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Cary H. Federman

Montclair State University, federmanc@montclair.edu

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WHO HAS THE BODY? THE PATHS TO HABEAS CORPUS REFORM

CARY FEDERMAN
Duquesne University

The purpose of this article is to place the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 within a political and historical framework that describes the effort by the Supreme Court and various interested parties to restrict prisoners' access to the federal courts by way of habeas corpus. Of principal concern here is how an act of terrorism against the United States provides an opportunity for Congress to restrict death row prisoners from obtaining habeas corpus review. Along with an analysis of Supreme Court decisions, three attempts to limit federal habeas corpus review for state prisoners from the late 1980s to the middle 1990s are described, all of which helped Congress to pass the AEDPA, a law that ratified the Supreme Court's most restrictive habeas corpus decisions dating back some 35 years.

Keywords: *Antiterrorism and Effective Death Penalty Act; antiterrorism law; death penalty; habeas corpus; Supreme Court*

[The Antiterrorism and Effective Death Penalty Act of 1996] greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications. If the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases. And if the prisoner asserts a claim that was not presented in a previous petition, the claim must be dismissed unless it falls within one of two narrow exceptions. One of these exceptions is for claims predicated on newly discovered facts that call into question the accuracy of a guilty verdict. The other is for certain claims relying on new rules of constitutional law.

—*Tyler v. Cain* (2001)

Habeas corpus is the principal means by which state prisoners attack the constitutionality of their convictions in federal courts. Various called “the great writ of liberty,” a “human right,” and “a bulwark” and “palladium” of English liberties, the ancient writ of habeas corpus has achieved a status in American jurisprudence that has surpassed even those rights deemed by the

U.S. Supreme Court to be preferred or fundamental, such as free speech and the right to privacy. In part because of the writ's historic association with the Magna Carta, many jurists and legal scholars consider habeas corpus as a tool of liberty in the fight against governmental oppression (Chafee, 1952, chapter 3; Dicey, 1961, chapter 5; *Ex parte Watkins*, 1830, p. 201; *Fay v. Noia*, 1963, pp. 400-401; Steiker, 2000; Wade & Philips, 1960, chapter 35; Wiecek, 1977, p. 157).

Today, however, the writ of habeas corpus stands accused of setting the guilty free. Critics charge that habeas corpus releases the convicted, not on innocence grounds or even for reasons of clemency, but on technical principles of law. Habeas corpus allows a solitary federal judge—so many miles removed from the crime scene and perhaps some 10 years after the initial conviction was rendered, after memories have faded and witnesses have either moved away or died—to find a due-process violation sufficient enough to overturn the judgment of numerous state judges and 12 jurors. To add insult to injury, habeas corpus interferes with the workings of what Supreme Court Justice Felix Frankfurter once called “our federalism” (Collins, 1992).

Recent decisions by the Supreme Court regarding habeas corpus, particularly death penalty cases such as *Tyler v. Cain* (2001) and *Felker v. Turpin* (1996), have done nothing more regarding the rights of prisoners who attack their convictions in federal courts than uphold restrictions passed by Congress in 1996 that prevent state prisoners from successfully attacking their convictions in federal habeas courts. And yet, the limitations on state prisoners' access to habeas corpus found within the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 do nothing more than uphold more than 30 years of Supreme Court decisions on the subject. The purpose of this article is to explain the various paths that led to the AEDPA. There are three: congressional, interest group, and the Supreme Court's habeas decisions. Regarding interest groups, I focus on three important proposals from 1988 to 1990 that sought to modify and limit habeas appeals. I also examine the ways in which the Supreme Court's view of habeas petitioners as convicted criminals and drains on the judicial system through time hardened the attitudes of members of Congress to the point that they passed antiterrorist legislation in 1996 that was largely symbolic but which has had real effects on the lives of convicted criminals (Tushnet & Yackle, 1997/1998). My focus will be on the writ's relation to capital cases only, because most (if not all) of the criticisms of habeas corpus stem from concerns that the writ is responsible for the length of time it takes to go from conviction to execution.

FROM THE COMMON LAW TO THE GILDED AGE

In Anglo-American jurisprudence, habeas corpus (“you have the body”) is an institutional means to test the proposition that individuals have the right to be free from arbitrary arrests. Between the American founding and Reconstruction, the justices of the Supreme Court understood habeas corpus as it had operated in England (*Ex parte Kearney*, 1822). That is, it could not be used after conviction to contest a court’s decision to incarcerate. Only executive clemency could rectify claims of a miscarriage of justice (Karlen, 1967, pp. 217-219; Kobil, 1990/1991). Yet by situating the writ in Parliament and not in the king’s courts, the English by the 17th century embedded habeas corpus within the language of civil liberties and legislative autonomy, thereby rejecting the idea, later adopted by the U.S. Supreme Court, that habeas corpus is a mere formal process (Bandes, 1996, p. 503). Both the king and Parliament saw clearly what the Americans would later learn with much difficulty: A granted writ alters jurisdictional boundaries.

