Death Penalty Habeas Corpus: Defining the Issues

Ira P Robbins
Death penalty habeas corpus: defining the issues

Finding a better way to handle the death penalty review process is a priority for our legal system. Effective solutions require consideration of a broad range of issues.

by Ira P. Robbins

The use of the federal writ of habeas corpus to review state court convictions has long been the subject of continuing controversy, particularly since the U.S. Supreme Court expanded its availability nearly three decades ago in *Fay v. Noia.* Some members of the state judiciary, and others, view federal habeas corpus review of state court criminal convictions as an affront to their sovereignty and an impediment to the certainty and finality of their judgments. As Professor Paul Bator has written:

I could imagine nothing more subversive of a [state] judge's sense of responsibility, of the inner subjective sense of conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.

In contrast, consider the following statement of Justice Oliver Wendell Holmes:

[Federal] habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.

The controversy concerning the use of the writ of habeas corpus echoes the debates of more than 200 years ago: the sovereignty of the states in preserving domestic order versus the preeminence of the federal government in vouchsafing national interests—in this case, constitutional criminal law.

The tensions surrounding federal habeas corpus review are most pronounced when the case under review involves the death penalty. The importance of the cases themselves is far greater, as are the attendant publicity and the public interest. The usual procedures are more extensive, involving far greater federal court time and effort. Unlike the "ordinary" state prisoner federal habeas corpus case, the federal courts, including the U.S. Supreme Court, have granted relief to a significant proportion of state prisoners under sentence of death.

Further, death penalty litigation is extraordinarily complex, both for the courts and for the attorneys involved. The cases incorporate the evidentiary and procedural issues that are associated with virtually every noncapital case. They also involve a host of issues that are unique to capital cases, including special voir dire of jurors; presentation of evidence going to guilt or innocence and to punishment; special penalty procedures, including additional factual findings by the jury; proportionality review (under some state appellate procedures); and critical questions of competence of counsel. Moreover, post-conviction cases involve not only issues that go to the merits of the case, but also those that go to the issuance of a stay of execution. A separate body of precedent has developed, based on the Supreme Court's 1983 decision in *Barefoot v. Estelle,* on the criteria to be used in deciding whether to grant a stay of execution in order to allow additional time for consideration of the merits of a petition. Problems of procedural default of possible claims, exhaustion of state judicial remedies, and abuse of the habeas corpus writ itself take on significance equal to that of the merits of the issues sought to be raised. In addition to the significance, publicity, and complexity that are associated with death penalty litigation, federal habeas corpus review of such cases appears to most observers to be both chaotic and protracted. The least complicated case, in which relief is denied at every stage, can be presented to the U.S. Supreme Court a minimum of three times, and to the federal district and appellate courts at least twice each.
Powell Committee report released

The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases of the Judicial Conference of the United States was formed by Chief Justice William H. Rehnquist in June 1988 to inquire into "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in capital cases in which the prisoner had or had been offered counsel. The 23-page report of that committee, chaired by retired Justice Lewis F. Powell, Jr., was released in September 1989.

The committee found that "our present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law." It expressed concern over the lack of coordination between the federal and state legal systems that often results in inefficient and unnecessary steps in the course of litigation; the pressing need for qualified counsel to represent inmates in collateral review; and the fact that litigation of constitutional claims often comes only when prompted by the setting of an execution date.

The draft legislation recommended by the committee would revise the existing habeas corpus statute only in those states that establish a system for the appointment and compensation of competent counsel throughout all stages of state post-conviction review. Among other things, the legislation would:

- Limit the period within which a federal habeas petition must be filed. No time limit currently exists.
- Establish an automatic stay of execution until federal habeas proceedings are completed, so that prisoners’ claims can be considered free from last-minute time pressure caused by an impending execution.
- Prevent prisoners from continuing to file repetitive petitions for habeas corpus in federal court after they have had one full course of judicial review, except when the claims raised relate to actual innocence.

