Statement of Seth P. Waxman

Hearing on S. 1088 before the Committee on the Judiciary

United States Senate

July 13, 2005

Statement of Seth P. Waxman

I want to thank the Committee for inviting me to discuss S. 1088, which would amend various provisions of the statutes governing the federal courts' jurisdiction to entertain habeas corpus petitions filed by state prisoners. Since 1979, I have been involved in federal and state litigation, in private practice and for the United States Department of Justice. I have litigated habeas corpus cases since 1980, most recently *Miller-El* v. *Dretke*, which was decided last month by the Supreme Court of the United States.

I want to address my remarks to the profound—and in my view profoundly unfortunate—impact this bill would have on the justice system. S. 1088 would largely eliminate the federal courts' jurisdiction to adjudicate serious, consequential, federal constitutional claims raised by state prisoners. As such, it would constitute a fundamental break with our longstanding statutory and constitutional tradition. What is more, it would generate an entirely new wave of litigation of just the type that the federal courts are only now largely completing following the wholesale 1996 revision of federal habeas procedures in the Anti-Terrorism and Effective Death Penalty Reform Act (AEDPA). I am aware of no data demonstrating that the streamlining provisions of AEDPA have failed to accomplish their purpose. And if inefficiencies were shown to persist in the way habeas corpus petitions are processed in federal courts, there are forthright ways to address them. This bill goes far beyond any ameliorative correction, to curb the federal courts' authority to vindicate meritorious constitutional claims—in non-capital as well as capital cases.

I. The Substance of S. 1088

The title of this bill suggests that it would streamline the processing of habeas corpus cases. When I first picked it up, I expected to find procedural adjustments meant to eliminate inefficiency. I found something else entirely. Section after section of the bill would eliminate federal-court jurisdiction to decide federal questions in habeas corpus cases. The bill is not limited to new procedural rules for litigants or courts to follow *when* federal courts exercise their habeas corpus jurisdiction to decide questions necessary to a proper result. It contains jurisdictional prohibitions that would prevent federal courts from addressing crucial federal issues *at all.*

Section 2, for example, would direct a federal court to dismiss a federal constitutional claim "with prejudice" when, under current law, the court would postpone consideration of the claim until the state courts have had an opportunity to address it first. The import is clear: Section 2 would turn what is now a rule governing the *timing* of federal jurisdiction into a rule *eliminating* federal jurisdiction itself.

There are numerous other examples; I will briefly address three. Section 4 would expressly withdraw federal jurisdiction to examine claims state courts resolved on state procedural grounds. Casting aside the "cause and prejudice" standard crafted in 1977 by Chief Justice Rehnquist—a standard that has proven remarkably effective as a gatekeeper against constitutional claims that were resolved by a state court on adequate and independent procedural grounds—the bill would require federal courts to accept at face value a state court's decision that some procedural rule established an immutable requirement, that the prisoner failed to comply

with that requirement, and that in consequence, the state court declined to consider the claim. Indeed, the bill would eliminate jurisdiction even to consider a claim that the state court *did* proceed to consider on the merits, and claims that any "default" was due to legal representation that fell below the Sixth Amendment floor.

Section 6 would eliminate federal jurisdiction to examine almost all claims addressed to the constitutionality of a sentence. Any recitation by the state court that constitutional sentencing error appeared "harmless" or "not prejudicial" would entirely divest federal courts of jurisdiction—even to examine whether or not such a conclusion was manifestly incorrect. Since any state court that identifies a *non*harmless constitutional violation is required to provide relief, the effect of Section 6 is essentially to strip federal courts of jurisdiction to consider claims of constitutional error in sentencing—even in the case of death sentences challenged on the ground that the sentence imposed does not comport with the Eighth Amendment or was the direct consequence of constitutionally ineffective counsel, in violation of the Sixth Amendment.

Section 9, the most sweeping provision of all, would completely withdraw federal jurisdiction to consider virtually *all* claims in capital cases (whether addressed to conviction or sentence, and regardless even of whether the state court actually addressed the claims), provided the case arises from a state that the Attorney General of the United States certifies as providing legal counsel in postconviction proceedings.