Regardless of what the English knew of the great writ’s jurisdictional capabilities and how they sought to contain it, it is clear that both the framers of the Constitution and the justices of the Supreme Court (both past and present) feared its effects on the states’ criminal procedures. Consequently, they chose to filter habeas corpus through the federal structure of the new American state. Notably, the Judiciary Act of 1789 prohibited state prisoners from petitioning federal courts for habeas corpus. However, following a series of antebellum sectional crises in which various states arrested (or threatened to arrest) federal revenue officers (in 1815 and 1833), military personnel (1863), and a foreign national (1842), Congress expanded federal habeas corpus and removal jurisdiction to the state level (Habeas Corpus Acts, 1815-1867). Although explicitly temporary in nature and designed to protect federal officers, not state convicts, these various removal and habeas corpus statutes created a pathway to the states (Lucie, 1986) that eased passage of the Habeas Corpus Act of 1867.

The 1867 act states in part that

The several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law [the 1789 act], shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty [italics added] in violation of the constitution, or of any treaty or law of the United States. (Habeas Corpus Acts, 1815-1867)

The 1867 act stands as an example of Reconstruction-era state making. With a statutory command to the federal courts to *have the body* of any prisoner

seeking relief, the 39th Congress ignored state sovereignty concerns regarding finality of punishment and codified the budding relationship prisoners would have with the national judiciary under the Fourteenth Amendment.

But the Radical Republican victory of the post-Civil War era was short-lived. Despite Congress' boldness in the face of a history of state control of punishment, the wording of the Habeas Act does not establish a bright-line relationship between the incarcerated and the federal courts that bypasses the state court system (*Wade v. Mayo*, 1948). The Supreme Court was free to ignore the nationalist intent of the legislation (particularly after the end of Reconstruction in 1877) and focus on the writ's common-law legacy in the United States—and it did. The act probably assumes common-law practices of using the writ as a preconviction remedy (Oaks, 1964/1965), but nothing in the language of the act prevents the writ from being used by state prisoners as a postconviction attack on a state court's judgment, because, as Marc Arkin (1995) wrote, "incarceration was not routinely imposed as a means of postconviction punishment for criminal acts until the nineteenth century" (p. 11). The problem with the 1867 habeas law is that, if used as a postconviction remedy, the determination of equitable relief falls not to Congress or to the states but to Supreme Court justices and federal court judges who presumably are free to investigate the prisoner's complaints and set him free. To be sure, the original state court decision stands, because a writ operates on the judicial fiction that habeas relief does not overturn state court decisions; it releases individuals from unlawful confinement. But the decision to release a prisoner on habeas corpus can upset a delicate federal-state balance cultivated through time by congressional leaders and Supreme Court justices and embarrass the state court (*Darr v. Burford*, 1950; O'Connor, 1980/1981).

Rather than accept the burden of acting like a clemency commission or a supervisor of state court criminal justice decisions, the Supreme Court held in *Ex parte Royall* (1886) that any constitutional infraction of a defendant's rights (such as they were in the 19th century) could be dealt with by state courts in an effort to nurture federal-state comity relations following the end of Reconstruction. A policy of deference on criminal matters would, moreover, provide the federal courts with sufficient time to deal with property claims arising from the Supreme Court's decisions equating property with persons (*Santa Clara County v. Southern Pacific Railroad*, 1886). In short, in *Royall*, the Court considered federal review of state prisoners' claims wasteful of important (and limited) judicial resources as well as constitutionally unnecessary, given the dual nature of the judicial system and the historic reliance on state courts to dispense justice to criminals. Unlike U.S. military and revenue officers before the Civil War who used the writ during confinement

but before trial and claimed the writ's historic mission as a pretrial check against arbitrary executive authority, post-Reconstruction Supreme Court justices considered state habeas petitioners convicted criminals and therefore were extremely reluctant to release prisoners found guilty of crimes ranging from forgery to murder (*Andrews v. Swarts*, 1894; *Ex parte Royall*, 1886; *In Ex parte Frederich*, 1892; *In re Shibuya Jugiro*, 1891; *In re Wood*, 1890):

[A] habeas corpus proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or a sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment of sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's exceeding its jurisdiction. (*In Ex Parte Frederich*, 1892, p. 76)

As the 19th century came to an end and as convicted criminals, Blacks, Asians, and indigents replaced federal officers who needed national protection from hostile state courts, the Supreme Court abjured any jurisdiction over criminal persons. The Court relegated the "great writ of liberty" to a backstop measure, an "extraordinary remedy" of the federal judiciary for overt instances of illegal criminal confinement (*Drury v. Lewis*, 1906; *Hans Nielsen, petitioner* 1888; *Harlan v. McGourin*, 1908; *Holden v. Hardy*, 1898; *Hurtado v. California*, 1884; *Hyde v. Shine*, 1904; *In re Kemmler*, 1890; *In re Lincoln*, 1905; *In re Loney* 1889; *In re Snow* 1887; *Koizo v. Henry*, 1908; *Maxwell v. Dow*, 1900; *Tinsley v. Treat*, 1906; *Toy Toy v. Hopkins*, 1908; *Twining v. New Jersey*, 1908).

