LEGISLATIVE REFORM OF FEDERAL HABEAS CORPUS

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BACKGROUND

Modern federal habeas corpus has been expanded over the past two decades to the point where there are virtually no limits or barriers to a convicted state prisoner seeking a review of his conviction. Simply stated, the "great writ" of habeas corpus is a remedy aimed at attacking unlawful custody. One of the statutory jurisdictional requirements is that the prisoner be "in custody."[1] Although Congress has provided a statutory structure for both state and federal prisoners,[2] the right is not one resting solely on statutory underpinnings. The Constitution provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it".[3] Precisely how this constitutional recognition of the "great writ" impacts upon the authority of Congress to shape the form and application of the remedy is a matter of scholarly debate.

Although custody is still clearly a jurisdictional prerequisite, it has been broadly construed to include parole decisions,[4] probation,[5] detainer warrants from other jurisdictions,[6] and situations where the sentence has already been completed.[7] The writ does not lie where the petitioner is fined but not in physical custody,[8] or where he is seeking to attack possible or certain future detention.[9] Despite the expansion of the writ, it is clear that only constitutional claims are subject to review and nonconstitutional claims that could have been raised on appeal, but were not, cannot be raised in the collateral proceedings.[10]

Federal courts have had explicit statutory authority to issue writs of habeas corpus since the Judiciary Act of 1789 was enacted. Initially, the writ

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1. 28 U.S.C. Sec. 2241(c)(3) (1970 ed.).
2. 28 U.S.C. Sec. 2241, 28 U.S.C. Sec. 2254, 28 U.S.C. Sec. 2255 (1970 ed.)
3. U.S. Constitution, Article I, Sec. 9.
4. Jones v. Cunningham, 371 U.S. 236 (1963).
5. Hahn v. Burke, 430 F. 2d 100 (7th Cir. 1970).
6. Broden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973).
7. Sibron v. New York, 392 U. S. 40 (1968).
8. Cohen v. Hongisto (unpublished decision; see 41 U.S.L.W. 3257) (9th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973).
9. Bocar v. United States, 449 F.2d 933, 936, n. 2 (9th Cir. 1971).
10. Sunal v. Large, 332 U.S. 174, 178 (1947), Stone v. Powell, 428 U.S. 465, 477, n. 10 (1976).

could issue only in instances where the person involved was in federal custody. During Reconstruction, however, the writ was expanded by statute so that the writ could issue in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ."[11] Thus, the scope of the writ was expanded to encompass state prisoners. Until 1953, however, the Supreme Court exercised considerable restraint in limiting the situations in which the writ would issue. While the traditional underpinning notion of jurisdiction "was subjected to considerable strain"[12] to encompass a limited number of cases, the writ was nonetheless judiciously confined.

Since 1953, the floodgates have literally opened on habeas corpus relief. According to the Administrative Office of the United States Courts, the number of habeas corpus petitions has escalated from 89 in 1940 to 1,020 in 1961 and to a staggering 12,000 in 1969.[13] Although the rapid increase of the 1960's apparently has begun to taper off in the 1970's, the net results have been the clogging of the federal court dockets and an inevitable draining of available resources from the normal criminal and civil caseload. In addition to the burdens imposed on the federal judiciary, the individual states are obligated to defend the applications; many state lawyers do nothing else but prepare responsive pleadings. The return of a state conviction has become the starting point for a potentially interminable litigation by way of collateral attack. As Chief Justice Warren E. Burger has noted, this expanded concept of habeas corpus jurisdiction has been "a major source of tension and irritation in state-federal relations."[14]

