing this bill, which has been endorsed by Amnesty International, the NAACP, and the ACLU.

The civil rights and civil liberties advocacy community, which I want to tip my hat to for protecting the rights that we take for granted in this country, that community has been integrally involved in the drafting of this bill and in laying foundations for more comprehensive reform in the months and years to come.

Without their hard work, legislation would be less efficient and less effective.

My bill, H.R. 3986, would empower Federal courts to grant habeas corpus petitions for inmates facing execution when newly discovered evidence convinces the court of probable innocence.

As the law stands today, death row inmates can be stranded in a procedural no man's land, condemned to die, even if there is compelling new evidence and even if their habeas lawyers were ineffective in some way. Imagine that, in America, you can be killed by the state without new evidence of your innocence ever getting a hearing. The status quo is inhumane, unconstitutional, and unacceptable.

Justice Stephens recently wrote that Section 2452(D) is arguably unconstitutional, to the extent it bars relief for an inmate sentenced to death who can present newly discovered evidence of innocence.

The Johnson-Nadler bill—and I thank Chairman Nadler for his work on this bill—this bill will fix the law as it stands to protect innocent Americans from execution. I can imagine few more urgent tasks as we restore America's reputation as the white light on the hill that everybody respects and appreciate the rights that the people are given under our system of government.

So I look forward to hearing the witnesses' views of this legislation, and I am equally interested in their thoughts on the broader issues at hand.

Today, we are not only considering the merits of the Johnson-Nadler bill, we are laying the groundwork for comprehensive reform of Federal habeas corpus. I want to emphasize that it is possible to legislate a system that is equitable and efficient, but only if we commit to finding real common ground and renounce the counterproductive legislative tactics that have stymied effective criminal justice reforms in recent years.

The legislative branch sometimes fails to recognize that the judicial branch is coequal, in terms of our branches of government. And perhaps, once this is passed, it will help to restore fairness.

We need to pass the "Effective Death Penalty Appeals Act," and quickly, before another potentially innocent American is executed. We should also commit to fully reforming those statutes during the 111th Congress. It will be a long time until the composition of Congress is as favorable for such reform as it is now.

I look forward to leading on this issue and working closely with both of my Chairmen, and all of the Chairmen actually, and the advocacy community to move legislation that will help restore fairness to Federal habeas corpus without compromising efficiency.

I thank our distinguished panel for their attendance, and I thank Chairman Nadler for holding this important hearing and for his indispensable assistance in helping to develop H.R. 3986.

I yield back the balance of my time.

Mr. NADLER. Thank you.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing, which we will only do, hopefully, if there are votes on the floor.

We will now turn to our panel of witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority in the Subcommittee, alternating between majority and minority, provided the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or is only able to be with us for a short time.

I will now introduce our witness.

Stephen Hanlon is a partner at Holland and Knight, currently managing the firm's community services team, which provides pro bono legal services for indigent clients.

Mr. Hanlon has worked on civil rights issues, particularly indigent defense systems, claims for survivors of the Rosewood massacre, death penalty litigation, prisoner rights, medical experimentation without consent, and racial discrimination. He is also a member of the American Bar Association Death Penalty Moratorium Project, and currently chairs the Constitution Project's board of directors.

He received his JD from the University of Missouri-Columbia School of Law and his BS from St. Louis University.

The Honorable Gerald Kogan served on the Florida Supreme Court from 1987 to 1998, including 2 years as chief justice. He served on the faculty of the University of Florida, the University of Miami, Nova University, the University of Virginia, and New York University.

Before serving on the Florida Supreme Court, Justice Kogan was a member of the U.S. Army Counterintelligence Corps, a practicing attorney, Dade County chief prosecutor, a circuit judge in Florida's 11th Judicial Circuit, and an administrative judge of the criminal division.

Since his retirement, he heads the National Committee to Prevent Wrongful Executions, along with co-chair Charles Baird, a former judge of the Texas Court of Criminal Appeals. He attended the University of Miami, where he received his bachelor's degree in business administration and his juris doctorate degree.

Michael O'Hare has served the State of Connecticut as the supervisory assistant State's attorney for the Civil Litigation Bureau since 2002. He currently supervises all Federal habeas corpus litigation for the State of Connecticut arising from challenges to State convictions.

Mr. O'Hare served in the U.S. Army Judge Advocate General's Corps and as a staff judge advocate in the Reserves from 1979 to 2009, which included deployment to Iraq in 2003. He retired from the Army with the rank of colonel.

He has also worked in the Justice Department's Office of International Affairs in the Criminal Division, the narcotics section of the Criminal Division as a member of the State of the Connecticut's capital litigation unit. In 2005, Mr. O'Hare successfully led efforts to defeat State and Federal habeas corpus challenges to the execution of convicted serial killer Michael Ross.

John Blume is professor of law at Cornell Law School and the director of the Cornell Death Penalty Project. He is the co-author

of the "Federal Habeas Corpus Update," an annual compendium of habeas corpus developments.

In addition to his academic work, he has argued eight cases before the United States Supreme Court. Since 1996, Professor Blume has served as one of several consultants to the Defendant Services Division of the Administrative Office of the United States Courts on habeas corpus issues.

Professor Blume is a 1978 graduate of the University of North Carolina at Chapel Hill, a 1982 graduate of Yale Divinity School, and a 1984 graduate of Yale Law School. He has been at Cornell Law School since 1993.

I am pleased to welcome all of you. Your written statements, in their entirety, will be made part of the record. I would ask each of you to summarize your testimony in 5 minutes or less.

I am supposed to say that, to help you stay within that time limit, there is a timing light at your table which switches from green to yellow to red. I am informed that the power has failed. It is back; the power is back. So you can't filibuster anymore. This is not the Senate anyway. You couldn't in any event, nor can we. But when 1 minute remains on your time, the light will switch from green to yellow, and then red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hand to take the oath.

[Witnesses sworn.]

Mr. NADLER. Let the record reflect that the witnesses answered in the affirmative.

You may be seated, and we thank you.

I now recognize for 5 minutes Mr. Hanlon.

TESTIMONY OF STEPHEN F. HANLON, CHAIR, AMERICAN BAR ASSOCIATION DEATH PENALTY MORATORIUM PROJECT STEERING COMMITTEE, PARTNER, HOLLAND AND KNIGHT LLP

Mr. HANLON. Thank you, Mr. Chairman.

I would like to focus my remarks on the recommendation in my written statement that, as part of any anticipated AEDPA reform, that the funding of State trial and particularly State post-conviction representation be seriously considered.

In 1989, the United States Supreme Court, in the Giarratano case, refuses to find a constitutional right to State post-conviction counsel. And the result is that, throughout the States now, we either have no State funding or grossly inadequate State funding, particularly for State post-conviction counsel.

It was about that time, in the late 1980's or early 1990's, that Justice Kogan and other members of the Florida Supreme Court came to us in the private bar and asked us to provide pro bono counsel since the State simply was not adequately funding post-conviction counsel. And then I learned for the first time of the enormity of this problem.

These cases raised for the first time ever the issues of ineffective assistance at trial, prosecutorial suppression of material evidence, and juror misconduct, and a host of other serious constitutional

issues involving facts which are almost entirely outside the trial record.

I have been practicing law now for approximately 43 years. I have done a wide range of civil trial practice: constitutional litigation, civil rights litigation, class action litigation, securities litigation, probate litigation. I have never seen anything in my experience approaching the factual and the legal complexity of capital post-conviction litigation. This can fairly be characterized as the brain surgery of our profession.

In the past 18 years, I and many members of my law firm have represented several men on death row. And it continues to astonish me that we cannot establish a right to adequately funded post-conviction counsel. A man's life is at stake.

I think both Professor Blume's written testimony and Justice Kogan's testimony give you a very good idea of the massive additional complexity that AEDPA has introduced into this area of the law. My experience with AEDPA—and I have been involved in this work both before AEDPA and after AEDPA—is that it has dramatically increased satellite litigation in death penalty cases, which has nothing to do with——

Mr. NADLER. Excuse me. Could you explain what you mean by "satellite litigation"?

Mr. HANLON. A host of procedural and technical questions that are unrelated to guilt, innocence, death-worthiness or constitutional error. And both the courts and counsel—and by counsel I mean not only defense counsel, I mean the State—are engaged in a wide variety of technical litigation, which again is well described in both Professor Blume's testimony and Justice Kogan's testimony, which is significantly slowing down this process and keeping us from getting to the merits of these cases.

There is a study that has been done by professors at Vanderbilt. This was a study that was funded by the National Institute of Justice, Office of Justice Programs, the Department of Justice. It was a collaborative effort with the National Center for State Courts, and it reviewed capital cases filed in 2000, 2001, and 2002, in the 13 Federal districts with the highest volume of capital habeas filings. And it found that capital habeas cases that terminated in Federal district court lasted an average of 29 months, almost twice the 15 months they took before AEDPA. I have a copy of that study and I ask permission to include that in the record.

Mr. NADLER. Without objection.*

Mr. HANLON. Thank you. Again, this is not only tying up State court—Federal court time, it is tying up the efforts of defense counsel and the Attorney Generals and the States attorneys around the country.

Our concerns about AEDPA and the additional complexity that it has added to the process are very real and substantiated. I urge to you proceed with great caution in your consideration of AEDPA reform.

[The prepared statement of Mr. Hanlon follows:]

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*The report entitled "Final Technical Report: Habeas Litigation in U.S. District Courts," is not reprinted in this hearing record but is archived at the Subcommittee and can be accessed at http://law.vanderbilt.edu//article-search/article-detail/download.aspx?id=1639.

PREPARED STATEMENT OF STEPHEN F. HANLON

TESTIMONY OF

STEPHEN F. HANLON

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

of the

U.S. HOUSE OF REPRESENTATIVES

for the

Hearing on the Impact of Federal Habeas Corpus Limitations on Death Penalty Appeals

December 8, 2009

Mr. Chairman and Members of the Subcommittee:

I am Stephen F. Hanlon, and I am the Chair of the American Bar Association's Death Penalty Moratorium Project Steering Committee and a partner at the law firm of Holland and Knight LLP. The American Bar Association is the world's largest voluntary professional organization, with a membership of almost 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Carolyn B. Lamm to share with you our views and concerns about the current state of federal habeas litigation in death penalty cases.

The public often assesses the value of our legal system by its perception of how well it functions. Capital cases are the most visible and complicated of all criminal cases. The consequences of making mistakes in these cases are severe and all too often irrevocable. The fundamental principle of fairness that we cherish in America requires that justice must be done, especially if the consequence of legal action is the death penalty. Effective defense representation at every stage of the proceedings in death penalty cases is a *sine qua non* of that principle. Despite this knowledge, state governments have failed for many years to implement the necessary reforms to address long-standing and systemic problems in our death penalty counsel systems. Mistakes that occur at trial as a result of these failures are aggravated by ever-tightening restrictions on federal court review, making it difficult, if not impossible, for federal courts to correct even the most serious deprivation of constitutional rights. A system that wrongly sentences people to death and then erects considerable obstacles to bar judicial review of their cases is not a system that comports with our principles of justice. It should not surprise

us that one consequence is a loss of public confidence in the integrity and accuracy of our legal system.

Let me be clear at the outset about where the American Bar Association stands on this issue. Except for its opposition to imposing the death penalty on individuals who committed their crimes while juveniles, individuals with mental retardation, and individuals with serious mental illness, the ABA has not taken a position on the constitutionality or appropriateness of the death penalty. However, in the decades since the death penalty was reinstated in 1976, the Association has adopted a series of policies concerning the administration of capital punishment. The ABA has made the right to effective assistance of counsel for all defendants at all stages of a capital case the cornerstone of its reform efforts. Further, the ABA recognizes that improvement in the availability and quality of legal representation must be supported by a system that provides rational and fair review in state and federal courts. The Association has adopted a series of recommendations since *Furman* to strengthen the courts' authority and responsibility to exercise independent judgment on the merits regarding constitutional claims during state post conviction and federal habeas corpus proceedings.

The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. In 1989, for example, the Association first adopted the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines). These Guidelines were greatly expanded and updated in 2003 to detail the minimal effort required by defense counsel and death penalty jurisdictions to ensure competent legal representation. They are now the accepted standard of care for the defense of death penalty cases, are cited by state and federal

courts, including the US Supreme Court, and have been adopted in a number of death penalty jurisdictions.

The Association also undertakes to help provide volunteer legal representation for indigent death row inmates through its Death Penalty Representation Project. Over the years, the Representation Project has worked with state governments to improve funding, training and standards for defense counsel and to implement and train judges and lawyers about the ABA Guidelines. It currently is the only organization working on a nationwide basis to recruit and train volunteer pro bono lawyers for the hundreds of indigent death row prisoners who lack counsel.

In a landmark study of capital cases from 1973 through 1995, 7 out of every 10 cases (68%) that were fully reviewed by the courts had serious, constitutional, reversible error. Although state courts threw out 47% of the capital convictions due to such errors, 40% of the *remaining* death sentences were found also to have serious error upon federal review. The most common errors prompting reversal of death sentences were "egregiously incompetent defense lawyers" and suppression of exculpatory evidence by prosecutors or the police.

Today, defendants who suffer serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and suppression of exculpatory evidence, often have no available remedy. The constraints on the ability of federal courts to serve as a final check on state capital convictions are particularly daunting for prisoners asserting claims of actual innocence. We know with certainty that defendants have been, and will be, wrongfully convicted of capital crimes. In fact, as of December 1 of this year, 139 death-row inmates from 26 states have been officially exonerated upon proof of innocence and released from custody after serving years (often decades) on death row. The conviction and execution of innocent

defendants is not only a moral travesty, but also a disservice to the community's need for justice and public safety.

It has often been said that the death penalty is "broken." This is because states have failed to ensure that capital defendants are provided with competent legal representation and fair trials. When state and federal courts also fail to undertake a thoughtful and searching review of mistakes that occurred at trial – including mistakes that result in convicting the innocent – a responsible society cannot permit executions to continue. It is for this reason that in 1997, the House of Delegates of the ABA voted overwhelmingly to call for a halt to executions until death penalty jurisdictions implement procedures that: (1) guarantee fundamental fairness and due process to those facing capital punishment; and (2) minimize the risk that innocent persons are executed.

