Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Statement of Senator Patrick Leahy,
Ranking Member, Committee on the Judiciary,
On Habeas Legislation (S.1088)
Executive Business Meeting
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Mr. Chairman, I strongly object to proceeding today on the habeas legislation, S.1088. We held our one and only hearing on this bill just two weeks ago. I would have hoped that we would have at least one or two more before launching into another wholesale rewriting of federal habeas corpus law. There is no crisis here, no reason to rush into an exercise that would require our courts and prosecutors once again to untangle what Congress has done on this subject, and no reason to shortcut our deliberative process on a bill with such serious implications for the administration of justice and the basic rights of the American people.

We have not heard fully from the Judicial Conference. In a letter to the Committee dated July 13, 2005, the Judicial Conference said that it opposes three provisions of S.1088 based on previously adopted positions, but the Conference made clear that it has not had sufficient opportunity to consider and comment on the bill's remaining provisions. The letter concludes:

"During the past decade, a body of case law has been carefully developed to implement the objectives of the AEDPA to streamline the procedures for federal habeas review. The proposed legislation may complicate the task of resolving many federal habeas cases by creating additional procedural issues that will undoubtedly be litigated in the federal courts. Such development might lead to more, rather than less, litigation."

The Committee received another letter recently from a distinguished group of former federal and state court judges, including two who also served as FBI Directors [William Webster and William Sessions]. These former judges expressed grave concerns about S.1088, which they say would prevent federal courts from granting many petitions, even in cases of actual innocence. They say the bill's exception for innocence "is so narrow that it will cover virtually no one." They call the bill's jurisdiction-stripping provisions "radical" and "inconsistent with the long history of our American legal system." They end by urging a study, by the Judicial Conference or another independent body, to determine whether there is any need for new legislation to decrease delays.

Another letter came in this week from former prosecutors, law enforcement officers, and Justice Department officials. They call the bill "counterproductive to our goals of ensuring public safety and fairness," and express concern that it would slow things down rather than speed them up, to the detriment of crime victims and their families.

We also received letters from several prominent conservatives -- John Whitehead, David Keene, former Congressman Mickey Edwards, and former Congressman Bob Barr. All question the need for this legislation and urge further study. Congressman Barr's letter is of particular interest, as he helped write the AEDPA in 1996. Calling the evidence for S.1088 "largely anecdotal" and "limited to cases within the Ninth Circuit and California in particular," Congressman Barr cautions against enacting sweeping national changes to address what appears to be a localized issue.

Other letters continue to pour in from organizations and individuals who are alarmed that S.1088 will eliminate safeguards and increase the risk of executing the innocent. These include letters from the Federal Judges Association, the U.S. Conference of Catholic Bishops, and numerous practitioners from law firms across the country.

Habeas corpus is a highly complicated body of law -- mostly because we made it complicated nine years ago -- but also because of the overlay of dozens of Supreme Court cases. We should proceed cautiously here, and with great care, lest we create more problems than we solve. We should be cautious rather than speed things up and increase the risk that innocent people will be executed.

Before I turn to the specifics of S.1088, I would like to note a point of history. In the past 10 years, we have enacted two important pieces of legislation affecting the administration of the death penalty: the major revisions of the AEDPA in 1996, and the much more modest, but important, reforms of the Innocence Protection Act (IPA) last year. The AEDPA was the culmination of years of congressional attention to various proposals for habeas corpus reform. The IPA was also the product of a lengthy congressional process, including multiple hearings in this Committee and in the House. Our departure from that process to rush ahead with a bill whose objective is to rush ahead with executions is as unseemly as it is unwise.

Now let me turn to the bill, the so-called "Streamlined Procedures Act." That is a good label. I'm for that label. We all probably are. Who could be against streamlined procedures? But regrettably, our jobs on this committee and in the Senate are more difficult than that. Our job here is not to vote for labels, but for legislation.

Abraham Lincoln once asked a man, "How many legs would a dog have if you called his tail a leg?"

"Five," the man replied.

"No," said Lincoln, "he would still have four. Calling his tail a leg does not make it so."

Calling this bill the "Streamlined Procedures Act" does not make it so. This bill would do nothing to "streamline" habeas corpus proceedings. To the contrary, the radical changes it proposes would further and unnecessarily complicate the law, spawning another decade of litigation and confusion in the federal courts. Just when the courts had finally sorted out the many questions raised by the AEDPA, they would be back to square one.

