

Subject	Date September 17, 1981
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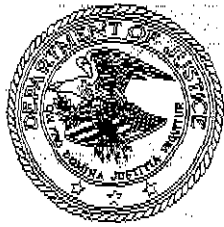
From John Roberts *JR*  
Special Assistant to  
the Attorney General

My involvement in the Judge O'Connor appointment process began my first day on the job, August 10. I started in on the process of preparing draft answers to questions that were *likely* to be *asked* during the confirmation hearings. The approach **was** to avoid giving specific responses to any direct questions on legal issues likely to come before the Court, but demonstrating in the response a firm command of the subject area and awareness of the relevant precedents and arguments. The preparation of such questions and answers remained a steady job for all concerned right up to the **day** before the hearings began.

A significant part of the process involved reading through past confirmation hearings, which I began to do sometime during the week of August 17. I covered the hearings of the Chief Justice and Justices Stevens, Harlan, Stewart, and, with your help, Blackmun. A topic outline of the more recent hearings (Chief Justice, Blackmun, Stevens) **was** prepared to identify the major areas of questioning and pet projects and concerns of Judiciary Committee members. A complete digest of significant questions and particularly good answers **was** also compiled. During the week before the hearings I read Judge O'Connor's extrajudicial writings (two articles) and used them **as** a source for further questions and answers.

In addition to the Q&A project, I **also** helped in preparing several written submissions to the Committee. I drafted the reply to the questionnaire item on judicial activism, and researched past hearings for that portion of the letter to Senator Helms concerning the practice of past nominees in **not** commenting on recent decisions. I later drafted the Judge's reply to Helms' second letter.

I participated in the two "mwot court" sessions with **Judge** O'Connor held here prior to the hearings, primarily asking questions based on past hearings.



# Office of the Attorney General

Washington, D. C. 20530

October 1, 1981

## MEMORANDUM

TO : Kenneth W. Starr  
Counselor to the Attorney General

FROM : John Roberts ~~OC~~  
Special Assistant to the Attorney General

SUBJECT : Judge Nixon's Opinions

I have read ten opinions written by Judge Nixon, chosen at random from among his earlier cases. One characteristic of Judge Nixon's jurisprudence which causes some concern is his propensity to reach out and decide complicated questions of law which he admits need not be decided. In Martin v. Texaco, Inc., 304 F.Supp. 498 (1969), Judge Nixon was confronted with a suit alleging intentional interference with a contract. The Judge decided that, because of the Statute of Frauds, no contract existed, and that therefore no action could be maintained for wrongful interference. Instead of ending the matter at that point, however, Judge Nixon assumed that a contract did in fact exist, and went on to rule that the defendant was entitled to summary judgment because its actions did not constitute wrongful interference.

Although this sort of alternative reasoning is a typical strategy employed by District Court judges anxious to avoid reversal on appeal, in other opinions Judge Nixon's propensity to "assume *arguendo*" and reach for alternative bases of decision has caused some difficulty. An outrageous example is Ingalls Shipbuilding Corp. v. Neuman, 322 F.Supp. 1229 (1970). The case involved the question whether plaintiffs were children of decedent under the Longshoremen and Harbor Workers Compensation Act, which defined "child" to include someone in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, or an acknowledged illegitimate child dependent upon the deceased. Judge Nixon began by persuasively reasoning that the issue of the paternity of the decedent had not been raised during the administrative proceedings, and that therefore the employer could not raise it in the District Court. Not satisfied to let matters rest there, Judge Nixon assumed that the paternity issue was properly raised, and concluded that the record revealed that the decedent was the father of

the two children. This was unfortunate because in deciding this question Judge Nixon was forced to deal with close and complicated questions of state law. In particular, it was necessary to overcome a *strong* legal presumption in the case *that* **the** children **were** not decedents of the deceased. Judge Nixon also made suspect factual conclusions based on the administrative record, after he himself *had* concluded that the **issue** of paternity was not raised at the administrative hearing. It clearly **would** have been the better part of judicial valor to rest decision on the conclusion that the issue **was** not raised during the administrative hearing.

In the same case, Judge Nixon determined that the illegitimate children were dependent upon the decedent, so as to come within the statute. As Judge Nixon recognized, this made it unnecessary to address the constitutional question whether it violated equal protection to require illegitimate children to prove **dependency**, whereas legitimate children were not required to do so. Nonetheless, analyzing Supreme Court cases, Judge Nixon went on to determine that there was no equal protection violation; After all of this, Judge Nixon also determined that, even if the children were not dependent acknowledged illegitimate children of **the** decedent, they *fell within the statute because the decedent had stood in loco parentis* with regard to the children under the terms of the statute.