S, 1088 recites exceptions to these wholesale jurisdictional prohibitions, and I will come to them in a moment. But the first order of business is to understand that these provisions would undercut the federal courts' ability to enforce fundamental federal constitutional rights. Only Section 9 would flatly *repeal* basic habeas jurisdiction (in death penalty cases). But the other sections would accomplish much the same purpose by withdrawing jurisdictional power to decide crucial issues *in* habeas corpus cases.

Stripping federal courts of jurisdiction in this way would come at an extremely high cost. We expect state courts to be sensitive to federal constitutional rights, and in the vast majority of cases of course they are. But under our constitutional tradition criminal cases—and especially those imposing capital punishment—require special care and review procedures that minimize the incidence of constitutional error. That is why we have a long tradition of ensuring that prisoners with federal claims have an opportunity to present those claims to federal courts as a necessary safeguard in those rare cases in which constitutional violations that are not corrected in state court. I urge this Committee to think long and hard before it approves legislation that would dilute that tradition of fairness and rationality in our constitutional system.

Now to the exceptions. The principal safety valve relates to so-call "actual innocence," and on first blush, you might think that S. 1088 relaxes jurisdictional prohibitions in circumstances in which a prisoner's factual guilt may be in doubt.[1] But on closer examination,

[1] The other exception frequently referenced in the bill is for "a new rule of law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (*e.g.*, Section 2 (incorporating 28 U.S.C. § 2254(e)(2)). But since 1989, when the Supreme Court first gave effect to that standard, the Court has never given a "new" procedural rule retrospective effect.

the "innocence" exception is far more circumscribed, because, with inconsequential exceptions, the bill would require that any prisoner who asserts that he or she is innocent demonstrate: (1) that the claim rests on a factual predicate that "could not have been previously discovered through the exercise of due diligence"; (2) that the underlying facts "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty"; *and* (3) that a denial of relief on the basis of the claim would be "contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." It's hard to think that any prisoner would be able to make all those showings. The new evidence establishing innocence might have been discoverable earlier; or that evidence might not clearly and convincingly persuade every reasonable judge or jury; or it might not be unreasonable to reject the constitutional claim itself (apart from any evidence of actual innocence). A genuinely innocent prisoner, then, may well be denied even review by a federal court.

As I mentioned earlier, Congress enacted comprehensive reform legislation in this field about ten years ago. At the time, I was responsible for coordinating much of the Department of Justice's views and comments on AEDPA, which we supported and which established extremely high thresholds for obtaining federal habeas corpus relief. Even AEDPA, however, did not withdraw federal-court *jurisdiction* to act in circumstances that warrant habeas corpus relief. It would be a serious mistake to do so now—particularly since, to my knowledge, no one has persuasively established that AEDPA has failed in any systemic way to resolve the inefficiencies in federal-court review that prompted its enactment.

II. Illustrations of Affected Cases

My concern about the profound effects S. 1088 would have stems not just from tradition or constitutional theory. It is not based solely on concerns about the wisdom of wholesale jurisdictional revision in the absence of data identifying any continuing systematic problem. Rather, I am concerned principally about real-world consequences, and my concern is based on real-world experience. We do not have to imagine instances in which federal habeas corpus jurisdiction is essential to the preservation of fundamental rights. Even under AEDPA's restrictive regime, we have real illustrations—habeas corpus cases in which serious constitutional violations went uncorrected until federal habeas corpus review. Consider four recent cases in which substantial majorities of the Supreme Court found egregious constitutional violations that had been overlooked by state courts. Were S. 1088 the law, the federal courts would not even have had *jurisdiction* to review the meritorious constitutional claims.

***Miller-El* v. *Dretke*, 73 U.S.L.W. 4479 (2005)**

Only a few weeks ago, in *Miller-El*, a six-member majority of the Supreme Court concluded that the Equal Protection Clause mandated habeas corpus relief because the prosecutors at petitioner's state murder trial had deliberately skewed the jury-selection process in a racially discriminatory manner—conducting *voir dire* with the purpose and effect of systematically eliminating African Americans. The petitioner had pressed that same claim

previously in state court, but the state courts had denied the claim because the prosecutors offered race-neutral explanations for their actions.