The capacity of an incarcerated prisoner to impose upon the time and resources of the federal judiciary is apparently only limited by the boundaries of his imagination and persistence. One federal judge has graphically illustrated this reality. Judge Elmo Hunter of the Western District of Missouri has documented how one federal inmate, Clovis Green, has managed to file 92 cases in his court, 47 cases in other federal district courts, 24 cases in the trial courts of Missouri, 25 federal appellate cases, and 38 state appellate cases, for a total of 219 civil cases over a period of several years. Although Mr. Green's prodigious efforts include a variety of mandamus and civil rights suits in addition to his habeas corpus portfolio, his example clearly reflects what Judge Hunter has labelled a "gross abuse of the judicial process which is impeding the ability of the Judiciary to carry out its proper functions."[15]

Granting that Mr. Green's efforts present an extreme example of the problem, it is nevertheless true that the federal judiciary has become in effect an additional layer of appellate review for state prisoners. While state or nonconstitutional claims are not subject to review, a petition need only demonstrate that existing state remedies have been exhausted in order to assert a constitutional claim.

11. Act of Feb. 5, 1867, 14 Stat. 385.
12. Stone v. Powell, 428 U.S. 465, 477, n. 10 (1976).
13. Administrative Office of the U. S. Courts, *1971 Annual Report.*
14. 56 A.B.A.J. 929, 931 (1970).
15. Green v. Garrott, 71 F.R.D. 680, 692 (1976).

EXPANSION OF THE SCOPE OF REVIEW

The reasons for the expansion of habeas corpus suits in recent years can be described as twofold. First, the Supreme Court, through a series of landmark cases, *Brown v. Allen,* 344 U.S. 443 (1953), *Fay v. Noia,* 372 U.S. 391 (1963), and *Townsend v. Sain,* 372 U.S. 293 (1963), has substantially broadened the scope of relief by revising legal precendents which had hitherto confined the availability of relief. A second cause for the increase must be attributed to the Supreme Court's restructuring in other areas of criminal law, particularly the liberalization of Fourteenth Amendment due process doctrines which have brought many more state criminal procedures under constitutional scrutiny. Under the stewardship of Chief Justice Earl Warren, numerous legal standards regarding the exclusionary rule,[16] right to counsel,[17] and protection from self-incrimination,[18] to mention only a few, were made applicable to the states. To the surprise of nobody, many inmates began to challenge the validity of their convictions in light of these new constitutional doctrines and thus contributed to the increase.

In *Brown v. Allen,*[19] the Supreme Court opened the way to expansion by making it clear that a federal judge had discretionary authority to order a plenary hearing where, in the judgment of the court, the state record did not afford an adequate opportunity to weigh the sufficiency of the allegations and evidence. Thus, U.S. district courts could order evidentiary hearings on federal claims which had already been litigated in a state court system. Furthermore, a federal court was required to exercise jurisdiction by examining the record to see if a hearing would serve the ends of justice. Subsequent to *Brown,* petitions nearly doubled, increasing from 660 in 1955 to 1232 in 1962.[20]

The real opening of the floodgates did not occur, however, until 1963 with the cases of *Fay v. Noia*[21] and *Townsend v. Sain.*[22] In *Fay,* the Court emasculated the exhaustion of remedies requirement in section 2254 by holding that the "requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court".[23] The Court also held that while failure to appeal a state court conviction would be a state procedural default foreclosing direct review by the Supreme Court, it would not bar a federal habeas corpus proceeding at the district court level. In reaching its conclusion, the Court noted that 28 U.S.C. Sec. 2254 "was enacted to codify the judicially evolved rule of exhaustion",[24] but insisted that the language of the statute and its history limited its application to remedies available at the time of application. In his dissent, Justice Tom C. Clark predicted that there "would be a rash of new applications".[25] As the earlier mentioned statistics indicate, his prophesy was fulfilled many times over.

16. Mapp v. Ohio, 367 U.S. 643 (1961).
17. United States v. Wade, 388 U.S. 218 (1967).
18. Miranda v. Arizona, 384 U.S. 436 (1966).
19. 344 U.S. 443 (1953).
20. Administrative Office of the U. S. Courts, *1962 Annual Report.*
21. 372 U.S. 391 (1963).
22. 372 U.S. 293 (1963).
23. Fay v. Noia, 372 U.S. 391 (1963).
24. Fay v. Noia, 372 U.S. 391, 434 (1963).
25. Fay v. Noia, 372 U.S. 391, 435 (Clark, J., dissenting) (1963).