Another example of Judge Nixon reaching out to opine on unnecessary matters is found in *Kitchens v. State*, 290 F.Supp. 856 (1968). A habeas corpus petitioner appeared before Judge Nixon, did not request counsel, and did not object to proceeding without counsel. Nonetheless, Judge Nixon sua sponte raised the question whether petitioner was entitled to be represented by counsel. He surveyed applicable cases and purported to devise general rules concerning when counsel is required in habeas corpus cases. Such general rules should not be determined in the context of a case in which the issue is raised sua sponte and there is no controversy concerning the matter.

On the other side of the ledger, *Akin Mobile Homes, Inc. v. Secretary of HLID*, 354 F.Supp. 1036 (1972), is particularly concise and persuasive treatment of a complicated jurisdictional issue concerning the concurrent jurisdiction of the District Courts and the Court of Claims.



# Office of the Attorney General

Washington, D. C. 20530

November 12, 1981

## MEMORANDUM

### Possible Reforms of the availability of Federal Habeas Corpus

The current availability of federal habeas corpus, particularly for state prisoners, goes far to making a mockery of the entire criminal justice system. For example, a typical state defendant receives a trial and full appellate review up to the state Supreme Court, all with the assistance of a lawyer, at state expense if necessary. Review in the United States Supreme Court by certiorari is then available. The state convict can then typically apply for state collateral relief, with yet another string of appeals up to the state Supreme Court, and yet another chance to petition the United States Supreme Court for certiorari. Even after the second run through the state court system, with opportunity for review by the federal high court, the case is hardly over. As Judge Friendly has put it, "the criminal process, in Winston Churchill's phrase, has not yet reached the end, or even the beginning of the end, but only the end of the beginning." Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 142 (1970). The state convict next turns to federal habeas corpus and a possibly endless stream of petitions, with only a rare possibility that a meritorious claim has been overlooked, and an even rarer possibility that the meritorious claim has anything to do with the petitioner's innocence.

It is almost inconceivable that a rational legal system, even one with full concern for the constitutional rights of criminal defendants, would be designed to approximate the present system, arrived at through time by an uncoordinated process of judicial and legislative accretions.

"The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction. He would be surprised, I should suppose, to be told both that it never was really bad and that it has been steadily improving, particularly because of the Supreme Court's decision that an accused, what-

ever his financial means, is entitled to the assistance of counsel at every critical stage. His astonishment would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime. His surprise would mount when he learned that collateral attack on a criminal conviction by a court of general jurisdiction is almost unknown in the country that gave us the writ of habeas corpus and has been long admired for its fair treatment of accused persons. *Id.*, at 145 (Footnotes Omitted).

The problems inherent in the present habeas corpus system have been repeatedly noted by commentators and jurists. The continual availability of the possibility of relief has turned many prisoners into writ-writers, never confronting the fact of their guilt, but rather viewing the criminal process as an ongoing game in which they are still active contestants. See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 *Harv. L. Rev.* 441, 452 (1963); Friendly, *supra*, at 146. This point was adverted to by the Supreme Court just last Term. Sumner v. Mata, 101 S. Ct. 764, 771 n. 3 (1981) (quoting Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)). The same appearance is conveyed to the public, with a consequent and deserved loss of respect for the criminal process. Questions may be raised on federal habeas corpus long after witnesses and participants have vanished from the scene, making response to the petition and retrial difficult. (but

Gathering witnesses and relevant material is often expensive and time-consuming if required long after the events in question. See Friendly, *supra*, at 146-148; Geagan v. Gavin, 181 F. Supp. 466, 469 (D. Mass. 1960) (Wyzanski, J.), affirmed, 252 F. 2d 244 (2 Cir.), cert. denied, 370 U.S. 903 (1962); Cf. Peyton v. Rowe, 391 U.S. 54, 62-63 (1968). The necessity of considering the endless stream of petitions taxes the resources of federal courts, both trial and appellate, and even the Supreme Court feels the burden since it must review large numbers of habeas cases to determine whether certiorari is warranted. State prosecutors must also expend their limited resources responding to certain of the petitions. See Friendly, *supra*, at 144 & nn. 9-10, 148-149. This resource-taxing flood also obscures the rare serious claim. As Justice Jackson has put it, "it must prejudice the occasional meritorious application to be buried in a flood of worthless ones. 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." Brown v. Allen, 344 U.S. 443, 537 (1953) (concurring). Finally, the extent to which federal district courts have come to function as appellate courts reviewing the decisions of the highest state courts represents a serious strain on the system of federalism.