From the end of Reconstruction to the middle of the 20th century, purposeful congressional forbearance from civil rights violations at the state level, and pressing property cases at the national (Warren, 1926, chapter 35), allowed the Supreme Court to give a narrow and procedural meaning to the due process clause of the Fourteenth Amendment in criminal matters as well as to habeas corpus. The Supreme Court's extension of property rights under the Fourteenth Amendment shaped habeas' development in the 19th and early 20th centuries by squeezing out civil rights claims in the federal judiciary (*Hale v. Henkel*, 1906). The Court's propertarian understanding of due process rights created an underlying pattern of chaos within American civil rights development (*Allgeyer v. Louisiana*, 1897; Hurst, 1956, pp. 10, 74). Throughout the 19th century, and well into the 20th, claims of constitutionally questionable arrests, confessions, and trials went unheeded in the state appellate courts while the federal judiciary's defense of property regularized the American state (*Brown v. Mississippi*, 1936; *Chambers v. Florida*, 1940; Forbath, 1991; Higgs, 1987, chapter 5; Nedelsky, 1990, p. 8; *Wabash, St. Louis, & Pacific Railway Co. v. Illinois*, 1886).

THE ROAD TO AEDPA

On April 24, 1996, just 5 days after the first anniversary of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, Congress passed the AEDPA (1996; *Congressional Quarterly Weekly Report*, 1996, pp. 1076, 1082). Senator Robert Dole had introduced the bill in the Senate, noting that it “should go a long way in preventing violent criminals from gaming the system—with more delays, more unnecessary appeals, and more grief for the victims of crimes and their families” (Sessions, 1996/1997, p. 1515). Apart from the AEDPA’s stated purpose—to grant federal authorities greater powers to investigate domestic terrorist threats and provide justice for victims—the AEDPA also limits the ability of state prisoners, particularly those on death row, to get federal habeas corpus relief.

The AEDPA’s four main features regarding habeas procedures include the following:

1. It imposes a 1-year limit on filing habeas petitions; previously, there was no deadline (AEDPA, 1996, § 101).
2. Habeas petitioners have only one chance for federal review, except in extraordinary circumstances; previously, there were no limits on the number of habeas filings a state prisoner could make (AEDPA, 1996, § 106).
3. It establishes an opt-in provision for states to provide counsel (AEDPA, 1996, § 106). In other words, “the opt-in provisions are a quid pro quo. If a state provides counsel, the opportunities of state prisoners for federal review are reduced, thus removing roadblocks to a state’s effective and expeditious use of the death penalty” (Kappler, 2000, p. 469). If a state does not opt in, and none have (Stummer, 2001, p. 608), then the filing deadline for habeas review expands from 180 days after final state court affirmance to 360 days.
4. “A determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence” (AEDPA, 1996, § 104; *Williams v. Taylor*, 2000). As in the other instances, this is a new addition to the habeas procedural maze.

In a situation that goes back to 1886 and *Ex parte Royall*’s requirement that the petitioner must first exhaust all forms of appeal (state and certiorari to the U.S. Supreme Court) before applying for habeas corpus, the new habeas law imposes a burden on the prisoner to disprove the state’s version of events by clear and convincing evidence. In passing a law directed at foreign and domestic acts of violence against U.S. citizens and buildings, Congress also codified substantial portions of the Supreme Court’s habeas jurisprudence

since the late 19th century that limits the rights of state prisoners to gain access to the federal courts and contest their confinements on constitutional grounds (*Rose v. Lundy*, 1982).

Following the bombing of the Murrah Federal Building, President Bill Clinton proposed the Anti-Terrorism Amendments Act of 1995, which was designed to increase federal powers to combat domestic and international terrorism through the Omnibus Counterterrorism Act (1995). In June 1995, the Senate passed, although the House of Representatives did not, the Comprehensive Terrorism Prevention Act. In March 1996, the House passed the Effective Death Penalty and Public Safety Act of 1996, which was a modified version of the Comprehensive Terrorism Prevention Act and which made it a crime “to commit an act of international terrorism in the United States, and if someone is killed in the act, the crime is punishable by death” (Smith, 1997, p. 266). The act also included a habeas provision that limited the amount of time prisoners could appeal their state court decisions in federal courts. The result of further House and Senate compromises was the AEDPA, which passed the Senate by a vote of 91 to 8 with 51 Republicans voting for and 1 against and Democrats voting 40 to 7 in favor of the bill. In the House of Representatives, the vote was 293 for and 133 against (Republicans: 186 to 46; Democrats: 105 to 86).

In the pages that follow, I analyze three attempts to limit federal habeas corpus for state prisoners. They are, in order of appearance, by the Reagan Administration’s Department of Justice (DOJ), the Powell Committee, and the American Bar Association (ABA). Lacking both a historical sense regarding the crucial role habeas corpus has played in getting prisoners’ claims heard in federal courts, and an institutional framework within which to structure a debate regarding prisoners’ allegations of illegal detentions in the 20th century without harming state interests in punishment, the proposals under review purposefully ignored habeas corpus’ historical importance to outcast minorities and indigent prisoners. Instead, following both recent and late 19th-century Supreme Court case law that has restricted federal access to state prisoners, and relying on the general public’s concerns about criminals evading punishment through frivolous appeals (Prison Litigation Reform Act, 1996), these proposals stress the writ’s detrimental effects on the states’ administration of the death penalty, such as time delays in capital trials. There is, however, something to learn from studying these proposals. Together, they provide a way to understand the sequence of events leading up to the AEDPA and explain how Congress’ policy choices in 1996 had been narrowed through time by Supreme Court rulings and law-and-order interest groups both within Congress and without.