Justice Clark also poignantly noted an inevitable but unfortunate consequence that would result from the deluge. Meritorious applications would be concealed in a sea of frivilous filings. As Justice Jackson noted in *Brown*, "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[26] As federal courts are forced to spread their resources ever more thinly, cursory analysis is inescapably necessitated. This is particularly accurate where the petitioner is filing without counsel and cannot identify his issues with precision and support them with basic authorities.

In *Townsend v. Sain* the Court elaborated on the considerations which ought properly govern the granting or denial of evidentiary hearings in federal habeas corpus proceedings and held that a federal evidentiary hearing is "required unless the state court trier of fact has after a full hearing reliably found the relevant facts".[27] The Court then went on to outline six specific situations where such a hearing would be mandatory. In other situations, the decision to hold a hearing was held to be subject to the discretion of the trial court. If *Noia* eased the path of filing the suit, it could be analogized that *Townsend* eased the literal opening of the doors to the courtroom.

REFORMATION OF SECTION 2254

Proposed reform of federal habeas corpus for state prisoners has been relatively frequent over the past three decades. Even before the 1963 decisions, modifications were suggested in the 1950's.[28] In 1966, section 2244 of title 28 was amended so as to impose a measure of finality to determinations by federal judges. Once a claim has been heard and determined, a judge need not entertain a future application absent a showing of new grounds. That same year, 28 U.S.C. Sec. 2254 was modified to make a state's finding of fact presumptively correct and to put the burden on the petitioner to prove otherwise. In reporting out the 1966 reforms, the Senate noted that increased habeas corpus petitions "in their totality have imposed a heavy burden on the Federal Courts".[29]

Reform of federal habeas corpus again resurfaced in 1968 when the Senate debated the Omnibus Crime Control and Safe Streets Act of 1968. As the bill emerged from committee, it contained provisions which might have entirely abrogated the right of state prisioners to habeas corpus.[30] As a result of fears regarding its constitutionality, the habeas corpus provisions were eventually amended out after a debate on the Senate floor. At the conclusion of that debate, Senator Hugh Scott colorfully cautioned that:

> if Congress tampers with the great writ, its action would have as much chance of being held constitutional as the celluloid dog chasing the asbestos cat through hell.[31]

In response to continued charges that the present statutory provisions

26. Brown v. Allen, 344 U.S. 443, 537 (1953).
27. 372 U.S. 293, 314 (1963).
28. Letter from Honorable Orie L. Phillips to United States Circuit and District Court Judges, *Habeas Corpus and Post Conviction Review*, 33 F.R.D. 363 (1963).
29. 1966 U.S. Code Cong. and Adm. News, 3663.
30. 114 Cong. Rec. 11186 (1968).
31. 115 Cong. Rec. 14183 (1968).

frustrate the judicial process by draining resources away from the regular caseload, legislative proposals to revise the availability of review were again considered in the 92nd and 93rd Congresses. Bills in the House (H.R. 13722)[32] and Senate (S. 567)[33] were introduced which would have effected a number of changes. In 1972, the chairman of the House Judiciary Committee, Emmanuel Celler, solicited the views of the Justice Department on the suggested reforms in H.R. 13722. Attorney General Richard Kleindienst responded to the request with a long letter analyzing in detail the reasons for reform and the legal ramifications of the bill. [34]

The Kleindienst letter stressed two basic reasons for reform. One reason for reform suggested was the common and frequently complained dilemma of allocating available judicial time between demands of those already convicted. A second problem discussed was the failure of interminable litigation to provide what Professor Bator has labelled "a realization by the convict that he is justly subject to sanction and that he stands in need of rehabilitation".[35] A judicial framework that provides endless inquiry into criminal judgments and holds out the possibility of eventual success it is argued, undermines the efforts to rehabilitate its criminals. The convict is never forced to accept the legitimacy and certainty of his incarceration.