Let us be candid about what this bill proposes. In the words of John Whitehead, President of the Rutherford Institute, S.1088 "is radical legislation which would effectively gut federal habeas corpus review where states have imposed a death sentence, as well as in non-capital cases." Its primary tool is to strip federal courts of jurisdiction to hear most constitutional claims.

I am aware that the Chairman may propose a substitute amendment, and I will address that in due course. The substitute is less drastic than S.1088, but would still inflict serious damage to habeas review. More to the point, it would do so for no good reason.

The Senator from Arizona has argued that the delays in federal habeas corpus are "far worse" than when Congress acted in 1996. He says statistics show a sharp increase in the number of habeas petitions pending before in the U.S. District Courts. In fact, the statistics he cites show the number of petitions "commenced," not "pending," and so they tell us nothing about how long it takes to process cases in federal court. The AEDPA was never meant to - and could not have hoped to -- reduce the number of petitions filed.

There are two other problems with the Senator from Arizona's numbers. First, they are a bit inflated in that they include petitions filed by federal prisoners under 28 U.S.C. 2255. Second, and more importantly, they fail to account for the explosion in the State prison population over the past decade. When you adjust for these problems, you see that the number of habeas petitions per capita has decreased steadily since we passed the AEDPA.

This chart gives us a snapshot, but hardly a complete picture. We need entirely different information before we can conclude that federal courts move these cases too slowly. For example, how many habeas petitions are dismissed summarily? How many require evidentiary hearings? What is the average processing time for these cases? If there are delays, where in the process are they occurring, why, and is the problem systemic or is it limited to a few courts or regions? That sort of information is not currently available.

I do not want to legislate in the dark. I need meaningful data; we all do. At the appropriate time, I intend to offer a substitute amendment that would begin the data-gathering process.

Let me briefly address two other arguments that have been made to justify the need for this bill.

First, the Senator from Arizona has noted that California takes a long time to execute people. That is true, but it does not tell us a lot about whether AEDPA is working. Much of the delay in California occurs in the state courts, not in federal habeas proceedings. Death row inmates must often wait many years before a lawyer is appointed for the automatic appeal. Then, California's process for appellate and post-conviction review creates a "bottleneck" in the California Supreme Court, which is required to review every capital judgment, and which also handles every post-conviction proceeding as part of California's unitary review procedure. So far this year, the California Supreme Court has issued 12 automatic appeal opinions. The judgments in these cases were rendered in the trial courts between December of 1990 and March of 1995 - ten to fifteen years ago. In short, California has problems, but they are not problems that would be ameliorated by the proposed bill.

Second, we are told that the AEDPA is not working because no State has been able to take advantage of its special procedures for capital cases. The AEDPA provides for expedited resolution of habeas cases in States that "opt in" to its provisions. To opt in, a State must establish procedures "for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have ... become final for State law purposes."

To date, no State has fully "opted in." Many have not even tried or have conceded that they do not meet the requirements. Others have tried, but without success. Only one State - Senator Kyl's home state -- has been found to qualify for opt-in status. That was three years ago, in the Spears case. Arizona did not get the benefits of opt-in status in that case because the defendant went through state post-conviction proceedings before Arizona put its system in place. But for future cases, Arizona presumptively is an opt-in jurisdiction.

Why haven't more states opted in? Not because Chapter 154 has failed to work as intended; rather, the States have simply refused to institute the sort of basic procedural safeguards that Chapter 154 was intended to encourage. Instead of diluting the standards we set in 1996, we should be helping states live up to those standards by fully funding the counsel program we enacted just last year in the Innocence Protection Act.

I have addressed some of the justifications for this bill. We have also heard anecdotes about cases that have dragged on for many years. Let me address one in particular, which Senator Kyl has mentioned a number of times: The Fornoff case in Arizona. As Senator Kyl has noted, the defendant in that case filed his federal habeas petition in 1992. The AEDPA was enacted four years later, and applies only to petitions filed after April 1996. Thus, the Fornoff case sheds no light whatever on the effects of the AEDPA - the statute Senator Kyl wants to amend.