THE CASE FOR LIMITING FEDERAL HABEAS CORPUS I: THE REAGAN ADMINISTRATION

No court of the United States other than the Supreme Court, and no judge of a court of the United States, shall have jurisdiction to entertain any challenge to the validity of a person's detention pursuant to the judgment of a state court, or to the execution of any other sentence imposed by a state court. (U.S. DOJ, 1988, p. 56)

The Reagan Administration's view of habeas corpus was that "the Constitution itself and historical practice are inconsistent with the existence" of a right to a federal habeas forum (U.S. DOJ, 1988, p. 42). The Reagan Administration held that, because Congress and not the Constitution created the federal judiciary, state prisoners do not have a right to a federal habeas court, only to Supreme Court certiorari review. The Reagan DOJ refused to regard any constitutional gains made by state prisoners since the Warren Court as an advance in the administration of criminal justice procedures. If the Warren Court proved anything, according to the DOJ, it demonstrated that federal review does more harm than good to state criminal justice interests. Content, then, with the level of protection afforded criminal defendants in the states, the DOJ's report stated that federal habeas corpus was unnecessary (U.S. DOJ, 1988, pp. 48-49).

The DOJ understood habeas corpus as it had existed under English common law, that is, as a pretrial remedy to contest arbitrary executive actions, not as a postconviction remedy for state criminal trials that violate constitutional protections and, as it had existed before *Brown v. Allen* (1953), a seminal habeas case that allowed the federal courts to reconsider a state prisoner's claims of unlawful detention regardless of the state's decision and fact finding. "In terms of historical practice," the report stated, "the general federal question jurisdiction of the federal courts is a late nineteenth century development" (U.S. DOJ, 1988, p. 42). The DOJ dismissed this change in legal outcomes without investigating the reasons why it had occurred (Orfield, 1995). Consequently, the DOJ held that any expansion of habeas corpus as a remedy for unconstitutional confinement claims was judicial activism and dangerous to the interests of federalism and the "dignity and independent stature of the state courts" (Yackle, 1983, p. 618; 1994, pp. 24-28).

The Reagan DOJ was convinced that the best solution to the problem of habeas corpus was its abolition (U.S. DOJ, 1988, p. iv). In lieu of that, the DOJ was willing to limit habeas corpus "to the role of a backstop remedy, whose availability would be conditioned on a state judicial system's failure to provide some meaningful process for raising and deciding a federal claim"

(U.S. DOJ, 1988, p. vi). The DOJ was also prepared to accept limitations on habeas appeals up to 1 year following conviction; require federal deference to state court findings of fact; limit habeas appeals arising from Fifth and Sixth Amendment claims, (*Duckworth v. Eagan*, 1989; *Kimmelman v. Morrison*, 1986), as the Court had done on Fourth Amendment cases in *Stone v. Powell* (1976); allow federal judges to dismiss unreasonably delayed petitions with greater dispatch; and would have been satisfied with establishing a uniform application of restrictive standards to claims not raised in the state courts. With the exception of the Fifth and Sixth Amendment claims, Congress included all of these suggestions in the AEDPA (1996, §§ 101, 104, 106, 107).

The DOJ's Office of Legal Policy staff never considered habeas corpus in light of the history of discrimination against minorities in particular or prisoners in general—either at arrest, during the original trial, or on appeal from the state trial—that influenced the Supreme Court to expand habeas corpus (and due process) from the 1930s to the 1960s (*Brown v. Mississippi*, 1936). In assessing habeas reform and federal judicial capacities, Reagan Administration habeas critics chose to ignore the patterning of the states' criminal justice structures—their histories of racial and ethnic bias (*Frank v. Mangum*, 1915; *Moore v. Dempsey*, 1923), for example—and instead paid special attention to the administrative problem that states would encounter in implementing relief from federal habeas courts in capital cases. Shunning the need for historical investigation into the legacy and resilience of “the patterns of discrimination, segregation, unequal justice and racial violence” (Litwack, 1998, p. xvii) that existed in the South from the 1870s through the 1960s, the Reagan DOJ concluded that federal habeas corpus for state prisoners is the result of both judicial activism (the incorporation of the Bill of Rights during the Warren Court era) and unnecessary legislative intervention (during Reconstruction, because the Habeas Corpus Act of 1867 created a second forum for appealing a state conviction). Selectively analyzing habeas's development throughout the years, the DOJ maintained that habeas corpus as a postconviction remedy is without deep roots in American constitutional law and in no way should be regarded as an unlimited right by state prisoners to use in the federal courts.

