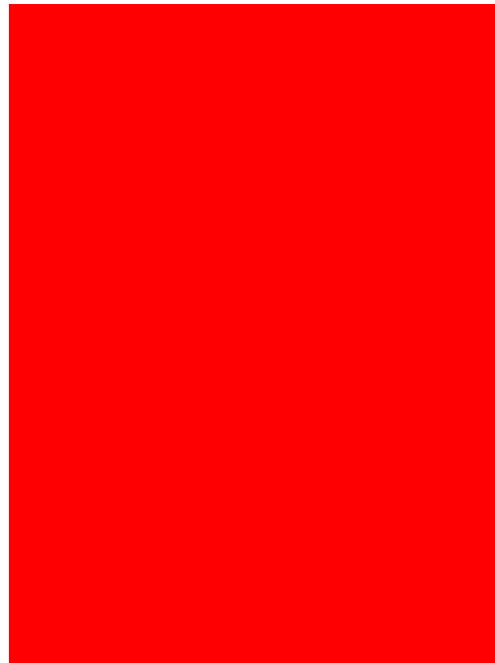


**UPSETTING
CHECKS
AND
BALANCES**



**CONGRESSIONAL
HOSTILITY TOWARD
THE COURTS IN
TIMES OF CRISIS**



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UPSETTING CHECKS AND BALANCES:

CONGRESSIONAL HOSTILITY TOWARD THE COURTS IN TIMES OF CRISIS



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This report has been prepared by the American Civil Liberties Union, a nationwide, nonpartisan organization of 275,000 members dedicated to preserving and defending the principles set forth in the Bill of Rights.

Upsetting Checks and Balances

October 2001

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UPSETTING CHECKS AND BALANCES:

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INTRODUCTION

Throughout American history, threats to domestic security have triggered unjustified assaults on civil liberties. Today the most basic civil liberty of all – the right to judicial review of executive authority – is uniquely vulnerable. Anti-terrorism laws passed by Congress in 1996 and again in 2001 reflect growing hostility to the role of judges in our constitutional system.

This report, planned long before September 11, focuses on the laws enacted five years ago rather than the USA-PATRIOT Act signed into law by President Bush last Friday. But enactment of the most recent anti-terrorism legislation provides new urgency for considering a theme common to all these laws: the role of the judiciary in curbing the excesses of executive authority in pursuit of politically popular goals.

The USA-PATRIOT Act has antecedents stretching back to the earliest days of the Republic. The Alien and Sedition Acts of 1798, criminal restrictions on speech during World War I, the internment of Japanese-Americans following the attack on Pearl Harbor, and the blacklists and domestic spying of the Cold War are all instances in which the government was granted (or assumed) summary powers in a moment of crisis, to the inevitable regret of later generations. The diminution of liberty that accompanied these episodes was later understood as an overreaction to frightening circumstances; each is now viewed as a shameful passage in the nation's history. After the immediate danger passed, it was recognized that the government had already possessed ample powers to address the threats at hand; the new tools were unnecessary at best and dangerous at worst.

Only rarely have the courts intervened to curb government authority during periods of genuine insecurity, even though many Americans now wish they had. In *Schenck v. U.S.*¹ the Supreme Court unanimously upheld a World War I-era conviction for printing leaflets that urged Americans to resist the draft. In the infamous case of *Korematsu v. United States*² the Court declined to overturn evacuation orders that led to the detention of thousands of Japanese-Americans during World War II. Yet in *Watkins v. United States*³ and related cases, the Court played a crucial role in limiting and eventually discrediting the reach of Cold War-era red-baiting tactics. In any event, it was a vital sign of America's constitutional democracy that such court challenges could be brought even in times of war and other perceived crises.

Judicial review is a cornerstone of our system of government. But the unbearably tragic September 11 attacks, which toppled many cornerstones and caused others to tremble, have led to enactment of an anti-terrorism bill that undercuts the role of the judiciary in scrutinizing executive actions. Many provisions of the USA-PATRIOT Act limit judicial review of law enforcement activities altogether, or create the illusion of judicial review while transforming judges into mere rubber stamps:

- Section 203 permits the disclosure of sensitive information about American citizens obtained through grand jury investigations and wiretaps to intelligence agencies without judicial review of the justification for such disclosure;
- Section 215 requires a judge to issue an order compelling production of books, records or other items under the Foreign Intelligence Surveillance Act upon receiving a law enforcement certification of relevance;
- Section 216 minimizes judicial checks on electronic surveillance by permitting the police to obtain information about private Internet communications under a meaningless standard of review;
- Section 358 allows law enforcement and intelligence agencies to obtain sensitive personal information without judicial review, while section 508 permits access to student records based on a mere certification by the law enforcement agent that the records are relevant to an investigation;
- Section 412 authorizes detention of suspects for seven days without any judicial review and possible indefinite detention of non-citizens without meaningful judicial review.

Under many of these provisions the judge exercises no review function whatsoever; the court must issue an order granting access to sensitive information upon mere certification by a government official. The Act reflects a distrust of the judiciary as an independent safeguard against abuse of executive authority.

Originally, the Administration asked for additional summary powers, but the bill was improved somewhat in Congress. Indeed, the version of the bill approved unanimously by the House Judiciary Committee strengthened judicial review of executive authority by, for example, requiring a court order before grand jury information could be shared with intelligence agencies. But many of these accountability measures were dropped under pressure from the Administration. As Congressman Barney Frank explained the next day: “What we decided to do in committee, correctly, was to give the law enforcement officials all the expanded powers they asked for. But we simultaneously tried to put into effect a full set of safeguards to minimize the chance that human beings . . . would abuse that power. The problem is that the bill before us today preserves the fullness of the powers but substantially weakens the safeguards.”⁴

The USA-PATRIOT Act misunderstands the role of the judicial branch of government; it treats the courts as an inconvenient obstacle to executive action rather than an essential instrument of accountability. While it does not literally strip courts of their jurisdiction to review anti-terrorism activities, it establishes toothless judicial review of that activity or bypasses judges altogether.

Only days after enactment, the full ramifications of this complex, hastily drafted 342

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page bill remain unexplored. The legislation awaits history's judgment. But even without the benefit of hindsight, it is cause for concern that key provisions of this wartime measure will be implemented without the benefit of full judicial scrutiny.

In depriving judges of their ability to safeguard individual rights against abuses of executive authority, the USA-PATRIOT Act builds on the dubious precedent Congress set five years ago when it enacted a trilogy of laws that, in various ways, divest federal courts of their traditional authority to enforce the Constitution and statutes of the United States.

The first of these three laws was enacted, as was the USA-PATRIOT Act, in response to an unprecedented act of domestic terrorism. The 1995 bombing of the Murrah Federal Office Building in Oklahoma City left 168 people dead and shocked the nation. President Clinton, much as President Bush did after the September 11 attacks, called on Congress to grant him new tools to conduct surveillance and detain suspicious individuals. Unlike the USA-PATRIOT Act, the Antiterrorism and Effective Death Penalty Act of 1996 was the product of a full year of congressional deliberation before it was enacted. But like this year's anti-terrorism bill, the 1996 anti-terrorism bill granted the government new powers while insulating certain enforcement actions – notably death sentences – from meaningful oversight by federal judges.

Within months of the passage of the 1996 anti-terrorism bill, Congress enacted two other laws – the Illegal Immigration Reform and Immigrant Responsibility Act and the Prison Litigation Reform Act – that also shielded executive authority over disfavored minorities from review by neutral judges. While not a direct response to terrorism, each of these laws targeted a population – immigrants and prisoners, respectively – thought to contribute to domestic insecurity. All three laws are part of the same dangerous experiment of dubious constitutionality known as *court-stripping*.

Some of the provisions in these three 1996 laws flatly deprive courts of the authority to hear certain types of cases. Under others, federal judges may hear the claims of disfavored litigants but are stripped of the legal means to help them. The result is no process for some, superficial process for others and due process for none.

At the time Congress considered these legislative proposals, the American public had little understanding of their far-reaching implications. Each bill was enacted under a popular banner – to ensure “swift punishment of terrorists,” to “crack down on illegal immigration,” to “slam the door on frivolous prisoner lawsuits.” But five years later, there is growing understanding of the effect of these laws and the radical legal theories on which they are based. It is now apparent that the court-stripping measures of 1996 represent a new and dangerous strain of constitutional thinking, one that has infected the recent anti-terrorism law.

A review of the legislative history surrounding the three court-stripping laws of 1996 suggests that they were not just good faith mistakes in response to perceived threats.

Rather, they were the opportunistic triumphs of an intellectual movement hostile to the role of the judiciary in American life. Court-stripping, which had long been advocated by a small group of scholars and policymakers, gained currency in the charged legislative atmosphere that followed the Oklahoma City bombing and in the anger at immigrants and prisoners that boiled over in the same period.

It is no surprise that the court-stripping movement achieved both its initial and its most recent successes in the context of bills to combat terrorism, nor that it flourished in legislation hostile to two of the least popular groups in our society – immigrants and prisoners. A bill to deny journalists access to the courts to hear First Amendment claims, in contrast, would not advance far in the legislative process. But terrorism is profoundly frightening, while immigrants and prisoners are familiar scapegoats in American politics.

Yet it is precisely because government is most likely to endanger the rights of innocent bystanders when its agents are in pursuit of wrongdoers that judicial oversight is needed. And it is precisely because unpopular minorities fare so poorly in the legislative process that our Constitution offers them recourse to the courts to protect their interests. That is why legislation to limit that recourse is so pernicious.

One reason immigrants and prisoners have so little voice in the political process (apart from the fact that they are almost always barred from voting) is that they are typically poor. So it is also no accident that at the same time Congress sought to limit the power of federal judges to vindicate the rights of immigrants and prisoners, it also enacted severe restrictions on legal services for the poor, and explicitly prohibited legal services lawyers from representing these vulnerable populations. These restrictions compound the harm caused by more direct forms of court-stripping.

The court-stripping movement has so far targeted death row inmates, immigrants, prisoners and now suspected terrorists. But the procedural devices employed against these vulnerable targets could ultimately be used to limit the rights of less narrowly defined groups as well. The constitutional chain is only as strong as its weakest link, and in 1996 the chain began to give way.

Five years later, and especially now that the concept of court-stripping has spread to the recent anti-terrorism bill, the time is ripe to assess these 1996 laws. How have these laws affected the lives of those who had depended on the federal courts to vindicate their constitutional rights? The results of this inquiry are dismaying. We now know that:

- The Anti-Terrorism and Effective Death Penalty Act, which limits the role of federal courts in hearing constitutional challenges by death row inmates and other state prisoners, has added to the chaos and sloppiness of a capital punishment system so fraught with error that almost one hundred innocent men and women have been sentenced to death.

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- The Illegal Immigration Reform and Immigrant Responsibility Act, which restricts judicial review of a range of executive branch decisions regarding legal and undocumented immigrants, has shattered families and ruined lives by blocking asylum for individuals fleeing persecution abroad and hastening deportation for minor misconduct.
- The Prison Litigation Reform Act, which withdraws from federal judges procedural tools they need to remedy unconstitutional prison conditions, has contributed to a life-threatening deterioration of prison environments and has had especially dire consequences for women, children and the mentally ill in prisons.

This report is, in effect, a five-year report card on the country's ill-considered foray into court-stripping:

Chapter One of the report reviews the vital role of an independent judiciary in our constitutional system.

Chapter Two traces the history of attacks on the judiciary; it is a long and ignominious history, but one which has, until recently, rarely resulted in legislative action.

Chapters Three through Five summarize the three court stripping laws of 1996, and describe the legal and practical experience under these laws for the past five years. Particular attention is directed at the ways in which these abstract laws have caused real hardship to ordinary people.

Chapter Six addresses a parallel development: the enactment in 1996 of rigid restrictions on legal services for the poor.

An Appendix contains an analysis of the technical legal issues surrounding court-stripping and poses the question: Is it permissible under the Constitution to deprive federal judges of the power to enforce legal rights? The answer is uncertain, but it is clear that there are some constitutional boundaries in this field that Congress may not cross. Indeed, the Supreme Court has begun to set some limits in the landmark immigration cases it handed down last term.

Whether or not such laws are constitutional, Congress should pull back from the precipice and reconsider the wisdom of these short-sighted laws it enacted five years ago. Court-stripping has created a dangerous imbalance in the American political system. By undermining the integrity of the branch of government established to preserve individual rights, Congress has exposed unpopular minorities to the unmerciful vagaries of majority rule and arbitrary administrative action. This is a development that endangers the fundamental rights of all Americans.

