Department of Justice

STATEMENT

OF

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BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 238, HABEAS CORPUS REFORM

ON

OCTOBER 8, 1985

Mr. Chairman and Members of the Committee:

I am pleased to appear today to present the views of the Department of Justice on S. 238, a bill to reform procedures for the collateral review of criminal judgments. We regard the enactment of this legislation as an essential part of the criminal law reform program of the Department of Justice and the Administration.

As you know, this Committee has exhaustively examined the need for reform in federal habeas corpus, and the specific proposals of this bill, over the past several years. Last year, the full Senate passed an identical bill, S. 1763, by a vote of 67 to 9. We have already testified at length on these proposals in the past two Congresses. 1/ My remarks today will consist of a brief review of the history of federal habeas corpus, a statement of the problems engendered by its contemporary character, and an analysis of the specific reforms proposed in S. 238 as a response to those problems.

1/ Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 8, 16-17, 32-41, 160-65 (1983); The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 16-107 (1982).

I. The History of Federal Habeas Corpus

Federal review of the judgments of state courts has traditionally been limited to review in the Supreme Court. The contemporary habeas corpus jurisdiction of the federal courts is a unique exception to this principle, under which the lower federal courts can review and overturn the judgments of state courts in criminal cases. The relevant history shows that Congress never decided to give the lower federal courts this extraordinary power, and that it has no basis in the Constitution and no deep roots in our history. Its existence is essentially the result of judicial innovations that occurred in the 1950's and 1960's.

At common law, habeas corpus was a means of securing judicial review of the existence of grounds for executive detention. If a person was taken into custody by executive authorities, he could petition a court to issue a writ of habeas corpus, which would order the custodian to produce the prisoner and state the cause of his commitment. If the government responded that the petitioner was being held on a criminal charge, the court would set bail for the petitioner, or order him recommitted pending trial, depending on whether the offense charged was bailable or

non-bailable. If the government could state no charge against the petitioner, the court would order his release. 2/

The importance of habeas corpus in this character -- as a safeguard against arbitrary executive detention -- was recognized by the Framers, who included in the Constitution a prohibition of suspending the writ of habeas corpus, except in cases of invasion or rebellion. The writ of habeas corpus referred to in the Suspension Clause of the Constitution, however, differed in two fundamental respects from the contemporary writ addressed by S. 238:

First, the right to habeas corpus set out in the Constitution was exclusively intended as a check on abuses of authority by the federal government, and was not meant to provide a judicial remedy for unlawful detention by state authorities. This point is evident, to begin with, from the placement of the Suspension Clause in Section 9 of Article I of the Constitution, which is an enumeration of limitations on the power of the federal government. The corresponding enumeration of restrictions on state authority in Section 10 of Article I contains no

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2/ See R. Rader, Bailing Out a Failed Law: The Constitution and Pretrial Detention in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 91, 94-96 (1983); Oaks, Legal History in the High Court -- Habeas Corpus, 64 Mich. L. Rev. 451 (1966).

right to habeas corpus. 3/ Shortly after the ratification of the Constitution, the First Congress in 1789 made the limitation of the federal habeas corpus right to federal prisoners explicit, providing in the First Judiciary Act (ch. 14, § 20, 1 Stat. 81-82):

> [T]he justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, That writs of habeas corpus shall in no case extend to prisoners in gaol [i.e., jail], unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same....

Second, the writ referred to in the Constitution, as noted above, was the common law writ of habeas corpus, whose function was limited to serving as a check on arbitrary executive detention and as a pretrial bail-setting mechanism. The Framers' recognition of the common law scope of the writ is evident in the language of the Constitution itself and the First Judiciary Act. The Constitution authorized suspension of the writ in cases of rebellion or invasion so as to permit in such circumstances executive detention unconstrained by normal legal processes and standards. 4/ The First Judiciary Act described the function of

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3/ See generally 2 M. Farrand, The Records of the Federal Convention of 1787, at 438 (1966); 3 id. at 157, 213, 290 (assumption in debate at the Constitutional Convention that the states would retain the authority to suspend the writ).