Despite grave concerns about the reliability of capital convictions, Congress, most prominently by enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), significantly *limited* the ability of death row prisoners to obtain independent judicial review and correction of their convictions and sentences of death. For the first time ever, AEDPA created a one-year statute of limitations for the filing of post-conviction appeals and instituted an arcane set of procedures that made the federal habeas process much more complex. Unfortunately, that same year Congress eliminated all federal funding for the resource centers that had handled state post-conviction proceedings for death row prisoners. As a result, many death row prisoners were left without counsel at all, and risked losing all potential claims on appeal when the statute of limitations period ended. Since ADEPA was enacted, many death row prisoners have lost their right to seek federal court review because their lawyers missed AEDPA's filing deadline; several have already been executed without any federal judicial review of their convictions and

sentences of death. And because the same incompetent lawyers who missed the statute of limitations also represented these defendants in state court, it is clear that some individuals have been executed without any meaningful judicial review at all.

When Congress enacted the Innocence Protection Act of 2004 (IPA), it sought to address the serious problem of lack of funding in the death penalty system. Part of the IPA authorizes $75 million in state grants each year for five years to improve training and qualification standards for prosecutors and defense counsel appointed to state capital cases. However, this provision has gone either completely unfunded or received only a tiny fraction of its authorized support since 2004. The IPA is scheduled for reauthorization in 2009, and the ABA supports its reauthorization and full funding to realize the intent of Congress.

AEDPA also provided for states to "opt-in" to expedited habeas procedures if the state demonstrated that it had a counsel system that provided competent legal representation to death row prisoners in state post-conviction proceedings. But death penalty states found it more to their interests to retain their current inadequate systems for the provision of counsel than to improve their counsel systems and obtain the benefits of opt-in. Dozens of federal courts that reviewed opt-in applications from many states found their counsel systems to be uniformly inadequate and therefore not qualified for opt-in certification. The work that the ABA has conducted, including an extensive examination of these systems in several jurisdictions, also found that state counsel systems do not ensure effective legal representation; the ABA has thus recommended immediate reforms.

Despite these glaring inadequacies, the USA PATRIOT Improvement and Reauthorization Act, passed by the 109th Congress and signed into law by President Bush in March 2006, included amendments to the opt-in provisions that *eased* the requirement of states

to make the necessary improvements. These amendments authorized the U.S. Attorney General, rather than federal courts, to determine which counsel systems qualified for the opt-in procedures, but did not do anything meaningful to require improvement to the quality and availability of counsel in state post-conviction proceedings. The plain effect of shifting the decision-making authority from the independent federal courts to the Attorney General (who is the nation's chief prosecutor and subject to only the most nominal judicial review) is to make certification easier by demanding less proof of a competent counsel system. This shift also virtually eliminates oversight of a state's compliance with the opt-in requirements. Perhaps most troubling, the retroactive application of the certification would immediately throw many death row defendants out of court because the new, shorter statute of limitations would have already run in their cases. There is a very real concern that if these amendments are implemented, the meritorious claims of many death row defendants will never be subject to federal court review, where numerous exonerations have occurred.

The integrity of the criminal justice system turns on the fairness of criminal trials, which is concomitantly dependent on the effectiveness of defense counsel's representation. But the promise of effective assistance of counsel, embodied in the Sixth Amendment, has often been broken for poor people. Capital defendants are almost always indigent and must rely upon a seriously flawed and malfunctioning indigent defense system that can often only provide counsel who are overworked, underpaid, or inexperienced. Capital defendants are disadvantaged from the start, and many receive death sentences that are both arbitrary and unfair. Moreover, the absence of a right to counsel in post-conviction proceedings, coupled with the myriad procedural and substantive obstacles to raising a claim of ineffective assistance of counsel, deprives capital defendants of justice. The initial success of the now-defunded federal resource centers

demonstrated how proper training, resources, and support for death penalty counsel can dramatically increase the quality of capital representation in state and federal post-conviction proceedings. The loss of this funding has resulted in terrible injustices in every death penalty jurisdiction the ABA has studied.

There is simply no excuse for executing individuals who were not first afforded their constitutional rights. Justice Kennedy recently opined that "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." This statement underscores the reality that "death is different." There is a greater urgency for the federal government to implement the following reform proposals in order to protect the constitutional rights of each individual at risk of execution. The guiding principle behind these recommendations is the need to administer the death penalty in a fair and equitable manner. This includes all assurances of effective and fully funded legal representation; appropriate judicial review to remedy constitutional violations and serious, reversible errors; and necessary procedures to protect the innocent. A dedicated, institutionalized federal commitment to effective capital representation is more important now than ever before.

There is much that needs to be done to address our broken death penalty system, including reform of federal habeas corpus law. Three broad reforms should be a priority for Congress and the Obama Administration in the near future:

- Suspend all federal executions pending a thorough data collection and analysis of racial and geographical disparities and the adequacy of legal representation in the death penalty system;

- Create an institutionalized federal commitment to fund defender organizations that provide state trial and post-conviction representation and are independent of the judiciary in every capital jurisdiction; and
- Amend the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) so that prisoners have better access to federal court review, eliminate the requirement of federal courts to defer to state court decisions, and eliminate or revise the USA PATRIOT ACT amendments to restore the appropriate role of federal courts in the opt-in certification process.

Thank you for the opportunity to appear before the Subcommittee and share the views of the American Bar Association on this important area of concern. I will be pleased to answer any questions you many have.

Mr. NADLER. Thank you. Mr. Professor, Judge Kogan.

TESTIMONY OF THE HONORABLE GERALD KOGAN, CHIEF JUSTICE (RETIRED), FLORIDA SUPREME COURT, CO-CHAIR, CONSTITUTION PROJECT DEATH PENALTY COMMITTEE

Judge KOGAN. Thank you very much, Mr. Chairman. I want to start out by showing you basically where I come from and what my experience has been in this field. Not only was I the chief prosecutor of the Capital Crimes Division in Miami, I personally appeared before jurors asking the jurors to impose the death penalty on the defendant who was there sitting in the courtroom and was being tried.

I had members of my staff, my associate prosecutors, also ask jurors under certain circumstances to impose the death penalty. When I left the State attorney's office I defended these particular cases. Later on I went on the trial bench and I tried death penalty cases as a trial judge. And starting in 1987 until the end of December 1998, I was a member of the Supreme Court of the State of Florida. And every single time a judge in the State of Florida imposed the death penalty on an individual, that case came before us on the court for our review and our decision as to what ought to be done with it.

As a matter of fact, 28 people were executed in the State of Florida while I was sitting on the Supreme Court. And in most of those cases, I in fact went ahead and signed off approving the imposition of the death penalty.

As a matter of fact, on nine occasions while I was chief justice I presided over these proceedings and I was the last person who made the final decision as to whether or not the defendant would suffer death or would not. And of course at that particular time, everything had been done. All the habeas corpus proceedings had been filed. All the post-conviction relief matters had been disposed of, and I was the one who stood between that person living or dying.

And I remember when I said there are no stays of execution because all of that has been decided and when governor's counsel heard that he told me what was proceeding on about putting the hood over the head of the person to be executed. He told me that, Mr. Chief Justice, the electricity—because in those days Florida only had the electric chair—has been turned up to 2,500 volts. And what do you think went through my mind at that time? With all of my experience, I knew that every day in this great country of ours with the greatest legal system in the world, I know that innocent people have been convicted of crimes they have not committed. I said God help us if we have made a mistake here. We are human beings. We are trying to work a system that we would like to believe is perfect. But being human beings we are not perfect and we can make mistakes. And then what seems like an eternity I was told the electricity was turned off and the attending physician had pronounced that individual dead.

In over 40 years of practicing in the death penalty field, both as an attorney, prosecutor, judge, trial and appellate, I have participated in the final decision in more than 1,200 capital cases. That does not mean all 1,200 people received the death penalty. But

they were subject to the death penalty at some point along in those particular proceedings.

And I learned one thing, that the most important thing that we have going for us is a system which allows us to permit the highest court in this land, the U.S. Supreme Court, to be able to consider those issues that manifestly affect whether or not people live or die after they have been convicted of a capital offense.

And we should do everything in our power—and of course you folks have power to see to it that all persons who are charged, especially in death penalty cases, have the ability to have these issues resolved by habeas corpus. Not in a year, not in 6 months as the current law requires, but whenever it arises.

We cannot as a civilized society tell these people you don't have any more rights because it is procedurally barred. That is absolutely absurd to say you have got to die because something wasn't filed on time or due to some peculiar reason we cannot consider what may manifestly be evidence of innocence.

And, Mr. Chairman, you mentioned something before about DNA. DNA is wonderful. There is only one problem with it. DNA only is present in a very limited number of cases. It does not consider those cases where people are convicted because of false identification or because of a false confession that in some way has been induced from their lips by law enforcement action and other items that come up as well. So you are right about that. Not so much to worry about the DNA, although there was a time that all of you gentlemen recall when prosecuting attorneys fought the defendant's ability to get DNA.

Mr. NADLER. Not so long ago a time.

Judge KOGAN. But I think now that—that is true. That is very, very true. And so from my background, you can see that I have had up front experience, I have been out there on the street with law enforcement looking at the dead bodies. I commiserated with the members of the families of these people who have been killed. But still I say that our system must provide all the safeguards that we possibly can in regards to preserving that very, very sacred writ of habeas corpus. And I think that Congress needs to reexamine the situation and come up with a comprehensive law. And I commend Congressman Johnson for taking a step in that direction. And I think this is a very, very worthwhile endeavor by this Committee and by Congress.

And I thank you for the opportunity for having said my piece, so to speak.

[The prepared statement of Judge Kogan follows:]

PREPARED STATEMENT OF THE HONORABLE GERALD KOGAN

Testimony of the Honorable Gerald Kogan

Chief Justice, Florida Supreme Court (retired)

Co-Chair, Constitution Project Death Penalty Committee

Federal habeas corpus is an enormously important element of our justice system with deep roots in our constitutional tradition. In particular, the federal courts' authority to adjudicate constitutional claims advanced by state prisoners is a valuable means by which the Bill of Rights is enforced in criminal cases. Scarcely anyone contends that the federal courts should not have this authority. The policy debate is over the proper arrangements for habeas corpus litigation in the federal forum.

I offer my experience as the head of a capital crimes unit in my state as well as the Chief Justice of the Florida Supreme Court. I know full well the importance of the federal courts respecting state process and procedures in these kinds of cases. But there are other critically important interests at stake here that I discuss below. I also testify as a co-chair of the Constitution Project's bipartisan Death Penalty Committee. The Committee comprises death penalty supporters and opponents, who have experience with every aspect of the criminal justice system. It includes those with prosecution and defense experience, former policymakers and law enforcement officials, victim advocates, business and media leaders, and scholars. The Committee issued a consensus report and recommendations in 2005. I submit that report, *Mandatory Justice: The Death Penalty Revisited,* as part of my statement because it

makes very clear the unanimous view of the Committee that access to the federal courts through habeas corpus must be restored, in the ways I outline here.

The Antiterrorism and Effective Death Penalty Act of 1996 was meant to streamline and expedite the habeas corpus process. Unfortunately, that Act (I will call it AEDPA) has done the opposite. AEDPA made at least three major mistakes—(1) AEDPA tried to fix things that were not broken; (2) AEDPA introduced ill-conceived and poorly drafted provisions that have frustrated courts and squandered scarce resources; and (3) AEDPA overlooked things that genuinely needed attention.

The Act's primary effect has been to undermine the ability of federal courts to determine whether prisoners are in custody in violation of the Constitution. In addition, the Act has had dire consequences for the states and state courts. Across the board, AEDPA has distracted public officials and courts from the merits of constitutional claims and buried them in technical procedural problems. I will give you some illustrations of these consequences and conclude with some recommendations for reform. I urge you to return to the drawing board and, on the basis of the experience with AEDPA, craft a more efficient and effective plan for federal habeas corpus.

I.

The most important policy change adopted in AEDPA was a novel restriction on the federal courts' authority to award habeas corpus relief on the basis of constitutional claims the federal courts find to be meritorious. Under 28 U.S.C. § 2254(d)(1), a federal court typically must deny relief, even if the court determines that a prisoner was convicted and sentenced in violation of the Constitution. The statute has lots of

complicating bells and whistles, but roughly speaking the idea is this. If a state court previously rejected a constitutional claim on the merits, a federal court can award relief only if the federal court determines that the state court decision was not only erroneous, but *unreasonable*.

This is an instance of fixing something that was not broken. Section 2254(d)(1) was meant to prevent federal courts from routinely substituting their own judgments for the judgments previously reached by state courts. But federal courts were doing nothing of the sort in 1996. Instead, they took state court decisions about constitutional rights very seriously and granted relief only when it was clear that the state courts had made a mistake. Still, Congress thought it was appropriate to adopt § 2254(d)(1) as an explicit directive that federal courts should be respectful of state court decisions.

The experience with § 2254(d)(1) has not been good. Consider two points.

First, § 2254(d)(1) deprives federal courts of the ability to vindicate constitutional rights. They are forced, instead, to develop a shadow set of standards delineating decisions about rights that are wrong, but not *unreasonably* wrong. In consequence, federal courts have denied relief to countless prisoners who were convicted or sentenced in violation of the Constitution. In a case now pending in the Supreme Court, *In re Davis*,[1] it is entirely possible that a man who has proven that he is *actually innocent* will be denied relief *and put to death*—because the federal courts may be unable to say that a state court decision rejecting his claim was unreasonably wrong at the time the state court acted.

[1] 130 S.Ct. 1 (2009). This is the much-celebrated Troy Davis case from Georgia.

Second, § 2254(d)(1) exacerbates friction between federal courts and state courts. State courts are used to the idea that their judgments may be effectively upset if federal courts conclude that they have made a mistake. State courts are *not* used to being told that their judgments are so far from the mark as to be unreasonable. Yet § 2254(d)(1) requires federal courts to make precisely that assessment if they are to award habeas corpus relief on the basis of claims they honestly regard as meritorious. This is not a recipe for harmonious federalism.

II.