Congress must also be vigilant in monitoring implementation of the newly minted anti-

terrorism law. That law limits the role that judges would ordinarily play in ensuring that enforcement agencies abide by constitutional and statutory rules. Without judicial oversight, there is a real danger that the war on terrorism will have domestic consequences inconsistent with American values and ideals.

I. ROLE OF THE FEDERAL COURTS

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

These were the words of U.S. Supreme Court Justice Robert Jackson in *West Virginia Board of Education v. Barnette*.⁵ The case arose when a group of Jehovah's Witnesses challenged public school regulations requiring students to salute the U.S. flag. The government sought conformity. A minority in the community sought freedom of expression. The Court upheld the rights of the minority and thwarted the will of the majority.

The *Barnette* case, and Justice Jackson's words, illustrate a vital principle in American life. While the nation's founders celebrated democracy, they also recognized that certain individual freedoms must never be placed at the mercy of shifting political majorities. They adopted a Constitution which sets certain individual liberties apart from majoritarian rule, and carved out for the federal judiciary a unique role in preserving these liberties.

The Promise of an Independent Federal Judiciary

The Framers had reason to place a premium on judicial independence. Colonial judges served at the pleasure of the king and were greatly distrusted by the colonists.⁶ Delegates to the Constitutional Convention quickly agreed on the need for a federal judiciary and took steps to ensure its independence. Article III of the Constitution specifies that federal judges shall have life tenure "during good behavior," and that their salaries cannot be decreased once they take office.

From the beginning, the federal courts were meant to have a primary role in guaranteeing the freedoms to be enjoyed by citizens of the young Republic. Introducing the Bill of Rights in the First Congress, James Madison said:

[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.⁷

Alexander Hamilton, in Federalist No. 78, likewise extolled the virtues of an independ-

ent judiciary: “In a monarchy it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body.”

The primary tool for federal courts to fulfill the role envisioned in the Constitution is judicial review. The courts’ independent and dispassionate interpretation of the Constitution would mean little if congressional majorities and the President were nonetheless free to enact laws that trampled on constitutionally assured liberties. Although the Constitution does not explicitly empower the federal judiciary to declare Acts of Congress or actions of the executive unconstitutional, the idea is plainly implicit in the nation’s constitutional design.

The principle was made explicit in the 1803 Supreme Court opinion of *Marbury v. Madison*.⁸ The *Marbury* case involved the validity of a judicial commission that had been signed, but not delivered, before the end of the presidency of John Adams. Ultimately, Justice Marshall declined to give effect to the commission. But before doing so, he declared and defended the right of the Supreme Court to declare Acts of Congress unconstitutional. Marshall said the Court could not hear the case because the Judiciary Act of 1789, which ostensibly gave the Court jurisdiction over the dispute, did so in an unconstitutional manner. His opinion included the famous and now broadly accepted declaration: “It is emphatically the province and duty of the judicial department to say what the law is.”⁹

The task of interpreting the Constitution – and safeguarding the individual liberties enshrined therein – falls not just to the Supreme Court, but to all federal courts.

There was disagreement at the Constitutional Convention about the need for lower federal courts to supplement the work of the Supreme Court. Some delegates believed state courts were sufficient to hear federal claims, while others insisted on the need for lower federal tribunals. James Madison was among those insisting on lower federal courts, stating “confidence cannot be put in the state tribunals as guardians of the national authority and interests.” Madison argued that state judges might be biased against federal law and interests, especially where there appeared to be a conflict with state law.¹⁰

Delegates compromised by authorizing Congress to create such lower federal courts as it deemed appropriate. Congress indeed established lower federal courts in the Judiciary Act of 1789, and such courts have existed ever since.

The debate about the so-called “parity” of state and federal courts has continued. State courts, like their federal counterparts, are commanded to interpret federal law and the federal Constitution, and to apply them in favor of state law where a conflict between the two bodies of law exists. But while some state courts are at least as solicitous of federal constitutional rights as are federal judges, there is legitimate concern about the ability of elected judges to carry out the unpopular task of upholding the rights of individu-

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als when those rights conflict with the interests of a majority of voters.

In most states, judges stand for election or for retention after an initial appointment, and unpopular decisions may come under attack during the judge's next campaign. These political pressures are particularly worrisome when the rights of unpopular litigants are at stake. State judges who vote to reverse a death sentence, for instance, may subject themselves to withering attack at election time. California Supreme Court Chief Justice Rose Bird lost a recall election in 1986 due to criticism of her opinions overturning capital sentences, and other judges have suffered a similar fate.¹¹

Abner Mikva, a former Congressman, federal appellate judge and White House Counsel, contrasted appointed federal judges with elected state judges:

Can we reasonably expect the judge who has to campaign for the office – raise money, get endorsements, please people, make speeches about the issues – to reflect the same values in office as does an appointed judge with life tenure? I have so phrased the question that to my mind the answer is so obvious that nothing more need be said. I put elected judges in a wholly different category, and while we have every right to expect such judges to be fair and honest, we really have no right to expect them to play the anti-majoritarian role that Madison envisioned for the federal, appointed judges.¹²

The Promise Fulfilled

Over the two-century life of the nation, the promise of judicial independence has been largely fulfilled. Federal judges have come to be recognized as the guardians of individual rights in the face of overreaching majorities. Some examples of judicial statesmanship shine as lodestars of our national identity, including such Supreme Court rulings as:

- *Brown v. Board of Education* (1954) – declaring racial separation in education to be inherently unequal and unjust, and paving the way for desegregation in all aspects of American life.
- *Gideon v. Wainwright* (1963) – establishing the right of poor defendants to be represented by government-paid lawyers at criminal trials.
- *New York Times v. Sullivan* (1964) – affirming the right of journalists to speak freely notwithstanding state libel laws.
- *Miranda v. Arizona* (1966) – requiring police officers to inform criminal suspects of their constitutional rights.

The power and wisdom of these rulings is seen most clearly in retrospect. Though largely venerated today, these rulings were widely opposed when handed down. There were calls to impeach Chief Justice Earl Warren following *Brown*, and Congress expressly sought (unsuccessfully) to overrule the constitutional holding in *Miranda* by statute.¹³

These cases and many others demonstrate that the federal judiciary has largely succeeded in shielding individual liberty from majoritarian pressures.

The modern-day denunciations of “activist” judges and “illegitimate” rulings ignore this proud history and fail to acknowledge the anti-majoritarian essence of the Bill of Rights. It is facile to say, as the critics do, that judges should interpret law, not make law. Of course that is so, but in the course of interpreting the Constitution, which is a supreme law, judges may be obligated to “make law” by invalidating statutes which are subordinate to the Constitution.

Conservative commentator Bruce Fein cautioned a Senate committee that “judicial activism” is “a phrase that has degenerated into code words by self-described political conservatives for rulings that arouse their personal or political ire.” He stated:

The idea that judicial invalidation of legislative [or] executive action is inherently a detraction of the idea of self-government as envisioned by our Constitution ... is woefully misconceived. The whole purpose of the Constitution is to restrain majorities. That is, they wanted to have an outside force that would insist, even if majorities at the time wanted to do something, they could not. So that when our Constitution prohibits certain kinds of conduct or action and the court enforces this restraint, that is not what I call judicial activism or a detraction of the popular will of those who ratified the Constitution, which were popular legislative assemblies specially selected for that purpose.¹⁴

This is not to say that federal judges are free to impose their personal views on legislatures and the public. Courts must defer to the policy choices of the elected branches as long as those choices fall within the wide range of choices permitted by the Constitution. Moreover, lower court judges must follow the precedents handed down by higher courts, and even the Supreme Court is bound by the principle of *stare decisis* which anchors new decisions to the weight of existing caselaw and judicial reasoning.

Congress has its own tools to influence the judiciary. If Congress disagrees with the court on a matter of statutory interpretation, it may simply pass a new law. On matters of constitutional interpretation, Congress may not pass a law to overturn the Supreme Court’s judgment, yet even here the Court need not have the last word – Congress can approve a constitutional amendment and send it to the states for possible ratification. Wisely, Congress has used this power on only rare occasions.

Impeachment is theoretically available to deal with a judge who utterly disregards the law, although disregarding the law is far different from interpreting or applying the law in a manner contrary to the wishes of politicians. Finally, Congress and the executive branch share control over federal judicial appointments. While there are fierce debates about the proper standard by which the Senate should review a judicial nominee, the “advice and consent” function inevitably applies at least some pressure to align the fed-

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eral bench with popular will.

These are clearly better ways for the legislative branch to express dissatisfaction with the courts than stripping the courts of their authority to rule. Court-stripping is inconsistent with the history and structure of our constitutional democracy, and, as shall be seen, poses a grave threat to the rights of all Americans.

II. ATTACK MOVEMENT

Early attacks

The federal courts have been under siege almost since their creation, their unpopularity a natural byproduct of the anti-majoritarian role that judges play in the constitutional scheme. Yet today's attacks are of a different and more dangerous nature than the controversies that have swirled around the courts in previous eras.

Although the Framers agreed to mandate the creation of a single federal Supreme Court, they debated whether to create lower federal courts at all. States' rights advocates insisted that state courts could adequately enforce federal and constitutional law, while Federalists insisted there should be an array of lower federal courts lest the Supreme Court become deluged with appeals from state proceedings.¹⁵ The compromise was to leave the decision to federal lawmakers, empowering Congress to create such lower federal courts as it "may from time to time ordain and establish."¹⁶

Given this antagonism toward the very creation of certain federal courts, it is not surprising that Federalists and Jeffersonian Republicans soon clashed over the power of the judicial branch. When a lame duck Federalist administration and Congress created new federal courts and promptly filled the new slots with Federalist judges, the incoming Jeffersonians moved to disband these courts and impeach other Federalist judges.¹⁷ During the Marshall Court in the early 1800s, lawmakers sought to block Supreme Court review of certain state court decisions due to distress over rulings seen as too centralist.¹⁸

Decades later, controversial court rulings interpreting Civil War-era legislation provoked another heated reaction. Fearful that the Supreme Court might invalidate aspects of Reconstruction, Congress moved to strip the High Court of jurisdiction over a recently passed habeas corpus statute. The resulting court battle – *Ex Parte McCordle* – remains one of the key cases on the issue of congressional power over the Supreme Court.¹⁹

Political frustration with the courts continued to percolate during the first half of the twentieth century. Progressives, unhappy with the conservative bent of court rulings in the field of labor law, won passage of the 1932 Norris-LaGuardia Act. That law restricted the authority of federal courts to issue restraining orders or injunctions in cases involving labor disputes, and stated that so-called "yellow dog contracts" – which required workers not to join a union – were not enforceable in federal courts.²⁰ The Supreme Court upheld Norris-LaGuardia in *Lauf v. E.G. Shinner & Co.*, seemingly unconcerned by the legislature's intrusion on the Article III prerogatives of the judiciary.²¹ The Court also upheld jurisdiction-stripping components of World War II-era price controls and draft legislation.²²

In the late 1950s, with anti-Communism in full throttle, some members of Congress

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reacted angrily to court rulings invalidating loyalty oaths for government workers and attorneys.²³ The resulting Jennings-Butler bill would have limited Supreme Court review in cases involving the federal employees security program, state legislation regarding subversive activities, and state bar admissions.²⁴ That bill narrowly failed after extensive debate during the 1957-1958 session.

The succeeding decades brought new challenges to the principle of judicial review. During the 1960s, there were proposals to strip courts of their jurisdiction over Vietnam draft issues and the use of the controversial “Miranda warnings,” which requires police officers to advise criminal suspects of their constitutional rights. The Senate passed language that would have barred federal jurisdiction to review or modify a state trial court’s determination that an accused’s admission was voluntary.²⁵ That proposal was never enacted.

Court-stripping efforts mushroomed in the 1970’s and 80’s as members of Congress sought to overturn court decisions regarding busing, school prayer and abortion. By one count, lawmakers introduced 30 such court-stripping bills in the early 1980s, some of which prompted extensive hearings.²⁶

These statutory proposals often paralleled efforts to amend the Constitution on the subjects in question. Indeed, the proposed court-stripping statutes can be understood as illegitimate short-cuts to avoid the arduous path of amending the Constitution.