4/ See generally id.; 1 Blackstone, Commentaries on the Laws of England 131-32 (1765).

the writ as "inquiry into the cause of commitment" and referred to its availability to federal prisoners "committed for trial".

The restriction of federal habeas corpus to federal prisoners was qualified by the enactment of the Habeas Corpus Act of 1867, which extended the availability of the writ to persons "restrained of ... liberty" in violation of federal law, without any requirement of federal custody. The legislative history of the Act indicates that it was meant to provide a federal remedy for former slaves who were being held in involuntary servitude in the states in violation of the wartime emancipation decrees and the recently enacted Thirteenth Amendment. 5/ While this narrow purpose was lost sight of in subsequent judicial interpretations of the Act, the early decisions continued to give a limited scope to federal habeas corpus, following the common law rule that habeas review of judicially imposed detention is limited to the question of whether the judgment was void because the committing court lacked jurisdiction.

In later cases, however, a gradual expansion of the scope of federal habeas corpus through caselaw development took place, based on the fiction that sufficiently serious defects in state proceedings would deprive the state court of jurisdiction and accordingly permit federal habeas review under the

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5/ See Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965).

traditional standards. This fiction eventually reached the breaking point and was abandoned by the Supreme Court in favor of an essentially appellate conception of habeas corpus. By the early 1960's, habeas corpus was established in its contemporary character as a mechanism by which state criminal judgments, following review and affirmance by the appellate courts of the state, can effectively be appealed to the federal trial courts for further review on federal grounds. 6/

II. The Problems of the Current System

Proponents of the current system of federal habeas corpus review have argued that it is necessary to guard against or correct injustices that would otherwise result from violations of federal rights by the state courts. Defenders of the current system also often emphasize the high regard in which the "Great Writ" has been held in the common law and American constitutional traditions, and suggest that so venerable an institution should not be tampered with lightly.

6/ See Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 483-501 (1963); William French Smith, Proposals for Habeas Corpus Reform in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint 137, 138-40 (1983) [hereafter cited as "Proposals for Habeas Corpus Reform"].

There is, however, no evidence that there is currently any general insensitivity to claims of federal right in the state courts; no evidence that direct review in the Supreme Court does not provide an adequate means of maintaining the uniformity and supremacy of federal law in state criminal cases as well as in state civil cases; and no evidence that federal habeas corpus has actually served in recent years to correct injustices occurring in state proceedings. A state prisoner who properly presents an application for federal habeas corpus has typically been tried and convicted of a serious offense in state court, has already had the conviction affirmed by a state appellate court on appeal, and has had an application for review denied or decided adversely by a state supreme court. Many habeas petitioners have also had additional review in state collateral proceedings. 7/ The incremental benefits of affording even more levels of mandatory review in the lower federal courts through habeas corpus are difficult to discern. In most habeas cases the federal courts agree with the conclusion of the state courts, though considerable time and effort at both the district court and circuit court levels is often expended in reaching this result. In the relatively few cases in which relief is granted, it is likely to reflect disagreement with the state courts on arguable or unsettled issues in the interpretation or application of

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7/ See Proposals for Habeas Corpus Reform, supra note 6, at 142.

federal law on which the lower federal courts may disagree among themselves. 8/

The questionable value of this type of review is emphasized by the experience of the District of Columbia, in which federal habeas corpus has been abolished. As a result of legislation enacted in 1970, prisoners in the District of Columbia cannot seek habeas corpus review in the federal district courts, but are limited to a collateral remedy in the local court system. 9/ We are unaware of any adverse effect on the quality or fairness of proceedings in the District of Columbia courts resulting from this restriction. When the abolition of federal habeas corpus in one major jurisdiction has caused no evident problems over a period of fifteen years, it becomes difficult to believe that the more modest reforms proposed in S. 238 would adversely affect the quality of justice in the substantially similar judicial systems of the states.