Two other provisions in AEDPA, 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1), govern the way federal courts develop the facts that allegedly fortify constitutional claims. Trouble is, these two provisions send conflicting signals. Section 2254(d)(2) tells a federal court that it must deny relief with respect to a claim the court thinks is meritorious, unless the federal court concludes that a previous state court decision rejecting the claim was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Section 2254(e)(1) tells the court that previous findings of fact in state court must be "presumed to be correct."

You see the problem. What is a federal court to do? Is it to accept or reject a state court factual determination according to whether it was *reasonable*? Or is it to presume that the factual determination was *correct*? Here is an illustration of poor legislative drafting. Courts across the country have tried to reconcile these two directives, so far in vain. Once again, the Supreme Court itself will have to patch

together a resolution in a pending case, *Wood v. Allen*.[2] The process need not be this tangled, and certainly the Supreme Court should not have to straighten out the snarls.

III.

Illustrations of attempts to fix things that are not broken *combined* with poor drafting are not far to seek. The best example may be § 2244(d)(1) which established exacting time limits for filing federal petitions. Everyone is aware that postconviction litigation is time consuming, and it made sense in 1996 at least to consider measures to speed things up. But there was no evidence that delays occurred between the conclusion of state court proceedings and the filing of federal habeas corpus petitions. Certainly, there was no reason to think that prisoners deliberately postponed federal petitions. It was argued that a prisoner under sentence of death might put off going to federal court merely to keep litigation going as long as possible. That argument was questionable in capital cases. In non-capital cases, it made no sense at all. A prisoner serving a term of years has every incentive to hasten litigation that might set him free. Understand that the time limits fixed by § 2244(d)(1) apply to all habeas cases, capital and non-capital alike. In any event, the law as it stood before AEDPA already provided for dismissing tardy petitions if the delay compromised the state's ability to respond.

Nevertheless, § 2244(d)(1) introduced precise filing periods. And the consequence has been maddening *delays* in the habeas process. I cannot tell you how much effort has been wasted over these time limits. The books are filled with long and

[2] No. 08-9156. This is a case from Alabama involving a prisoner whose lawyers allegedly failed to develop mitigating evidence for the sentencing phase of the trial.

meticulous judicial opinions on how the time periods are to be computed and when they are suspended. By my rough count, the Supreme Court has itself decided a dozen cases on these matters alone. You would be amazed at the problems that have come up.

For example, the time limit for filing a petition for a writ of habeas corpus in federal court is suspended while a prisoner's "properly filed" application for postconviction relief is pending in state court. If, however, the state courts ultimately decide that an application for state relief was filed late in *state* court, the tolling effect of the state petition on the filing period for a federal habeas petition is eliminated. By now, the filing period for going to federal court has probably expired, and a tardy federal petition will be dismissed. Moreover, the federal filing period is not suspended while a habeas corpus petition is pending in *federal* court. So if the federal courts ultimately dismiss a petition because it was filed before state court avenues for litigating the claim were exhausted, the federal filing period will probably expire before the prisoner can exhaust state remedies and get back to federal court. Seeing the squeeze all this creates, the Supreme Court has suggested that prisoners might file simultaneous petitions in state and federal court, hoping that one or the other will stop the clock.

You see where this is going. Time limits meant to give prisoners an incentive to file federal applications as soon as possible end up foreclosing federal adjudication altogether. Into the bargain, time limits cause untold confusion and, certainly, squander scarce resources. It is a strange system that forces prisoners to file multiple lawsuits at the same time simply to avoid dismissal for being untimely.

I want to emphasize that the burdens imposed by § 2244(d)(1) do not fall exclusively on prisoners or on federal courts. State officials must respond to prisoner applications and must, then, devote considerable effort to sorting out differences over filing-period questions. State courts are also affected. The time limits for federal habeas petitions attach significance to proceedings before state courts, which, in turn, must now address ostensibly state law issues with an eye on the federal consequences.

Yet another vexing filing-period case from my own state, *Holland v. Florida*,[3] is pending in the Supreme Court now. In *Holland*, a federal petition was filed late because of what the Court of Appeals for the Eleventh Circuit called his court-appointed attorney's "professional negligence." Nevertheless, the Eleventh Circuit concluded that § 2244(d)(1) required dismissal. Here again, habeas law should not be this complicated, it should not be this arbitrary, and, certainly, it should not require Supreme Court decisions every year. Here again, AEDPA is at fault for ill-conceived provisions, ineffectively drafted.

IV.

Let me give you one more example under the heading of trying to fix things that don't need fixing. The principal impetus behind AEDPA was the concern that prisoners on death row were abusing federal habeas corpus as a device for frustrating capital punishment by the back door. That was the concern, notwithstanding that most of the provisions in AEDPA were also made applicable to non-capital cases, which were not thought to be present the same problems. In one way, AEDPA singled out capital cases

[3] No. 09-5327. The question in *Holland* is whether the federal limitation period should be tolled on equitable grounds.

for special treatment. Under a new Chapter of the United States Code, Chapter 154, AEDPA established an extensive set of special rules for capital habeas corpus cases.

One might have thought that at least in this instance AEDPA was addressed to something that warranted attention. Think again. In all this time, the provisions in Chapter 154 have not been applied. The reason is that Chapter 154 is a so-called "opt-in" arrangement. Its various provisions, almost all of them helpful to the state, are triggered only if the state provides competent counsel to indigent prisoners in previous postconviction proceedings in *state* court. The states have been unwilling to do that, so all the provisions ostensibly designed to deal with capital cases have been idle to this day.

One may speculate about why Chapter 154 has been ineffective. What is important to understand now is that it has *been* unsuccessful and stands, accordingly, as another example of AEDPA's failures. One might think that the proper course now is to tweak the "opt-in" arrangement in a way that encourages states to cooperate. I caution you against that response. If Chapter 154 comes into play, lawyers and courts will be forced to deal with another layer of poorly conceived and drafted provisions. I am afraid we will have another generation of confusion, waste, and wheel-spinning.

V.

AEDPA largely overlooked some genuine problems besetting federal habeas corpus. I will mention only three.

First, we need to address the questions that arise when habeas corpus petitioners advance claims that depend on changes in the law. Under existing

arrangements, associated with the Supreme Court's decision in *Teague v. Lane*,[4] federal courts usually do not entertain claims resting on new procedural rules. The chief problem is deciding what counts as "new" in these circumstances. Surprisingly, as things now stand, a claim is said to turn on a "new" rule of law unless the precedents in existence at the time the prisoner's conviction and sentence became final made it unreasonable to determine the claim against him even then. By this account, "new" rules are a lot more common than one would suppose. The *Teague* doctrine effectively reproduces the idea in § 2254(d)—namely, that a federal court must defer to a *reasonable* state court decision on the merits of a federal claim, even when the federal court concludes that the prisoner's constitutional rights were violated.

Second, we need to address longstanding questions about whether or when a federal court should decline to consider a federal constitutional claim on the ground that the prisoner failed to raise it properly in state court and thereby forfeited an opportunity for state court adjudication. The "procedural default" issue comes up in many cases and often forecloses federal court treatment of what may be meritorious constitutional claims.

Third, we need to deal with the question whether some acknowledged violations of the Constitution at trial were harmless and thus should not be the basis for federal habeas corpus relief. The "harmless error" issue also surfaces in many cases and warrants serious attention.

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[4] 489 U.S. 288 (1989).

VI.

I have discussed are only a few illustrations of the many things about federal habeas corpus that have gone wrong and should be addressed in new legislation. I urge you to consult with the ABA and other professional organizations about the best way to proceed from here, the best substantive policies to adopt, and the best way to articulate those policies.

For my own part, I would offer these recommendations.

1. In the near term, Congress should repeal or postpone implementation of Chapter 154. The provisions in that optional chapter should not form a part of a revised program for habeas corpus and certainly should not be allowed to complicate matters in advance of general reform.

2. Apart from dealing with Chapter 154, Congress should eschew piecemeal amendments to AEDPA in favor of general programmatic solutions to these problems.[5]

[5] By some accounts, habeas corpus under AEDPA has become such a sink hole that it is beyond hope. And we would be better off discarding this form of federal jurisdiction entirely. I do not take that view. Nor do most professionals in the field. Congress must also recognize that habeas corpus enjoys some constitutional foundation in the Supremacy Clause. In *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2229 (2008), the Supreme Court explained that "the Suspension Clause remains applicable and the writ relevant . . . even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights." Id. at ___, 2270. If Congress were to withdraw the federal courts' existing jurisdiction to entertain petitions from state convicts, it seems clear that Congress would have to create an adequate alternative to the writ.

Mr. NADLER. And thank you. Mr. O'Hare, you are recognized for 5 minutes.

TESTIMONY OF MICHAEL E. O'HARE, SUPERVISORY STATE'S ATTORNEY, CIVIL LITIGATION BUREAU, OFFICE OF THE CHIEF STATE'S ATTORNEY, CONNECTICUT

Mr. O'HARE. Thank you. Thank you, Chairman Nadler, Members of the Subcommittee. I am Michael O'Hare——

Mr. CONYERS. Turn your mic on, please.

Mr. O'HARE. I am sorry. Members of the Committee, I am Michael O'Hare, an Assistant State's Attorney from the State of Connecticut, and I am speaking on behalf of the State today. Thank you for the opportunity to address the Committee on an issue of great importance to the State.

The bill is important to the States because it has a direct effect on the ability of the States to carry out the lawful judgments of their courts, the lawful and constitutional judgments of their courts. As a prosecutor and as a Federal habeas practitioner, the proposed legislation raises a number of concerns for me. I will focus on two that I think are most significant.

First, I believe that the proposed amendment to section 2254(d) is of questionable constitutionality. And second, I think——

Mr. NADLER. Could you, sir—please don't assume that everybody automatically knows which section is which by number. You might characterize what amendment you are talking about and what position you are talking about.

Mr. O'HARE. I am sorry, Mr. Chairman. I am talking about the provision that sets forth the standards for Federal habeas corpus relief in AEDPA, the section that provides that you are entitled to relief if you can show that there has been an unreasonable application of clearly established Federal law or an unreasonable determination of the facts.

I also believe that if enacted the amendment to section 2244—and that is the section that bars successive petitions—would effectively prevent the States from ever carrying out an execution.

The proposed amendment to section 2254(d), that is the section that sets forth the standards that must be met to obtain Federal habeas corpus relief, seeks to add a provision that would provide relief for claims of actual innocence raised by petitioners who have been sentenced to death. It is well established, however, that congressional enactments must be based on the Constitution. If a Federal statute—if a statute enacted by Congress exceeds Congress' constitutional authority, it is unconstitutional.

Here I believe that the proposed amendment exceeds congressional authority because it creates a remedy for a claim of actual innocence. As Justice Scalia pointed out in his dissent in In re: Davis, and also as the Court as a whole stated in Herrera v. Collins, the Constitution has never been interpreted to provide Federal habeas corpus relief for claims of actual innocence.

And the reason for this is clear. Under our Federal system, Federal courts may, of course, determine whether State courts have properly applied the provisions of the procedural protections that are required by the United States Constitution. But there is nothing in the Constitution to provide Federal courts with superior au-

thority in determining the facts. The claim of actual innocence is a factual claim and under our constitutional system I believe that the States have the final say in adjudicating such a claim. Indeed in Barefoot v. Estelle and other cases the United States Supreme Court has said that the role of the Federal courts in Federal habeas corpus claims is not to retry facts or review State factual determinations, but rather it is to determine whether the State court judgment has been determined in compliance with the procedural requirements under the Federal Constitution.

Because the proposed amendment here seeks to provide relief on a factual claim I believe it exceeds Congress' power to act and is therefore unconstitutional.

The proposed amendment to section 2244 seeks to remove the barrier to successive petitions with respect to claims of actual innocence raised by petitioners who have been sentenced to death. If this provision is enacted, because it removes the barrier to second or successive factual innocence claims, it would effectively authorize an unlimited number of claims of actual innocence. As such it becomes a vehicle for perpetual delay and would ultimately prevent States from carrying out executions. I don't believe that such a rule would be in the public interest or in the interest of justice, and I would urge the Committee not to adopt these amendments.

Thank you.

[The prepared statement of Mr. O'Hare follows:]

PREPARED STATEMENT OF MICHAEL E. O'HARE

STATEMENT OF

MICHAEL E. O'HARE
SUPERVISORY ASSISTANT STATE'S ATTORNEY
OFFICE OF THE CHIEF STATE'S ATTORNEY
STATE OF CONNECTICUT

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS
AND CIVIL LIBERTIES
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 3986, A BILL TO AMEND TITLE 28, UNITED STATES CODE,
TO CLARIFY THE AVAILABILITY OF HABEAS CORPUS RELIEF
FOR A PERSON WHO IS SENTENCED TO DEATH
THOUGH ACTUALLY INNOCENT

PRESENTED ON

DECEMBER 8, 2009

I. Introduction

Chairman Nadler, Ranking Member Sensenbrener and Member of the Subcommittee, thank you for the for the invitation to appear before you today. Thank you also for holding this important hearing on the proposed amendments to the provisions of Title 28, United States Code, governing the availability of federal habeas corpus relief to state prisoners.

My name is Michael O'Hare and I am an assistant state's attorney for the State of Connecticut. I serve as the supervisor of the Civil Litigation Bureau of the Office of the Chief State's Attorney. In this capacity, I supervise all litigation on behalf of the State of Connecticut to defend against federal habeas corpus challenges to state convictions. In addition, I have had substantial experience in prosecuting capital cases in the trial courts of Connecticut and in defending capital convictions and death sentences on appeal and in both state and federal habeas corpus proceedings.

Today, I will speak in opposition to the proposed amendments to Title 28 on behalf of the of the State of Connecticut. It is the state's position that the proposed amendments should not be adopted because they are not only unnecessary, they would unconstitutionally encroach on the state's authority to define and punish crime in compliance with the requirements of the United States Constitution.