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See Sumner v. Mata, 101 S. Ct., at 770. See also Snead v. Strinaer, No. 80-2017 (Nov. 2, 1981) (Rehnquist, J., joined by Burger, C.J., and O'Connor, J., dissenting from denial of certiorari).

None of this, however, is constitutionally compelled. The suspension clause of 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." Article 1, §9, clause 2. In ex parte Bollman, 8 U.S. (4 Cranch) 74, 95 (1807), however, Chief Justice Marshall ruled that there was no implicit right to federal habeas corpus and that "the power to award the writ by any of the courts of the United States must be given by written law." This was consistent both with the negative phrasing of the suspension clause and its legislative history, which indicates that the clause was adopted in lieu of alternative versions affirmatively granting the right of habeas corpus. See Developments in the Law -- Habeas Corpus, 83 Harv. L. Rev. 1038, 1266 (1970). It is also in accord with Congress' unfettered discretion over the jurisdiction of the lower federal courts.

Since the availability of habeas corpus, at least in the federal courts, is not mandated by the suspension clause but is rather a matter of legislative grace, it would seem that "what Congress has given, Congress can partially take away." Friendly, supra, at 171. The argument that the suspension clause freezes every congressional extension of habeas corpus does not seem tenable. As an initial matter it seems bizarre for a constitutional provision to be interpreted to preserve something -- federal habeas corpus -- which did not yet exist when the provision was enacted. This suggests that the suspension clause refers to that habeas corpus which did exist when the Constitution was adopted, i.e., state habeas corpus. Thus interpreted the suspension clause would bar congressional interference, except in the enumerated circumstances, with state habeas corpus. See Duker, A Constitutional History of Habeas Corpus, 126-156 (1980); Note, Constitutional Problems in the Execution of Foreign Penal Sentences, 90 Harv. L. Rev. 1500, 1516-1517 n. 87 (1977). Cf. Bagnall v. Ableman, 4 Wisc. 163, 167 (1855); Macready v. Wilcox, 33 Conn. 321, 329 (1866) (both viewing suspension clause as prohibiting congressional interference with state habeas). It is true that the court ruled in Tarble's Case, 13 Wall. 397 (1872), that state courts could not grant habeas relief to federal prisoners, but that was in a situation in which federal habeas was available, and the suspension clause arguably was therefore not implicated. Cf. Hart & Wechsler, The Federal Courts and the Federal System 357 & n. 48 (2 ed. 1973).

The question of the meaning of the suspension clause is largely academic in the present context, however, since whatever the clause refers to -- state habeas or contemplated federal habeas -- "it can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." Friendly, supra, at 170. See Marchese v. United States, 304 F. 2d 154, 156 (9 Cir. 1962); Jones v. Squier, 195 F. 2d 181 (7 Cir. 1952); S. Rep. No. 90-1097, 90th Cong. 2d Sess. 65-66 (1968). The writ as known to the Framers was of course nothing like what the writ has become. The writ was primarily viewed as protection against executive detention, and "convictions by a court of competent jurisdiction could not be reexamined on habeas corpus at all." Hart & Wechsler, supra, at 1513. See Oaks, Legal History in the High Court - Habeas Corpus, 64 Mich. L. Rev. 451, 468 (1966). There is contrary dicta in Fay v. Noia, 372 U.S. 391 (1963), but that has been thoroughly discredited, see Oaks, supra; Friendly, supra, at 170-171, and in fact repudiated by the Supreme Court, see Stone v. Powell, 428 U.S. 465, 474-482 (1976).

As Chief Justice Burger, joined by Justices Rehnquist and Blackmun, flatly stated in Swain v. Pressley, 430 U.S. 372, 385 (1977) (concurring opinion): "I do not believe that the suspension clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction . . . ." Indeed, there was no federal habeas corpus for state prisoners at all until 1867, see Ex parte Dorr, 3 How. 103 (1845); Stone v. Powell, 428 U.S. 465, 475 (1976).