Also serving on the special committee were Charles Clark, chief judge of the Fifth Circuit; Paul H. Roney, chief judge of the Eleventh Circuit; William Terrell Hodges, chief judge of the U.S. District Court for the Middle District of Florida; and Barefoot Sanders, a judge on the U.S. District Court for the Northern District of Texas.

Senate bills introduced

The Anti-Drug Abuse Act of 1988 set out a procedure to consider legislation to reform habeas corpus actions in capital cases. It provided that, following the report of the special committee on habeas corpus reform, chaired by Justice Powell, the chairman of the Senate Judiciary Committee was to "introduce a bill to modify Federal habeas corpus procedures after having faithfully considered the report and recommendations of the special committee."

On October 16, 1989, the chairman, Senator Joseph Biden of Delaware, introduced S. 1757, the "Habeas Corpus Reform Act of 1989," which would amend Title 28 of the U.S. Code. (Congressional Record, October 16, 1989, page S 13472). The major provisions of that bill are noted in the chart on page 218. The same day, Senator Strom Thurmond of South Carolina introduced S. 1760, embodying the Powell Committee proposal.

ABA Task Force issues habeas corpus recommendations

The American Bar Association Task Force on Death Penalty Habeas Corpus issued a nearly 400-page report on November 27, 1989, setting forth the findings and recommendations of its year-long study of the entire system of post-conviction review of state capital convictions and sentences. The report concluded that current criticisms of the review process as being too long and too slow are justified, but that the same process is "susceptible to unfair outcomes due to the inadequate presentation of constitutional issues."

The Task Force said that streamlining post-conviction death penalty review must include assurances that qualified counsel be provided at every stage of the expedited review process. In calling for a carefully crafted package of interconnected reforms designed to make the process less complex, the Task Force stressed that any "new process must also be sure and fair—as the existing process often has not been due to the failure to provide qualified counsel in stages leading up to federal habeas corpus review."

The report points out that the "provision of knowledgeable counsel at trial would restore the trial as the 'main event' in the criminal process because constitutional issues would be first recognized, aired, and resolved at that level, rather than later. As a result, there would be fewer colorable claims of ineffective assistance of counsel and fewer of the reversals and retrials that now so frequently and substantially prolong the process."

Another reform the report calls "critical" is implementation of a statute of limitations to speed up the process. The report says that a one-year statute of limitations on filing of all post-conviction applications in capital cases would "compel prisoners and counsel to seek prompt review" and would signify to all parties that "unnecessary delay in reviewing capital convictions and sentences is not tolerated."

The Task Force was co-chaired by Chief Justice Malcolm M. Lucas of the California Supreme Court and Judge Alvin B. Rubin of the United States Court of Appeals for the Fifth Circuit. Professor Ira P. Robbins of American University's Washington College of Law was the reporter. The other task force members were: Justice Rosemary Barkett of the Florida Supreme Court; Stephen B. Bright, director of the Southern Prisoners Defense Committee; Talbot D'Alember of Steele, Hector and Davis in Miami; John M. Greacen, clerk of the United States Court of Appeals for the Fourth Circuit; William B. Hill, Jr., deputy attorney general of Georgia; Professor James S. Liebman of Columbia University Law School; Judge Barefoot Sanders of the U.S. District Court for the Northern District of Texas; and Judge Donald W. Stephens of the North Carolina Superior Court.
Under current practice, many of the complicated issues are presented to the courts under extraordinary time constraints. Both state and federal courts have become accustomed to a frantic pace of last-minute applications, accompanied by frenzied paperwork from the attorneys, procedural ambiguities arising from simultaneous proceedings in state and federal courts, and rapidly convened hearings and conferences, many by conference call. Neither the prisoner nor the prison authorities know when an execution will be halted by a telephone call literally at the last minute. Despite the frenetic pace of some of these proceedings, death penalty litigation in most cases is quite protracted. It is rare for a death sentence to be carried out within five or six years of its imposition.8

In view of the foregoing characteristics of death penalty litigation, capital punishment necessarily poses a dilemma for the legal system. Principles of deterrence and retribution that underlie the concept of a death penalty presumably require its relatively swift and certain imposition. Yet its inexorable finality requires that no argument be left unaddressed in the process of assuring that the death-sentenced inmate is in fact guilty and was convicted fairly and in accordance with constitutional procedural safeguards. Put differently, respect for the criminal justice system and the integrity of the constitutional criminal process are simultaneously called into question.9 In this context, the responsibilities of both the federal and state judiciaries are heavy. The need for cooperation between the state and federal court systems is great, but actual cooperation has typically been grudging at best.