THE CASE FOR LIMITING FEDERAL HABEAS CORPUS II: THE POWELL REPORT

In June 1988, Chief Justice William Rehnquist appointed former Supreme Court Justice Lewis Powell, a longtime critic of federal habeas relief for state

prisoners (*Schnecko v. Bustamonte*, 1973; *Stone v. Powell*, 1976), the chair of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases. The committee included four federal district and appellate court judges from the Fifth (Louisiana, Mississippi, and Texas) and Eleventh Circuits (Alabama, Georgia, and Florida). In July 1989, these six states held 40% of the nation's death row inmates (Berger, 1990, p. 1674, n. 62). The two principal findings of the Powell Committee were (a) that the present system of federal habeas review fosters delay in the movement of habeas appeals from the state to the federal courts; and (b) that there is a "pressing need for qualified counsel to represent inmates in collateral review" (Habeas Corpus Reform, 1990, p. 9). To rectify these problems, the Powell Committee proposed,

Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant. When this review has concluded, litigation should end. (Habeas Corpus Reform, 1990, p. 13)

Justice Powell blamed state prisoners' habeas petitions for interfering with the successful implementation of the death penalty. Indeed, the view persists today, both among the public and among judges, lawyers, and Supreme Court justices, that habeas corpus petitions undermine state court judgments in spite of the fact that state prisoners' habeas filings have not kept pace with the increase in the total number of prisoners (Fliter, 2001, p. 6). Since 1964, habeas filings by state prisoners have not constituted more than half of all filings in U.S. district courts by state prisoners, as they did between 1960 and 1963 (Thomas, 1988, p. 96). "Only in the 1960s," Thomas (1988) has written, "did the increase in the proportion of suits to prisoners roughly match the increase in the number of filings, but both the number of filings and the proportion of prisoners filing them peaked in 1970" (p. 98). Since then,

Fewer prisoners have been filing habeas claims, declining from about 5 suits for 100 prisoners in 1970 to less than 2 since 1984. Hence, the increase in the number of filings may reflect little more than the increase in the prison population. This suggests that most prisoners—contrary to the claims of critics—accept the finality of their confinement, because very few prisoners challenge their conviction after incarceration. (Thomas, 1988, p. 98)

Yet Powell chose not to see in 1989 what Justice Frankfurter knew as far back as 1953:

Of all federal question applications for habeas corpus, some not even relating to State convictions, only 67 out of 3,702 applications were granted in the last seven years. And “only a small number” of these 67 applications resulted in release from prison: “a more detailed study over the last four years . . . shows that out of 29 petitions granted, there were only 5 petitioners who were released from state penitentiaries.” The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by indiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others. (*Brown v. Allen*, 1953, p. 498)

Choosing to ignore the fact that no study had revealed that habeas corpus undermines the states’ interest in punishment or that it poses a real threat to federal-state comity concerns, Justice Powell (1988/1989) wrote in the *Harvard Law Review*,

A dozen years after the uniquely fair *Gregg*-type statute was approved, we have more than 2,000 convicted murderers on death row, and just over 100 executions. However this delay may be characterized, it hardly inspires public confidence in our criminal justice system. (pp. 1040-1041)

Appearing before Congress to defend the committee’s report, Powell stated that “the hard fact is that the laws of thirty-seven states are not being enforced by the [federal] courts” (Habeas Corpus Reform, 1990, p. 40). The Powell Committee surveyed 50 postconviction cases in high death penalty states—Florida, Texas, Alabama, Mississippi, and Georgia (Habeas Corpus Reform, 1990, p. 15). At the time, the average death penalty proceeding, from sentencing to execution, took 7 years. It took 6 years if the state had no postconviction review of its own. From 1976, when the Supreme Court allowed the states to resume executions (*Gregg v. Georgia*, 1976), to September 21, 1989, when the Powell Committee report was issued, 118 executions had taken place, although two more followed by year’s end (NAACP Legal Defense & Educational Fund, 2001, p. 8). The average time elapsed from sentence to execution in 1989 was 95 months—the longest on record (Bedau, 1997, p. 15). “Delay of this magnitude,” Powell stated before Congress, “is hardly necessary for fairness or for thorough review” (Habeas Corpus Reform, 1990, p. 40).

To reduce perceived delays that interfere with execution timetables, the committee proposed a 6-month period within which federal habeas petitions

could be filed (Mello & Duffy, 1990/1991). At the time, there were no time limits on habeas appeals. The Powell Committee wanted to bar claims to the federal courts after 6 months that had not been made in the state court unless the defendant had a new claim that could prove his innocence (Habeas Corpus Reform, 1990, p. 14). The committee agreed to start the 6-month period only on the appointment of counsel for the prisoner and suspend the time, called tolling, during state court proceedings. If the prisoner accepted the state's counsel, he would be prohibited from challenging his lawyer's effectiveness in court. Congress codified this proposal in the AEDPA (1996, § 107).

The Powell Committee barely mentioned the problem of state prisoners inadvertently waiving their federal rights, which increases the risk of executing those with constitutional claims not heard by a federal court (Mello, 1987/1988; *Smith v. Murray*, 1986). Because the Powell Committee regarded habeas corpus as a legislative creation divorced from constitutional principles, a position Justice Powell has held since the early 1970s, it saw no need to dictate to the states how they should proceed in this area of constitutional policy (Habeas Corpus Reform, 1990, p. 271). Instead, the Powell Committee focused on the problem of time delays and unqualified death row attorneys from an administrative standpoint, thus failing to address the reason why these are problems. Time delays and unqualified attorneys working on death penalty cases are partly the result of the states' unwillingness to train death penalty lawyers and provide quality counsel at the trial stage (Anti-Drug Abuse Act, 1988; Bright, 1994, 2001, p. 17; Kirchmeier, 1996, pp. 426-427; *Murray v. Giarratano*, 1989) and partly the result of complicated Supreme Court decisions from the 1970s and 1980s that have (a) allowed unqualified attorneys to defend habeas petitioners in capital cases; and (b) denied state prisoners a federal hearing despite strong evidence that any procedural faults that occurred at the initial trial were the lawyer's doing, not the habeas petitioner's. In *Coleman v. Thompson* (1991), for example, the Supreme Court upheld a Virginia law that prohibited the state from accepting appeals after 30 days. Coleman's lawyer miscalculated the time from conviction to appeal, and the net effect of his inadvertent error was Coleman's execution. Problems of ineffective counsel have plagued capital defendants and habeas petitioners since the latter half of the 19th century (*Daniels v. Allen*, 1953; *In re Shibuya Jugiro*, 1891; *Powell v. Alabama*, 1932)—a fact the Powell Committee ignored.