The Supreme Court recognized that AEDPA requires any federal court entertaining a habeas corpus petition (including the Supreme Court itself) to presume the accuracy of state-court findings of fact. To overcome that presumption, the petitioner must prove by "clear and convincing evidence" that the state-court findings were wrong, and indeed that the state courts' decision was based on an "unreasonable" determination of the facts. The threshold for obtaining relief in *Miller-El* was therefore extraordinarily high in light of existing federal statutes (which, of course, remain in place today). Yet six Supreme Court Justices concluded that the evidence of deliberate, unconstitutional race discrimination was so overwhelming that the Constitution simply would not permit the conviction to stand.

That evidence showed that prosecutors had struck ten of the eleven African Americans who were qualified to sit on the jury, even as they failed to strike whites who could be distinguished from African Americans only on the basis of race. The evidence also showed that the prosecutors questioned African Americans, but not whites, using techniques designed to trick them into statements that might be the basis for exclusions for cause. They described executions in lurid detail to African Americans, but not whites, again hoping that blacks would be troubled and reveal some basis for being excused. They insisted on shuffling the seating of veniremen when it appeared that African Americans were next in line to be considered. And they took their cues from a manual (no longer formally a matter of policy) explaining that African Americans should be kept off juries whenever possible. All this evidence established a case of race discrimination that prosecutors were completely unable to explain away.

The Committee should understand that habeas corpus exists for cases like *Miller-El*, in which serious, consequential violations of federal constitutional rights corrupt a criminal trial but are not corrected in state court. AEDPA has already set the bar very high, allowing only egregious cases like *Miller-El* to succeed. This new bill, S. 1088, would set the stage for frustrating justice in those very cases. Several of the provisions in this bill might foreclose federal court action in a given case, depending upon the circumstances. But certainly Section 9 would have a devastating effect. Under that section, a federal court would have no jurisdiction even to address the kind of claim that the petitioner in *Miller-El* advanced (if the case arose from a state certified by the Attorney General to supply counsel in state postconviction proceedings).

***Banks* v. *Dretke*, 124 S. Ct. 1256 (2004)**

Last year in *Banks* the Supreme Court voted 7-2 to upset a death sentence and directed the lower courts to review an equally troubling constitutional question regarding the underlying conviction. The record before the Court showed plainly that: (1) the state's two essential witnesses lied repeatedly to the jury—one at the guilt phase of the trial and the other at the sentencing hearing; (2) state prosecutors assured the jury and the court that those witnesses were telling the truth; (3) those prosecutors also assured defense counsel that all relevant materials had been disclosed; and (4) the prosecutors persisted in those representations throughout the process in state court. In state court the petitioner was unable to prove that the prosecutors had in fact

suppressed a wealth of information that would have demonstrated that the state's witnesses were lying. The truth came out only in federal habeas corpus proceedings.

Had S. 1088 been in place, none of this disturbing, prejudicial prosecution misconduct would have come to light—for the simple reason that the prosecutors kept the critical information away from the state courts and this bill would have eliminated federal habeas corpus review. Neither claim in *Banks* had been fully presented fully to the state courts, and Section 2 would have required a federal court to dismiss them with prejudice. Neither claim would have fit within the extremely narrow exception that Section 2 would allow. Independently, Section 3 of the bill would have barred the claim going to the conviction in *Banks*. The petitioner did not secure evidence to support that claim until the federal petition had been pending for more than a year. It was only at that point that a federal magistrate ordered the state to make crucial evidence available and thus put the petitioner in a position to amend his petition. Finally, Section 9 certainly would have foreclosed federal habeas corpus in *Banks*—if the state had supplied counsel in state postconviction proceedings under a system satisfactory to the Attorney General.

The *Banks* case illustrates the way in which prosecutorial misconduct can undercut the integrity of state-court processes without the knowledge of state courts. The only safeguard to address that kind of behavior is federal habeas corpus.