The day the Senate blocked a constitutional amendment to allow school prayer, for example, Senator Jesse Helms vowed to press ahead with attempts to restrict federal court jurisdiction over school prayer, abortion and busing. Helms said, “there is more than one way to skin a cat, and there’s more than one way for Congress to provide a check on arrogant Supreme Court justices who routinely distort the constitution to suit their own notions of public policy.”²⁷ Helms and others proposed legislation to curb the power of federal courts, including the Supreme Court, to review and hear any case involving voluntary prayer in public buildings and schools.²⁸ On abortion, parallel House and Senate proposals would have barred lower federal courts from issuing injunctions “in any case arising out of State or local law that prohibits or regulates abortion or the provisions of public assistance for the performance of abortions.”²⁹

These statutory efforts were turned back as too extreme amid bipartisan alarm over threats to the constitutional order. Republican Senators Barry Goldwater of Arizona and Lowell Weicker of Connecticut were among those battling court-stripping bills on school prayer, busing and abortion. Conservative icon Goldwater warned his colleagues that the “frontal assault on the independence of the Federal courts is a dangerous blow to the foundations of a free society.”³⁰

Congressional distrust of judges also manifested itself during this period in the movement to strip judges of their traditional discretion over criminal sentencing. In its benign form,

this movement produced the federal sentencing guidelines system which requires judges to impose sentences within (or explain departures from) ranges established by a central commission composed, in part, of judges themselves.³¹ But at its extreme, this movement features mandatory sentencing laws that leave judges powerless to impose a sentence below the statutory minimum and invest actual sentencing authority in unaccountable prosecutors. Yale Law School Professor Kate Stith and Second Circuit Judge Jose Cabranes aptly characterized this movement as “Fear of Judging.”³²

Recent Assault

By the 1990s, the political climate had become a crucible for attacks on the judiciary.

Edwin Meese III, Attorney General in the Reagan administration and a proponent of court-stripping measures, declared that the federal judiciary “has strayed far beyond its proper functions.” He counseled, “we will never return the federal government to its proper role in our society until we return the federal judiciary to its proper role in our government.” To that end, Meese advocated that the Senate move aggressively to block “activist” judicial nominees and urged lawmakers to limit the jurisdiction of the lower federal courts and the Supreme Court.³³

John Ashcroft, then a U.S. Senator and now the Attorney General, voiced similar concerns that the federal judiciary had overstepped its bounds and become “a robed, contemptuous elite fulfilling Patrick Henry’s prophecy, that of turning the courts into, quote ‘nurseries of vice and the bane of liberty.’”³⁴

During the 1996 presidential campaign, politicians of all stripes felt free to vilify judges. That year New York federal district Judge Harold Baer was widely condemned after holding in a routine drug case that illegally obtained evidence could not be admitted at trial. Republican lawmakers called for his impeachment while President Clinton’s press secretary said the President might request Baer’s resignation.³⁵ Meanwhile, candidate Patrick Buchanan attacked federal judges as “little dictators in black robes” and called for an end to life tenure for them.³⁶ Republican presidential nominee Bob Dole campaigned with harsh words for “activist judges” and blamed the federal judiciary for boosting the crime rate through lenient treatment of criminal defendants.

This was not just a war of words. As the 1996 campaign trail brimmed with claptrap about the need to “tame” judges, the 1995-96 session of Congress gave birth to three significant pieces of legislation undermining the role of courts: the Anti-Terrorism and Effective Death Penalty Act, the Illegal Immigration Reform and Immigrant Responsibility Act, and the Prison Litigation Reform Act.

Court-strippers achieved their first success with the Antiterrorism and Effective Death Penalty Act. Riding a wave of public revulsion over the bombing of the Oklahoma City

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federal building, lawmakers passed an anti-terrorism bill that dramatically restricted federal judicial review for death row inmates and for many immigrants facing deportation or seeking asylum.

Later that year, lawmakers went further in limiting immigrants' access to the federal courts. The Illegal Immigration Reform and Immigrant Responsibility Act, approved in September 1996, eliminated or severely restricted judicial review for a range of critical actions affecting immigrants.

A third court-stripping measure – this one targeting prisoner lawsuits over prison conditions – won passage as a barely-debated amendment to an appropriations bill. The Prison Litigation Reform Act imposed severe new restrictions on prisoners' ability to file such suits, and on the authority of federal judges to craft remedies for unlawful prison conditions.

While these court-stripping proposals came from GOP ranks, Democrats typically mounted only limited opposition to them and President Clinton signed these harsh, far-reaching provisions into law without serious objection.

Aftermath

Since 1996, Congress has not enacted significant additional court-stripping laws, although the new USA-PATRIOT Act substantially limits judicial oversight, as described in the introduction to this report. One law from the late 1990's contains a relatively limited court-stripping provision: the Foreign Narcotics Kingpin Designation Act of 1999 directs the president to issue an annual report designating the world's "drug kingpins" and attaches severe penalties to financial transactions or other dealings with these people. The law specifies that the courts have no jurisdiction to review "determinations, findings and designations made under this Act."³⁷

But court-stripping has been festering in Congress despite the lack of new laws. Angry anti-judicial rhetoric persisted throughout the late 1990's, and a number of court-stripping bills were considered but not enacted.

In April 1997, Senator Spencer Abraham hailed the Prison Litigation Reform Act (PLRA) for "putting rational restraints on judicial power." Abraham, a Michigan Republican who now serves as Secretary of Energy, said the Act showed "we can rein in judicial activism," and urged his audience to look toward the PLRA as a "model in passing further reforms to correct other instances of judicial overreach."³⁸

In 1998 the House debated a proposed Judicial Reform Act which, among other "reforms," would have withdrawn district court jurisdiction to issue prisoner release orders and immediately ended any consent decrees that predated the PLRA.³⁹ The bill was

clearly a vehicle for expressing hostility to judges. It was sponsored by Majority Whip Tom DeLay, a Texas Republican who has also called for impeaching judges whose rulings struck DeLay as too activist. Such judges, DeLay said, “need to be intimidated.”⁴⁰

An earlier version of this bill would have also altered the procedures for judicial consideration of any legal challenge to a referendum passed by voters. Under the bill, such cases would have been heard by a three-judge panel rather than a single federal judge, and litigants would have been given the right to reject the first panel assigned to their case. These proposals were a direct response to the decisions of federal district court judge Thelton E. Henderson, who stayed enactment of a California referendum on affirmative action after finding that it would violate the Constitution.

In introducing the Senate companion to the Judicial Reform Act,⁴¹ Senate Judiciary Committee Chairman Orrin Hatch had harsh words for named judges. After accusing Judge Henderson of attempting to act “like a super-legislator” for ruling on the California referendum, he turned his attention to Judge Norma Shapiro who had presided over a prisons conditions lawsuit in Philadelphia. Judge Shapiro, he said, “used complaints filed by inmates to impose her activist views and wrestle control of the prison system...How can we expect law enforcement to provide protection and safe streets if at every turn there is a Judge Shapiro waiting anxiously for the chance to release lawlessness on our communities? This reform bill will prevent Judge Shapiro and other like-minded judges from ever endangering families and children in our communities again by preventing these Judges from releasing prisoners based on prison conditions.”⁴²

The following year, Congress debated whether to legislate the constitutionality of posting the Ten Commandments on government property. A House-passed amendment would have declared that, under the 10th Amendment, the question of whether such posting is allowed was reserved to the states. Federal courts, the proposal stated, “shall exercise the judicial power in a manner consistent with the foregoing declarations.”⁴³

Another battleground during the late 1990’s was the judicial confirmation process. Federal judicial vacancies mounted in number and duration, as a bloc of Senators scuttled action on some Clinton nominees and subjected others to unjustified criticism and scrutiny. President Clinton may have shared responsibility for the delay in filling judicial vacancies, since he took longer than many of his predecessors to nominate judicial candidates.⁴⁴ But the Senate deserves more blame: over one key period that body took an average of 144 days to act on judicial nominations, and substantially longer for certain nominees.⁴⁵ That is almost twice as long as the average period of consideration for the nominees of Presidents Reagan and Carter. And now it is President George W. Bush’s turn to complain about delay in the Senate’s consideration of his judicial nominees.

The effort by first President Clinton and now President Bush to fill vacancies on the influential District of Columbia Circuit is illustrative. When Republicans controlled the Senate they refused to consider a number of President Clinton’s nominees to that court

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on the grounds that the D.C. Circuit did not have enough work to justify its traditional complement of judges.⁴⁶ Now that a Republican is President, Senate Republicans want the seats filled, but Senate Democrats have not considered President Bush's nominees to the court.

Even some of the usually circumspect Supreme Court Justices have felt compelled to speak out against tactics of delay and intimidation. In a January 2001 speech at the University of Melbourne law school, Supreme Court Justice Ruth Bader Ginsburg decried what she saw as new threats to judicial independence. Ginsburg complained about lawmakers' threats to impeach judges who write controversial decisions, as well as the "political hazing of federal judicial nominees."⁴⁷ Ginsburg noted the record delays in confirming some judicial nominees, and said the resulting judicial vacancies threatened the quality of the federal courts.

But perhaps the ultimate effort to undermine the independence of the judiciary is the proposed constitutional amendment replacing life tenure for federal judges with a system under which judges would be subject to reconfirmation after completing a 10-year term.⁴⁸ While there is no serious danger that such an amendment will be adopted in the near future, the message from its supporters to the judiciary is clear: get in line, stop thwarting majority rule, stop performing your constitutional duty. Through such acts of intimidation, the court-strippers aim to advance their agenda even without enacting new laws.

Meanwhile, as shall be seen in the next three chapters, the court-stripping laws that were enacted in 1996 have begun to harm individual rights in many ways.

III. HABEAS CORPUS

Calvin Burdine's lawyer slept through whole portions of the trial at which his client was convicted and sentenced to death.⁴⁹ Ronald Williamson's lawyer neglected to tell the jury that someone other than his client had confessed to the crime.⁵⁰ In Michael Graham's trial, the prosecutor withheld evidence and relied on false testimony to secure his conviction and death sentence.⁵¹

These and many other recent cases shed light on a death penalty system that is in woeful disrepair. Even when the state seeks to impose this grave and irreversible penalty, defendants routinely receive trials marred by sloppy lab work, suggestive identifications, police and prosecutorial misconduct, and, above all, inept representation by state-appointed lawyers. Since capital punishment resumed in the United States in the late 1970's, almost 100 inmates have been released from death row based on evidence that they were innocent of the crimes for which they had been condemned to die.⁵² Many additional inmates have had their convictions reversed due to serious errors that cast doubt on the reliability of the verdicts against them.

Yet even as DNA testing has demonstrated the disturbing fallibility of the justice system and the need for rigorous review of criminal convictions, Congress has moved in the opposite direction. The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) imposed dramatic new restrictions on the ability of state prisoners to have their convictions reviewed by a federal court, even in death penalty cases. Under this law, federal judges are sometimes powerless to correct errors in criminal proceedings, and many inmates are simply shut out of federal court altogether.

The Need for Federal Review

State prisoners account for most of the roughly two million people incarcerated in the United States on any given day, including about 3,800 on death row. Federal habeas corpus is a means by which these state prisoners can challenge the validity of their convictions in federal court.⁵³

Following conviction, a defendant may file a direct appeal in state court and ultimately the U.S. Supreme Court. If the direct appeal fails, the defendant may seek post-conviction review in state court, which is meant to catch errors that are difficult to prove or develop at trial, such as suppressed evidence or incompetent counsel. But defendants do not have a constitutional right to counsel at this stage and states do not consistently provide lawyers for inmates who cannot afford their own. Habeas corpus review in federal district court is an essential safeguard to ensure the fairness and reliability of a criminal conviction.⁵⁴

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According to a recent comprehensive study of capital punishment in the United States, reviewing courts found serious prejudicial error in 68% of the death sentences imposed from 1973-1995. State courts catch some of these errors, but a substantial number of errors – in 21% of all capital cases – remain uncorrected until federal habeas review.⁵⁵ Federal habeas is a vital bulwark that has, at least until recently, minimized the chances that innocent men and women would become victims of state-sponsored murder.

The need for habeas corpus review is illustrated by the case of Joseph Brown (now known as Shabaka Waglini). In 1974, a Florida court convicted Brown of first-degree murder and sentenced him to death. His appeals in state court were unsuccessful. But in 1986 a federal court ordered a new trial after finding the prosecutor had concealed evidence that the fatal bullet could not have come from Mr. Brown's gun, had allowed the star witness to lie in exchange for lenient treatment in his own robbery case, and had knowingly misled the jury in closing arguments.⁵⁶ Mr. Brown was released after spending 14 years on death row for a crime he did not commit.