In light of the foregoing problems caused by the current status of habeas corpus law, and the fact that the provision of federal habeas corpus is a matter of legislative grace, the question would seem to be not what tinkering is necessary in the system, but rather why have federal habeas corpus at all? AS Judge Friendly has noted, however, "any murmur of dissatisfaction with this situation provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant.", Friendly, supra, at 142. The foregoing does, however, at least suggest the desirability of stringent restrictions on the availability of federal habeas corpus. Several proposals have been advanced going to the substance of the petitions, for example, requiring a colorable showing of innocence, permitting habeas review only when the state court process was determined to be inadequate, or only when it was demonstrated that the petitioner had not received a full and fair adjudication of his claim. These various proposals

have merit, **and** doubtless one should be adopted. Much of the problem with federal habeas corpus, however, **lies** in the systemic costs of processing the petitions, regardless of what **is** being looked for in terms, of substance. Reform should **be** considered which would bring some control to the endless stream of petitions. Two obvious such reforms are the imposition of a statute of limitations and a ban on successive petitions.

Current federal habeas corpus **is** a highly unusual statutory remedy in that it has no express or implied statute of limitations. The **only** time limitation **is** the weak laches concept embodied in Rule 9(a) of the Rules Governing §2254 Cases:


"A petition may **be** dismissed **if** it appears that the state of which the respondent **is** an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that **it** is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

Every petition must therefore be **examined** to weigh the equities, no matter how old. The rule does **nothing** to ease the burden on courts and prosecutors of considering and responding to petitions. A statute of limitations, **of** the sort proposed by the Attorney General's Task Force on Violent Crime, Recommendation 42, would give some finality to litigation in this area. Meritorious claims could **still** be raised within the limitations period, and such **an** opportunity, together with the previous opportunities, for review on direct appeal, would satisfy any due **process** claims. Due process requires a reasonable opportunity to raise constitutional claims: **it** does not require that **such an** opportunity constantly and continuously be available. The claims most likely to be barred are the frivolous ones that arise in a prisoner's imagination when he has nothing to do during a long incarceration. See Cams, The Rebel ("In prison, **dreams** have no limits and reality **is** no curb."). The unnecessary dictum in Davis v. Adult Parole Authority, 610 F. 2d 410 (6 Cir. 1979), to the effect that a statute of limitations would violate the suspension clause; **is** simply erroneous, in light of the limited nature of habeas corpus referred to in the suspension **clause**.

A second proposal which would ease the existing burden of **processing** and considering frequently frivolous petitions would **be** to ban successive petitions. Current law does not require **a** federal court to consider a successive habeas petition brought **by** a state prisoner if the petition "presents no new ground not theretofore presented and determined, and the judge or court **is** satisfied that the ends of justice will **not** be served by such inquiry," 28 U.S.C. §2244(a). **See also** §2244(b).

Successive petitions by federal prisoners need not be entertained if they *seek* "similar relief" as in the previous petition. 28 U.S.C. §2255. Again, as with the timeliness aspect, these provisions do not relieve courts of the burden of processing successive petitions. The provisions have been loosely interpreted by the courts as requiring careful weighing of the equities and examination of whether the second petition raises new claims not previously determined. See, e.g., Sanders v. United States, 373 U.S. 1 (1963). It hardly seems extreme to limit prisoners to one habeas petition, and to expect them to raise in that one petition all the claims they may have. AS with petitions which are delayed beyond a reasonable limitations period, successive petitions are likely to have a higher percentage of frivolous claims. Exceptions to the ban on successive petitions could be made for claims of newly discovered evidence or changes in the law which should be retroactively applied. The Supreme Court's decision in Sanders does not bar an absolute ban on successive petitions, since it was merely interpreting the statutory provision in 28 U.S.C. §2255.

Perhaps one of the clearest wastes of judicial resources is requiring the Supreme Court to review on certiorari federal habeas by state prisoners after a federal district court has denied the petition and a federal Court of Appeals has declined to issue a certificate of probable cause permitting an appeal. Last Term three Justices argued that Congress had already precluded such review, since in the absence of a certificate of probable cause the case is not "in" the Court of Appeals and the certiorari jurisdiction exists only to review cases which are in the Court of Appeals. Jeffries v. Barksdale, 101 S. Ct. 3149 (1981) (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari). Codifying this conclusion would significantly ease the current burden on the Supreme Court of processing frivolous certiorari petitions by state prisoners seeking federal habeas corpus. In the typical case the Supreme Court will have already been presented with the case twice before, on direct review and review of denial of state collateral relief.

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