Because of federalism concerns, the Powell Committee refused to set national right-to-counsel standards for all 50 states. It also recommended automatic stays of execution, but only for those states participating in the

reforms. The purpose of the automatic stay is to prevent last-minute appeals to judges to delay execution. Rather than focusing on prisoners' claims, the committee presumed their invalidity and preferred to streamline the death penalty process by eliminating delays and repetitive petitions and, most important, reasserting the need for the complete exhaustion of one's state appellate remedies before going to a federal habeas court—a doctrine that goes back to *Ex parte Royall* in 1886 and a procedure that, in fact, increases time delays in executing criminals. Under the Powell Committee's proposal, each state could decide for itself what constituted quality counsel in capital cases (AEDPA, 1996, § 106). The committee feared that the imposition of national attorney standards would take power away from the states in terms of setting counsel fees, or fees for witnesses, and impose unnecessary financial and administrative burdens on the states. According to Justice Powell, because the states "would have little incentive to opt for a system that does not recognize" their interests, proposals for reform "must take care not to destroy the increased finality and order that will prompt the states to participate" (Habeas Corpus Reform, 1990, p. 47). To enforce finality, or the idea that "no one . . . shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation" (*Mackey v. United States*, 1971, p. 691; *Teague v. Lane*, 1989, p. 309; *Withrow v. Williams*, 1993, p. 698), the Powell Committee supported codifying the Burger and Rehnquist Courts' most restrictive (in regard to gaining access to the federal courts) habeas decisions to date (*Engle v. Isaac*, 1982; *Murray v. Carrier*, 1986; *Teague v. Lane*, 1989).

The major innovations of the Powell Committee were the imposition of a 6-month cutoff period for state petitioners to file a federal habeas appeal and the noncoercive, voluntary nature of the proposed reforms for the states, particularly in regard to counsel. In 1990, Senators Strom Thurmond, Joseph Biden, and Arlen Specter each introduced habeas bills largely tracking the Powell Committee's proposals (Berger, 1990, p. 1677; Faust, Rubenstein, & Yackle, 1990/1991, p. 644). Congress adjourned before resolving the several disputes (Berke, 1990, p. A1).

THE CASE FOR LIMITING FEDERAL HABEAS CORPUS III: THE ABA

In 1990, the ABA proposed changes in habeas corpus that would have imposed burdens on both habeas petitioners and the states and used a cutoff period of 1 year for the filing of habeas petitions. The ABA Task Force was more diverse than the Powell Committee. It consisted not only of lawyers and

judges from both the federal and state courts but also a law professor and the director of the Southern Prisoners' Defense Committee (Berger, 1990, p. 1684). The ABA thought that the tradeoff between requiring the states to provide quality counsel and a 1-year cutoff period would be a viable alternative to the more restrictive congressional plans proposed throughout the years and the Reagan Administration's 1988 proposal (*Law & Contemporary Problems*, 1998; Robbins, 1990/1991).

The ABA was more willing than the Powell Committee to employ the coercive powers of the federal government to ensure that the states were protecting criminal defendants. All of its provisions, if made into law, would bind the states. The ABA was also less disturbed than the Powell Committee with protecting federalism and finality and more concerned with ensuring that qualified attorneys represent death-sentenced individuals. Yet speeding up the habeas and death penalty appeals process was a key provision of the ABA plan. Following conviction, the ABA would allow state prisoners 1 year in which to file habeas corpus petitions. The ABA deemed the assurance of qualified counsel to be the "*sine qua non* of a just and efficient capital system" (Habeas Corpus Reform, 1990, p. 486). To that end, it recommended requiring states to train death penalty lawyers, compensate them adequately for their work, and have lawyers stay with their clients throughout the appellate process, including habeas corpus.

The ABA also differed from the Powell Committee by rejecting a number of Supreme Court decisions that had made prisoner access to federal habeas courts more difficult, such as procedural default (*Wainwright v. Sykes*, 1977), the exhaustion of remedies, and the presumption of correctness of state court findings of fact. Consequently, it advocated eliminating the waiver of federal claims from the cause-and-prejudice standard of *Wainwright v. Sykes* (1977). Under the Court's cause-and-prejudice test, developed more forcefully throughout the 1980s by the Rehnquist Court (*Murray v. Carrier*, 1986), six questions must first be addressed before a federal court can begin to discuss the merits of a state prisoner's claim. The result can be the execution of an innocent person without a federal hearing (*Herrera v. Collins*, 1993). Ostensibly done in the name of protecting the states from unnecessary or premature federal intervention, these tests serve to make the habeas corpus/capital punishment process burdensome, inefficient, and risky for prisoners who proceed with inexperienced lawyers or no lawyer at all.