Is there a better way to handle the death penalty review process? If so, what is it? Chief Justice William H. Rehnquist recently called for "some sort of regularization of the procedures which now attend last minute appeals and requests for stay of execution"10 by state death-row inmates. Citing "the sort of chaotic conditions that often develop within a day or two before an execution is scheduled,"11 he urged the Conference of Chief Justices in January 1988 to study ways to regularize the situation. "We judges," he said, "have no right to insist that matters such as these proceed at a leisurely pace, or even at an ordinary pace, but I think we do have a claim to have explored the possibility of imposing some reasonable regulations in a situation which is disjointed and chaotic."12

The American Bar Association, under a grant from the State Justice Institute, formed a State-Federal Task Force to address the foregoing concerns. This article, summarized from the Task Force's Background and Issues Paper, identifies the major issues that are involved in the death penalty review process.

The aim of the Task Force project—which included regional hearings at which more than 80 witnesses testified—was to formulate a series of recommendations that, when implemented, would produce state and federal review procedures in death penalty cases that: are coordinated; are efficient (in terms of the use of the time and resources of both counsel and the courts); result in certainty, to the extent possible, that no person will be executed on the basis of a conviction that is flawed by fundamental factual, legal, or constitutional procedural error; and are devoid of the chaotic character of current "last minute," piecemeal, state and federal reviews. The project and this summary article suggest that an effective solution to the problems of last-minute federal court review and requests for stays of execution will be found not by focusing only on the last stage of the review process, but rather by investigating the needs of the entire criminal justice process in capital cases.

The major issues
The first issue that needs to be addressed is the purpose of state and federal post-conviction review of state criminal convictions. Is the purpose different for capital than for noncapital cases? There are also several essential issues associated with the competence, provision, and zeal of counsel. For example, should the states be required to provide counsel for indigent persons after the first appeal as a matter of right? If so, should the counsel requirement include state post-conviction review or review on certiorari in the U.S. Supreme Court?

The provision of counsel also raises questions such as: What compensation and other resources should be provided? Should different counsel be appointed at some stage of the review process, such as on direct appeal in the state? Should jurisdictions create a formal system for providing counsel for indigent persons in capital cases? If so, how should the system be structured to attract and retain qualified attorneys and to insure independence of counsel and competent representation? And, finally, should minimum standards for representation of defendants/appellants/petitioners in capital cases be established? If so, what standards?

State procedural default rules are another area in need of examination. Among the issues: Should state procedural default rules apply in capital cases? If so, what should be the test for their application? How should the test apply to unintentional counsel errors? Under the Wainwright v. Sykes13 and Murray v. Carrier14 standard, how should the terms