Many errors in death penalty trials are attributable to shamefully inadequate funding for indigent defense services – particularly at the trial level. Most capital defendants are poor and must rely on court-appointed counsel. These cases typically involve complex procedures and technical scientific evidence, yet the lawyers provided by states are often ill-prepared to mount a competent defense. In many states court-appointed lawyers need not have any experience in death penalty law, or even criminal law.⁵⁷ One court appointed a divorce lawyer to represent a capital defendant.⁵⁸ The infamous “sleeping lawyer” who represented Calvin Burdine was not an aberration; there are too many examples of lawyers who drink, sleep or just plain fumble their way through these life-or-death proceedings.⁵⁹

To be sure, there are many hard-working, dedicated capital defenders, but they receive little for their efforts – compensation is often capped by state rules despite the many hours needed to mount an effective death penalty defense and the need to pay investigative expenses.⁶⁰ Few lawyers can make a living under these restraints, and the ones that do are often courthouse hangers-on who cannot make a living any other way. In overturning one Texas death penalty sentence based on ineffective assistance of counsel, the Fifth Circuit noted that the state-appointed defense attorney had been paid a fee that amounted to a rate of \$11.84 per hour. “Unfortunately,” the court observed, “the justice system got only what it paid for.”⁶¹

Moreover, state judges who preside over capital trials and the first rounds of review are often elected and face considerable political pressure not to reverse a jury conviction. For instance, Justice Penny White participated in a death penalty case as a member of the Tennessee Supreme Court. White joined her colleagues in ruling that the defendant's sentencing hearing was infected with error and must be held again. In her next election, White was attacked as a foe of the death penalty in advertisements suggesting she was personally responsible for the reversal in that case. She lost the election.⁶²

These flaws in the death penalty system have combined to tragic effect, as the following examples illustrate:

- **Frank Lee Smith.** Smith spent 14 years on Florida's death row for a murder he did not commit. Even after the chief witness recanted, Smith was denied a new trial. He was eventually exonerated, but by the time his attorneys prevailed in their effort to obtain the exculpatory DNA test, Smith had died of cancer in prison.⁶³
- **Ernest Miller and William Jent.** These half-brothers were convicted of rape and first-degree murder and sentenced to death. They came within 16 hours of execution in 1983, when a federal judge issued a stay. Three years later, suspicion shifted to a new suspect and evidence emerged to exonerate Miller and Jent. A federal judge ordered a new trial after finding that the prosecution had suppressed evidence that supported the defendants' claims of innocence.⁶⁴
- **Ronald Keith Williamson.** Williamson was convicted and sentenced to death in Oklahoma state court for murder and rape. Courts later found that his lawyer did not conduct a meaningful investigation. The lawyer had become aware that another man had confessed to the crime, but never bothered to inform the jury of that fact. Nine years after his conviction, Williamson won a new trial after federal courts found he had received ineffective assistance of counsel. After DNA tests implicated an earlier suspect, Williamson and a co-defendant were released and all charges against them were dropped in 1999.

Some political leaders have responded forcefully to these and other disturbing revelations. In early 2000, Illinois Governor George Ryan imposed a moratorium on executions pending review of that state's troubled capital justice system. Ryan, a Republican who supports the death penalty, acted after new evidence showed that 13 men on death row in Illinois were actually innocent. One of them was Anthony Porter, who came within hours of dying before a judge stayed the execution to examine his legal competency. Journalism students at Northwestern University then uncovered evidence that exonerated Porter and led to the conviction of another man.⁶⁵ Since then, public unease with the death penalty has surfaced nationwide and legislation to improve the system is under consideration in numerous state legislatures.⁶⁶

But just as Americans recoil from revelations about mistakes and injustices in the death penalty system, the unwise decision Congress made five years ago to curtail federal court review of these errors is beginning to be felt.

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1996 Legislation

Placing new limits on habeas corpus was a failed conservative aspiration for years. Pro-death penalty lawmakers repeatedly sought to limit judicial review of state convictions, claiming that death row inmates were delaying their executions with unwarranted appeals. This drive repeatedly foundered in Congress.

In 1996, however, proponents of capital punishment seized an opening. Amid public outcry over the bombing of the federal building in Oklahoma City, lawmakers attached habeas corpus restrictions to a fast-moving anti-terrorism bill. In fact the provisions would have little, if any, effect on the punishment of those who carried out the bombing, but efforts to strike habeas corpus restrictions from the bill fizzled once President Clinton indicated his willingness to sign a bill with the offending provisions.

The congressional debate seemed oddly frozen in time. Proponents of the restrictions spoke of endless litigation by death row inmates, but the Supreme Court had already curtailed federal habeas review through a series of rulings. Yet the restrictive Court rulings paled in comparison to the 1996 legislation. “For the justices’ chisel, Congress substituted an axe,” remarked one habeas scholar.⁶⁷

The habeas restrictions apply to petitions by all state prisoners, not only those involving the death penalty. Among the most egregious new restrictions are the following:

- **Statute of limitations** – Inmates must file a federal habeas petition within one year of exhausting any available state review.⁶⁸ Previously, there was no statutory filing deadline.
- **Limits on federal hearings** – Inmates may not obtain an evidentiary hearing in federal court to present relevant new evidence of innocence unless they meet an extraordinarily high burden of proof, even if the relevant evidence did not come to light at trial due to the incompetence of the state-appointed defense attorney.⁶⁹
- **“Gatekeeper” panel for successive petitions** – A panel of three circuit judges must approve a second or subsequent habeas petition. The panel must act within 30 days and there is no review of this decision by the Supreme Court. Such petitions are only permitted if the petitioner relies on a new rule of constitutional law or newly available evidence such that “no reasonable fact-finder” would have found guilt.⁷⁰
- **Deference to state judges** – A federal judge must defer to a state court’s determinations of legal questions and mixed questions of law and fact. Under prior Supreme Court precedent, federal courts conducted an independent review of such questions, since federal habeas courts were presumed to be best suited to resolve federal constitutional issues.⁷¹ Under the 1996 law, a federal court may

only grant the petition if the state court's decision involved an "unreasonable application of established federal law."⁷²

This deference provision is the most offensive of the new restrictions. Under this extraordinary law, if a federal judge finds that a state court judge wrongly decided a purely legal question – even one arising under the U.S. Constitution – the federal judge may not reverse the state decision unless the state judge was not just wrong, but "unreasonably" so. This rule applies even in capital cases: although a life is at stake, an incorrect state court decision that could result in execution must stand unless it is "unreasonably" incorrect.

A number of Senators recognized this deference provision as an unprecedented intrusion on the independence and integrity of the federal courts, but an amendment offered by Senator Joseph Biden to remove the provision failed narrowly in the Senate.⁷³

Court Review of the 1996 Limits

As with the other two 1996 court stripping laws, courts have struggled with two questions regarding the Anti-Terrorism Act: (1) what limits on judicial review did Congress mean to impose; and (2) did it have the constitutional authority to do so? In the habeas cases governed by the new law that have reached the Supreme Court so far, the Justices have generally upheld the thrust of the new restrictions while interpreting them in a manner that leaves some room for federal judicial review of constitutional errors.⁷⁴

Shortly after passage of AEDPA, the Supreme Court considered the Act's limits on judicial review in the case of *Felker v. Turpin*.⁷⁵ The petitioner challenged the new "gatekeeping" rules on second or subsequent petitions as unconstitutional. The Court upheld the gatekeeper provision, noting that it has typically left it to Congress to determine the proper scope of the writ, and this law's restrictions on successive petitions are not so severe as to amount to suspension of the writ in violation of Article I, §9 of the Constitution.⁷⁶

The Court noted that, theoretically, a habeas petitioner could bring a successive petition directly to the Supreme Court under the 1789 Judiciary Act. By finding that it still had jurisdiction to hear a petition such as Felker's, the Court avoided the stark question of whether Congress may, consistent with the separation of powers doctrine, deny a habeas petitioner any federal judicial forum at all. But the option of direct review by the Supreme Court is of little comfort to inmates seeking judicial review of their confinement, since the Justices are unlikely to consider more than a handful of petitions, if any, under their original jurisdiction.

The Supreme Court reviewed another controversial portion of the 1996 law – that requiring federal judges to defer to state judges' "reasonable" interpretations of federal

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law – in *Williams v. Taylor*.⁷⁷

The court-appointed defense lawyer for Terry Williams made almost no effort to save his client's life. At sentencing he presented no evidence of Williams's mental retardation or of the beatings Williams had suffered as a child, and he failed to return a phone call from a witness prepared to testify on Williams's behalf at sentencing. Williams's lawyer told the jury: "I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself." The jury sentenced Williams to death.⁷⁸

The question was whether the poor performance by his lawyer during the punishment phase of the trial deprived Williams of his constitutional right to effective assistance of counsel. The Virginia Supreme Court held that it did not. A lower federal court found for Williams, but the Fourth Circuit Court of Appeals reversed, finding that the state court view of the case was "reasonable."

The Supreme Court reversed the Court of Appeals and overturned the death sentence. Justice O'Connor, writing for the Court, rejected the Fourth Circuit's contention that a state court's legal interpretation would be "reasonable" so long as "reasonable jurists" could disagree about the result. However, O'Connor's opinion also explained that a state court could be "incorrect" without being "unreasonable." Her opinion contemplated that there would be cases in which a federal court could conclude that a state court had reached the wrong decision regarding a defendant's federal constitutional rights, but would be unable to act because the state court decision was not so wrong as to have been unreasonable.⁷⁹

Stated bluntly, the question in habeas cases after *Williams I* will be: "How bad was the state court decision?" Even under this restrictive standard, six justices voted to reverse Terry Williams's death sentence because of his lawyer's incompetence at sentencing. But while Williams himself emerged with a victory, the principles of judicial review and federal supremacy suffered considerable harm.

In another case decided the same day, also called *Williams v. Taylor*,⁸⁰ the Supreme Court addressed another troubling aspect of the 1996 law – the new obstacles it establishes for habeas petitioners to obtain an evidentiary hearing in federal court.

Michael Williams was convicted of murder and sentenced to death in a small Virginia town. Unbeknownst to the defendant or his lawyer, one of the jurors had been married to the prosecution's lead witness. The prosecutor, moreover, had represented the juror in her divorce. Neither the juror, the witness nor the prosecutor revealed these facts. Williams found out about the various relationships while on death row, and sought to present evidence about them to the federal court reviewing his conviction.⁸¹

The lower federal court found that under the 1996 anti-terrorism law, Williams was not entitled to an evidentiary hearing because he should have found out about the relation-

ships earlier. The Supreme Court rejected this narrow interpretation of the 1996 law and held that Williams was entitled to a hearing. The Court declared that only a lack of diligence or some greater fault by the prisoner or his lawyer would trigger the onerous limitations on federal hearings established by AEDPA.⁸²

Practical Effects

While legal skirmishes continue to adjust the precise contours of the new law, the overall impact of the 1996 changes is clear: they slam the courthouse door shut on many legitimate claims by inmates that they have been convicted in violation of the Constitution.

The one-year filing deadline itself poses a daunting hurdle, since many prisoners will have difficulty finding a lawyer in time to meet the deadline, if they find one at all. Capital prisoners in some states have somewhat better access to lawyers, but these cases are complex and only the most seasoned capital litigators can be counted on to weigh the merits of all claims and draft a suitable petition under a tight filing deadline. Failure to include a claim at this point may well bar a prisoner from raising it at all.⁸³

The idea of a filing deadline was originally tied to the promise that an inmate would receive competent counsel at all stages of review, including state post-conviction proceedings.⁸⁴ But AEDPA imposes a one-year limit without enhancing the quality of indigent defense in capital cases. The law does offer states even more restrictive federal habeas review of the state's proceedings if the state provides adequate counsel to death row inmates. No state has yet qualified under this provision.⁸⁵

Moreover, the same Congress that imposed the one-year statute of limitations also denied federal funding to the Death Penalty Resource Centers, the small band of capital litigation specialists who had scratched out a modicum of post-conviction fairness in key Death Belt states.⁸⁶ So at the same time that it became harder to find a lawyer to file a habeas petition, the period in which such petitions must be filed became drastically shorter.

In other words, without doing anything to improve the fairness of death penalty trials, Congress has made it immeasurably harder to win federal review of death penalty convictions. Worse, even those defendants who can surmount the new procedural obstacle course and obtain federal habeas review, will be afforded a hollow version of judicial review. The restrictions on evidentiary hearings and the requirement that federal judges defer to "reasonable" interpretations of law by state judges mean that even when federal judges review these cases, their authority to correct all but the most extreme errors will be missing.