II. Background

The genesis of the proposed amendments to Title 28 is the action taken by the United States Supreme Court in *In re Troy Davis*, No. 08-1443, an petition for a writ of habeas corpus filed with the Court pursuant to 28 U.S.C. § 2241 and the court's original habeas jurisdiction. The Court transferred the case to the United States District Court for the Southern District of Georgia for an evidentiary hearing and a factual determination regarding the petitioner's claim of actual innocence. Justice Scalia, joined by Justice Thomas, filed a vigorous dissent to the majority's order. Justice Scalia stated that "[e]ven if the District Court were to be persuaded by [the petitioner's] affidavits, it would have no power to grant relief." Justice Scalia noted that "[f]ederal courts may order the release of the convicted state prisoners only in accordance with the restriction imposed by the Antiterrorism and Effective Death Penalty Act of 1996." Justice Scalia further observed that the statute " bars the issuance of a writ of habeas corpus 'with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or an unreasonable application of, clearly established law, as determined by the Supreme Court of the United States.' 28 U.S.C. § 2254(d)(1).

Justice Scalia then pointed out that the United States Supreme Court "has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." (Emphasis in original.) Indeed, Justice Scalia noted that "[q]uite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on 'actual innocence' is constitutionally

cognizable. See *Herrera v. Collins*, 506 U.S. 390, 400-401, 416-417 (1993). . . ." Justice Scalia concluded therefore, that "[a] state court cannot possibly have contravened, or even unreasonably applied, 'clearly established Federal Law, as determined by the Supreme Court of the United States,' by rejecting a claim that the Supreme Court has not once accepted as valid."

III. Proposed Amendments to Title 28

The proponents of the bill seek to address Justice Scalia's concern that Title 28, U.S.C. §2254 affords no basis for relief on claims of actual innocence in two ways. First, they propose that an additional basis for relief be added to §2254(d)(1) specifically provide for relief when the state court decision being challenged:

> resulted in, or left in force, a sentence of death that was imposed without consideration of newly discovered evidence which, in combination with the evidence presented at trial, demonstrates that the applicant is probably not guilty of the underlying offense.

Second, the proponents of the bill seek to amend Title 28, U.S.C. § 2244(b) by removing the bar against successive petitions for petitioners who have been sentenced to death and are claiming actual innocence.

IV. The Proposed Amendments Should Not Be Adopted

The proponents of the amendments to Title 28 are seeking to overcome the absence of a constitutional right to habeas corpus relief on a claim of actual innocence by creating such a right for petitioners who have been sentenced to death through legislative enactment. The proposed amendments should not be adopted because they are unconstitutional and contrary to sound criminal justice policy.

A. Amendment to 28 U.S.C. § 2254

The proposed legislation seeks amend § 2254(d)(1) by adding a specific statutory basis for federal habeas corpus relief to petitioners who have been sentenced to death and are claiming actual innocence. The proposed amendment should not be adopted for several reasons. First, the proposed amendment is unconstitutional because it seeks to provide a right that has no basis in the constitution and it violates the right of noncapital defendants to equal protection of the law. Second, the proposed amendment is unnecessary to protect the constitutional rights of defendants who received fair trials in the state courts. Finally, the amendment would impose a severe burden on the states by requiring them to retry defendants many years after the commission of their crimes and the conclusion of their original trials.

1. The proposed amendment is unconstitutional

The proposed amendment to § 2254(d)(1) seeks to provide a basis for relief for claims of actual innocence despite the fact the United States Supreme Court has never held that the Constitution provides such a right. See *Herrera v. Collins*, 506 U.S. at 400; *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *Townsend v. Sain*, 372 U.S. 293, 317 (1963). It is, however, well established that "[e]very law enacted by Congress must be based on one or more of the powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Indeed, the *Morrison* court noted that "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Id., quoting *Marbury v. Madison*, 1 Cranch 137, 176, 2, L.Ed. 60 (1803). An enactment providing relief to habeas corpus petitioners for the violation of a right that has never been recognized by the United States Supreme court would exceed Congress's "constitutional bounds," and therefore he unconstitutional. *United States v. Morrison*, supra, 607.

Moreover, the Constitution guarantees criminal defendants equal protection of the law. *Chapman v. United States*, 500 U.S. 453, 464-65 (1991). The proposed amendment offers defendants who are sentenced to death a means to challenge their convictions that is unavailable to defendants with lesser sentences. The Supreme Court, however, has never held "that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." *Murray v. Giarratano*, 492 U.S. 1, 9 (1989). A legislative enactment that offers a substantial benefit to those convicted of the most serious crimes, while denying it to those convicted of lesser offenses, is certainly contrary to public policy. In this case, it would also violate the constitutional requirement for equal protection. *Chapman*, supra, 464-65.

2. The proposed amendment is unnecessary

The proposed amendment to § 2254 is unnecessary because, as the Supreme Court noted in *Herrera*, the Constitution offers capital defendants abundant procedural protections to ensure that they receive a trial that is fair and a result that is reliable. See *Herrera v. Collins*, 506 U.S. at 398-399. All criminal defendants are entitled to a presumption of innocence, and may insist on a trial in which their guilt must be established beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). Other constitutional protection help to ensure that innocent persons are not convicted of a crime. See, e.g., *Coy v. Iowa*, 487 U.S. 1012 (1988) (right to confront witnesses); *Taylor v. Illinois*, 484 U.S. 400 (1988) (right to compulsory process); *Strickland v. Washington*, 466 U.S. 668 (1984) (right to effective assistance of counsel). Moreover, in capital cases, the Supreme Court has required additional protections because of the nature of the penalty. See, e.g., *Beck v. Alabama*, 447 U.S. 625 (1980) (jury must be given option of convicting defendant of lesser offense).

Given these procedural protections, the Supreme Court observed that "there is no guarantee" that the guilt or innocence determination made by a habeas court would be any more reliable than the original determination made by the trial court. *Herrera v. Collins,* 506 U.S. at 403. Indeed, the Court noted that "the passage of time only diminishes the reliability of criminal adjudications." Id.

This is not to say, however, that the Supreme Court casts a blind eye on claims of innocence in adjudicating habeas corpus claims. In *Sawyer v. Whitley*, 505 U.S. 333 (1992), the Court held that a petitioner whose federal claims was barred could have the claim reviewed on the merits upon a showing of actual innocence. The Supreme Court's habeas jurisprudence makes clear, however, that a claim of actual innocence is not itself a constitutional claim, but, rather, is a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered." *Herrera v. Collins*, 506 U.S. at 404.

3. Retrial of successful petitioners would place a severe burden on the states

The proposed amendment provides that a petitioner who can establish he is "probably not guilty of the underlying offense" would be entitled to federal habeas corpus relief. The typical relief in a federal habeas case is a conditional order of release unless the state elects to retry the petitioner. *Herrera v. Collins*, 506 U.S. at 403. Final judgement in a federal habeas corpus case usually does not take place until years after the petitioner's original trial and many years after the commission of the crime in question. Retrying successful petitioners after such an extended period of time would place a severe burden on the states. Indeed, in most cases, it would be impossible for the state to retry a petitioner who obtained relief under the amendment. Consequently, enactment of the amendment would inevitably result in the release of petitioners who had been proven guilty of capital murder beyond a reasonable doubt, who were sentenced to death, whose convictions were upheld on direct appeal and in state post convictions proceedings, but who were able to meet the minimal standard of "probably not guilty" in a federal habeas corpus proceeding taking place years later. Placing such a difficult burden on the states with regard to their worst criminals is neither in the public interest nor in the interest of justice.

B. Amendment to 28 U.S.C. § 2244

The proposed legislation seeks to amend Title 28, U.S.C. § 2244(b) by removing the bar against successive petitions for petitioners who have been sentenced to death and are claiming actual innocence. Because the proposed amendment to § 2244 is specifically intended to enable petitioners who to raise claims of actual innocence, it is objectionable for all of the reasons set forth above. However, because the proposed amendment allows an unlimited number of claims of actual innocence to be raised in federal habeas corpus petitions, it is nothing more than a vehicle for perpetual delay. Except in cases where the petitioner elected accept his death sentence, enactment of the amendment of § 2244(b), coupled with enactment of the amendment to § 2254(d)(1), would ensure that no state could ever carry out an execution again. Accordingly, the amendment should not be adopted.

Mr. NADLER. I thank the gentleman. Mr. Blume, you are recognized for 5 minutes.

TESTIMONY OF JOHN H. BLUME, PROFESSOR OF LAW, DIRECTOR, CORNELL DEATH PENALTY PROJECT, CORNELL UNIVERSITY LAW SCHOOL

Mr. BLUME. Mr. Chairman, Members of the Committee, thank you for this opportunity.

The Nadler-Johnson bill is a laudable effort to address a critical problem in the criminal justice system: The conviction and execution of the innocent. I think the problems with habeas corpus are much deeper than that, and I want to talk about a few of those instances today. But I do want to first say that I think that Mr. O'Hare is clearly wrong that this bill is unconstitutional. If he were right, then the Supreme Court itself acted in a completely lawless and ultra vires manner when it sent Troy Davis's case back to the District Court for further fact-finding. They could not have done that had they not at least implicitly recognized a right not to be executed if you are innocent.

I want to talk about three issues briefly. The first was mentioned by Chairman Nadler in his opening response, is the statute of limitations. The statute of limitations in AEDPA has produced Draconian results. A number of death sentence inmates and literally thousands of non-death sentence inmates have been deprived of any Federal habeas corpus review of their convictions in death sentences because of this.

I want to briefly talk about one case. Kenneth Rouse was convicted and sentenced to death in North Carolina for the crime that he allegedly murdered, raped, and robbed an elderly white female. Mr. Rouse is African American. He produced uncontradicted evidence in Federal court that one of the jurors who convicted him and sentenced him to death's mother was also convicted, raped and robbed by a different African American male and he lied about that fact during voir dire for the purpose of getting on the jury to sentence Mr. Rouse to death.

That uncontradicted evidence received no Federal review whatsoever. Why? Because his attorneys filed his habeas petition 1 day, yes, 1 day late. And they did so despite the fact that there was a good faith dispute about whether that filing was timely.

That is shocking and that is unconscionable and that shouldn't be allowed in a civilized society but it goes on in this regime.

Second, I would like to talk about Federal procedural default. As Mr. Hanlon mentioned in his remarks, there is this sort of Byzantine set of procedural rules that are now in place in the habeas system. And these also produce Draconian and unjust results. John Eldon Smith was executed in the State of Georgia despite the fact that there was widespread discrimination against women in the grand jury process that led to his conviction and death sentence. His co-defendant's lawyers objected. Mr. Smith's lawyers did not object. What was the result? Mr. Smith was executed. Mr. Smith's co-defendant received a new trial and was sentenced to life imprisonment.

It is absolutely clear that had Mr. Smith's lawyers objected it would not have made one bit of difference to the judge because that judge overruled the objection made by his co-defendant, but yet one person lived and one died because one set of lawyers knew the rules of the road and the other set of lawyers didn't.

Again, that is shocking and unconscionable and it should not be allowed. It also means in these capital cases a substantial amount of time and effort is spent on the riveting questions such as was there a State rule? Is it consistently and regularly applied? Is it adequate? If all of these procedural obstacles were eliminated we could streamline the review, we could achieve more justice and the system would work better and produce just results.

Finally, I wanted to talk a little bit about 2254(d), which was also mentioned in the Chairman's opening remarks. Section 2254(d) says that a Federal court cannot grant relief unless the State court's decision was contrary to or an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States or constituted an unreasonable determination of the facts.

Now, I realize that is quite a mouthful. And this particular language has no pedigree in habeas. We don't know where Congress actually got it from when it passed AEDPA in 1996. But I will say that proponents of the AEDPA assured Members of Congress that if they passed this that meritorious claims would be vindicated. President Clinton's signing statement said the same thing. But that promise has been broken. In Neal v. Thigpen for example, a case out of the 5th Circuit, Mr. Thigpen presented evidence that persuaded that court that his conviction and death sentence was obtained unconstitutionally. His lawyers presented virtually no evidence of mitigation, despite the fact that there was uncontradicted evidence of the extreme abuse to which he was subjected to when being placed in the State mental institution, including being repeatedly gang raped by other members there. The 5th Circuit agreed that his lawyer's performance was unreasonable, they agreed that it was prejudicial, but they said they could do nothing because while the State court decision was wrong, it was not so off the mark and thus AEDPA tied their hands.

Again, that should not be allowed. If there is a constitutional violation the Federal court should have the power to remedy it. This court should go beyond just the question of innocence, engage in sweeping reform and untie the hands of the Federal courts and allow them to get down to the business of remedying constitutional error.

Thank you.

[The prepared statement of Mr. Blume follows:]

PREPARED STATEMENT OF JOHN H. BLUME

Statement of John H. Blume
December 8, 2009

I appreciate the opportunity to address the Committee on the important issue of habeas corpus. The writ of habeas corpus has a long and storied history in this Country, but its significance and vitality has been significantly diminished in the last few decades due to the combined effect of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and a number of judicial decisions – both pre and post AEDPA – that have limited the scope of the "Great Writ."

Representative Johnson's bill, H.R. 3986, is a laudable effort to address a significant problem facing the criminal justice system: the conviction and execution of those who are, or may well be, actually innocent of the offense for which they were convicted and sentenced to death. But the problems with the current habeas corpus regime are much more widespread than the conviction of the innocent, and Congress should examine a number of different areas of that system and make necessary changes to allow individuals convicted of crimes and sentenced to death by the state courts meaningful access to the federal courts. In my testimony today, I would like to address several of the more significant problems with the current habeas regime.

First, is the statute of limitations. AEDPA created for the first time, a statute of limitations for federal habeas corpus cases. In broad strokes, the current statute requires prisoners to file a federal petition within one year of their case becoming final on direct review. There are several complicated tolling provisions. Due to the lack of clarity in the statute, even today, thirteen years after AEDPA's enactment, there is still substantial confusion as to when a petition must be filed. The Supreme Court has yet another case on its docket this term, *Holland v. Florida*, dealing with the meaning of the limitations provision. While it is not unreasonable to want to prevent "stale" or untimely claims, AEDPA's statute of limitations has resulted in numerous shocking and unfair results. Numerous death sentenced inmates, and literally thousands of non-capital habeas petitioners, have been deprived of any federal review of their convictions and death sentences because a federal court determined the habeas petition was not filed on time. Let me briefly discuss one of those cases, *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2003). Rouse raised a claim in his federal petition that one of the jurors who convicted him of murder and sentenced him to death lied during voir dire. And it was not just any lie. Rouse, who was African-American, was charged with murdering and attempting to rape an elderly white female. In his federal petition, Rouse alleged, and provided evidence supporting his claim, that one of the jurors intentionally concealed that his own mother had been murdered, robbed and raped by an African-American, and that he – the juror – harbored intense racial bias against African-Americans as a result of his mother's murder. And, to make matters worse, if they could be worse, he lied to get on the jury for the purpose of sentencing Rouse to death as an indirect act of revenge for his mother's death. However, despite this disturbing and shocking evidence, he received no federal review of his conviction and death sentence. Why? Because his lawyers filed his habeas petition one day – yes one day – late. And they did so based on at least a facially plausible understanding that the petition was timely filed. Injustices such as the one revealed in Rouse's case should not be allowed to be swept under the proverbial rug due to such a hyper-technical violation of the habeas statute.