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9. Compare, e.g., Coleman v. Balkcom, 451 U.S. 949, 956-964 (1981) (Rehnquist, J., dissenting from the denial of certiorari) (referring to a "statemate in the administration of federal constitutional law," a "mockery of our criminal justice system," and a "state of savagery," and stating, inter alia, that "[t]he jurisdiction of the federal courts over such matters should be ended") with id. at 954-956 (Marshall, J., joined by Brennan, J., dissenting from the denial of certiorari) (inter alia, stating: "Certainly no Member of this Court would ... the consequences of death for the defendant."); compare also Sykes v. Georgia, 425 U.S. 191 (1976) (holding that federal habeas corpus cannot be denied a state prisoner in federal court for want of state procedures even though the state courts do not follow its guidelines). See also id. at 210 (Stevens, J., concurring) (stating: "Such an absolute bar to filing a state habeas corpus petition is inconsistent with the federal system of justice and a denial of the habeas corpus privilege.") (interpreting Spalding v. Hine, 218 U.S. 490 (1911) as meaning that an individual has the right to file a federal habeas corpus petition). The aim of the Task Force project—which included regional hearings at which more than 80 witnesses testified—was to formulate a series of recommendations that, when implemented, would produce state and federal review procedures in death penalty cases that: are coordinated; are efficient (in terms of the use of the time and resources of both counsel and the courts); result in certainty, to the extent possible, that no person will be executed on the basis of a conviction that is flawed by fundamental factual, legal, or constitutional procedural error; and are devoid of the chaotic character of current "last minute," piecemeal, state and federal reviews. The project and this summary article suggest that an effective solution to the problems of last-minute federal court review and requests for stays of execution will be found not by focusing only on the last stage of the review process, but rather by investigating the needs of the entire criminal justice process in capital cases.

11. Id.
12. Id. Chief Justice Rehnquist added more recently that "we are not talking about wholesale reshaping of the nature of habeas corpus jurisdiction, but about modest changes which will impose some order on the chaos which at present often proves to be chaotic and drawn out unnecessarily." Remarks of Chief Justice William H. Rehnquist at the American Bar Association Mid-Year Meeting (Feb. 6, 1989), at 13.
13. 433 U.S. 72 (1977) (holding that federal habeas corpus courts cannot consider issues that have been procedurally barred in the state courts unless the petitioner shows good cause for failure to comply with the state rule and actual prejudice resulting therefrom, or unless there was a "miscarriage of justice").
14. 477 U.S. 478 (1986) (holding that unintentional counsel errors cannot constitute "cause" under the Sykes cause-and-prejudice test and stating that, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of showing cause for the procedural default").
### Side-by-side comparison of death penalty habeas corpus proposals