Generally speaking, the Justice Department concluded that federal habeas corpus under H.R. 13722 would be refashioned in three significant dimensions. First, 28 U.S.C. Sec. 2254(a) would be amended so as to limit the constitutional claims which could be collaterally raised by state prisoners to those which were not raised in state court, which there were no fair and adequate opportunities to raise, and which would not be raised in a state court.

Second, 28 U.S.C. Secs. 2254(b) and (c) would have been eliminated and supplanted by a new subsection, 2254(a) (1) (ii) expressing a different concept of exhaustion. Under H.R. 13722 the only time exhaustion of state remedies would be controlling would be if the claim was one which was not raised and could not have been raised. In short, a procedural default in the state process would bar a federal collateral inquiry. Third, a proposed section 2254(a) (1) (iii) under H.R. 13722 would have limited the type of claim which could be raised on federal habeas corpus.

Similarly, S. 567, which was introduced in the 93rd Congress, would have curtailed habeas corpus review of constitutional claims to situations where the matter "was not theretofore raised and determined" in state court. On the matter of exhaustion, S. 567 would have treated the failure to utilize an available state remedy as a deliberate by-pass barring relief and thus directly restrict the impact of *Fay v. Noia.* A procedural default in pursuing a constitutional claim would have been excused only if a waiver were shown to be clearly unintelligent or involuntary. Succinctly stated, both these bills would enact an exhaustion requirement that bites hard on state criminals who elect not to appeal their conviction or otherwise fail to avail themselves of existing remedies. Neither, however, was enacted.

32. H.R. 13722, 92nd Cong., 2d Sess. (1972).
33. S. 567, 93rd Cong., 1st Sess. (1973).
34. 119 Cong. Rec. 2222 (1973).
35. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 451, (1963).

In the absence of Congressional limitation of federal habeas corpus, the Supreme Court has recently begun to limit the availability of relief. The Court held last summer in *Stone v. Powell*[36] that a state prisoner may not be granted habeas corpus relief where the state provided an opportunity for full and fair litigation of a Fourth Amendment claim. The Court has also held in *Francis v. Henderson*[37] that a state prisoner who failed to make a timely challenge to the composition of a grand jury that had indicted him could not bring such a claim in a post conviction habeas corpus proceeding absent a claim of actual prejudice.

Both *Francis* and *Stone* are significant habeas corpus decisions in that they reflect an incipient trend of the Court to curtail the expansion of the writ triggered by *Fay v. Noia* and earlier mentioned cases. In *Francis* the Court noted that "in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power".[38] Justice William J. Brennan, Jr., stressed in his dissent that the Court in *Francis* was rejecting the narrow "deliberate by-pass" doctrine for state procedural defaults in *Fay* by treating the petitioner's failure to challenge as a waiver. He went on to speculate that the *Francis* holding portended "either the overruling of *Fay* or the denigration of the right to a constitutionally composed grand jury".[39]

Division on the Court over the scope of habeas corpus was abundantly evident in *Stone* as well. Writing for the majority, Justice Lewis F. Powell, Jr., rationalized the narrowing of review with respect to Fourth Amendment claims on the ground that claims of illegal search and seizure, unlike Fifth or Sixth Amendment violations, do not "impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers."[40] Complaining that the decision portended a "substantial evisceration of federal habeas corpus jurisdiction,"[41] Justice Brennan wrote a strong dissent in which he argued that the majority has misinterpreted section 2254 in reaching its decision.