The second problem I would like to address is that of procedural default. Even before AEDPA, the Supreme Court, in a number of decisions, created barriers to federal review of cases where the habeas petitioner allegedly violated some state procedural rule. Most of the rules involve failure to follow some state rule of procedure such as the contemporary objection rule or rules requiring federal claims to be presented to the state courts at particular times in particular ways. Again, I admit that respect for some state rules of procedure is important. But, in the current system, many clearly meritorious claims are barred from any habeas review by the federal courts for trivial failures to comply with state rules. John Eldon Smith was executed in Georgia because his lawyer failed to object to unconstitutional discrimination in the jury selection process because they were not aware of Supreme Court decisions prohibiting the systematic exclusion of women from juries. His co-defendant's lawyers did object. The result? The co-defendant was awarded a new trial by the federal courts in her habeas challenge to her conviction and death sentence and was subsequently resentenced to life imprisonment. Mr. Smith was executed. It is clear that it would not have made a bit of difference to the state courts if his lawyer had objected. The same state judge presided over the jury selection in both cases, and he paid no heed to his co-defendant's objection. But because his lawyers, due to lack of familiarity with the governing law, failed to object, Mr. Smith went to his death. Even death sentenced inmates with claims challenging their categorical ineligibility for the death penalty are sometimes denied federal habeas review of their claims. In *Hedrick v. True*, 443 F.3d 342 (4th Cir. 2006), a federal court determined that it would not consider Hedrick's claim that he was mentally retarded, and thus not eligible for the death penalty pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* was decided while Hedrick's state post-conviction challenge was pending in the Virginia Supreme Court and thus there was uncertainty as to what the procedure was for raising a mental retardation claim. But because the federal courts determined that Hedrick had not "fairly presented" his claim to the state courts, the claim was deemed procedurally defaulted.

In the current habeas system, a tremendous amount of time and attorney and judicial resources are expended wrangling over issues related to the procedural default doctrine such as: a) did the petitioner in fact violate a state rule of procedure; b) if so, is the state rule "independent," "adequate" and "consistently and regularly applied;" c) if so, is there cause and prejudice for the failure to comply with the state rule. This is not only time consuming and wasteful, it frequently obscures what should be the most important consideration: was there a violation of the petitioner's constitutional rights? The process would be simplified and streamlined by the elimination of procedural default. Cases would move faster and more fair and just results would be achieved.

Finally, I would like to talk about what many say is the "centerpiece" of the AEDPA – 28 U.S.C. §2254(d). This section provides that an application for a writ of federal habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings, unless the adjudication resulted in a decision that was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States or was based on an unreasonable determination of the facts. I realize that is quite a mouthful. This particular provision, unlike many other parts of AEDPA, had no habeas pedigree. It was not rooted in prior Supreme Court decisions, nor was it contained in any prior legislation that had been proposed to modify habeas corpus. This particular section of AEDPA has produced draconian

results. When §2254(d) was being debated in Congress, its proponents assured members who expressed skepticism that meritorious constitutional claims would still be vindicated under §2254(d). President Clinton's signing statement contained similar assurances that AEDPA would not bar review of meritorious claims. In many cases, however, that promise has been broken. In *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002), the petitioner raised a claim of ineffective assistance of counsel. It was not disputed that his attorneys failed to investigate and present evidence of the shocking physical, sexual and emotional abuse to which their client was subjected, including being brutally and repeatedly gang raped when he was a juvenile at a state mental institution, and evidence of his very low intellectual functioning. The federal court determined that his trial lawyers had conducted an unreasonable investigation and that there was a reasonable probability that had his counsel presented this evidence, Neal would have been sentenced to life imprisonment rather than the death penalty. But, despite the federal court's conclusion that Neal had presented a meritorious claim of ineffective assistance of counsel, Neal's claim was rejected. Why? Because the federal court concluded that the state court's decision was definitely wrong, but it was not completely off the mark and thus was not objectively unreasonable. This is an intolerable result.

Furthermore, §2254(d) has created a perverse incentive system. Because it has been construed to focus only on the state court result, and not necessarily the reasoning used by the state courts, AEDPA has created what is effectively a reward system for state courts to say as little as possible about the merits of a particular individual's federal constitutional claims. If the state court says nothing, most circuits have construed §2254(d) as creating a presumption that the state courts correctly identified and applied controlling Supreme Court precedent even when there is no objective reason to believe they did so. Summary adjudications by state courts thus are treated more deferentially than are detailed and carefully reasoned state court decisions. Even when a state court's reasoning is facially defective and patently unreasonable, the focus on the bottom line result also insulates many state court decisions that are inconsistent with governing constitutional law.

Section §2254(d) should be revisited by the Congress. In its current form, and as currently applied by the federal courts, it leaves many clearly meritorious federal constitutional claims without a remedy. This makes the "Great Writ" of habeas corpus nothing more than a shadow of the historic remedy which has played a significant role in the development and protection of constitutional rights, and has produced numerous fundamentally unfair and unjust results.

Given the importance of federal habeas corpus to our constitutional system, I would urge this Committee and the Congress to engage in meaningful habeas corpus reform and untie the hands of the federal courts to review meritorious claims of constitutional error.

Thank you.

Mr. NADLER. Thank you very much. I will begin the questions by recognizing myself for 5 minutes. Let me start by asking Mr. O'Hare, since one of the major purposes of AEDPA, which I think you referred to also, was for finality and to reduce the number of post-conviction appeals and, more importantly, to reduce the time of litigation between an adjudication of guilt and execution of sentence, but since the result seems to have been a great lengthening of the time—because of all of the—as Judge Kogan referred to it—

satellite litigation, and all of these other questions of whether the statute was met and so forth, do you think that ought to be reviewed or revised because in fact the central purpose of the statute has gone the other way? It seems to have backfired?

Mr. O'HARE. Well, in my view, Mr. Chairman, that additional litigation arises when the State—and I represent the State and I have done this—we move to dismiss petitions on the grounds that they are filed in violation of the statute of limitations——

Mr. NADLER. Excuse me. That is exactly my point. Wouldn't it be better, instead of wasting a lot of time, money, and effort as to whether the procedures were followed properly, to get to the heart of the matter on the merits?

Mr. O'HARE. No, I think the heart of the matter on the merits has been resolved in the State courts and I think the point of AEDPA is to allow that ruling to stand unless there is a clear constitutional error.

Mr. NADLER. Okay. Now, based on a study commissioned by the Department of Justice—well, as I said, it is now obvious that capital habeas petitions now take twice as long as they did prior to AEDPA's enactment. Let me ask Judge Kogan, since the primary purpose of AEDPA was to improve the efficiency in the habeas process, do you think the act should be modified? Same question.

Judge KOGAN. Well, obviously I think the entire habeas corpus position has to be looked at again and a whole new regimen of what is going to happen in these situations adopted by the Congress. Because if you don't do that you are going to get involved in things that are really superfluous. Procedural matters are all well and good. The only problem with procedural matters is they obscure the thing you are really looking at.

Mr. NADLER. That is an interesting philosophical point of view, which is exactly the opposite of Mr. O'Hare's view, which seems to be better to spend time on the procedural obstacles to vindicate the right of a State not to have their determinations looked at on merits by a Federal court. Which I disagree with, Mr. O'Hare, but that is his position as I gather it.

Now let me ask you further, Judge Kogan, based on our—because of the provision in the AEDPA that a Federal court cannot grant habeas on a claim decided unless it is contrary to or involved in unreasonable application of clearly established Federal law or based on unreasonable determination of the facts in light of the evidence, could there be circumstances where innocent individuals are denied habeas relief?

Judge KOGAN. Sure, it could do that. In other words you are looking at is the lower court making a mistake? That is really what you are looking at. And the whole point is that if you are going to go ahead and start talking about whether or not something is reasonable or unreasonable, you have to go to the highest level in favor of the person who is filing that particular petition. Because remember, the whole system of justice is not just to convict the guilty, it is also to protect and prevent the innocent from being convicted.

Mr. NADLER. Although some people's view seems to be that the purpose of the Federal justice system is to protect the right of the States to make determinations whether right or wrong.

Professor Blume, in light of what we have been discussing, do you have any specific suggestions on how to modify the current law to ensure that individuals whose Constitutional rights have been violated are ensured meaningful review of their habeas petitions in Federal court?

Mr. BLUME. Yes, I would suggest that 2254(d) be eliminated.

Mr. NADLER. Just eliminated? Not modified?

Mr. BLUME. Yes, it has created a perverse incentive system in many ways, in that the less the State courts say, the more deference they get in Federal court.

Mr. NADLER. In other words, the less they say the more deference they get because they don't say enough to hang themselves?

Mr. BLUME. To hang themselves. And the Supreme Court has focused solely on the result at the lower Federal court. There is a presumption that the State courts got it all right when they in fact say nothing. I don't think that is what the people who passed AEDPA intended, but that it is how it has played out and it has led to numerous Draconian and unjust results. The elimination of procedural default would also get down to the business, as you said, of getting to the merits, and avoiding——

Mr. NADLER. Besides eliminating 2254(d) in its entirety, would you have any other suggestions?

Mr. BLUME. Yes, I would get rid of the procedural default doctrine and if you want to leave the statute of limitations at least create a fair equitable tolling provision.

Mr. NADLER. And what would a fair equitable tolling provision look like?

Mr. BLUME. A fair equitable tolling provision I think would take into account that some attorney errors would justify Federal review. Right now Federal courts have interpreted that such lawyers' egregious mistakes, no matter how egregious, does not toll the statute of limitations. And because many of these inmates have no right to either a lawyer or an attorney of their choice—and there have been shocking examples of attorney malfeasance in this—there should be some exceptions to statute of limitations for attorney error.

Mr. NADLER. And one further question before my time expires. Do you think it should make any difference in the degree of review of attorneys' misconduct or lack of effective representation with respect to tolling the statute if the attorney was selected by the defendant or is assigned to him?

Mr. BLUME. I don't know that that should necessarily be. I think I would really want to focus more on the attorney's conduct. It may be that he might be selected poorly but they are not really in the position to know what they are getting.

Mr. NADLER. My time has expired. I recognize the distinguished Chairman of the full Committee, the gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman. Could I solicit the views of those that are on the panel with Mr. O'Hare about the question of constitutionality? I want—I am here to help Mr. Johnson. So what I would like to ask all of you to do, is help us figure out how we can improve this really important piece of legislation.

But let's look at the constitutional question first. Could you start us off, Mr. Hanlon?

Mr. HANLON. Well, I would start—I read briefly Mr. O'Hare's statement before coming in—sitting down here. And I note that he starts off citing dissenting opinions in the recent Supreme Court case. And I think Professor Blume is absolutely right that the action that the court took in Troy Davis's case is the strongest message that I think can be sent to this Committee and others that there is a constitutional right involved when we are dealing with the execution of a possibly potentially innocent man. And I think that is why the Court sent the case back.

Justice Stevens weighed in on this, and I just don't think you can make the case that the law as it stands right now holds that there is no constitutional right to be free from execution of a potentially innocent man.

Mr. CONYERS. Judge Kogan?

Judge KOGAN. Well, as everybody knows, we do have an amendment to the U.S. Constitution that talks about nobody's life, liberty or property can be taken without due process of law. And due process of law has been defined over the years by all courts, including the U.S. Supreme Court, to include those things that arguments such as Mr. O'Hare's might have years ago been valid, but really aren't any more.

What do we mean by due process of law? Simply has the law treated this particular litigant, in this case the defendant, fairly? And that is really the issue. And the court can always decide whether or not that person has been treated fairly and do it under the due process clause.

Mr. CONYERS. Thank you. Professor Blume?

Mr. BLUME. Yes, I addressed this in my opening remarks but let me go with a little more detail. Yes, it is true that prior to In re: Troy Davis the Supreme Court had said we have never explicitly decided whether there is a right not to be executed if you are innocent. That of course is a statement that I think most people on the street in this country would find shocking. That in this country, supposedly the greatest democracy in the world, the greatest defenders of civil liberties, that it is not enough to obtain a new trial. That you are just innocent of the offense for which you were convicted and sentenced to death.

But despite that fact I think it is true the court could not have done what it did in In re: Davis. It took the case and said we are sending it back to the district court to determine if Mr. Davis is innocent in light of the statutory criteria it met, unless it first decided implicitly that there is a constitutional right not to be executed unless you are innocent. They would have had no power to do that without at least making that determination. So I think Davis speaks clearly to the fact that there is now a constitutional right not to be executed while you are innocent. Thus this Committee has and the Congress has the power to pass it and I think also to influence the decision of what is the standard for innocence, which is something this bill takes on.

Mr. CONYERS. Well, Attorney O'Hare, what seems to be disturbing some of the people at this hearing about your analysis?

Mr. O'HARE. Well, I think they have stated what disturbs them about my analysis. But I would respond by saying that I believe on that issue the Court spoke most clearly in Herrera v. Collins,

where they declined to hold that there is a right to relief on a claim of actual innocence—for a right to Federal habeas corpus relief on a claim of actual innocence. And I think that is the state of the law and their action on the order in Troy Davis does not alter that.

And I think that the real issue is not whether or not a person can be executed if he is innocent of the crime. I think the issue is where that decision is made. And I believe that the decision—if the decision is made in a State proceeding that complies with the requirements of the Federal Constitution, then that should be the final decision on that issue. And I think that that is the basis of our Federal constitutional system. And I believe that in Herrera v. Collins the United States Supreme Court, the entire court in this case, declined to hold that there is a basis for relief on a claim of actual innocence in Federal habeas.

