

TESTIMONY OF THE HONORABLE GERALD KOGAN

BEFORE THE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

1:00 p.m. Tuesday, December 8, 2009 2237 Rayburn House Office Building

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

Testimony of the Honorable Gerald Kogan

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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*,<sup>1</sup> 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.

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<sup>1</sup> 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*.<sup>2</sup> 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

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<sup>2</sup> 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*,<sup>3</sup> 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

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<sup>3</sup> 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*,<sup>4</sup> 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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<sup>4</sup> 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.<sup>5</sup>

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<sup>5</sup> 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.