<table>
<thead>
<tr>
<th>Subject</th>
<th>ABA Task Force</th>
<th>Powell Committee</th>
<th>Biden Bill</th>
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<tbody>
<tr>
<td><strong>Counsel</strong></td>
<td>All stages in all courts</td>
<td>State post-conviction</td>
<td>Cert. following direct appeal and state post-conviction</td>
</tr>
<tr>
<td>Qualifications of counsel</td>
<td>ABA Guidelines for Appointment &amp; Qualification of Counsel</td>
<td>None; state required to establish</td>
<td>Anti-Drug Abuse Act standards</td>
</tr>
<tr>
<td><strong>Compensation</strong></td>
<td>N/A</td>
<td>Anti-Drug Abuse Act standard—all amounts &quot;reasonably necessary&quot; to carry out the appointments legislation</td>
<td></td>
</tr>
<tr>
<td>Resource centers</td>
<td>Support for resource centers</td>
<td>N/A</td>
<td>Post-conviction counsel must be different from trial and appellate counsel</td>
</tr>
<tr>
<td>Restrictions</td>
<td>New counsel on appeal, continues for post-conviction</td>
<td>Post-conviction counsel must be different from trial and appellate counsel</td>
<td></td>
</tr>
<tr>
<td>Enforcement</td>
<td>Withholding of presumption of correctness, exhaustion, and procedural default for proceedings without qualified counsel</td>
<td>State opts in, in order to obtain such benefits as statute of limitations</td>
<td></td>
</tr>
<tr>
<td>Ineffectiveness claims</td>
<td>Cannot be made against post-conviction or habeas counsel</td>
<td>Cannot be made against post-conviction or habeas counsel</td>
<td></td>
</tr>
<tr>
<td>Procedural default</td>
<td>State should review all claims of constitutional error under Fay v. Noia test and apply plain error rule liberally to review of state-law issues</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>In state review process</td>
<td>Allow review of defaulted claims resulting from counsel’s “ignorance or neglect” or if necessary to avoid a “miscarriage of justice”</td>
<td>N/A</td>
<td>Allow review of defaulted claims resulting from counsel’s “ignorance or neglect” or if necessary to avoid a “miscarriage of justice”</td>
</tr>
<tr>
<td>In federal review process</td>
<td>One round of state and federal habeas conducted under stay; federal court enters, if necessary</td>
<td>One round of state and federal habeas conducted under stay; federal court enters, if necessary</td>
<td>One round of state and federal habeas conducted under stay; federal court enters, if necessary</td>
</tr>
<tr>
<td>Statute of limitations</td>
<td>365 days</td>
<td>365 days</td>
<td>State post-conviction proceedings, except for cert. petition</td>
</tr>
<tr>
<td>Period, following direct appeal and cert. petition</td>
<td>60 days for good cause</td>
<td></td>
<td>None</td>
</tr>
<tr>
<td>Extensions</td>
<td>Any state or federal proceedings, including cert. petition</td>
<td>State post-conviction proceedings, except for cert. petition</td>
<td>State post-conviction proceedings, including cert. petition</td>
</tr>
<tr>
<td>彩色 claim, not previously presented, either of factual innocence or of the petitioner's ineligibility for the death penalty</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Successive petitions</td>
<td>Claim not previously raised due to state action, new law, or new facts; or underlying claim, if proven, would undermine court's confidence in a jury's determination of guilt on the underlying offense; or consideration necessary to prevent a “miscarriage of justice”</td>
<td>(1) Claim not previously litigated, and (2) not previously raised because of state action, new law, or new facts, and (3) facts underlying claim, if proven, would undermine a court’s confidence in a jury’s determination of guilt of the underlying offense</td>
<td>(1) Claim not previously raised, due to state action, new law, or new facts, or (2) facts underlying claim, if proven, would undermine court’s confidence in a jury’s determination of guilt of underlying offense, or (3) consideration necessary to prevent a “miscarriage of justice”</td>
</tr>
<tr>
<td>Exhaustion</td>
<td>Early review of all claims in first habeas petition to identify any that have not been exhausted: stay pending state court review of non-exhausted claims</td>
<td>Non-exhausted claims precluded unless prevented by state action or based on new facts. If not precluded, exhaustion not required; factual hearing in federal court</td>
<td>N/A</td>
</tr>
<tr>
<td>Retroactivity (Teague v. Lane: Penry v. Lynaugh)</td>
<td>Changes in federal constitutional law should apply retroactively if failure to apply them would undermine the accuracy of the guilt or the sentencing determination</td>
<td>N/A</td>
<td>Apply interim change in the law if, in light of Staywall v. Denno factors, it would be &quot;just to give the prisoner the benefit of the interim change&quot;</td>
</tr>
<tr>
<td>Period for implementation</td>
<td>2 years</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Bench and bar support</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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“fundamental fairness,” “manifest injustice,” and “miscarriage of justice” be defined for capital cases?

Should the exhaustion-of-state-judicial-remedies doctrine be eliminated or modified in death penalty habeas corpus cases? If the latter, are the rules for waiver of exhaustion already sufficient to accomplish the purposes of a modification? Alternatively, is an amendment to 28 U.S.C. §2254(b) and (c) warranted? Should the state routinely waive exhaustion in capital cases? Also, where unexhausted claims are presented to a federal district court that has stayed or is disposed to stay the execution, should that court hold the case in abeyance until all cognizable claims have been exhausted in the state system?

Successive petitions, abuse of the writ, and delay are also pressing issues. What standards should apply for federal courts to entertain second or successive petitions in capital cases? Should the standards for “same claim” successive petitions be different from those for “new claim” successive petitions? How should the term “ends of justice” be defined? Should there be a statute of limitations for state and/or federal post-conviction petitions in death penalty cases? If so, what should the limitations period be? When would it start to run? What exceptions, if any, would exist?

