

Editorial

The erosion of the Great Writ

The Streamlined Procedures Act, now before Congress, is the latest attempt in an ongoing effort to cripple federal habeas jurisdiction.

March 18, 1963 may have been the high water mark for the writ of habeas corpus, the so-called Great Writ. On that day, the Supreme Court considered the habeas petitions of Clarence Earl Gideon and Charles Noia and, in *Gideon v. Wainwright* and *Fay v. Noia*, established important safeguards for indigent defendants and personal liberty. In *Noia*, the Court concluded that Mr. Noia's continued incarceration was an affront to the "conscience of a civilized society," when it was revealed that his confession—the sole bit of evidence against him—had been obtained by police brutality. Even more important, the Court, after a long review of the history of the Writ, concluded that "[o]ur survey discloses nothing to suggest that the Federal District Court lacked the power to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, the nature of the writ at common law, the language and purpose of the Act of February 5, 1867, and the course of decisions in this Court extending over nearly a century are wholly irreconcilable with such a limitation."

Since then, however, the courts and Congress have eroded the impact of the Great Writ, reducing it to a network of procedural hurdles for indigent defendants, frequently unaided by counsel, seeking to challenge the constitutionality of their convictions or sentences in federal court. And although *Gideon* sparked the "right to counsel revolution," and *Noia* hailed the Great Writ as the most important protection for personal liberty against intolerable government restraint, those pronouncements now languish in the recesses of memory. Dissenting in *Stone v. Powell*, Justice Brennan remarked in 1976 that "[t]he groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction," and his words proved prophetic; within two decades of that decision, the Court in a series of decisions rolled back federal habeas protections nearly to pre-*Noia* levels.

Congress, too, bears responsibility for the demise of this historic check on government overreaching. Less than 10 years after the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) created a statutory maze of obstacles to habeas relief,

another chillingly titled bill of the same tenor, the Streamlined Procedures Act (SPA), is currently wending its way through the legislative process.

Introduced in both the Senate and the House, the SPA goes even further than the AEDPA to destroy the Great Writ. It includes a provision that removes jurisdiction from federal courts to consider claims that a state court refuses to hear because of a procedural error. Even if the error is caused by a lawyer's inadequate assistance, as is sadly so often the case, a federal court cannot hear a procedurally defaulted claim.

The SPA also bars federal courts from hearing almost all claims by capital defendants that a sentencing error occurred so long as the U.S. attorney general, the country's *chief prosecutor*, certifies that a state's indigent defense system satisfies statutory standards. The legislation also limits judicial discretion, by requiring federal courts to dismiss with prejudice any claims that failed to exhaust state postconviction proceedings, irrespective of the merits of those claims. Even the SPA's so-called "innocence exception"—an exception narrower than a needle's eye—reveals much about its sponsors' intent to cripple federal habeas jurisdiction.

All of this comes despite the highly-publicized, rapidly-growing list of exonerations of the wrongly convicted. Like Clarence Earl Gideon and Charles Noia before them, many of those innocent persons owe their freedom to the availability of habeas relief. Yet, many of them would have been denied relief

Editorials are prepared by a committee of the American Judicature Society appointed by the chair of the board.

continued on page 90

| Editorial

(continued from page 56)

under the SPA.

Not surprisingly, the bill has faced considerable resistance, although some of its opponents may be surprising. Critics include the Judicial Conference of the United States, former federal and state judges and prosecutors, the Rutherford Institute, and the American Conservative Union. Even state court judges, the

very judges whose actions are challenged in habeas proceedings, have condemned the bill and urged Congress to consider instead "targeted methods [to] ameliorate . . . documented problems" rather than depriving "federal courts of their traditional jurisdiction . . ."

This statement by state court judges speaks volumes about the many flaws in our justice systems, many of which stem from our neglect of the legitimate needs of indigent defendants and will be

exacerbated by this latest legislative assault on habeas. In today's legal landscape, more, rather than less, should be done to ensure that the courts fully and fairly study the merits of these cases. Those who share AJS' commitment to a fair system of justice should work to revive a forgotten promise to deliver a full measure of justice to all defendants, even the poorest among us.

That is exactly what the Supreme Court recognized more than 40 years ago. ☞

American Judicature Society



The American Judicature Society promotes the effective administration of justice at all levels. To this end, AJS publishes this journal and other literature, conducts and disseminates empirical research, produces educational programs, and maintains an information service. AJS also operates the Elmo B. Hunter Citizens Center for Judicial Selection, the National Jury Center, the Center for Judicial Independence, and the Center for Judicial Ethics. AJS membership is open to anyone who supports the improvement of the nation's courts.

Judicature is a forum for fact and opinion relating to all aspects of the administration of justice and its improvement. Readers are invited to submit articles, news, and letters for publication. *Judicature*, a refereed journal, notifies authors of its decisions within 45 days and publishes most accepted articles within six months. Manuscript submission information is available at www.ajs.org/ajs/publications/ajs_jud-manuscripts.asp or by calling 773-973-0145.

Judicature is indexed in *Index to Legal Periodicals*, *Current Law Index*, *Legal Resource Index*, *Criminal Justice Periodical Index*, and *PAIS Bulletin* and is available on-line on the WESTLAW® service.

PRESIDENT

Allan D. Sobel (asobel@ajs.org)

JUDICATURE STAFF

EDITOR David Richert (drichert@ajs.org)

DESIGN Mary-Ann Lupa

PRODUCTION Patricia Frey

AJS STAFF

COMMUNICATIONS AND PUBLICATIONS ASSOCIATE

Dawn Buzynski

CONSULTANT TO THE ELMO B. HUNTER
CITIZENS CENTER FOR JUDICIAL SELECTION

Rachel Caufield

PROGRAMMING ASSOCIATE Timothy Eckley
DIRECTOR, CENTER FOR JUDICIAL ETHICS Cynthia Gray
BOOKKEEPER AND MEMBERSHIP COORDINATOR

Laury Lieurance

ADMINISTRATIVE ASSISTANT Krista Maeder
DIRECTOR, AJS NATIONAL JURY CENTER David McCord
DEVELOPMENT CONSULTANT Richard Perrault
DIRECTOR OF PUBLICATIONS David Richert
SENIOR PROGRAM ASSOCIATE Kathleen Sampson
ASSISTANT TO THE PRESIDENT Beth Tigges

INTERNS Taryn Dozark, Megan Erickson,
Kendra Mills and Maggie White