Wiggins v. Smith, 123 S. Ct. 2527 (2003)

In *Wiggins*, a seven-member majority of the Supreme Court held that the petitioner's lawyers rendered ineffective assistance of counsel at the sentencing phase of his capital trial, in violation of the Sixth Amendment. There too the state's highest court had rejected that very claim on the merits. Accordingly, when the case reached the Supreme Court by way of a habeas corpus petition, AEDPA barred relief absent an extraordinary showing: the petitioner had to satisfy the Supreme Court that "clear and convincing evidence" established that the findings of fact in state court were erroneous; that the state-court decision against the petitioner was based on an "unreasonable" determination of the facts; *and* that the ultimate state-court decision rejecting the Sixth Amendment claim was not only wrong, but "objectively unreasonable."

Writing for the Court, Justice O'Connor explained that in this exceptional case all three of those tests were met. The petitioner was facing a death sentence. The jury was entitled to hear evidence regarding his childhood that might warrant mercy. Yet his attorneys presented no evidence regarding his life history at all. That history reflected numerous facts mitigating the petitioner's responsibility—facts the Court described the story as "excruciating." The petitioner's mother was an alcoholic who regularly beat him, left him alone for days without food, and on one occasion pressed his hand against a hot stove burner. Shuttled among various foster homes, he was repeatedly sexually molested and raped.

The defense attorneys could not explain their failure to investigate these matters and present them to the jury. They contended that they had made a tactical judgment *not* to ask the jury for mercy but, instead, to convince the jury that the petitioner had not actually killed the victim—notwithstanding that he had just been convicted of that offense (in a trial to the judge).

The Supreme Court found it plain that the lawyers had looked no further than a few court records, failed to commission a social worker to fill out the record, and also failed themselves to investigate and evaluate the mitigating evidence available. They simply had failed to take the minimal steps necessary to identify evidence that would have been crucial to any genuinely informed choice whether or not to use the sentencing proceeding as an opportunity essentially to re-try the question of guilt.

If S. 1088 is enacted, Section 9 would completely deprive federal courts of jurisdiction in cases like *Wiggins*—if the relevant state satisfies the Attorney General that it supplies effective lawyers in state postconviction proceedings. At best, the idea seems to be that if lawyers are provided to handle cases at the postconviction stage in state court, federal habeas corpus is unnecessary. That is not at all necessarily the case. Cases like *Wiggins* show that quality representation is needed primarily at the original trial and sentencing stages of the state process. Unfortunately, many states do not provide effective attorneys when they are most needed. And even if better representation is provided later in postconviction proceedings, the damage has already been done.

Cases like *Wiggins* demonstrate, moreover, that even excellent representation in state postconviction proceedings does not ensure that state courts will always reach even reasonable decisions on the merits of federal constitutional claims. The evidence regarding the petitioner's life history was developed by new lawyers who represented him at the state postconviction stage. Those lawyers did the job that the attorneys at the sentencing stage had not. Still, the state courts failed to recognize a violation of the petitioner's Sixth Amendment rights—an oversight that fully seven members of the Supreme Court determined to be not just error, but an "unreasonable application of clearly established law."

Lee v. _Kemna_, 534 U.S. 362 (2002)

In *Lee*, another six-member majority of the Court held that state courts had unjustifiably declined to consider a claim that a petitioner had been denied due process of law when the trial judge refused to give him time to find alibi witnesses who had disappeared from the courthouse. Local rules of procedure required that a request for a continuance must be in writing and, since the petitioner's lawyer presented his request orally (without objection on this ground by the prosecution or comment by the trial judge), the state appellate court held that he had committed "procedural default" making it unnecessary to address his federal constitutional claim.

Defense counsel in *Lee* had arranged for members of the petitioner's family to appear and explain under oath that he had been with them in California at the time the offense in question had been committed in Missouri. Those witnesses were in court when the trial began, sequestered and under subpoena, but they left after being told (apparently by a representative of the state) that they would not be needed until the following day. That afternoon, when defense counsel called them to the stand, he was surprised by their absence and immediately requested a brief continuance so that he could locate them. The trial judge did not rely on the rule requiring requests to be in writing, but said that it would be inconvenient to postpone matters until the

following day because he meant to visit his daughter in the hospital. The trial continued without the alibi witnesses, and the petitioner was convicted.