The ABA recommended that all states with death penalties provide counsel at all stages of capital litigation. In the ABA's follow-up study on capital punishment in 1998, the association found that, "in case after case, decisions about who will die and who will live turn not on the nature of the offense the

defendant is charged with committing, but rather on the nature of the legal representation the defendant receives" (*Law & Contemporary Problems*, 1998, p. 228). Factoring out California, where an inordinate number of ineffective counsel claims in death penalty cases arise, the number of claims regarding ineffective counsel is 48%, tied for second place after trial court error (*Habeas Corpus in State & Federal Courts*, 1994, pp. 84-85). Moreover, as Columbia University Law Professor James Liebman has recently demonstrated, federal habeas review has had a positive effect on state prisoners' claims of unlawful detention (Liebman, Fagan, & West, 2000). A previous investigation into habeas success rates by Liebman (1990/1991, p. 541, n. 15), which the current study relies on, revealed that "the federal courts found constitutional error in 40% of the 36 capital judgments of conviction and sentence that those courts finally reviewed in habeas corpus proceedings between 1976 and mid-1991" (Liebman et al., 2000, p. 6).

Like the Powell Committee's report, the ABA failed to garner enough support in Congress. Representative Henry Hyde submitted a habeas bill that embodied much of the Powell Committee's recommendations, replacing a slightly more liberal bill that was closer to the ABA's proposal. But when Congress passed a crime bill in 1990, habeas and death penalty provisions were not included. The technicalities of habeas corpus and the intensity of the debate about death penalty appeals wore Congress down (Berger, 1990, p. 1714).

THE JUDICIAL POLITICS OF HABEAS CORPUS REFORM

In various forms, the proposals surveyed all made their way into the AEDPA of 1996. But the path to the AEDPA is deeper than the Reagan, Bush, and Clinton presidencies. It was laid in the years immediately following the end of World War II. The proposals under review were models for change, which Congress later adopted and the Supreme Court endorsed. But 1996 was not the first time Congress had expressed an interest in habeas corpus reform. Congress has debated numerous bills to restrict habeas corpus since the 1950s, although none have become law (Winkle, 1985, p. 263).

From 1954, just after the Court decided *Brown v. Allen* (1953), to 1964, 1 year after the Court decided *Fay v. Noia* (1963), a decision that fundamentally overthrew 80 years of restrictive habeas jurisprudence, Congress tried four times, unsuccessfully, to limit federal habeas corpus review for state prisoners (Weisselberg, 1990). From 1966, when Congress last ratified certain significant Supreme Court decisions concerning habeas corpus procedures, to 1996, "the only congressional revisions of any kind to the federal

habeas corpus statutes were those already approved by Supreme Court jurisprudence" (Sessions, 1996/1997, p. 1518). Indeed, going back to 1886 when the *Royall* decision first connected habeas claims to prisoners' rights, Congress has refrained from active involvement in prisoners' rights issues by preferring to validate Supreme Court decisions regarding criminal justice (Eskridge, 1991; Fliter, 2001; Ignani, Meernik, & King, 1998). "When the judicial train arrives at the station before the legislative one, there is little reason to enact a statute from a policy standpoint" (Tushnet & Yackle, 1997/1998, p. 2).

Habeas corpus has become a symbol, not of the abstract notion of the liberty of the individual as the history books portray it but, of prisoner hubris in the face of the states' criminal justice administration. If habeas corpus was ever a get-out-of-jail card for prisoners as critics allege, it was only so from 1963 to 1969 when the Warren Court issued its most expansive habeas decisions (*Fay v. Noia*, 1963; *Townsend v. Sain*, 1963). Yet from the moment the Supreme Court expanded the scope of habeas corpus for state prisoners during the 1960s (Friendly, 1970; Peller, 1981/1982), opponents of an enlarged habeas jurisprudence, both in Congress and on the Supreme Court (*Kaufman v. United States*, 1969), began pushing for habeas restrictions for administrative and constitutional reasons relating to protecting the integrity of the capital punishment process.

By the 1970s, in an effort to redress a seeming imbalance in federal-state relations caused by Warren Court decisions that had applied the criminal provisions of the Bill of Rights to the states, the Burger Court began imposing jurisdictional burdens on state prisoners seeking habeas relief as a way to stem the flow of habeas petitions coming from state prisoners and give state court judgments greater protection against habeas attacks in federal courts (*Wainwright v. Sykes*, 1977). The Rehnquist Court has continued the practice of saddling habeas petitioners, but not the states, with legal responsibilities. The Rehnquist Court has imposed burdens not on the states regarding police tactics or on state courts or legislatures regarding the quality of capital defense attorneys but on prisoners who are mostly poor, illiterate, ignorant of the legal system, and who quite often operate without counsel or with poorly trained capital defense attorneys (Dow, 1995/1996). To limit the writ's effectiveness, the Rehnquist Court relies on complex legal rulings (called retroactivity) stemming from the administrative problems of applying to habeas petitioners extensions of Warren-era constitutional holdings that addressed criminals' fundamental rights (such as Fourth, Fifth, and Sixth Amendment case law). In a series of cases in the late 1980s and early 1990s, for example, the Rehnquist Court prevented habeas petitioners from asking the courts to apply certain cases to their situation (that could potentially help their cause)

that had been decided after their state court convictions had become final (*Penry v. Lynaugh*, 1990; *Sawyer v. Smith*, 1990; *Teague v. Lane*, 1989).