Mr. CONYERS. If it turned out that many here today were correct, you could reconcile yourself with a new position on this subject? I mean, is this deeply held and you don't have any question about it? Or is it something that you can accept after you review the kinds questions that have been raised about it?

Mr. O'HARE. Well, Mr. Conyers, I am a practitioner and I apply the law as I believe it exists. So my position is based on the law as I believe it currently exists today and I represent my clients, the people of the State of Connecticut, based on that belief. If the Supreme Court were to change and issue a clear opinion indicating that there was such a right then certainly I would alter my position.

Mr. CONYERS. Well, that is pretty decent of you. We appreciate that very much. And the reason that I pursue this conversation is that we all—some of our views, legal, are deeply held. And I have found myself on occasion saying I don't care what the Supreme Court says. As a matter of fact increasingly I have found myself with that view.

So I just wanted to know if you could easily adjust yourself to that if the Supreme Court spoke thusly. I have got some issues that I think the Supreme Court, with all due respect, was dead wrong. So is there any other basis of persuasion that might move you to modify your position?

Mr. O'HARE. Well, Mr. Conyers, as a practitioner, I have to follow the law as articulated by the Supreme Court and my own State Supreme Court on matters of State law. And I often disagree with my State Supreme Court and sometimes the United States Supreme Court. But when I do, I follow the law in representing the State of Connecticut.

Mr. CONYERS. Well, you can't not follow the law, but that does not mean you don't—you haven't changed your opinion. Do you see what I am trying to convey? I mean, just because the Supreme Court says O'Hare is wrong, that does not mean O'Hare says okay, I will do it your way. You likely don't have any other choice. But would there be other things that could help you reexamine your position like maybe reviewing this transcript of this discussion?

Mr. O'HARE. Well, Mr. Conyers, I always keep an open mind on these issues.

Mr. CONYERS. Well, now that is what I was looking for. I wish you had said that a few minutes ago instead of about how blindly

you follow Supreme Court dicta. But I thank you for this discussion.

Mr. O'HARE. You are welcome.

Mr. NADLER. The gentleman yield back?

Mr. CONYERS. Yes.

Mr. NADLER. I now recognize the gentleman from Virginia for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. Let me follow through on that just a minute. Mr. O'Hare, you talk about what the law is. In the legislative branch we have the opportunity to perhaps change the law. And I was wondering since we know what we know with findings of DNA where people have had a trial and by all aspect its looks like a fair trial, but we know that they just got it wrong. Now, do you find it inherently wrong to have—just inherently wrong, whether that it is the way it is or not, that there is a system that someone who is factually innocent of the charge ought to be executed?

Mr. O'HARE. My State, my State has very broad rights of post-conviction, to challenge convictions in post-conviction proceedings. And we have virtually unlimited opportunity for defendants in our State who want to present DNA evidence and other claims of innocence to do so in the State courts.

Mr. SCOTT. If the DNA is kind of outside of the process, that is just the umpire after the game has been played. You have a videotape review and they just got it wrong. If there is no DNA, you wouldn't expect any better percentage results than in the case of DNA. We know there is DNA, they come and look at it, and whether you got it wrong. If you don't have the DNA, it is not perfect. Some of them are wrong. If you can show that you are factually innocent of the charge, is there anything inherently wrong with a system that will put you to death anyway? Without an appeal?

Mr. O'HARE. I think that someone who can show that they are factually innocent of the charge should not be put to death.

Mr. SCOTT. Where in the process would they have the opportunity to have someone put a stop to the proceedings?

Mr. O'HARE. I think, as I indicate in my testimony, in my view it should take place in the State proceeding.

Mr. SCOTT. In the State court. You trust the State court to get it right and the Federal court should have no opportunity to put a halt to the State proceedings when someone claiming innocence would be denied the opportunity to present the evidence gets put to death anyway without the Federal Government being able to put a halt to the proceedings?

Mr. O'HARE. I think that the Federal Government can ensure that the defendant——

Mr. SCOTT. But there is nothing inherently wrong with a system that would put them to death if he is factually innocent of the charge? We have questions as to whether factual innocence is—whether you have a constitutional right against execution if you are factually innocent. Is nothing inherently wrong with that process?

Judge Kogan, do you have—is there something inherently wrong with a system where someone who is factually innocent cannot present evidence to show that they are innocent?

Judge KOGAN. In this country there is. There are some countries around the world where I think that routinely happens. But the important thing to remember——

Mr. SCOTT. That what happens?

Judge KOGAN. Where they are put to death. Where they just have evidence, but they have no chance to present it and even if they did present it, they wouldn't prevail anyway.

Mr. SCOTT. Does that happen in the United States?

Judge KOGAN. Unfortunately, I believe so. Let me also say——

Mr. SCOTT. And is there something inherently wrong with that?

Judge KOGAN. Inherently wrong? In a country such as ours that prides itself upon the right of individuals to have life, liberty and the pursuit of happiness, it sure does. It is just morally wrong to execute someone who is innocent of a crime and especially not even giving that person the opportunity to come around to show that they are in fact innocent.

And also let me say this. You know, having been on the bench, I am not someone who overlooks reality. Courts can be wrong. They are wrong many, many times. State Supreme Courts make mistakes. The U.S. Supreme Court makes mistakes. And for us to say that let us rely upon a supposed infallibility of a State court is a big mistake.

Mr. SCOTT. Mr. Blume, is there anything inherently wrong with putting innocent people to death?

Mr. BLUME. Yes. I think to me the answer is simple. In this day and age in this society it is unconscionable that we would execute someone who may be innocent without giving them some fair opportunity to present that evidence.

Mr. SCOTT. Mr. Hanlon.

Mr. HANLON. The answer is yes, of course. It is inherently wrong. One of the things I would like you to do in your review here is question the underlying assumption of AEDPA. AEDPA's underlying assumption was that there was a need to restrict Federal court review in death penalty and habeas litigation.

This is 1996. There was a study Professor Liebman did at Columbia University from 1973 to 1995 of all death penalty cases during that period of time. There was a 68 percent error rate. 47 percent of that was out of the State courts and 40 percent out of the Federal courts. Imagine if that were an airline.

The need to restrict review with a 68 percent error rate is simply nonexistent. That is an error rate unheard of in the annals of Anglo American jurisprudence. The normal rate of reversals—and Justice Kogan, correct me if I am wrong—but I think it is 5 percent, somewhere around 5 and 10 percent.

Mr. SCOTT. This is in death penalty. 68 percent error rate?

Mr. HANLON. Yes.

Mr. SCOTT. And what do you mean by error rate?

Mr. HANLON. There were serious constitutional reversible errors in those cases.

Mr. SCOTT. Thank you, Mr. Chairman.

Judge KOGAN. If you would allow to me to interrupt, I was also part of that Columbia University study with Professor Liebman. So I am very, very familiar as to what took place during that particular study. But as I said before, the problem with all of these

things is that we have human beings trying to be perfect in operating the system. And you can't say that we can operate a perfect system. There is no such thing. So therefore we have to give this escape valve which allows us to correct somewhere around the line errors that even the courts themselves will submit.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. Will the gentleman yield?

Mr. SCOTT. I yield.

Mr. NADLER. You were just saying in that study where they found 68 percent error rate, how did they define the error rate?

Judge KOGAN. I think Mr. Hanlon described it. Actually, it does not mean that the person was innocent. It means that there was some substantial mistake that occurred during the proceeding that would entitle the defendant to either a new trial——

Mr. NADLER. As defined by a subsequent court or as defined by the people doing the study?

Mr. HANLON. Defined by the State courts and Federal courts.

Mr. SCOTT. That was the finding. They were in fact set aside?

Mr. HANLON. Yes.

Mr. NADLER. I now yield 5 minutes to the gentlelady from California.

Ms. CHU. Mr. Hanlon, many of your criticisms of AEDPA seem to some back to one major flaw in the way we handle capital cases in this country, the lack of well-trained, experienced lawyers to help prisoners who are sentenced to death penalties and who lack the lack the ability to have representation on their appeals. And the statistics are disturbing that seven out of 10 capital cases fully reviewed over a 20-year period had serious constitutional errors.

I doubt that many prisoners that are sentenced to death can afford the cost of a multiyear post-conviction proceeding and yet they are not guaranteed counsel after their initial conviction.

What is the best way to fix this problem? What is the best way to make sure that they have adequate legal advice and representation? Should the Federal Government provide defenders to capital cases to shepherd them through the Federal process post-conviction as we do prior to conviction?

Mr. HANLON. Well, that is a very good question. The American Bar Association has studied this issue for over 20 years now and continually promulgated guidelines, recommendations, an exhaustive study of the State systems. Particularly now I want to focus on State post-conviction capital litigation. And because we can't establish a constitutional right to capital post-conviction representation, the funding for counsel in these cases is grossly inadequate almost everywhere. And this is just terribly exacerbated by a 1996 effort to limit Federal review. Under that situation, one would think you would want to expand Federal review knowing that the problem of adequate counsel in capital post-conviction, in cases where this is the first time that this issue can be raised, ineffective assistance of counsel, prosecutorial misconduct, suppression of material evidence, juror misconduct, et cetera.

So what we are recommending here is that the Congress seriously consider funding for these State capital post-conviction defender systems. Because we have at least a 20-year record of failure. We can't get it. We have tried and tried and tried and we are

met with well, it is just a matter of legislative grace. We don't have to provide you with any. And faced with that, we go begging but we always come up dramatically short. And it seems to me that the record is overwhelming right now that we are not going to get that funding in the States. And we have only one other place to look for it.

Ms. CHU. And you mentioned that there are Federal training programs in place to help States improve training and standards for counsels that are appointed to State capital cases. Are the States taking advantage of this?

Mr. HANLON. I frankly don't know the answer to that question, but I will get it for you. One of the bad things that happened in 1996 is that we lost funding for the Volunteer Lawyers Resource Center. Right at the time we had this record established of a 68 percent error rate and inadequate funding in the States, then we lost that Federal funding that we had there. And those were—they would help lawyers like me who never tried a misdemeanor case to come in and do a capital case and train us. So the training money is essential.

I just don't know the answer to your question. I just don't know.

Ms. CHU. Justice Kogan, you gave a detailed analysis of the flaws in the drafting of that process. The last time Congress meddled with habeas corpus we clearly missed the mark and it has made it even more difficult and more time consuming for inmates to receive proper justice.

In your testimony you mentioned two pending Supreme Court cases that will rule on the same issues that you raise. Why not leave it up to the courts to iron out these inconsistencies and confusion of law?

Judge KOGAN. Well, remember now we have 50 States in the United States. And you could very simply wind up with 10 or 15 different ideas as to what something should be interpreted as and what the law should be.

We have the United States Supreme Court and it is there in the Constitution for a purpose, and the purpose is to be the Supreme Court of the United States. And this is where these differences ought to be ironed out.

Ms. CHU. Thank you, I yield back.

Mr. NADLER. And thank you. And I am corrected by counsel. Let the record reflect I did not yield to the gentlewoman from California; I recognized her for 5 minutes, as I now recognize the gentleman from Iowa for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I may not ask you to yield during this process. I thank the witnesses as well, and the level of curiosity that has grown here, but as I listened to Mr. Hanlon talk about the statistics of the error rate and defined it, I think a couple of you gentlemen, in an accurate way. Process, procedure, legal technicalities whatever it might be, but not necessarily innocence.

And so I would ask first Mr. Hanlon this question. Of this data that you put out, do you have data that would reflect the identity of the individuals and the numbers of individuals who were executed unjustly who were actually innocent of the crime?

Mr. HANLON. That data is generally collected by the Death Penalty Information Center and is available on its Web site. Okay? But

I do want to correct the record. I did not say that these errors were procedural, technical, et cetera. My testimony was that the courts had reviewed these cases and had found serious constitutional and reversible error.

Mr. KING. Thanks for the clarification, Mr. Hanlon. I did not intend to put words in your mouth, but I would ask you again do you have knowledge of any individuals who were executed that have been determined to be innocent?

Mr. HANLON. I think I am going to ask Justice Kogan to answer that question.

Mr. KING. I will be happy to turn this to the Honorable Judge Kogan, but I want the record to reflect that I am asking the Honorable Judge Kogan if he can respond to that question.

Judge KOGAN. I cannot give you names, but I will say this. I am going to use DNA as an example of what I am going to refer to. Now, say to yourselves, DNA as we all know, first of all, only covers a certain number of cases but say it this way. What happened to these people prior to DNA being developed as a science which could prove them innocent? I will tell you exactly what happened to them. They were executed. Common sense tells you that. You can't say, oh, you know, DNA only arose and was used in recent years like it is just something that fell out of the sky. In other words, there were innocent people going back to the founding of this country. But yet we did not have DNA developed up until the nineties where it was able to be used in court to exonerate. So logically, they had to have been executing.

Mr. KING. Mr. Kogan, I would point out that we have over 40,000 people a year killed on the highways in America and over 16,000 that are murdered in America and we will lose an average over the last 2 years of 172 troops in Afghanistan. Surely when we look at the magnitude of what we are dealing with, do you have a sense of the magnitude of how many innocents have been executed over a period of time? Do you have any sense of that that you can help this panel out?

Judge KOGAN. I understand that we have had 100 to 150 people exonerated by DNA.

Mr. KING. None of them executed.

Judge KOGAN. No, none of them were executed but if we didn't have DNA they would have been.

Mr. KING. Are we certain of that? I am glad this happened. And I have been a strong supporter of establishing a DNA data bank and all kinds of circumstances because I think the saving of one life is worth all the investment we could possibly put into it. I don't want to leave a tone—I would just like to be able to understand the magnitude of this. I agree with the necessity to never execute anyone and unjustly an innocent person.

Mr. NADLER. Will the gentleman yield?

Mr. KING. Yes, I would yield.

Mr. NADLER. With respect to your question just now, in what percentage of death penalty cases is DNA evidence available?

Judge KOGAN. I can't give you an exact percentage but it is a very, very small amount.

Mr. NADLER. So in other words, one has to assume that if X percent of people would have been executed but for DNA evidence

where DNA evidence is available, then probably a similar amount of people who are innocent are executed where the DNA evidence is not available; would that be correct?