The Supreme Court recognized that, under its precedents, a federal court entertaining a habeas corpus petition usually cannot consider a claim that was not presented to the state courts in accordance with state procedural rules. But in this case, it was clear that the state courts had no *adequate* basis for refusing to address the prisoner's claim. It was arbitrary, the Supreme Court held, to deny even a short continuance to find alibi witnesses who had mistakenly left the room—witnesses who might well establish that the defendant was not guilty. In *Lee*, moreover, the prosecution relied on eyewitnesses who did not know the defendant well—the kind of testimony that juries tend to believe but that professionals know is notoriously unreliable. The Court thus understood that the state courts had denied a continuance that might have allowed an innocent man to avoid conviction and had given a weak procedural reason for refusing to consider his claim that he had been denied a fair trial.

Cases like *Lee* illustrate how federal habeas corpus is essential in some cases to identify circumstances in which arbitrary state-court behavior can *both* violate due process *and* potentially insulate unfair or erroneous convictions from review in federal court. The prisoner in *Lee* had to clear a high hurdle; he had to establish that the state's reason for declining to treat his due process claim was inadequate. But he met that high burden.

Had S. 1088 been enacted, the result in *Lee* would have been completely different. Section 4 would strip federal courts of jurisdiction to consider a claim that a state court declined to entertain on the basis of some procedural error committed by the prisoner or his lawyer in state court—even if, as was the case in *Lee* and *Osborne* v. *Ohio*, 495 U.S. 103 (1990), the asserted procedural rule was nothing more than a "formal 'ritual'" that "'further[s] no perceivable state interest." Under Section 4 a federal court would have to accept at face value a state court's decision that a state rule established a procedural requirement, that the prisoner or his attorney failed to comply with that requirement, and that, in consequence, the state court declined to consider the prisoner's federal claim. The only exceptions would be for prisoners whose claims rest on "new rules" of law that have retroactive effect or on an overwhelming demonstration of actual innocence based on facts that could not have been discovered previously. Under Section 4, federal constitutional claims like the claim in *Lee* would go without consideration in either state or federal court, irrespective of their merit and irrespective of their bearing on prisoners' guilt.

III. A Better Way

Over the last ten years, the Supreme Court and the lower federal courts have struggled with the provisions of AEDPA, attempting to smooth out the wrinkles so that habeas corpus cases are handled efficiently. Perhaps it is time to stand back, take stock of how AEDPA has fared, and respond to any deficiencies the courts have been unable to address. To my knowledge, that has not been done—certainly not in any objective, systematic way. Instead, S. 1088 adopts a blunderbuss approach to problems that may not even persist—eliminating rather then streamlining the exercise of federal habeas corpus jurisdiction.

There is a far better way to proceed. The Judicial Conference of the United States, the Administrative Office of United States Courts, the Federal Judicial Center, and other institutions *exist* for the purpose of solving problems arising in the judicial branch. I urge the Committee to take advantage of those good offices rather than enacting jurisdiction-stripping legislation on an inadequate record.

Specifically, the Committee should begin by getting the facts straight. We know that some death penalty cases have taken years to resolve, but we do not know why or, more importantly, whether delays in some cases represent a pattern in the system. Good data should be developed to identify any systemic inefficiencies that actually persist. Once that data is assembled, the Committee should work with the Judicial Conference and other institutions and organizations to evaluate it, identify genuine problems, and prepare targeted measures that address the identified problem while minimizing unintended consequences. If the data reveal systemic delays in the federal courts' adjudication of habeas cases, forthright steps can be taken to accelerate the process. Legislation of that kind might produce greater efficiency, something that everyone should want. By contrast, S. 1088 would compromise the federal courts' jurisdiction to perform their vital function in our constitutional system—the enforcement of fundamental constitutional rights in cases like *Miller-El*, *Banks*, *Wiggins*, and *Lee*.