Examples of the consequences of this new regime are already emerging:

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- Howard Neal is a mentally disabled man who was abandoned as a child, spent eight years in a mental hospital and was later sexually abused while in prison. After Neal was convicted of a capital crime, his attorney failed to investigate or present much of this mitigating evidence to the sentencing jury. Reviewing his case on a habeas petition, the Fifth Circuit agreed that Neal had been deprived of effective counsel and that “there is a reasonable probability that a jury would not have been able to agree unanimously to impose the death penalty if this additional evidence had been effectively presented and explained to the sentencing jury.” Nevertheless, the circuit denied relief after concluding that the state court was not “unreasonable” in concluding that Neal had not been unfairly prejudiced by his lawyer’s performance.⁸⁷
- The South Carolina jury deciding whether Richard Tucker would be sentenced to die was hopelessly deadlocked. The trial judge delivered what the federal courts eventually found to be a coercive, erroneous instruction to the jury, which promptly returned a death sentence. The South Carolina courts affirmed the sentence, but the federal courts found that a constitutional error had occurred. Nonetheless, in what the Fourth Circuit called “a textbook example of the effect of AEDPA on our review of a state court decision,” the federal court affirmed the South Carolina ruling because, while incorrect, it was not “unreasonably” incorrect.⁸⁸
- Tuan Van Tran was stopped and arrested in the course of a robbery investigation, primarily on the basis that he fit the physical description of a suspect, spoke Vietnamese and had the same name that a robbery victim had reportedly heard used by a robber during an attack. Reviewing the case, the Ninth Circuit concluded that the police did not have probable cause to make the arrest, and that the state court had erred in finding that probable cause existed. But the court concluded that the state court’s decision was not so wrong as to be “unreasonable” and therefore denied habeas relief.⁸⁹

Even on its own terms, the law is problematic. A primary goal of the 1996 habeas corpus restrictions was to speed up and simplify the process of death row appeals. On this count, the law has failed – litigating death penalty appeals is more complicated and time-consuming than ever due to uncertainties created by the new law. As Boston University law professor Larry Yackle, an expert on federal habeas law says: “It’s bad policy, poorly executed.”⁹⁰

Post-1996 Legislative Activity

There have been no serious attempts to redress the harms of the 1996 law. There have been efforts to improve the administration of capital punishment in other, related ways. For instance, lawmakers in the Senate and House have introduced the “Innocence

Protection Act” (S. 486 / H.R. 912), a package of death penalty reforms sponsored by over 200 members from both parties.⁹¹ The legislation would make it easier for inmates to obtain DNA testing to challenge their convictions and would establish a commission to prescribe minimum standards for lawyers in death penalty cases. The bill is designed to prevent errors in the first instance, and therefore does not directly address the habeas restrictions in the 1996 Act. However, one portion of the bill would lift certain habeas restrictions if a state failed to meet standards for adequate counsel.⁹²

Polls show that there is growing public interest in improving the administration of the death penalty. It remains to be seen whether these concerns will lead Congress to revisit the harsh habeas corpus restrictions it enacted five years ago.

IV. IMMIGRANT RIGHTS

Olufolake Olaleye immigrated legally to the United States from Nigeria in 1984 and became a legal permanent resident six years later. She gave birth to two children who are both U.S. citizens. Mrs. Olaleye has worked steadily and never received public benefits. In 1996 she applied for citizenship and was on her way to obtaining full legal rights in this country.

But in the wake of the 1996 court-stripping bills, Mrs. Olaleye was suddenly deemed worthy of deportation, not citizenship. The problem? Fifteen dollars' worth of baby clothes. In 1993, Mrs. Olaleye was charged with shoplifting \$14.99 of merchandise when, she says, she tried to return some baby clothes without a receipt. She did not have an attorney when she went to court and was persuaded to enter a guilty plea to resolve the matter. Mrs. Olaleye was given a suspended sentence, paid a fine and thought she had put the incident behind her. But four years later Congress passed legislation that retroactively designated her an "aggravated felon." Mrs. Olaleye was denied citizenship and ordered deported.

Worse, Congress tried to prevent immigrants such as Mrs. Olaleye from seeking a waiver of deportation from an immigration judge. Under prior law, that judge would have considered certain established factors, such as undue hardship to Mrs. Olaleye's children, and then applied his or her discretion to decide whether Mrs. Olaleye should be allowed to stay in this country. A federal judge also could have reviewed the case for abuse of discretion. But in 1996, Congress tried to slam those courthouse doors shut.⁹³

In its recent ruling in a case called *Immigration and Naturalization Service v. St. Cyr*, the United States Supreme Court restored a measure of discretion and judicial review to the law that caused such anguish to Olufolake Olaleye and other immigrants. But despite that decision, many immigrants have lost the right to challenge deportation orders, refugees fleeing persecution can be turned away without a chance to present their claim for asylum to a judge, and systematic abuses by the Immigration and Naturalization Service can only be challenged one immigrant at a time – if at all.

As with the death penalty, administration of the country's immigration laws has been severely flawed and prone to discrimination. Federal court review has served as an important check on such problems. Now, with review more limited and the rule of law diminished, immigrants and their families are suffering.

Legislative Crackdown

Anti-immigrant sentiment, often virulent in the United States, was running high in the early 1990's. Pressure for legislation to tighten legal immigration and punish immigration law violators reached a peak during the 104th Congress, and lawmakers responded

with an omnibus bill to overhaul the nation's immigration laws. At first, the bill was guided by the relatively benign recommendations of a bipartisan commission chaired by former Congresswoman Barbara Jordan. As the legislation progressed, however, it became a vehicle to attack the politically vulnerable immigrant population.

The restrictions came in a one-two punch: first, in April 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) which included several punitive anti-immigration provisions. Several months later, as Congress headed out on the campaign trail, it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which further restricted immigrants' rights.

As detailed previously, the terrorism bill was largely a reaction to the Oklahoma City bombing. Although anti-terrorism initiatives had been proposed before the bombing, it was the Oklahoma attack that propelled legislators into action – and overreaction. In the initial days following the bombing, there was considerable speculation that the attack had been carried out by Middle Eastern terrorists. Although the attack was soon revealed to be the work of homegrown terrorists, the early focus on foreigners helped justify inclusion of new measures to turn away asylum seekers and deport immigrants.⁹⁴

Specifically, the terrorism bill created a new process called “summary exclusion” to turn away foreigners arriving without proper documents. Even individuals fleeing persecution would be afforded only a cursory examination by an INS agent and no judicial review. The terrorism law also made it easier to deport non-citizens who had committed crimes.

Just months later, Congress went further down the path of court-stripping. IIRIRA included a range of measures designed to keep immigrants from entering the country and make it easier to deport immigrants, whether legal or undocumented, who are already in this country. Debate took place in the charged atmosphere of the 1996 presidential campaign. Republican nominee and Senate Majority Leader Bob Dole even advocated a potentially disastrous provision that would have barred undocumented immigrant children from attending school.⁹⁵ This mean-spirited provision had passed the House but was ultimately dropped from the bill. The final immigration package passed in the closing hours of the session as part of a mammoth appropriations bill.

Many of the proposals to limit immigrants' access to judicial review passed without serious objection or debate. The restrictions were justified by claims that aliens were abusing the review process to delay deportation, although studies contradicted this assertion.⁹⁶ There was serious debate on one item: the new procedures to turn away foreigners who arrive without documents. Human rights advocates complained that the proposal would make it too easy to turn away victims of persecution, who often cannot obtain proper documents before fleeing their home countries. Despite close votes, however, the more restrictive language was included in the final law.⁹⁷

Lawyers and judges are still untangling the meaning of the two step assault on immi-

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grants. The terrorism law installed one set of rules, many of which were replaced a few months later by the immigration bill. In addition, the immigration law included transitional rules for cases already in the pipeline as well as permanent restrictions applicable to subsequent cases. While the transitional rules have had a devastating impact on many immigrants, their details are beyond the scope of this report.⁹⁸ The permanent restrictions on judicial review enacted under the immigration law are summarized below.

- **Expedited removal⁹⁹** – The immigration law creates a new, truncated process for individuals seeking asylum who arrive without proper documents. Those who are barred from entering the country are generally denied the opportunity to appeal the decision to a judge.

Under the new law, the INS officer at a port of entry segregates out any individual the officer believes has improper documentation.¹⁰⁰ These individuals are questioned further and, unless the individual expresses a fear of returning to their home country, he or she can be deported without any review. There is no oversight of the officer's determination by a federal judge or even an immigration judge. An individual caught in this process has no right to communicate with friends, family or even an attorney.

The statute seeks to preclude judicial review of “any other cause or claim arising from” expedited removal¹⁰¹ and specifically bars any federal court from certifying a class action to challenge the expedited removal procedures.¹⁰² The Act does permit a challenge to the “validity of the system” and its implementation, but only in the D.C. district court within 60 days of implementation. Of course, that limit presents a virtually insurmountable practical impediment to systemic litigation.

If the individual does express a fear of being returned, he or she is supposed to be referred to an asylum officer who will assess whether the individual has a “credible fear” of persecution. If the asylum officer believes the refugee meets this test, he or she is then referred to an immigration judge for an asylum hearing. But if the asylum officer is not persuaded that credible fear exists, the individual faces immediate expulsion, subject only to possible review by an immigration judge, which must take place within seven days. Critically, if an individual is not referred for a credible fear interview – either because the INS officer does not believe the individual's expression of fear, or because the individual is unable to communicate those fears – there is no review of this threshold determination.

- **Deportation of “criminal” aliens** – The 1996 law eliminates some federal court review of the deportation of criminal aliens, and enlarges the number of deportable crimes so as to cover many more immigrants. Such “aggravated felonies” include any criminal conviction that resulted in a sentence (suspended or otherwise) of a year or more, including such minor offenses as shoplifting. In most cases, immigrants who have been convicted of one of a broad list of crimes

do not have any right to judicial review of a deportation order.¹⁰³ The harshness of these provisions was mitigated by the Supreme Court's *St. Cyr* decision, discussed subsequently.

- **Discretionary decisions** – The 1996 law eliminates judicial review of a range of discretionary administrative decisions, including cancellation of deportation.¹⁰⁴ Regarding deportation, the law also limits review of decisions to commence proceedings, adjudicate cases or execute removal orders.¹⁰⁵
- **Injunctions** – No court other than the Supreme Court may issue an injunction regarding inspection, apprehension, detention and removal of aliens, other than regarding an individual alien.¹⁰⁶ While the law does not prohibit class action lawsuits over this group of claims,¹⁰⁷ it prevents lower federal courts from issuing any class-wide relief that makes such lawsuits effective. With respect to an individual alien, a court may not enjoin enforcement of a final removal order unless the alien demonstrates by clear and convincing evidence that the removal order is prohibited by law.¹⁰⁸

Court Decisions

Of all the groups disadvantaged by the court-stripping laws of 1996, immigrants have so far obtained the most sweeping redress from the Supreme Court. In the recent companion cases of *INS v. St. Cyr* and *Calcano-Martinez v. INS*, the Supreme Court interpreted IIRIRA to permit habeas corpus review of deportation decisions, and cast significant doubt on the constitutionality of any law flatly depriving immigrants of such review.

The government sought to deport Enrico St. Cyr and Deboris Calcano-Martinez, lawful permanent residents of the United States with aggravated felony convictions. When they filed habeas corpus petitions challenging their deportation orders, the Attorney General asserted that under the 1996 Anti-Terrorism and Immigration laws she lacked authority to grant a waiver of deportation and that federal courts lacked authority to rule on her interpretation of the statute. But the Court found squarely that the Attorney General did, in fact, possess such discretion and that the immigrants were entitled to judicial review.

The Court resolved the cases on statutory rather than constitutional grounds by finding that Congress never intended to repeal all habeas review. But while it avoided ruling directly on the constitutional question, the Court observed that a complete elimination of federal judicial review would be unprecedented and that the bar on judicial oversight of even the particular type of claim in *St. Cyr* would raise profound constitutional questions. The Court stated:

A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substan-

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tial constitutional questions. Article I, § 9, cl. 2, of the Constitution provides: “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.” Because of that Clause, *some* “*judicial intervention in deportation cases*” is unquestionably “*required by the Constitution.*” *Heikkila v. Barber*, 345 U.S. 229, 235 (1953).¹⁰⁹

Because the decision rests on grounds of statutory interpretation, Congress could theoretically attempt to amend the law to repeal habeas corpus review explicitly. But were it to do so, Congress would have to overcome the Court’s warning that efforts to deprive federal courts of jurisdiction over habeas corpus petitions would not likely pass constitutional muster.