In order to avoid “last-minute chaos,” a number of issues associated with certificates of probable cause and stays of execution need to be addressed. What measures, if any, should be adopted to require or encourage the filing of post-conviction proceedings before a date of execution is set? After a date of execution is set and collateral review is sought, when should a stay of execution be granted? For what duration?
We must also ask whether there should continue to be a certificate-of-probable-cause requirement for the review of capital cases. If so, should it be restricted only to second or subsequent appeals from the denial of habeas corpus relief? If a district court denies a certificate of probable cause, what weight should the appellate court attach to that denial? If the certificate requirement continues to be applied in capital cases, when a district judge, circuit judge, or circuit justice grants a certificate of probable cause, should a stay of execution automatically be granted as well? If a federal district court grants relief on a habeas corpus claim, should it address the merits of all of the other questions as well?

With regard to expedited procedures, are they appropriate for the post-conviction review of federal constitutional claims in death penalty cases? If so, when? What should the procedures be? Should they be restricted only to second or subsequent appeals from the denial of habeas corpus relief? More generally, should there be a "model timetable" for all of the stages of death penalty review? If so, what times are appropriate for each stage? What exceptions, if any, should be recognized? Whether or not there are expedited procedures, what internal procedures (such as assigning all motions and substantive matters in a case to the same panel) might make the review process both more fair and more efficient? And, finally, should priority be given to deciding death penalty cases in federal district courts and courts of appeals?

Conclusion

The writ of habeas corpus has been called many things, such as "a broom to clean the judicial house," the most celebrated writ in English law," the common law world's "freedom writ," the "only sufficient defence of personal freedom," "the most important human right in the Constitution," an attribute of our way of life," and, of course, "the Great Writ." On the other hand, habeas corpus has also been termed "troublesome," "an untidy area of the law," a "bane," and the "Greatly Abused Writ." Whatever habeas corpus is, it is immediately clear that the federal writ is controversial—especially in state death penalty cases.

In this article, I have tried to organize some of the controversy by setting forth particular questions for deliberation and discussion. In performing this work, it might be helpful to consider the following comment of noted constitutional law scholar Charles Alan Wright: "[T]he most striking fact about habeas corpus over the years has been its ability to change." But how far? And in which direction? How can we be assured of quality state proceedings in death penalty cases? How can we be assured that the effective assistance of counsel will mean more than the mere physical presence of an attorney, if that much? Perhaps, if it would save substantial time, the federal courts should be allowed to reach state death-row inmates' claims on the merits, without procedural delays, so that the judges may then have time to deal with less important matters. Perhaps, on the other hand, federal habeas corpus review should be significantly foreclosed if the states are both equipped and truly eager to address federal constitutional claims meaningfully. Perhaps federal courts should nevertheless have the last word. Perhaps all of these questions should not be addressed broadly, but rather on a case-by-case basis.

These ideas present some of the challenges facing Congress, state legislatures, and the next generation of federal habeas corpus review in state death penalty cases. There are no easy answers. There are not even easy questions, for the intricate interweaving of law and rhetoric on habeas corpus reflects complex emotional and intellectual visions of our society.

It might be constructive to follow the approach of philosopher John Rawls and consider, from behind a "veil of ignorance," what type of a death penalty review system would be preferred if we did not know in advance what our role in the system might be—whether victim, litigant, prosecutor, defense counsel, state judge, federal judge, or member of the public. This impartial vantage point may yield fresh insights into what we mean, and ought to mean, by fundamental fairness. "In the end," as Judge John C. Godbold has stated, "we are all in the justice business together…. We…ought to pursue it, and must pursue it, with the honor and dignity due from committed professionals who believe in the goal [of] justice under the Constitution."

Needless to say, considering what is at stake, the task is a critical one. Chief Justice Rehnquist recently addressed the task in the following way:

I am sure that the committees studying [the system of collateral review in death penalty cases] will come up with useful suggestions as to how [the problems] may be solved. I think if we give the states an incentive to provide counsel for habeas petitioners, and require that all federal claims be consolidated in one petition and filed within a reasonable time after the conclusion of direct review, the system will be considerably improved.

Although many of the ideas and issues presented in this article are interrelated—perhaps with answers to counsel questions seen as the glue that will hold an ultimate package together—and there are numerous directions for sets of recommendations to take, the objective is a clear one: to provide federal-state coordination, with fairness, in death penalty cases.

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