Testimony of

Mr. Larry Yackle

June 18, 2002

I am happy to be here at the Committee's invitation to testify regarding Title I of Senator Specter's bill, S. 2446. Of course, I speak only for myself, not for Boston University or any other institution or organization.

I claim no special expertise regarding all the proposals in all the bills before the Committee. Other members of this panel do have that expertise. I will say, however, that I have followed reforms in this area for years, and I have never before seen such an impressive list of measures that promise genuine results. I am pleased, then, to be here today to witness the Committee's consideration of the bills offered by the Chairman, by Senator Feinstein, and by Senator Feingold.

I applaud the objectives that Title I seeks to achieve. State and federal prisoners under sentence of death often wish to challenge their convictions or sentences by filing habeas corpus or §2255 motions. It only makes sense that their executions should be stayed while the courts adjudicate their claims. Under current law, it is possible that prisoners may be executed before the courts determine whether their convictions and sentences are valid. The primary purpose of Title I is to ensure that does not happen.

In addition, as I understand it, Title I hopes to eliminate or reduce the hectic litigation over stays of execution that now vexes the judicial system. By ensuring that stays are issued seasonably, Title I would make it unnecessary for lawyers and judges, including Supreme Court justices, to labor through the night in order to avert executions that would frustrate judicial consideration of prisoners' constitutional claims.

Under current law, stays are ultimately issued in most death penalty cases. But that scarcely means that current law is well and good as it stands. I would want to make three points.

First, if litigation of stays of execution almost always results in the issuance of stays, then the enormous time and effort expended by lawyers and judges is unjustified. Scarce resources are squandered to no purpose. Litigation over stays does not genuinely and efficiently sort cases in which prisoners have potentially valid claims from cases in which prisoners do not. If some prisoners fail to obtain stays, it is almost certainly because they are not represented by lawyers with the professionalism and skills required for effective capital representation. The doors to our courts should not be open or closed arbitrarily on the basis of the quality of representation that litigants receive.

Second, the stays of execution that current law produces are typically short-lived. In many instances, they serve only for a matter of days while some current judicial proceeding is under way. As a practical matter, then, they do not relieve the courts involved from distorting time pressure. They have the opposite effect. As courts consider constitutional claims, they must constantly keep their eyes on the clock and mark the time remaining under a stay for the completion of their work. That is not the way to achieve thorough, careful adjudication.

Third, the distortions created by time pressure, in turn, invite judicial errors that must be redressed still later in the process. Herein the sad irony of the limits that current law places on stays of execution. By requiring lawyers and judges to do work hastily, current law virtually

guarantees that litigation in capital cases will be inefficient. Initially, time and resources are wasted on the question whether stays should issue. Next, the consideration of claims under short-term stays produces errors. Then, additional litigation is required to catch and correct those very errors. The goal should be to achieve sound adjudication of constitutional claims as soon and as efficiently as possible. By allowing stays of execution only intermittently, current law defeats that purpose.

More than a decade ago, a special ad hoc committee of the Judicial Conference of the United States, chaired by Justice Powell, recognized these very problems and proposed a plan for resolving them. The Powell Committee plan contemplated that stays of execution would be mandatory in all capital cases, thus requiring no frenzied litigation to determine whether they should issue, and that those stays would remain in place until all judicial proceedings regarding prisoners' claims were completed.

As it happened, the Powell Committee built that plan for stays of execution into a larger proposal addressing a host of other issues. The working idea for that larger proposal was that if states agreed to provide effective lawyers to represent prisoners in state postconviction proceedings, they should be rewarded with various adjustments in the statutes and rules governing federal habeas proceedings. Those adjustments, in turn, worked to the advantage of states responding to habeas corpus petitions. For example, in cases to which the larger scheme applied, prisoners would have to file their petition within six months.

The particular plan for stays of execution did not fit that description; it was not an adjustment in federal habeas law that would favor the states. Instead, it was simply a sensible reform offering benefits to all concerned. Nevertheless, in order to frame its larger proposal as a symmetrical whole, the Powell Committee made the plan for stays of execution optional along with the adjustments that would favor the states. In retrospect, I dare say that the Powell Committee thought it made no difference that the plan for stays of execution was optional. The Committee probably assumed that states would routinely do what was necessary to trigger the larger proposal in its entirety.

In 1996, the Congress incorporated a variant of the Powell Committee's general proposal into what is now Chapter 154 of Title 28 of the United States Code. The provisions in that chapter are optional. They are applicable only in cases arising from states that establish effective systems for ensuring that prisoners in capital cases are properly represented in state postconviction proceedings. That, of course, was the Powell Committee's idea. Chapter 154, like the Powell Committee proposal, includes a provision on stays of execution: 28 U.S.C. §2262. Six years later, only one state has done what is necessary to trigger the application of Chapter 154. Accordingly, §2262 has virtually no practical effect.

It may be that, as time goes on, more states will establish qualifying programs for counsel in state postconviction proceedings and thus make §2262 more generally applicable. Even if that happens, however, the problems with stays of execution will remain. Section 2262 does not make stays mandatory even in cases to which it applies. Stays issue automatically upon application, but they expire unless prisoners promptly makes a "substantial showing of the denial of a Federal right." The Powell Committee plan for stays deliberately avoided fixing any such standard in order to eliminate the need for litigation over both the issuance and the maintenance of stays. By establishing the "substantial showing" standard (or any standard), §2262 invites the very kind of wasteful, distorting litigation over stays that the Powell Committee meant to avoid.

There are, then, serious problems that need attention. The mechanics of an appropriate reform measure can be debated. Title I of Senator Specter's bill provides an excellent start. I have some

ideas for amendments that, in my view, would improve the product. I would be glad to discuss those ideas with the Committee, now or in the future. At this point, however, I want only to say again that the objectives of Title I are sound. I hope this Committee will approve a measure that finally attends to the many problems associated with stays of execution in death penalty cases.