In 1996, Congress reentered the habeas debate to codify, not alter, the Supreme Court's decisions from the early 1970s to the 1990s. Congress has involved itself in habeas reform only to minimize the degree of constitutional attacks on the state courts and maximize the states' legitimacy in the post-New Deal era. "The post-Civil War history of federal habeas," Joseph Hoffmann wrote in 1989, "reveals that Congress either has followed the lead of the Supreme Court in defining the scope of federal habeas, or has remained completely silent in the face of the Court's numerous decisions interpreting the Act of 1867" (p. 178). The Court views habeas corpus "as a subject almost completely within its own domain" (Hoffmann, 1989, p. 177), mostly because of the writ's common-law heritage but also because of congressional reluctance to increase legal protections for prisoners. The Supreme Court's labeling of habeas petitioners as convicted criminals and brutal murderers (*Herrera v. Collins*, 1993; *Sawyer v. Smith*, 1990) has also had the effect of discouraging habeas' mainstream supporters in Congress and delegitimizing sympathetic members of liberal, elite groups outside of Congress. (Indeed, more research needs to be done regarding the Court's description of criminals in murder cases and the effect it has on the law and politics.) According to Isaac Balbus (1973), "Once the process of criminalization has begun, . . . moderate and partially sympathetic members of the elite are likely to find it politically impossible to support the cause of 'criminals'" (p. 12).

The new act, which Yackle (1996), a prominent critic of the Court's habeas decisions considers "not well drafted," "bears the influence of various bills that were fiercely debated for nearly forty years" (p. 381). The AEDPA, which expands the government's jurisdiction to anyone attempting to commit an act of terrorism against the United States, does not ban so-called cop-killer bullets. Nor does the act ban the use of firearms by terrorists, such as machine guns, sawed-off shotguns, and explosive devices. The act prohibits fundraising to aid terrorists (AEDPA, 1996, § 303) but does not enhance the government's wiretapping powers of suspected terrorists. It is also without provisions to enlist the military "in cases involving biological and chemical weapons," and it failed to lengthen the "statute of limitations on firearms violations" (AEDPA, 1996, § 501; Smith, 1997, p. 269). The legislative compromises forged between liberals concerned with expanding wiretapping functions and conservatives concerned about gun restrictions that produced the AEDPA notwithstanding, the AEDPA is not directed at stemming crime or terrorism. As Senator Joseph Biden said, "It's a habeas corpus bill with a little terrorism thrown in" (Idelson, 1996, p. 1046).

CONCLUSION

The history of habeas corpus in the United States is of a limited rise (1787 to 1867) and precipitous fall (1886 to 1915) and of a substantive but patchwork rise (1923 to 1969) and a substantive and patterned fall (1970 to 1996). Periodizing the history of habeas corpus in the United States calls into question the mythic characterizations of habeas corpus as the “great writ of liberty” or as a legal protection against unlawful and arbitrary confinement. It is, in fact, clear that the Supreme Court and Congress consider the writ to pose a threat to the states’ interest in capital punishment. But this threat transcends habeas’s power to set free convicted murderers. It goes to the root of a state’s reason for being. “A state unable to execute those it condemns to die would seem too impotent to carry out almost any policy whatsoever” (Sarat, 2001, p. 18). It behooves constitutional scholars interested in capital punishment to pay more attention to the political struggles of both prisoners and the Supreme Court that are “mediated by the institutional setting in which [they] take place” (Steinmo, Thelen, & Longstreth, 1992, p. 2). The political struggles of prisoners include not just trying to get out of prison but the federal-state relationship that channels prisoners’ movements away from federal habeas review. Not all struggles are violent. Understanding prisoners’ struggles should also include using habeas corpus to attack convictions in federal court or pursuing suits against prison officials, which the Prison Litigation Reform Act (1996) limits. Suits against prison officials or postconviction appeals that challenge state court rulings provide a lens through which to view how institutions respond to challenges to their authority. Viewing the writ as a symbol and a sword, prisoners seek the protection of the writ from judicial detention. Habeas corpus exists to cut through the legal forms that protect state court decisions from being overturned on appeal. This is the reason why habeas corpus provokes backlash; this is why it remains necessary. But at its core, habeas corpus poses a challenge to the state’s claim of the body of the prisoner.

Studying habeas corpus throughout the years highlights the plurality of jurisdictional powers that struggle for control of the movement of prisoners and underscores the problem of administering justice in a federal republic. Habeas corpus is a jurisdictional problem in a nation of jurisdictions. Those looking for a way to understand capital punishment jurisprudence need to pay closer attention to the Supreme Court’s habeas corpus decisions and the long-term effects of Congress’ activity and inactivity on prisoners’ rights claims.

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Cary Federman received his Ph.D. from the Department of Government and Foreign Affairs at the University of Virginia. Currently teaching in the Department of Political Science of Duquesne University, he was a 1999/2000 Fulbright Scholar in the Department of Political Science, University of Zagreb, Croatia, and a lecturer in the Department of Criminology, Faculty of Law, University of Ljubljana, Slovenia.