What the Fornoff case does show is the danger of legislating by anecdote. We should not approve the radical changes proposed by S.1088 based on a few isolated cases about which we have incomplete knowledge. But since we have started down that road, I would like to describe some cases myself. These are just a few, representative examples of situations in which federal courts granted relief under existing law, based on clear and often egregious constitutional violations, but which federal courts would be prevented from even considering if the jurisdiction-stripping provisions of S.1088 were enacted. I have chosen cases in which the defendant was under sentence of death, but I could just as well have chosen any number of non-capital cases, since the bill would affect all federal habeas cases, capital and non-capital alike.

Ricardo Aldape Guerra

Ricardo Aldape Guerra was sentenced to death for the 1982 shooting death of a Houston police officer. In state post-conviction proceedings, counsel sought relief based on numerous instances of police and prosecutorial misconduct. The trial court, without holding a hearing or making findings of fact, recommended denying the petition. The Texas Court of Criminal Appeals accepted the trial court's recommendation and denied relief.

The federal district judge - an appointee of President Reagan - conducted an extensive evidentiary hearing. He concluded that Mr. Aldape Guerra was innocent and had been the victim of police and prosecutorial misconduct. This is from the court's opinion:

The police officers' and the prosecutors' actions ... were intentional, were done in bad faith, and are outrageous. These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos. ... Their misconduct was designed and calculated to obtain a conviction and another 'notch in their guns' despite the overwhelming evidence that [another man] was the killer and the lack of evidence pointing to [Aldape] Guerra.

The Fifth Circuit affirmed the district court's decision unanimously, and Mr. Aldape Guerra -- who had maintained his innocence throughout -- was released. Prosecutors conceded that, without the evidence tainted by State misconduct, they lacked a sufficient basis for prosecuting him.

Scott Atlas, a lawyer for Mr. Aldape Guerra's lawyer, has written to the Committee in opposition to S.1088. According to Mr. Atlas, if section 9 of the bill had applied to Aldape Guerra's case, he would have been executed long ago. That is because section 9 eliminates federal court jurisdiction in death penalty cases except for prisoners who raise claims based on a retroactive new rule of law and those who offer clear proof of actual innocence based on evidence that could not have been discovered earlier through the exercise of due diligence. Mr. Aldape Guerra raised no new rule of law, and the evidence he offered could have been discovered with due diligence but was not because counsel was ineffective.

Ernest Willis

Ernest Willis went to Texas's Death Row in 1987. He was convicted of causing the deaths of two young women, who died as a result of a night-time fire in a private home. Like the victims, Mr. Willis was a guest in the home at the time of the fire; he narrowly escaped death himself in the same incident. He was more than 40-years-old and had never been charged with, much less convicted of, a violent crime.

At trial, the State presented a circumstantial case, using poorly trained and largely unqualified fire investigators to portray the blaze as having been arson, based on their interpretation of the physical evidence. Mr. Willis' guilt was largely inferred from his presence at the scene and by his impassive demeanor, which was induced by drugs given to him by his jailers. The jury convicted Mr. Willis of capital murder and sentenced him to death.

After Mr. Willis was convicted the lead prosecutor boasted to the press, "We are just tickled pink. We didn't have any eyewitnesses. We didn't know what type of flammable material was used. It was all circumstantial material."

Represented by new volunteer attorneys, Mr. Willis pursued a new trial in state post-conviction proceedings. The same judge who had presided over Mr. Willis' original trial heard new evidence in hearings that lasted several days. At the conclusion of those hearings, in June of 2000, the judge entered findings of fact detailing the ways in which Mr. Willis' right to a fair trial had been violated. Ultimately, the original trial judge recommended that Mr. Willis should receive a new trial as a result of prosecutorial misconduct and his own trial attorneys' ineffective performance. However, the Court of Criminal Appeals reversed. Its order was six pages long, unpublished, and was rendered without the benefit of substantive briefing or oral argument.

Mr. Willis turned to the federal courts. In 2004, a district judge issued an order granting Mr. Willis a new trial. Without taking any new evidence, the judge found that the original trial judge's findings were correct, that Mr. Willis' rights had been grossly violated, and that the Court of Criminal Appeals had unreasonably refused to remedy those violations. The judge issued an order granting Mr. Willis a new trial, and the State of Texas made the rare choice not to appeal.