Judge KOGAN. I don't know. There is no way for us to quantify that at all. But we have to say logically that if now we have exonerated between 100 and 150—and it may be more than that—by DNA in capital cases, look at the same percentage for years gone by.

Mr. KING. Justice Kogan, I think you have given an accurate answer on this. We don't know the number and we don't know the names. And it would be helpful to know the number and the names so that we understood the magnitude of this. Is this a way-out-on-the-stretch anomaly or a statistical—and I think we are going to have to go look at that data on the Web site, as mentioned to Mr. Hanlon.

But I also want to point out before I turn to Mr. O'Hare, and my clock is running out, I watched the O.J. Simpson trial and there was DNA evidence there. So some of these things go out the window when it comes time to go before a jury.

Mr. O'Hare, I wanted to get a clarification that you might be able to illuminate the situation and that is if I go to the bill and it reads on page 2: "A sentence of death that was imposed without consideration of newly discovered evidence which, in combination with the evidence presented at trial, demonstrates that the applicant is probably not guilty of the underlying offense." Can you tell me where is that burden of proof on "probably"? And how do you define "probably"?

Mr. O'HARE. Well, I think that if there is going to be a right to habeas corpus relief for claims of factual innocence, "probably" is far too low a burden of proof. In my State we do have actual innocence claims can be made in post-conviction proceedings and the standard is clear and convincing evidence of actual innocence, which is a higher and more appropriate standard.

So I would suggest that a standard of "probably" is far too low and too imprecise.

Mr. KING. Would you agree as our side-bar conversation that "probably" means preponderance? And if that is the case shouldn't that be an amendment to this language so that it is clear and convincing to us?

I think that is a good place for me to yield back to the Chairman, and I thank the witnesses for their testimony.

Why don't you answer the question I asked? Would you agree that the bill should be amended for preponderance if that is the intent?

Mr. O'HARE. I think preponderance would be a much clearer standard.

Mr. KING. I am clearly convinced.

Mr. NADLER. I thank the gentleman, and I now recognize the gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman, and I appreciate you being here.

Mr. NADLER. I am sorry. I recognize the gentleman from Georgia.

Mr. GOHMERT. I appreciated being recognized. Good to see you too. Thank you.

Mr. NADLER. I am sorry.

Mr. JOHNSON. Thank you, Mr. Chairman. I will say that a probable cause standard, in other words it is more likely than not——

Mr. NADLER. Sir, your mic, please.

Mr. JOHNSON. That standard is used for arrests, for criminal offenses and also for things like search warrants. And so I just want everyone to know that probable cause, which is what this legislation would actually provide for is not a strange or foreign standard that is used by the courts.

Back in 1980, I was a brand new lawyer. I started practicing in January 1980, handling misdemeanor cases. And a friend came to me and said there is a guy down on death row who really needs an attorney, and he is due to get killed, as I recall it was around February 26, almost 1 month to go. The death penalty bar was so busy that they were willing to entrust that case to a young lawyer with no experience. We didn't have the death penalty seminars to get lawyers ready for that kind of work.

And so Mr. Howard Jones had already exhausted his direct appeals and so now it was State habeas and Federal habeas, on down the line. The record on the State habeas level pretty much mirrored the trial court's denial of the motion for new trial and was also in keeping with the Supreme Court's, the State Supreme Court's denial of any relief in this case. There were a number of issues that only ripened about 8 years, 7, 8 years later, so Howard Jones from October 1977 until I think it was around March 1984, languished on death row.

His attorney was great friends with the D.A. And the D.A. And his attorney were also well-acquainted with the judge. During the trial where the defense lawyer filed two motions, both of which were misspelled, motion for "trail" as opposed to "trial" and there was some other motion with misspellings. It wasn't a careful approach to representing Mr. Jones.

To make a long story short, in 1984 a Federal district court judge was able to see that this case against Howard Jones was based on perjured testimony and also prosecutorial misconduct, and the prosecutorial misconduct had to do with allowing the State's principal witness to testify that there was no deal between he and the State. He had already received a 12-year sentence for armed robbery with the murder case being dead docketed. But anyway that case ended up, the prosecutor allowed that testimony and the defense lawyer did ask the appropriate question of the State's principal and main witness. It did ask him and he said no, I've not reached a deal. Nobody disputed that on the prosecution side.

So I am saying that to say it went all of the way through State court, the appellate direct appeal, and all of the way up to the U.S. Supreme Court. Then when I came into the case—well, actually I came into the case at State habeas, but then we embarked upon the Federal habeas and it was a Federal district judge and it was also the public defender for the main witness against my client who as he was getting older I guess he wanted to make a death bed confession or something like that. But he was the one who told the court who testified that yeah, my client did have a deal, this is what the deal was. And so based on that, the judge ruled in favor of Mr. Jones.

Now not to talk about whether or not Mr. Jones was guilty or innocent, I think it is important for people to have respect for our system of justice. And if our system of justice allows for lies, for a conviction to be based on lies, knowingly, then we need to improve that system. So I am just stating for the record that procedurally, procedural issues are important. Certainly procedural requirements are very important. So is the application of substantive law and whenever that process is not true, whenever there is a question about whether or not witnesses lied, in Troy Anthony Davis, several of the identification witnesses testified that it was Troy Anthony Davis who pulled the trigger, but now they are all saying that they were victimized by police misconduct and they wanted to change their testimony.

So, you know, people do have conversions at some point where the truth comes out. And for us not to be able to get at that truth in the most important type of case that we can have where a person's life is at stake, where the State is getting ready to take someone's life, I think a successive petition, if necessary, in that case is not too tough a procedural hurdle for States to overcome.

I had some questions that I wanted to ask, but I felt like it was better for me to give my personal experience with this and to echo, everybody has been talking about prosecutorial misconduct and ineffective assistance of counsel, and it does happen in the real world. I want to thank the Chairman for allowing me to have a little more time than I should.

I yield back, Mr. Chairman.

Mr. NADLER. The time of the gentleman has expired.

I now recognize the gentleman from Texas.

Mr. GOHMERT. I do appreciate you all being here, and I am sorry I was late. We were going through a Federal district judge impeachment hearing downstairs.

Just so I know where everybody stands, I would like to ask: Do you support the imposition of the death penalty in any cases from State court personally?

Mr. HANLON. I am here on behalf of the American Bar Association, and the American Bar Association, other than certain categories of juveniles, mental retardation——

Mr. GOHMERT. So you have no personal opinion?

Mr. HANLON. I have a personal opinion.

Mr. GOHMERT. What is your personal opinion?

Mr. HANLON. My personal opinion is that the death penalty is not worth the price. But that is my personal opinion.

Mr. GOHMERT. I know. You are here representing the ABA. I appreciate that.

Judge?

Judge KOGAN. This may surprise you. I am opposed to the death penalty because I see the problems in the system and how every day we run the risk of executing, and it is a person. For that reason alone. But there are some people who have committed crimes that are so heinous and so horrible that actually I think the only way society can show its disapproval is by exercising the death penalty.

Now that doesn't mean run of the mill——

Mr. GOHMERT. My time is so limited. I am just trying to get a feel where everybody is.

Judge KOGAN. There are certain people, and on a world scale, and on a world scale Adolph Hitler, Joseph Stalin, Mao Tse-tung——

Mr. GOHMERT. But they weren't tried in State court.

Mr. O'HARE. I have argued to uphold death penalties, and I do in certain situations support the imposition of the death penalty.

Mr. BLUME. My personal opinion is similar to Mr. Hanlon's. I think it is not worth the time and effort.

Mr. GOHMERT. Thank you. That lets me know where everyone is coming from personally. Since we do in our court proceedings allow questions so we know where people are coming from personally.

When I look at the proposed bill, I do have concerns about the word "probably." Yes, we have all kinds of law on the words "probable cause," but "probably" is going to create all kinds of new case law. And so if the idea were to drag litigation out, drag things out to prevent any further execution in any case, then this would seem to be a good word to use.

Also, the law as it exists right now has some limits on how many shots at the apple you get as well as exhaustion requirements, and it is my understanding under the proposed law that there is no exhaustion requirements of other remedies as well as potentially unlimited opportunities to continue to pursue a writ of habeas corpus under that bill.

Is that your understanding? Mr. Hanlon, is that your understanding that there is no limit to the number of writs that may be brought under the proposed bill?

Mr. HANLON. You mean under Congressman Johnson's bill, is there any limit to the number of proposed writs?

Mr. GOHMERT. That is correct.

Mr. HANLON. I am not sure that I know the answer. I know there is no specific limit articulated in the bill.

Mr. GOHMERT. Then that would be subject to court interpretation, but the bill itself does not limit it.

I have to tell you, I appreciate Mr. Johnson's comments. I was appointed to appeal a death penalty case in Texas and I have had three death penalty cases that I tried as a judge. Two had the death penalty sentence imposed and one did not. The one I was appointed to appeal, though, the court kept dragging—the highest court in Texas kept dragging its feet on whether or not to render a decision. Frankly, I had done a very effective case of pointing out that I didn't have a problem with the death penalty, but in that case the rules were not followed and needed to be reversed. But my client kept begging me, please, it has been so long, tell them just give us a decision, leaving me on death row for an unlimited period is cruel and unusual. Don't make me sit here day after day after day not knowing whether I am going to die next month or not die next month. Am I going to get close and be pulled back. Let's just do it. It is cruel and unusual to make me sit here for such a long period of time.

So I see the pendulum swing back and forth, but I want to make sure that we don't go as far as we had back in the sixties and seventies, forgetting the victims and victims' rights. I think we have

done a good job with the DNA laws that we have passed, and I applaud the majority's efforts in making sure that we get better results in trials, but I would hate to see us completely eviscerate a State's rights to impose punishment.

Thank you.

Mr. NADLER. Thank you.

The gentlelady from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman, and I thank the witnesses as well. I want to make a statement just for the record that this hearing is on the impact of Federal habeas corpus limitations on death penalty appeals. And I appreciate the honesty of the witnesses, but this is not a hearing on your position on death penalty. I am sure many of us would have differing views on how we would approach our analysis of the moral validity of the death penalty. And many of us quarrel with ourselves in particular, Judge, on the framework which you used, heinous and horrific crimes. You probably have personal quarrels with your own morality.

But I think this hearing is important because many of us have lived through the crisis of death penalty cases becoming political footballs. I think that is an abuse of justice. I think that is a heinous, immoral act. When in essence the political future of those who are entrusted to make fair and unbiased decisions are based solely on the latest poll, whether or not I will win the conservative vote, whether or not I can go into a primary and be successful.

And why am I speaking from that perspective, because I have had real life experience over a period of years in trying to secure not biased results, not feeding false information to distort the decision-making process of an elected official, but giving them our very best so they can make the right decision or giving the very best to the Supreme Court so they can in essence put in place a stay. But obviously if you are addressing the conservative court versus another type of court, and of course we have lived under now what has been called a conservative court for more than two decades.

So let me give you an example of what we face in particular in the State of Texas. One particularly troubling case is the case of Todd Willingham, who was executed by lethal injection in Texas in 2004. Todd Willingham was accused of deliberately trapping his three children inside of a burning house. He contended that he did not set the fire and was asleep on the morning that the house caught fire, but managed to escape with burns while his daughters died inside. Before Willingham's execution, his attorneys were able to procure expert evidence proving that he did not cause the fire that killed his daughters. Yet the Governor's office of the State of Texas declined to even read the report. Todd Willingham was executed without an opportunity to appeal with evidence that could have very well saved his life. A heinous crime, certainly something that would distort the hearts and minds of individuals as to why this person should live.

Chairman Nadler, if I could, I would like to officially ask for a full hearing on the Todd Willingham case. I think it is a case in point, and I have written a letter.

Mr. NADLER. If the gentlelady will yield, that is in the works.

Ms. JACKSON LEE. Thank you. I am so grateful for the leadership of this Committee.

Let me move quickly and just indicate, that is one glaring case out of the State of Texas, one Governor by the name of Governor Rick Perry.

The second case was with a Kristian Oliver, executed on November 6, 2009, one case that I personally got involved with because it was represented that there was new evidence dealing with DNA on a rifle. Certainly someone died. No one would ever diminish the loss to these families. But someone died, and we asked for a 30-day stay. It was rejected. The Governor did not respond.

Mr. Blume, if I can quickly ask the question as to what the legislation Mr. Johnson has offered, and I am an original cosponsor, would have done to these cases when I believe it was truly tainted by political aspirations and political concerns as opposed to the basic raw facts of a simple process of justice, and not even justice, but a procedural road map in order to allow new evidence to be presented.

I would like Judge Kogan and Mr. Hanlon to answer those cases as well.

Mr. BLUME. Certainly I know about the Willingham case more than the second one. I do believe that the bill, if enacted, would have created a forum for Mr. Willingham to present his new evidence. To me, it is a clear case of someone who was executed even though they were innocent in this country.

Ms. JACKSON LEE. Mr. Hanlon, are you familiar with the Todd Willingham case out of Texas?

Mr. HANLON. I am. I read Jeffrey Toobin's article. And I agree with Mr. Blume.

I want to address this question of factual innocence, if I may. My colleagues at the ABA have given me the DPIC Web site numbers. There have been 137 death row exonerations; 17 people found factually innocent through DNA evidence; 122 overwhelming evidence of innocence undermine the validity of the conviction, for a total of 139.

Let me tell you what is even more disturbing to me than that, and that is in many, many of these cases how lucky we were to find it.

In Chicago, some Northwest journalism students worked. We were just lucky that there was a law professor there who put his students out to do an investigation, to unearth it and produce the exonerations. I can say in my review of these cases I am convinced to a moral certainty that we have executed innocent people. It is almost inconceivable that we haven't done that given the luck that we have had many, many times throughout the system.

Ms. JACKSON LEE. Judge Kogan?

Mr. NADLER. The time of the gentlelady has expired. The gentleman may answer the question.

Ms. JACKSON LEE. The question was would a procedural road map help to void political decisions or decisions that might cloud the opportunity for new evidence to be presented?

Judge KOGAN. There is no question you would need a road map to do that, and it should be set up and done.