CONSTITUTIONAL DIMENSIONS IN LEGISLATIVE REFORMATION

Although the *Stone* and *Francis* decisions clearly represent significant curtailments in the availability of the writ they both do not specifically address the question that has intrigued constitutional scholars and concerned Congressional reformists: To what extent is the writ of habeas corpus minimally guaranteed by the Constitution? Any efforts at habeas corpus revision require exploration of the extent to which the writs may be confined and expanded within constitutional parameters. Before one can legislatively refashion the statutory structure one must identify precisely what habeas corpus rights exist only as

36. Stone v. Powell, 428 U.S. 465 (1976).
37. 425 U.S. 536 (1976).
38. 425 U.S. 536, 539 (1976).
39. 425 U.S. 536, 546 (Brennan, J., dissenting) (1976).
40. Kaufman v. United States, 394 U.S. 217, 224 (1969), as quoted in Stone v. Powell, 428 U.S. 465, 479 (1976).
41. Stone v. Powell, 428 U.S. 465, 503 (Brennan, J., dissenting) (1976).

statutory rights embodied in the federal code. What Congress has given, Congress can take away.

Attempts to delineate the constitutional parameters of habeas corpus have produced different schools of thought. One view that has been offered holds that, in spite of the language in Article 1 of the Constitution, Congress has the authority to revoke entirely the right of the writ. This view, often labelled the "statutory writ"[42] doctrine, holds that habeas corpus exists only as a creature of statute and is subject to unrestrained modification by Congress. It draws its vitality from the remarks of John Marshall in *Ex parte Bollman* where he stated that "the power to award the writ by any of the courts of the United States, must be given by written law".[43] This doctrine was embraced in 1968 by those who sought to modify habeas corpus in the Omnibus Crime Control and Safe Streets Act of 1968. As noted earlier, however, those sections were deleted as a result of constitutional doubts.

An opposing school of thought has been eloquently documented by Prof. Francis Paschal of Duke University's School of Law.[44] Professor Paschal reasons that the suspension clause in the Constitution gives courts the direction to make the writ available and that the Judiciary Act of 1789 operated to implement existing constitutional federal habeas corpus jurisdiction rather than create statutory jurisdiction. After tracing the history and context of habeas corpus through the Constitutional Convention and early decades of the Republic, Paschal concludes that Marshall's remarks in *Ex parte Bollman* are misplaced and that early legislation only ratified a preexisting power of the courts to employ habeas corpus relief.

If one accepts this thesis, then presumably Congress can revise its statutes and limit habeas corpus to the extent mandated by the Constitution between. The Court has not explicity confronted this question. The delineation between the minimal constitutional guarantees (accepting, of course, Paschal's thesis) and the supplemental statutory rights is at best uncertain. In the landmark *Fay*, the Court discussed at length the history of habeas corpus in this country. In his opinion, Justice Brennan wrote that:

> at all events it would appear that the Constitution invites, if it does not compel, cf. *Byrd* v. *Blue Ridge Rural Elec. Cooperative*, 356 U.S. 525, 537, a generous construction of the power of the federal courts to dispense the writ comfortably with common-law practice.[45]

A reading of this passage would appear to sound the death knell for exponents of a statutory writ doctrine. While much of the *Fay* opinion is dicta, the acknowledgment of habeas corpus as a right of constitutional dimension is repeatedly infused throughout the opinion. Moreover, neither of the dissents in *Fay* indicate that the writ is anything but a great constitutional privilege.

The *Fay* decision, however, ultimately turned on the construction of the statutory provisions in the United States Code. As regards the holding that

42. Collings, *Habeas Corpus for Convicts - Constitutional Right or Legislative Grace?*, 40 Calif. L. Rev. 335 (1952).
43. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807).
44. Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605.
45. Fay v. Noia, 372 U.S. 391, 406 (1963).

the exhaustion requirement, section 2254, is limited to state remedies still open when the applicant files his application in Federal court, the Court specifically noted that there was "no warrant for attributing to Congress, in the teeth of the language of sec. 2254, intent to work a radical innovation in the law of habeas corpus".[46] The Court did not address the deeper question of whether such a "radical innovation" would be constitutionally permissible.