Consequences

The effect of the myriad restrictions in IIRIRA has been to cast out long-time residents for minor infractions committed long ago, and to turn away desperate refugees seeking sanctuary. While *St. Cyr* restored a measure of judicial review over these determinations, the underlying policies remain harsh and punitive. Notwithstanding *St. Cyr*, the 1996 law still removed a significant measure of judicial oversight over the I.N.S., an agency with a history of troubled and often discriminatory administration.¹¹⁰

It is difficult to quantify the harm inflicted by the new expedited removal procedures, since many immigrants are turned away without an opportunity to speak to a lawyer and the INS does not keep or share detailed data about people who are sent back under this process. But the Lawyers’ Committee for Human Rights report cited earlier in this chapter tells some of these painful stories, and there is no reason to doubt that many more exist:

- A young ethnic Albanian student fled Kosovo after being beaten by Serbian police. He arrived in the United States, but could not communicate with the Serbian interpreter the INS procured to interview him. Instead of finding an Albanian interpreter to help the refugee, the INS ordered him removed, without even referring him for a “credible fear” interview. Fortunately, the student succeeded on his second attempt to enter the U.S. and was allowed to apply for asylum.
- A Tibetan Buddhist nun fled her country after being imprisoned by Chinese officials for advocating religious freedom and independence for Tibet. She flew to New York to seek asylum, but was never even referred to an asylum officer for a credible fear determination. She was sent back to India where her flight had begun.

- Two Ecuadoreans fled their country after receiving death threats for helping to expose police corruption. Although they requested asylum in Miami, they were returned to Ecuador without even being referred to an asylum officer for a credible fear determination. They were able to escape Ecuador once more, this time to a European country where they were permitted to stay.
- A Sudanese Christian woman fleeing persecution for her political and religious beliefs sought asylum at the U.S. border. Although she told the INS border officials she was afraid to return to Sudan, they nonetheless ordered her deported without a credible fear interview, let alone an asylum hearing. Her deportation was halted only because her husband, who entered the U.S. separately and was granted a credible fear interview, alerted a lawyer to his wife's situation. The two were eventually granted asylum.

These examples illustrate that refugees who desperately need asylum may be turned away from the United States without even a “credible fear” interview. But even those who are referred for interviews may be erroneously removed. For example, an Albanian woman who had been subjected to gang rapes because of her husband's political activities failed her credible fear interview and was deported back to Albania because she was ashamed to describe her experience to a male interpreter.¹¹¹ Only after the ACLU threatened litigation – and after she had spent four months in hiding – did the INS agree to let her come back. She was subsequently granted asylum.

In two of the examples cited above, refugees were granted asylum – in one instance in a European country – on their second attempt. But few refugees have the resources to seek asylum a second time. Once turned away, the individual may have no choice but to return home and remain there despite persecution.

Refugees are especially victimized by the expedited removal process, since those truly fleeing persecution are the least likely to have proper travel documents. Traumatized, lacking basic knowledge of our immigration laws, and without the assistance of qualified interpreters, they are often unable to communicate their fears to the low-level INS officer who make these life-or-death decisions.

Moreover, this process is susceptible to tragic mistakes that affect American citizens. A 35-year-old U.S. citizen was deported to Jamaica because INS officials concluded incorrectly that her passport, as well as the birth certificate presented by waiting relatives, was forged. The woman, who was mentally disabled, was held overnight in shackles before being sent back to Jamaica, where her flight had originated. She was allowed to enter the United States a week later, but suffers nightmares from her experience.¹¹²

Despite the clear, accumulated evidence of mistakes and abuses, administrative determinations regarding summary exclusion are subject to only the most limited judicial review. An immigration judge can review the denial of a credible fear claim, but, as already

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noted, this is no help for those returned without even an opportunity for a credible fear interview. Further, the cursory nature of the credible fear process and the rigidly short deadline for this review does not give refugees a meaningful chance to find representation or gather documentation to support their claims.

Before the ruling in *St. Cyr*, the new provisions regarding detention and deportation of immigrants had also spawned many tales of injustice. For example:

- Alejandro Bontia had lived in the United States since he was seven years old. But returning to the U.S. after a trip abroad, Bontia was stopped by the INS and ordered deported to the Philippines where he had been born. Under the new law, Bontia was an aggravated felon because 13 years earlier, when he was 21, he had been placed on probation for a consensual sexual relationship with his 16-year-old girlfriend.¹¹³
- Jose Velasquez moved to the U.S. from Panama almost 40 years ago when his father was stationed here as a diplomat. Velasquez became a legal permanent resident, attended high school in Philadelphia and later married. He and his wife opened a small store in the early 1980's and ran it together for nearly 20 years. But at a party in 1988, Velasquez was approached by an undercover agent who wanted to buy marijuana. Velasquez pointed to another individual as a possible source. For this, he was convicted of drug trafficking, sentenced to five years probation and fined \$5,000. A decade later, after a trip to visit his sick mother, Velasquez was asked at the airport whether he had ever been arrested. He responded truthfully, was summarily detained and is still fighting deportation.¹¹⁴

Mandatory detention provisions in the 1996 laws have made it even harder for immigrants fighting deportation. Detainees have trouble conferring with their lawyers, especially when they may be abruptly moved to remote detention facilities.¹¹⁵ Moreover, detention tears immigrants from their families and jobs as they try to establish a right to stay in the country.¹¹⁶

Legislative Reaction

The harsh effects of the 1996 legislation are all too apparent, and before the September 11 terrorist attacks there was significant momentum toward ameliorating them. Press accounts of immigrants deported after decades in this country for transgressions such as hair pulling, consensual sexual conduct and shoplifting had resulted in a significant shift in public opinion. Some members of Congress had undertaken a legislative campaign entitled "Fix '96." Senator Edward M. Kennedy, Chairman of the Senate Immigration Subcommittee, is the lead sponsor of the Immigrant Fairness Restoration Act of 2001 (S. 955), which would undo an array of recently enacted restrictions concerning immigrants, including the curtailment of judicial review in the 1996 immigration and anti-terrorism

laws. And Senate Judiciary Chairman Patrick Leahy has introduced the Refugee Protection Act (S. 1311) to limit the use of expedited removal and restore other safeguards for asylum seekers.

Even some champions of the 1996 restrictions had been willing to admit they pushed too far. Before leaving Congress at the end of 2000, Florida Republican Bill McCollum, a key backer of the 1996 immigration bill, sponsored legislation to roll back one of its most punitive provisions – the retroactive application of the new “aggravated felony” definition. Under the bill, the greatly expanded list of deportable crimes would not apply to convictions predating passage of the immigration law in September 1996. The legislation passed the House, but was not considered in the Senate.¹¹⁷

The recent terrorism in New York and Washington has altered political and legislative priorities and will undoubtedly delay any relief. In fact, the new anti-terrorism law contains additional immigration restrictions, which may pose new constitutional problems.

Meanwhile, despite widespread acknowledgment of the unfairness caused by the 1996 laws, immigrants remain subject to their flawed provisions. Congress’s attack on vulnerable immigrants does more than disadvantage immigrants. The 1996 laws violate the constitutional separation of powers and undermine the rule of law itself.

V. PRISON LITIGATION

In Boise, Idaho, a 17-year-old boy was jailed for failing to pay \$73 in traffic fines. Over a 14-hour period, he was tortured and finally murdered by other prisoners in the cell. Another teenager had been beaten unconscious by the same inmates several days earlier. More than 6520 children had been held in the jail over a 3-year period, 42% for traffic offenses and 17% for truancy and other status offenses.¹¹⁸

In Georgia, female prisoners as young as 16 years old were forced to have sex with prison guards, maintenance workers, teachers, and even a prison chaplain. The sexual abuse came to light when many women prisoners become pregnant and were pressured into having abortions. More than 200 women testified by affidavit that they had been coerced into having sex with prison employees or that they knew other prisoners who had been coerced into doing so.¹¹⁹

Appalling prison conditions like these cry out for remedial action, yet there is no reason to hope that the political branches of government would pay heed without judicial intervention. Prisoners, who in almost all states cannot vote and in many states will never regain the right to vote, can never depend on fair or respectful treatment from an elected legislature. Rather they are dependent upon the judicial branch to enforce the Eighth Amendment prohibition on cruel and unusual punishment.

Passage of the Prison Litigation Reform Act of 1995¹²⁰ was propelled by ridicule and outrage (orchestrated by the bill's proponents) over anecdotes regarding prisoners suing the warden for better tennis shoes or a different style of peanut butter. The public has been led to believe that prisoners lead an easy, luxurious life. But prison litigation is far more often about sexual assaults, communicable diseases and intolerable overcrowding than peanut butter. Even after prisoner lawsuits in the 1960's and 70's led to improvements in some facilities, wretched and brutal conditions are widespread today. What may no longer exist is an unimpeded route to relief in the federal courts.

Prisoners and the Courts

For many years, prisoners had little practical recourse to the courts. Their access to lawyers and law libraries were limited, and the lawsuits that were filed rarely overcame judicial deference to prison officials.¹²¹ Conditions reflected the second-class legal status of prisoners. "Life in many institutions is at best barren and futile, at worst unspeakably brutal and degrading," concluded a presidential commission on criminal justice in 1967.¹²²

Yet even as that commission formulated its assessment, the tide was turning. In 1961, the Supreme Court ruled that section 1983 of the Civil Rights Act of 1871 could be invoked

to sue state officials in federal court for violations of federal statutory or constitutional rights.¹²³ By the 1970s, prisoner rights advocates were successfully challenging cruel and unusual prison conditions in a systemic fashion through class action lawsuits and other tactics. Slowly, prison conditions began to improve. Even the conservative criminal justice professor John Dilulio has acknowledged the positive impact of prison litigation:

If the question is one of net assessment, then the impact of judicial intervention into prisons and jails over the last two decades has been positive – a qualified success, but a success just the same. For proponents of judicial restraint, there is no use denying that in most cases levels of order, amenity, and service in prisons and jails have improved as a result of judicial intervention. And in most cases it is equally futile to assert that such improvements would have been made or made as quickly in the absence of judicial intervention.¹²⁴

But the prison reform movement had detractors, notably state and local officials who complained that courts were micromanaging prison operations. Indeed, the growth in prisoner filings in federal court was dramatic, leaping from just 3,129 in 1971 to more than 16,000 by 1981.¹²⁵ In 1980, Congress attempted to strike a balance by enacting the Civil Rights of Institutionalized Persons Act.¹²⁶ That law authorized the U.S. Attorney General and the federal courts to certify state administrative grievance procedures and required that inmates exhaust those procedures before filing complaints in federal court.

The number of prisoner filings had stabilized by the 1990s, but by then public hostility toward prisoners (and the politicization of criminal justice issues in general) had become feverish. When Congress considered anti-crime legislation in 1994, lawmakers seemed determined to outdo each other with amendments to strip “amenities” from prisons. Two years later, dramatic restrictions on the ability of prisoners to sue and the power of courts to redress unconstitutional prison conditions became law with barely any debate.

Prison Litigation Reform Act

The evolution of congressional thinking about prison litigation is illustrated by the changing approach of then-Senator Bob Dole. In 1982, Dole proposed financial assistance to improve prisons so they could move out from under court control. In 1995 he proposed to strip judges of the power to maintain such control. It seemed the problem was no longer unconstitutional prison conditions, but the hubris of federal judges seeking to remedy such conditions.

In introducing an early version of the Prison Litigation Reform Act, Senator Dole explained that the law would “restrain liberal federal judges who see violations of constitutional rights in every prisoner complaint...to micromanage state and local prison systems.” He promised that the legislation would curb frivolous prisoner lawsuits over

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“such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.”¹²⁷

The PLRA was added to an appropriations bill and enacted with little public awareness or debate. Opponents had little opportunity to point out that the rate of prisoner lawsuits had been dropping since the early 1980’s. The increase in absolute numbers was largely a function of the growth of the prison population, not an increase in the inmate litigiousness. Similarly, efforts to counter complaints of “frivolous” suits and “micro-managing judges” with the long, graphic list of valid prison lawsuits – women inmates sexually abused by prison guards or other inmates,¹²⁸ mentally disturbed children kept naked and shackled to their beds,¹²⁹ hundreds infected with tuberculosis after prison officials ignored the warnings of health officials¹³⁰ – were unavailing.