While the benefits of the current system of federal habeas corpus are, to say the least, nebulous, its costs are substantial and obvious. The exercise by individual federal

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8/ See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 165 & n.125 (1970).

9/ See Proposals for Habeas Corpus Reform, supra note 6, at 148-149; McGowan, The View From an Inferior Court, 19 San Diego L. Rev. 659, 667-69 (1982).

trial judges of the authority to review and overturn the considered judgments of state supreme courts is a perennial source of tension in the relationship of the federal and state judiciaries. While most habeas applications are wholly lacking in merit, they continue at a high level from year to year. In recent years they have accounted for about 8,500 filings annually in the district courts. Habeas corpus petitions, in common with other prisoner suits, are usually filed as a means of harassing the authorities, or as a form of recreational activity which passes the time in prison. The difficulty of dealing with these cases is increased by the absence of any definite time limit on habeas applications, which can result in the need to reconstruct events after a lapse of years or decades. A study funded by the Department of Justice in 1979, for example, found that 40 percent of habeas corpus petitions were filed more than five years after the state conviction, and nearly one-third were filed more than a decade after the state conviction. Still longer delays were noted in some cases in the study, up to more fifty years from the time of conviction. 10/

Federal habeas corpus has also been a major contributing factor in the endless litigation and re-litigation that has characterized state criminal cases involving capital

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10/ See Allen, Schachtman & Wilson, Federal Habeas Corpus and its Reform: An Empirical Analysis, 13 Rutgers L. J. 675, 703-04 (1982).

sentences. The possibility of moving such cases into federal court by applying for habeas corpus and securing last-minute stays of execution from federal judges has been an important weapon in the defense attorney's arsenal of delaying tactics, and has frustrated state efforts to implement fair and effective procedures for imposing and carrying out death sentences. 11/

Finally, the traditional reverence for the Great Writ provides no support for the continuation of federal habeas corpus in its present character as a third or fourth level of review for state criminal convictions. As noted earlier, this use of habeas corpus would have appeared totally alien to the Framers, and to common law jurists generally prior to the middle of the twentieth century. The same consideration is a sufficient response to supposed constitutional problems that have been alleged by opponents of the reforms proposed in S. 238. The writ whose operation would be affected by S. 238 -- a quasi-appellate mechanism for reviewing state criminal judgments -- is simply not the writ referred to in the Constitution.

11/ See Proposals for Habeas Corpus Reform, supra note 6, at 145-46.

III. The Reforms Proposed in S. 238

S. 238 incorporates a moderate and balanced set of reforms addressed to the clearest abuses of the existing system of habeas corpus review. The specific reforms proposed in the bill are as follows:

First, as noted above, there is no definite time limit on habeas corpus applications. This is in marked contrast to other areas of federal criminal procedure, in which it is consistently recognized that limitation periods are essential for ensuring a reasonable degree of finality in criminal judgments. For example, state prisoners' applications for direct review of their convictions in the Supreme Court are subject to a normal 90 day limit, and motions for a new trial by federal prisoners based on newly discovered evidence are subject to a two year limitation period under Federal Rule of Criminal Procedure 33. S. 238 would similarly provide for a one-year time limit on habeas corpus applications by state prisoners, normally running from exhaustion of state remedies, and a two-year limit on collateral attacks by federal prisoners, normally running from finality of judgment. The need for such reforms has cogently been expressed by Justice Lewis F. Powell:

> Another cause of overload of the federal system is 28 U.S.C. § 2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of federal review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of

> justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy. 12/

A second reform of the bill addresses the problem of claims that were not properly raised in state proceedings. It would establish a general rule barring the assertion in federal habeas corpus proceedings of a claim that was not properly raised before the state courts, so long as the state provided an opportunity to raise the claim that satisfied the requirements of federal law. The main practical import of the proposed rule is for cases in which attorney error or misjudgment is advanced as the reason why a claim was not raised in the state courts, resulting in its forfeiture under state rules of procedure. A procedural default of this sort would be excused in a subsequent habeas corpus proceeding if the attorney's actions amounted to constitutionally ineffective assistance of counsel, since the default in such a case would be the result of the state's failure, in violation of the Sixth Amendment, to afford the defendant effective assistance of counsel. 13/ But lesser oversights or misjudgments -- which even the most able attorney will sometimes engage in, given the pressures and complexity of criminal adjudication -- would not be grounds for re-opening a

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12/ Address before the A.B.A. Division of Judicial Administration, Aug. 9, 1982.

13/ See Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).

criminal case in federal court. 14/ As Justice O'Connor stated for the Supreme court in Engle v. Isaac:

> Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit ... [a particular] ... argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available ... the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default. 15/

A third major reform of S. 238 is affording finality to "full and fair" state adjudications of a petitioner's claims. Justice O'Connor has observed:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give

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14/ The bill would apply the same standard -- constitutional ineffectiveness -- to claims in collateral attacks by federal prisoners that a procedural default should be excused because of counsel error. The Supreme Court has recognized that the grounds for excusing procedural defaults in collateral proceedings should be no more permissive in relation to federal prisoners than in relation to state prisoners. See United States v. Frady, 456 U.S. 152, 166 (1982).

15/ 456 U.S. 107, 133-34 (1982).

> finality to their judgments on federal constitutional questions where a full and fair adjudication has been given in the state court. 16/

As the legislative history of the proposal explains, the "full and fair" standard would normally be satisfied if the state court's decision of the petitioner's claims was reasonable in it determinations of law and fact, and was arrived at by procedures consistent with due process. 17/ The proposed standard may be compared to that applied in habeas corpus proceedings prior to the unexplained substitution of the existing rules of mandatory re-adjudication in decisions of the 1950's and 1960's. In the period preceding those innovations it was recognized that federal habeas corpus should not be a routine avenue of appellate review of state criminal judgments, but should be reserved for extraordinary cases involving a serious defect in state processes. In the decision of Ex Parte Hawk in 1944, for example, the Supreme Court stated:

> Where the state courts have considered and adjudicated the merits of ... [a petitioner's] ... contentions ... a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated .... But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy ... or because in the particular case the remedy afforded by state law proves in practice unavailable or

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16/ Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 William and Mary L. Rev. 801, 814-15 (1981).

17/ See S. Rep. No. 226, 98th Cong., 1st Sess. 24-27 (1983).

> seriously inadequate ... a federal court should entertain his petition for habeas corpus, else he would be remediless. 18/

Finally, S. 238 would institute reforms recommended by Judge Henry Friendly 19/ and Professor David Shapiro 20/ in the procedure on appeal in collateral proceedings and the operation of the exhaustion requirement. These reforms will improve the efficiency of habeas corpus proceedings and reduce the litigating burdens presently associated with them.

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In sum, the writ of habeas corpus that currently burdens the courts, vexes federal-state relations, and defeats the ends of criminal justice is not the writ of habeas corpus that was esteemed by the founders of our nation and accorded recognition in the Constitution. The diversion of the Great Writ from its historic function is the source of its current disrepute and the problems it has engendered. The reforms proposed in S. 238 would go far toward correcting the major deficiencies of

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18/ 321 U.S. 114, 118 (1944).

19/ See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 144 n.9 (1970) (access to appeal in collateral proceedings).

20/ See Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 358-359 (1973) (exhaustion of state remedies should not be prerequisite to denial of claims on the merits).

the present system of federal habeas corpus in terms of federalism, proper regard for the stature of the state courts, and the needs of criminal justice.

I would be pleased to answer any questions the Committee may have.

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