Let me make one comment. I just remembered something. A number of years ago I was on an American Bar Association panel at the Inns of Court in London, and it was an international gathering. And the moderator of that panel, in front of a huge audience said, you know in order for a country to become a member of the European Union, they have to abolish capital punishment in their countries. He said how come the United States still has capital punishment? I said very simply because our elected public officials who have something to say about that feel that the American people are in favor of the death penalty. Then he told us something that I never knew before. He said in every one of the European Union countries, the general populace is in favor of the death penalty, but we don't worry about that because we are their elected officials and they have confidence in our ability to know more about these problems and the issue of the death penalty than they do and they trust us to do the right thing.

Ms. JACKSON LEE. A potent statement, and I think the right note to end my questioning on. Thank you, gentlemen, very much.

Mr. NADLER. I now recognize the gentleman from Georgia for a unanimous consent request.

Mr. JOHNSON. Mr. Chairman, I would like to submit three letters, one from NAACP and the other from Amnesty International, and the third from the ACLU. All of these documents show that these organizations are in favor of H.R. 3986.

Mr. NADLER. Without objection, they will be admitted for the record.

[The information referred to follows:]

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1156 15TH STREET, NW SUITE 915 · WASHINGTON, DC 20005 · P (202) 463-2940 · F (202) 463-2953
E-MAIL: WASHINGTONBUREAU@NAACPNET.ORG · WEB ADDRESS WWW.NAACP.ORG

November 17, 2009

Members
US House of Representatives
Washington, DC 20515

via fax

RE: NAACP CALLS FOR YOUR SUPPORT AND CO-SPONSORSHIP OF H.R. 3986, THE *EFFECTIVE DEATH PENALTY APPEALS ACT*

Dear Representative;

On behalf of the NAACP, our nation's oldest, largest and most widely-recognized grassroots-based civil rights organization, I strongly urge you to support and co-sponsor H.R. 3986, the *Effective Death Penalty Appeals Act*, introduced by Congressman Hank Johnson (GA). This legislation would take a crucial step in ensuring that our criminal justice system is equipped to prevent the execution of innocent Americans.

We know that our criminal justice system is capable of making mistakes. It is incumbent upon Congress to ensure that such mistakes cannot result in the execution of an innocent person. The *Effective Death Penalty Appeals Act* would help avoid this tragedy by empower federal courts to grant habeas relief for a prisoner on death row who presents newly discovered evidence that demonstrates probable innocence. It would also allow prisoners on death row to file successive habeas petitions if, and only if, they present newly discovered evidence that a panel of federal judges rules may be reasonably expected to demonstrate innocence.

Sadly, the American criminal justice system has a long and sordid history of bias against racial and ethnic minorities: a bias that continues to this day. That is one reason we feel strongly that H.R. 3986 must be enacted; to allow justice to prevail when the ultimate punishment is being considered and a person's life is in question.

Thank you in advance for your attention to the NAACP position. Should you have any questions or comments, please do not hesitate to contact me at my office at (202) 463-2940.

Sincerely,

Hilary O. Shelton
Director, NAACP Washington Bureau &
Senior Vice President for Advocacy and Policy

AMNESTY INTERNATIONAL USA
ACTION FOR HUMAN RIGHTS. HOPE FOR HUMANITY.

AMNESTY INTERNATIONAL USA
PRESS RELEASE
Wednesday, November 4, 2009

Suzanne Trimel
Media Relations Director
Amnesty International USA
201-247-5057 (mobile)

Amnesty International Welcomes Introduction of "Effective Death Penalty Appeals Act"

Bill Would Provide Critical Options to Death Row Inmates with New Evidence of Innocence

Laura Moye, director of Amnesty International's Death Penalty Abolition Campaign, made the following comments today following introduction of HR 3986, the "Effective Death Penalty Appeals Act.":

"We are grateful to Rep. Hank Johnson, D-Ga. for his leadership in addressing the serious issues that can prevent death row inmates from establishing a strong claim of innocence. When a person facing execution has strong evidence of his innocence, he should have ample opportunity to bring those claims back into a court of law. The law as it stands today is flawed in this respect. Rep. Johnson's bill would ensure that death row inmates have the opportunity to present newly discovered evidence of innocence.

Given that 139 people have been wrongfully convicted and sent to death row in the last three decades in the United States, it is especially important that lawmakers take a close look at the flaws in a system that irreversibly takes human life. Amnesty International believes the death penalty should be abolished; this would be the best way to ensure that innocent people are not executed. But we hope that lawmakers on various sides of the debate can find common ground on the issue of innocence. "

Georgia prisoner Troy Davis, who faced execution three times despite having strong claims of innocence, faced a difficult legal battle in presenting his innocence claims due to the Anti-Terrorism and Effective Death Penalty Act of 1996, which limited his ability to appeal his case in federal courts. This bill would help prisoners with similar cases.

Davis, who has always maintained his innocence, has been on death row since 1991. Last year, he came within two hours of execution, but the U.S. Supreme Court ruled in August that he should be allowed a new hearing to establish his innocence.

Davis was convicted in 1991 of killing police officer Mark Allen MacPhail in Savannah, Georgia, in 1989. No murder weapon was produced at trial, nor any physical evidence linking Davis to the crime. Seven of nine witnesses against him later recanted or changed their initial testimonies in sworn affidavits.

Amnesty International is a Nobel Peace Prize-winning grassroots activist organization with more than 2.2 million supporters, activists and volunteers in more than 150 countries campaigning for human rights worldwide. The organization investigates and exposes abuses, educates and mobilizes the public, and works to protect people wherever justice, freedom, truth and dignity are denied.

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December 8, 2009

Dear Representative:

RE: ACLU Urges Support for H.R. 3986, the Effective Death Penalty Appeals Act – A Valuable First Step in Reforming a Broken Death Penalty System

On behalf of the American Civil Liberties Union, a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, we urge you to co-sponsor and support H.R. 3986, the Effective Death Penalty Appeals Act, which was recently introduced by Representative Henry Johnson (D-GA). This timely legislation is an important first step in urgently needed habeas reform. It would ensure the availability of federal habeas corpus relief for defendants sentenced to death, but who are later able to present evidence establishing their innocence that may not have been available at the time of trial, and could have led to a different result if it had been presented.

Since 1973, there have been 139 individuals who have been released from death row through evidence of their innocence, including nine so far in 2009 alone.[1] The sentencing of innocent people to death continues to be a fundamental failure in our system of capital punishment. Providing federal courts with the opportunity to hear evidence of an individual's innocence, which may not have been available at the original trial, is an essential component of a fair justice system, and is particularly critical in cases where a defendant has been sentenced to death. Numerous federal laws, however, currently prohibit just such claims from ever being heard.

Federal laws like the Antiterrorism and Effective Death Penalty Act of 1996 and the USA PATRIOT Improvement and Reauthorization Act of 2005, as well as numerous Supreme Court decisions, have greatly limited the ability of federal review of state court death penalty convictions. In addition to the denial of relief to defendants who have powerful evidence of their innocence, many defendants who have suffered serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and suppression of exculpatory evidence have been left without federal judicial recourse. H.R. 3986 begins to correct this failure in our death penalty system by, at a minimum, ensuring that those on death row who have exculpatory evidence will be able to make their case in the federal system. While the ACLU is fully supportive of this legislation, we also believe that a more comprehensive solution to the egregious limitations on federal habeas corpus relief in death penalty cases is needed. As just one

[1] Death Penalty Information Center, available at - http://www.deathpenaltyinfo.org/innocence-and-death-penalty

example, we are concerned that the limitation on habeas appeals when a constitutional violation exists remains unresolved under this legislation.

Last year, the ACLU, along with a broad-based coalition of organizations comprising the Criminal Justice Transition Coalition, produced "Smart on Crime: Recommendations for the Next Administration and Congress."[2] In it, the coalition writes –

> The death penalty is one aspect of the criminal justice system that society cannot afford to be broken. There is simply no remedy for the execution of defendants who were not afforded all of their constitutional rights or, even worse, are innocent of the crime charged. Justice Kennedy recently opined that "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[3]

Justice Kennedy's words resonate in the Effective Death Penalty Appeals Act, which will provide an additional layer of protection in ensuring that innocent men and women are not put to death in this country. While the ACLU ultimately favors a more robust and comprehensive solution to the denial of federal habeas corpus rights to those on death row (and recognizes that the best answer to these problems ultimately lies in the abolition of capital punishment), we also recognize the importance of embracing positive reforms.

For that reason, we encourage you to fully support and co-sponsor H.R. 3986, the Effective Death Penalty Appeals Act.

Sincerely,

Michael W. Macleod-Ball
Acting Director, ACLU Washington Legislative Office

Jennifer Bellamy
Legislative Counsel

[2] "Smart on Crime: Recommendations for the Next Administration and Congress," available at - http://2009transition.org/criminaljustice/
[3] *Kennedy v. Louisiana*, ___ U.S. ___, 128 S.Ct. 2641, 2650 (2008).

Mr. NADLER. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward to the witnesses and ask them to respond as promptly as they can so their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

I thank the Members and witnesses. With that this hearing is adjourned.

[Whereupon, at 3:10 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

guardian.co.uk

Willingham capital case haunts Texas governor as state launches inquiry

Ed Pilkington in New York
guardian.co.uk, Thursday 1 October 2009 19.01 BST

The scene in Corsicana, Texas, on the morning of 23 December 1991, was one of pure horror. According to eyewitnesses, Cameron Willingham stood in front of his wood-framed home as it was engulfed in flames pleading for someone to call 911 and screaming: "My babies are burning up!"

When fire fighters arrived, they found him dressed only in trousers and with hair on his chest, eyelids and head singed. They had to handcuff him to a truck to prevent him from trying to break into the three-bedroom bungalow to rescue the infants. One officer received a black eye in the scuffling.

All three of his children - Amber aged two, and one-year-old twins Karmon and Kameron - died. When Willingham gave permission for authorities to search his home after the event he told them: "I'd just like to know why my babies were taken from me."

That desire set in train a series of events that were to lead, 13 years later, to his own death at the hands of the state of Texas. Local fire investigators inspected the charred house to determine the cause of the blaze, and ended up concluding that Willingham, an unemployed car mechanic, had started it with lighter fuel in a deliberate act of arson.

He was convicted on a charge of capital murder in 1992, at the end of a two-day trial in which only one defence witness was presented, and sentenced to death.

Despite serious donbts from experts raised before his death, and despite his steadfast insistence of his innocence - he rejected a plea bargain in which he would have been given life

in jail in return for pleading guilty - Willingham was administered the lethal injection in 2004 upon the final go-ahead of the governor of Texas, Rick Perry.

Now the spectre of Cameron Willingham has come back to haunt Governor Perry. Doubts about the execution have multiplied to such an extent that the Texan legislature ordered the state's Forensic Science Commission to carry out an official inquiry.

Its 51-page report, written by a nationally-recognised expert on fire safety, Craig Beyler, tore apart the original case against Willingham on virtually every count. It found that the key evidence upon which the conviction was based had no basis in modern fire science and that "a finding of arson could not be sustained".

The report was particularly critical of one of the fire inspectors, who has since died, saying his findings were "nothing more than a collection of personal beliefs" and more "characteristic of mystics or psychics".

Pressure over the case reached boiling point this week, prompted in part by a 16,000-word analysis of the case by David Grann in the New Yorker magazine. The Texas Forensic Science Commission invited Beyler to present his report in person today/ on Friday.

But on Wednesday night, Governor Perry announced his decision to remove the head of the commission and two of its key members and replace them with a new board. The first act of the incoming chairman was to cancel Friday's meeting, and with it postpone any discussion of the Beyler report.

Texas is legendary for its enthusiastic approach to the death penalty. It has executed 441 prisoners since capital punishment was revived in the US in 1976, more than any other state by a large margin.

Yet even by the standards of Texan justice, Perry's move has astounded death row opponents. The Innocence Project, a New York-based group that has been at the centre of attempts to prove Willingham's innocence, likened the action to Richard

Nixon's dismissal of the Watergate prosecutor in the so-called "Saturday night massacre".

Beyler told the Guardian that he could only speculate on what had happened.
"None of us understand what's going on here," he said.

Sam Bassett, the removed head of the panel, told Associated Press: "We should not fail to investigate important forensic issues in cases simply because there might be political ramifications."

Perry's spokesperson denied any connection between the change of personnel at the top of the commission and Friday's meeting. "This is business as usual," he said, insisting the governor had followed routine appointments procedures.

In 2006, Justice Antonin Scalia of the US supreme court, said that in the modern judicial system there had not been "a single case - not one - in which it is clear that a person was executed for a crime he did not commit". Yet all of the key grounds upon which Willingham was put to death have been cast in serious doubt.

A month before he died, a report compiled by another recognised fire expert, Gerald Hurst, was presented to the governor's office and the Board of Pardons which had the power to stop the execution. It found that not "a single item of physical evidence ... supports a finding of arson". The Innocence Project looked into what had happened to the report, and concluded that both Perry and the board had simply ignored its scientific evidence.

In his findings, Beyler says that the specific burn patterns on the floors and skirting board of the house upon which the initial fire inspectors had largely based their opinion were based on assumptions that had been overruled by modern scientific experiments. He said these assumptions had no basis in good investigative work even back in 1991, and suggested the fire could have been the result of natural causes, pointing to a space heater in the children's room.

An important piece of evidence at Willingham's trial came from

a prison inmate, Johnny Webb, who told the jury that Willingham had confessed to him while in jail that he had set his house on fire with lighter fluid. Webb temporarily retracted that testimony before the trial - a fact that was not brought to the attention of Willingham's lawyer.

When the New Yorker tracked down Webb recently, he asked the reporter: "The statute of limitations has run out on perjury, hasn't it?"

A further area of concern was the lacklustre way in which the defence was conducted. Willingham's lawyer at the 1992 trial, David Martin, told the New Yorker that he believed his client was guilty. "Shit, it's incredible that anyone's even thinking about it," he said.

As Willingham lay on the gurney awaiting lethal injection, his last words were: "I am an innocent man convicted of a crime I did not commit." Shortly before he died he wrote to his wife that "some day, somehow the truth will be known and my name cleared."

• This article was amended on 16 October 2009. The original said that Cameron Willingham was convicted of homicide. This has been corrected.