Key Provisions of the PLRA:¹³¹

Historically, many prison lawsuits were resolved by the parties agreeing to enter into a consent decree, a mechanism by which courts supervised improvements to unconstitutional conditions over a period of months or even years. The PLRA includes provisions making it harder to approve – and easier to terminate – such decrees. For example:

- **Existing Decrees.** Injunctions or consent decrees that were in place at the time the law was passed became subject to immediate termination unless they contained a specific finding of liability.¹³² Since defendants typically entered consent decrees to avoid such a finding, this language effectively subjected all pre-existing consent decrees to immediate termination.
- **Two year cutoff.** Under the law, injunctive relief, whether ordered by the court or agreed to by the parties in a consent decree, must end after two years unless the court finds that it is necessary to counter ongoing violations. The injunction is subject to a motion to terminate every year thereafter. The fact that an existing injunction may be necessary to prevent a facility from back-sliding into unconstitutionality is not relevant under the Act.
- **Preliminary injunctions.** Emergency relief, in the form of a preliminary injunction, expires after 90 days unless the court makes the injunction final within that time.¹³³
- **Automatic stay.** If the defendant files a motion to modify or terminate an injunction, the existing court order is automatically stayed after thirty days. The court may postpone the stay for only 60 additional days, and only for good cause.¹³⁴ This gives plaintiffs no more than 90 days to prove that the relief is still war-

ranted under the law's stringent provisions.

- **Population cap or prisoner release order.** Under the new law, only a three judge court may relieve unconstitutional prison overcrowding by imposing a population cap or issuing a prisoner release order, and may only do so in extreme circumstances. In addition, the law grants a wide range of state and local officials, including prosecutors and legislators, standing to intervene to oppose or seek to terminate such orders.¹³⁵
- **Special masters.** The law restricts the power of special masters – officials appointed by judges to oversee improvements in prison conditions – and significantly limits their compensation.¹³⁶ Some veteran masters have resigned in light of the new limits.

In addition to the provisions affecting only injunctive relief, there are other provisions of the PLRA that hinder prisoners' access to the courts. For example:

- **Physical injury requirement.** A prisoner may not obtain damages for injuries unless those injuries include some physical harm. Some courts have interpreted this provision to bar damages for violations of constitutional claims, such as violations of the right to freedom of religion or privacy.¹³⁷
- **Exhaustion requirement.** A prisoner may not file a lawsuit without first presenting the claim to any available prison grievance system, *even if* that grievance system cannot provide the relief the prisoner seeks.

Court Rulings

Attorneys for prisoners quickly recognized that the PLRA was an unprecedented legislative trespass onto the province of the judiciary in enforcing the Constitution. IN cases pending at the time of enactment, they argued that the law's provisions regarding the termination of existing injunctions violated the separation of powers doctrine by reopening final judgments or by dictating a "rule of decision" in such cases. The Supreme Court found otherwise in the case of *Miller v. French*.¹³⁸

Miller involved the Pendleton Correctional Facility in Indiana. Since 1982, the facility had been under a federal court order to remedy unconstitutional conditions, including overcrowding, inadequate staffing, inadequate food and medical services, and the inappropriate use of mechanical restraints by which some inmates were chained in their beds for up to two days.¹³⁹ In June 1997, Indiana filed a motion under the PLRA to terminate the injunction. Under the PLRA's "automatic stay" provisions, that action would have automatically suspended the court-ordered relief if the court did not make the necessary findings and reaffirm it as constitutionally necessary within 90 days. The prisoners chal-

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lenged the automatic stay provision itself as unconstitutional.

The Seventh Circuit struck down the automatic stay as a violation of separation of powers. The Supreme Court, however, upheld the authority of Congress to dictate the automatic stay, at least as to a separation of powers challenge. The Court left open the possibility that the short deadline within which the court would need to justify ongoing relief might, in a complex case, constitute a violation of the Due Process Clause.

While Miller struck a blow to hopes of defeating the law's restrictions on injunctions and other forms of systemic relief, lower court rulings have rejected other challenges to restrictions in the PLRA. Advocates have alleged, for example, that the law violates principles of equal protection because it singles out a disfavored group for limited access to the courts. Although the Supreme Court has not yet reviewed such a case, lower courts have generally rejected such challenges.¹⁴⁰

A more recent Supreme Court decision upheld a provision in the PLRA that acts as an absurd obstacle to prisoners seeking judicial relief. In *Booth v. Churner*,¹⁴¹ the Supreme Court held that, because of the Act's exhaustion requirement, a prisoner cannot file an action for money damages without first presenting the claim to any available grievance system, even if that grievance system cannot award damages to the prisoner. This provision is particularly harsh because if a prisoner misses the deadline for presenting the claim to the prisoner grievance system, which may be a week or less, the prisoner may be forever barred from pursuing the claim in court.

And this term the Supreme Court will consider the related question of whether the PLRA's exhaustion requirement bars claims for the physical mistreatment of a prisoner unless the prisoner first goes through the grievance system. Because many grievance systems include an "informal resolution" stage, application of PLRA's exhaustion requirement in this circumstance would mean that a prisoner could not file a damages action based on a beating unless the prisoner first meets with the staff member who administered the beating.¹⁴²

Practical Effects

It is too soon to measure the full effect of the PLRA on prison conditions, and in any event such qualitative conclusions are difficult to reach. But some early indications of a decline in conditions are ominous.

For existing lawsuits, the law has thrown prisoners and prisons into a fresh round of litigation. At the time the PLRA was passed, 36 states were operating under at least one court order regarding prison or jail systems. Four years later, at least 21 of those had filed motions to terminate a previous court order or consent decree.¹⁴³ Most of those challenges were successful, at least at the district court level. The success rate has less to do

with dramatic improvements in prison conditions than with the fact that the law makes it extremely difficult to justify ongoing injunctive relief in the time allowed.

Justice Breyer, in his dissent in *Miller v. French*, explained why the 90 day deadline to justify an existing injunction or consent decree might be unworkable in particular cases. Breyer cited the barbaric prison conditions in Puerto Rico that had led to the imposition of a court injunction there. The conditions included inmates living in 16 square feet of space (four feet by four feet), sick inmates without medical or psychiatric care, virtually non-functioning plumbing, and dungeon-like rooms described as cages with bars on the top and floors covered with raw sewage. The district court's effort to correct such conditions had led to 15 published opinions over more than a decade, affecting 21 facilities. "Where prison litigation is as complex as the litigation I have just described," Breyer wrote, "it may prove difficult for a district court to reach a fair and accurate decision about which orders remain necessary, and are the 'least intrusive means' available, to prevent or correct a continuing violation of federal law."¹⁴⁴

The termination provisions of the law have tended to encourage state and local officials to litigate their right to be removed from judicial oversight rather than expend resources on fixing the violations that led to litigation in the first place. One advocate describes negotiating a settlement to remedy overcrowding and dangerous conditions in one jail system, only to have the defendants move under the PLRA to terminate the agreement before making an effort to comply with it.¹⁴⁵

Elizabeth Alexander, director of the National Prison Project of the American Civil Liberties Union, compares prison litigation to school desegregation litigation in the 1950's and 60's. Litigants in the desegregation cases often had to return to court repeatedly to keep the pressure on recalcitrant school districts. If those courts had been under PLRA-like restrictions, they would have had to abandon the decrees the moment a school district began complying with the law – but long before desegregation was truly achieved.¹⁴⁶

At the same time, very few new prisoner class actions have been filed. The small prisoner rights bar is too busy defending old agreements to file new complaints, and new limits on attorney's fees in such cases serve as a disincentive to litigate. And when new cases are filed, they take longer to resolve – the PLRA was promoted as a victory for states' rights, but the law makes it difficult for state officials to enter into consent decrees, even if such agreements might be preferable to litigation.

Individual prisoner lawsuits have dropped from over 41,000 in 1996, to fewer than 29,000 in 1997 – the first full year in which the PLRA was in effect.¹⁴⁷ Filings continued to drop in subsequent years even as the prison population increased. The PLRA's sponsors boast about these figures, but it is impossible to know how many worthy suits are being lost along with some undoubtedly flimsy ones. It is clear that it is now harder to pursue even a meritorious claim.

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Onerous new filing fee requirements and a bar on suits by “frequent filers” are two reasons meritorious suits may not be filed. These limits include an exception for lawsuits concerning imminent harm. However, the Third Circuit recently held that this harm must exist at the time of filing, not at the time of the incident alleged in the lawsuit. Four dissenting judges complained that the majority’s interpretation requires the plaintiff to be “running from his attackers as he files.”¹⁴⁸

Nor is it easy to establish the requisite physical harm to accompany a claim for emotional injury. One inmate filed a lawsuit for damages after being repeatedly attacked by other inmates.¹⁴⁹ The inmates “stomped on [Mr. Luong’s] face;” “attacked [him] in the shower ... with [a] knife or a shank” and in a subsequent attack “with a broom stick.” They gave him many cuts and abrasions on his face and body, detailed by the prison hospital. Yet the magistrate held that Mr. Luong was eligible neither for a transfer nor for damages because he did not show the necessary physical harm.¹⁵⁰

Congressional Reaction

There have been conflicting efforts to amend the PLRA – some members would like to restore some rights to prisoners, while others would prefer to tighten statutory restrictions even further. In the former category, Senator Paul Wellstone (D-MN) offered an amendment to the fiscal year 1999 appropriations bill for the Department of Justice to exempt certain vulnerable groups of prisoners – juveniles and the mentally ill – from the strictures of the PLRA. The amendment failed by a close margin.¹⁵¹

On the other hand, the House (but not the Senate) passed new restrictions on prison conditions lawsuits when it debated a proposed Judicial Reform Act sponsored by House Majority Whip Tom DeLay (R-Texas).¹⁵² The DeLay bill would have unequivocally barred federal judges from releasing prisoners, notwithstanding the existence of life-threatening conditions, and would have legislatively terminated existing consent decrees, even in jurisdictions where officials wished them to continue. Passage of the bill prompted former House member, federal judge and White House Counsel Abner Mikva to write: “As far as the House was concerned, this part of the bill was occasioned by some reckless judges who were emptying out the jails because the inmates weren’t served Jello. Anyone who has read prison litigation knows that the judges are not concerned about Jello, but about whether we belong to a civilized society.”¹⁵³

Inhumane prison conditions are not a thing of the past. In January 2000, prison guards in Westchester County, New York were arrested for raping and sodomizing female prisoners and forcing some to strip in exchange for medication.¹⁵⁴ And in Alabama, overcrowding has become so endemic that prisoners sleep on cafeteria tables and a federal judge has compared conditions to those on a slave ship.¹⁵⁵ The prevalence of such problems will increase as prisons strain under record rates of incarceration. As two advocates warned shortly after passage of the PLRA: “Prisoners will feel the impact of overcrowd-

ing, reduced services, increased idleness, and tension, at the same time as their ability to ventilate their problems and have their concerns heard in court is being drastically cut back. This is a recipe for disaster.”¹⁵⁶

Conservative Seventh Circuit judge Richard Posner has written of the danger of treating prisoners as though they were fundamentally different from others in the society:

[W]e should have a realistic conception of the composition of the prison and jail population before deciding that they are a scum entitled to nothing better than what a vengeful populace and a resource starved penal system choose to give them. We must not exaggerate the distance between “us,” the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.¹⁵⁷

As Judge Posner’s dichotomy suggests, a deterioration in prison conditions is only one disturbing legacy of the PLRA. Another is erosion of the federal judiciary as a bulwark against the unconstitutional imposition of punishment on a despised minority.

VI. ACCESS TO JUSTICE

It is no accident that the 1996 court-stripping measures target inmates and immigrants, two of the poorest and most vulnerable populations in our society. In the mid 1990's, the same politicians who favor court-stripping simultaneously waged a determined campaign to eliminate or hamstring lawyers for the poor. The emerging result of this campaign is a two-tiered system of justice, one in which disfavored minorities are deprived of an effective voice in court.

The Legal Services Corporation (LSC) was created by Congress in 1974 to help provide legal representation for the poor. LSC provides grants to about 270 local programs nationwide that dispense legal advice and represent indigent clients in court. In its quarter century history, the organization has helped a vast number of poor citizens win basic rights and cope with standard legal problems such as divorce and landlord-tenant disputes. Indigent legal services are in high demand, vastly outpacing available resources.

In 1995 and 1996, the new Newt Gingrich-led majority in Congress acted to slash funding for the LSC and dramatically restricted the types of cases LSC attorneys may handle. Congressional opponents of legal services for the poor accused LSC-funded lawyers of pursuing a social agenda rather than tending to the routine legal needs of the poor. When the dust settled in the 104th Congress, funding for the Legal Services program was reduced but not eliminated, a victory for the program's defenders. But at the same time, Congress enacted an onerous set of restrictions on LSC-funded lawyers as part of an omnibus appropriations bill¹⁵⁸ and those restrictions have been renewed every year since.