On remand, the local prosecutor was troubled by the thin evidence in the case and decided to have it re-examined before deciding how to proceed. This time, the job was assigned to two extensively qualified arson experts. They concluded that the fire was accidental. They explained that the original verdict of arson was based on misunderstandings about the significance of certain physical evidence; advances in fire science in the 1990's made clear that the original investigators had mistaken certain features as indicating an intentionally set fire.

Based on their report, the District Attorney dismissed all charges against Mr. Willis. A little over a month later, he signed a "Certification of Actual Innocence" stating that "the record shows the actual innocence of Mr. Willis." It concluded, "In behalf of the State of Texas, I extend my apologies to Mr. Willis and best wishes to Mr. Willis and his family."

If the changes in federal habeas law contemplated by S.1088 had been in effect when Mr. Willis' case was wrongly rejected by the Texas Court of Criminal Appeals, the federal district court would have had no jurisdiction to review the case or to correct the extraordinary injustice originally identified by the state trial judge. No new evidence or new facts were developed after Mr. Willis' case was denied by Texas's highest court; the factual record was complete once the original trial judge had finished hearing evidence. Thus, under section 9 of S.1088, there would have been no jurisdiction for federal habeas review, and Ernest Willis would have been executed.

Ronald Keith Williamson

Ronald Keith Williamson was convicted and sentenced to death for the rape and murder of a young woman in Ada, Oklahoma. Following direct appeal, he filed a petition for state post-conviction relief. The trial court denied the petition and the Oklahoma Court of Criminal Appeals affirmed, finding that all of his claims were procedurally barred.

Mr. Williamson then petitioned for a writ of federal habeas corpus. The district court granted the writ on a variety of grounds, including trial counsel's ineffective performance in not seeking a competency hearing. The district court held that the state procedural bar regarding the competency claim was not "independent," and therefore the Court could reach the merits of this claim.

The Court of Appeals affirmed, holding that counsel's ineffectiveness had led to the trial of a person who may have been mentally incompetent. Mr. Williamson also prevailed in both federal courts on another of his claims - that trial counsel had been ineffective in failing to investigate the many leads suggesting that he was actually innocent and that the crime had actually been committed by his chief accuser, Glen Gore. Prior to his retrial, Mr. Williamson - now with the assistance of competent counsel -- was exonerated by DNA testing. The charges against him were dismissed and Glen Gore - who indeed turned out to be the real culprit - was convicted of the crime and sentenced to death.

Barry Scheck, who worked on the Williamson case, testified at our hearing. He said if section 4 of S.1088 had been in effect when Mr. Williamson filed his federal habeas petition, it would have stripped the federal courts of jurisdiction to hear any of the claims found "barred" by the Oklahoma state courts. There would have been no retrial, and Mr. Williamson would have been executed despite his innocence.

Conclusion

Our hearing earlier this month only highlighted the extent of our collective ignorance about the issues S.1088 purports to address. We do not know how widespread post-conviction delays are. We do not know to what extent those delays are attributable to federal habeas corpus, which S.1088 would radically curtail, or to state post-conviction proceedings, which it entirely ignores. We do not know how effective the AEDPA has been - or how effective it will be now that the courts have finally clarified what it means - at reducing post-conviction delays. And we do not know what the federal judiciary, which actually administers the AEDPA, and whose jurisdiction would be profoundly affected by the bill, might tell us about the effectiveness of the AEDPA and the real-world implications of S.1088. We know none of these things. And the proponents of S.1088 want us to pass their legislation fast, before we can find out.

There are, however, things that we do know. We do know that federal habeas corpus is not merely a bastion of liberty in some abstract sense: It has saved innocent lives from execution; it is one of the bedrock rights that belong to the American people; it has revealed profound injustices that violate fundamental constitutional rights; and it has led to the re-opening of cases which in turn has led to the capture and imprisonment of those who are truly guilty. We do know that if enacted, S.1088 would represent a dramatic curtailment of the Great Writ. And we do know that under S.1088, federal court doors would have been shut to inmates whose innocent lives have been saved by federal habeas proceedings. In short, we know this: A vote for S.1088 is a vote to substantially increase the probability that innocent people will be executed. Before the Committee adopts a measure with such drastic consequences, we should at least know what problems we are supposed to be addressing.