In his dissenting opinion in *Francis*, Justice Brennan described the recent trend of the Court as "infidelity to the teaching of *Fay*" and "hostility toward" its "precedential force".[47] Although it is difficult to foresee how the Court will construe *Fay* in the future, it would appear that the broad expansion of the writ envisioned in *Fay* by Justice Brennan is in the process of being curtailed.

CONGRESS CAN ENACT A MEANINGFUL EXHAUSTION REQUIREMENT

Legislative suggestions at reducing the volume of habeas corpus petitions have tended to focus in two areas: (1) limiting the types of claims reviewable, and (2) barring collateral review in the face of procedural defaults at the state level.

While the Supreme Court has evinced a willingness (e.g., *Stone*) to restrict the availability of relief by denomination of certain types of claims as non-reviewable, any legislative effort to create a hierarchy of reviewable claims runs a high risk of not passing constitutional muster itself. Any such effort would virtually force the draftsmen to forecast what will and will not be delineated by the Court as constitutional deprivations.

A fruitful path to pursue would be to impose a strict exhaustion requirement at the state level . By rewriting section 2254 to require the exhaustion of state remedies available at the time the sentence was imposed, Congress could overturn the construction accorded the present exhaustion language in *Fay* and insure that state courts have an opportunity to review habeas corpus claims before the federal courts entertain jurisdiction. From a standpoint of comity, this will also reflect a greater respect for state appellate procedures. Under the existing arrangement, an inmate can eschew a state appeal and go into federal court after the time limits have expired on his state rights. In effect, an inmate can "exhaust" his remedies by waiving them. As a result, the federal judiciary has become an alternative layer of direct appeal from state court convictions.

Such a revision would also have a favorable effect from a practical standpoint. By limiting collateral attack to matters appealed or otherwise reviewed in state court, Congress would greatly assist the federal judiciary. By the time the matter came into federal court, the legal issues would have been refined and analyzed by earlier argumentation. In reviewing a petition with the benefit of the ruling of a state's highest court, a federal district judge's task in looking for a constitutional deprivation would be greatly facilitated. Such an arrangement would also make it much easier to determine if an evidentiary hearing would be appropriate.

Requiring strict exhaustion would also accord a greater respect for the state judicial systems. If the timely taking of a state appeal was a prerequisite

46. Fay v. Noia, 372 U.S. 391, 435 (1963).
47. Francis v. Henderson, 425 U.S. 536, 546 (Brennan, J., dissenting) (1976).

to federal review, a convicted defendant would be obligated to treat a state appeal in a serious manner. There is little rationality in permitting a defendant to sit back, wait for the time to expire on his state appeals process, and then make his entrance into federal court by alleging "exhaustion of remedies". If an exhaustion duty is to mean anything, it must mean a duty to affirmatively act in a timely manner. Just as the federal courts have unhesitatingly required timely compliance with civil and criminal rules, there is no reason why a state defendant should be allowed to default on his rights and then come into federal courts.

Those who would resist such a revision of the existing law are likely to point to instances where state courts have capriciously denied a defendant's appeal. Recognizing that such instances do exist, we should nevertheless require a meaningful exhaustion requirement. Discretion could be vested in federal courts to allow for the recognition of "effective" if not technical exhaustion of state remedies. Naturally, exhaustion would vary on a state by state level as do state appellate procedures.

CONCLUSION

The value and role of the writ of habeas corpus in insuring the protection and vitality of other constitutional rights cannot be questioned. As a result of events in recent years, however, the "great writ" has slowly become an impediment rather than an instrument of justice. Federal district courts simply do not have the resources or time effectively to operate as an appellate forum for state inmates who have opted to forego their state procedures. The legislative enactment of a more strict state exhaustion doctrine as a precondition of jurisdiction would ease the existing problem, serve the ultimate ends of justice and restore prestige and respect for the presently much abused "great writ".