The Supreme Court recently struck down one of these restrictions in a case called *Legal Services Corporation v. Velazquez*.¹⁵⁹ Congress had prohibited LSC funding of lawyers or organizations that participate in any litigation, lobbying or other effort to reform federal or state welfare laws. Lawyers were still allowed to represent individual clients seeking specific relief, such as a mistaken application of the law, but could not on behalf of these individual clients seek relief that involves "an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Thus LSC-funded attorneys could not participate in a lawsuit challenging the constitutionality of newly passed welfare reform laws.

In *Velazquez*, the Supreme Court struck down this restriction as an unconstitutional intrusion on the First Amendment rights of Legal Services clients and their lawyers. The majority wrote that when an LSC-funded lawyer represents a client in a benefits case, that attorney "speaks on behalf of the client....The lawyer is not the government's speaker." As the client's voice, the attorney must be free to advance all relevant arguments, the Court held, including possible challenges to the constitutionality of the federal or state welfare statutes. To restrict LSC lawyers in this way, the Court said, "distorts the legal system by altering the traditional role of the attorneys."¹⁶⁰

But just one week after handing down *Velazquez*, the Court refused to review a lower court decision upholding many other restrictions on LSC attorneys.¹⁶¹ These ongoing prohibitions severely hamper the work of legal service attorneys by limiting their representation of clients on a range of matters:

- **Class actions.** Lawyers receiving LSC funds are forbidden to initiate or participate in class-action lawsuits, even though class actions may be the most efficient way to represent clients who face a common problem.
- **Soliciting.** LSC-funded lawyers may not give “in-person unsolicited advice to...obtain counsel or take legal action.” The experience of legal services lawyers is that some of their neediest clients were unaware of their legal rights at the outset, including individuals who may not understand how to seek out a lawyer on their own.
- **Attorneys’ fees.** LSC lawyers are barred from seeking or collecting attorneys’ fees even if they prevail in cases that, under state or federal law, provide for the winning party to collect such payment from the loser. That is true even though LSC lawyers might be required to pay fees under some of these statutes were they to lose. For instance, in New York City housing courts, landlords may claim attorneys’ fees if they win but tenants represented by legal service lawyers may not, leaving landlords with no incentive to settle, and every incentive to escalate litigation.¹⁶²
- **Lobbying.** LSC-funded attorneys may not contact lawmakers or appear at legislative hearings unless directly invited to do so. They are also blocked from participating in rule-making proceedings at the administrative level. Like the ban on class action lawsuits, this restriction prevents legal services lawyers from solving their clients’ problems in the most efficient and comprehensive fashion.
- **Impermissible Clients.** Perhaps the most blatant move to deprive disfavored minorities of access to the courts is the 1996 provision prohibiting legal services lawyers from representing (1) jail or prison inmates, even those who have not been convicted or whose legal issue is unrelated to imprisonment; (2) public housing tenants facing eviction; and (3) illegal aliens or even certain groups of legal immigrants. Following enactment of the initial restrictions, Congress created an exception that permits LSC-funded lawyers to represent immigrants in domestic violence cases, but the other categorical restrictions stand.

The restrictions apply not only to the use of government funds, but to all programs run by a legal services office that receives any federal money. This device enables Congress to restrict the work of poverty lawyers beyond the scope of the federal subsidy. The passage of the 1996 restrictions prompted a “mass abdication” as legal services lawyers were forced to withdraw from more than 600 cases.¹⁶³

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Attacks on funding for legal services have persisted even after Congress imposed the stringent limitations on the conduct of legal services attorneys. For instance, House Republicans sought a 50 percent cut in LSC funding for fiscal year 2000. Rep. James Ramstad (R-MN) sponsored a successful floor amendment to restore funding and chided opponents for making “misleading, outdated charges” against LSC.¹⁶⁴

The Death Penalty Resource Centers are another victim of the campaign by some in Congress to limit access to the courts by disfavored litigants. Beginning in 1988, the federal government had funded several groups to provide experienced post-conviction representation to death row inmates. In addition to providing representation for indigent defendants, the centers tracked death penalty cases through the appeals process and helped arrange pro bono representation for defendants.

But in 1996, just as it was raising the procedural bar for defendants to file federal habeas petitions, Congress voted to eliminate funding for these 20 law centers. The action has severely cut the availability of legal assistance for those facing the death penalty. And the need for such lawyers is dire. Indigent defendants have no guaranteed right to counsel for state post-conviction review, but without it these defendants may waive defenses or miss critical deadlines.

So in the same year in which Congress so drastically stripped courts of their authority to vindicate the constitutional rights of prisoners and immigrants, it also limited the ability of such individuals to obtain lawyers. These events make clear that the court-stripping movement is motivated by more than abstract notions about the proper role of the judiciary. Rather, court-stripping and lawyer-stripping alike deprive disfavored minorities of the opportunity to litigate the questions that they inevitably lose in the legislative branch.

In effect, court-stripping and lawyer-stripping serve as a form of insurance for the same majoritarian interests that oppose the rights of immigrants and prisoners. These parallel tactics serve to insulate the majority’s legislative victories from review by the one branch of government established to protect the rights of minorities. These tactics short-circuit the Constitution itself.

CONCLUSION

For many years court-stripping was the subject of academic musing. Now it is embedded in federal statutes. Legal challenges to the three 1996 laws discussed in this report are forcing the courts to grapple with profound constitutional questions about the role of the judiciary – and Congress’s power to limit that role – more intensively than at any time in history. The new anti-terrorism law will surely spawn additional consideration of these questions.

It has not been the purpose of this report to reach definitive conclusions about the constitutionality of court-stripping. Appended to the report is an analysis of some of the constitutional questions presented by the court-stripping statutes, but the answers to those questions are not clear-cut. From *INS v. St. Cyr* we can discern that the broadest forms of court-stripping are unconstitutional, while *Felker v. Turpin* and *Miller v. French* suggest that more narrow limits on jurisdiction and remedies are permissible.

While the Supreme Court has utilized statutory interpretation as a first line of defense against court-stripping, and thereby mitigated the harsh consequences of these laws, there are limits to the Court’s capacity to avoid the central constitutional dilemma created by court-stripping: may Congress deprive courts of the ability to enforce the Constitution?

In *Felker*, the Court avoided the looming constitutional question by finding that Congress had not meant to preclude habeas corpus petitioners from bringing actions directly to the Supreme Court under its original jurisdiction. In *St. Cyr*, the Court avoided the “difficult” constitutional issue by interpreting the 1996 immigration law to preserve habeas corpus review for immigrants facing deportation. And in *Miller* the Court decided one constitutional issue – finding that the automatic stay provision of the PLRA did not offend the separation of powers doctrine – but left to another day whether the restrictions offended due process.

Perhaps the Justices hope that if they avoid the stark constitutional questions raised by these laws, Congress will refrain from amending them in a manner that makes resolution of the constitutional issues unavoidable. So far that approach has worked. But the cases leave the American people on the edge of a precipice – what if Congress were to amend the immigration law to more explicitly repeal habeas jurisdiction? Surely that would be unconstitutional, but can we count on judges to defend the ultimate prerogatives of the judiciary?

Ultimately, the point is broader. *Wherever* the Supreme Court finally sets the constitutional limits on congressional power to control federal jurisdiction, the policy arguments against court-stripping remain. In any of its many variations, including those in the recent antiterrorism bill, court-stripping is an unwise and dangerous legislative practice.

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As a practical matter, court-stripping may be self-defeating. Such legislation is typically motivated by congressional anger toward the content of certain court rulings. But removing future jurisdiction over the issue may simply serve to lock in “bad” precedent – a conundrum even some critics of so-called activist judging have acknowledged. Former Judge Bork notes that:

Some state courts would inevitably consider themselves bound by the federal precedents; others, no longer subject to review, might not. The best that Congress could hope for would be lack of uniformity. This is a far cry from amending the Constitution or even overruling a case. While it may seem preferable to some to lack uniformity on a particular issue rather than to have a repugnant uniform rule, the government could not easily bear many such cases and certainly could not long endure a complete lack of uniformity in federal law. Thus there are practical limitations on excessive use of the Exceptions Clause.¹⁶⁵

More troublesome is that court-stripping defeats the spirit of the Constitution. The Framers took care to create an independent judiciary to safeguard individual liberty. Removing important issues from the purview of the courts, especially those concerning the rights of unpopular minorities, is a direct assault on these constitutional protections. By the same token, Congress does great harm to the integrity of the federal judiciary when it leaves issues before the courts, but attempts to manipulate how judges may remedy violations of constitutional or statutory rights.

Even scholars who believe that the Constitution allows significant congressional control of federal jurisdiction generally agree it would be unwise to invoke it over any significant category of federal law or use it to achieve a desired substantive outcome.¹⁶⁶ Thus Professor Gerald Gunther, writing at the time Congress was considering court-stripping bills in the early 1980s regarding abortion, busing and school prayer, concluded “I would urge the conscientious legislator to vote against the recent jurisdiction-stripping devices because they are unwise and violate the ‘spirit’ of the Constitution, even though they are, in my view, within the sheer legal authority of Congress.”¹⁶⁷ Put another way, “[w]hat may be conceivable in theory would be devastating in practice to the real world system of checks and balances that has enabled our constitutional system to function for 200 years.”¹⁶⁸

A review of the three court-stripping laws enacted by Congress in 1996, as well as the parallel restrictions placed on legal services lawyers, demonstrates that these laws have begun to erode the rights of disfavored minorities in our society. Death row inmates now have less access to the courts to contest the constitutionality of their convictions, other prisoners have less ability to challenge their conditions of confinement, and, notwithstanding the *St. Cyr* decision, immigrants still have less recourse to the federal courts to review the often arbitrary and capricious determinations of the Immigration and Naturalization Service.

While it remains to be seen whether similar restrictions will spread to less vulnerable populations, either scenario is distressing: there will either be a diminution of civil rights and civil liberties in general, or a two-tiered system of justice will become entrenched, offering one clear, easy path for the majority and a tangled, difficult one for unpopular minorities.

Even the latter scenario has grave consequences for the broader society. As Winston Churchill observed a century ago: “The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal...measure[s] the stored-up strength of a nation and [is] sign and proof of the living virtue in it.”¹⁶⁹

Every schoolchild learns about the checks and balances in the American system of government. Much is at stake in the debate over whether those checks may be altered. Indeed, justice is in the balance.

APPENDIX: Is Court-Stripping Constitutional?

The body of this report has addressed the question: is court-stripping a wise policy? The report concludes that court-stripping is, in fact, dangerous and objectionable because it upsets the carefully considered structure and balance of the federal government. By undermining the role of the judiciary as a check on executive action, court-stripping diminishes government accountability. Court-stripping is especially threatening to the poor and vulnerable minorities in our society because they must often rely on the courts to vindicate their rights and interests.

Apart from the wisdom or foolishness of court-stripping as a policy, a separate question is whether it is permissible under the Constitution. The separation of powers doctrine that court-stripping offends emanates from the checks and balances in the Constitution itself. The Supreme Court has made clear that efforts to aggrandize one or two branches of government at the expense of the third branch may be invalid.

There is no clear answer to the constitutional question. Some types of court-stripping are blatantly unconstitutional. More subtle forms of court-stripping may or may not violate the Constitution. This Appendix addresses the technical legal issues involved in considering this question.

The Supreme Court has rarely been called upon to demarcate the constitutional limits on legislative control of the judicial branch. At various points in American history Congress has *threatened* to deprive the federal courts of jurisdiction over controversial matters, but typically lawmakers have pulled back before enacting such laws. The modern court-stripping movement has carried the country into uncharted legal waters.

Through the years, uncertainty about the legality of court-stripping has led to a healthy restraint on the part of both branches – in the absence of fixed boundaries, each branch had to be mindful of the prerogatives of the other within a zone of possible overlap or conflict. Now, however, Congress has grown bolder and is testing those boundaries. As a result, the balance between the legislative and judicial branches is shifting as the Supreme Court confronts the legality of the 1996 laws.

There are several distinct questions embedded in the general issue of congressional control of federal court jurisdiction. First, may Congress limit the appellate jurisdiction of the Supreme Court? Second, to what extent may Congress restrict the jurisdiction of the lower federal courts? Third, when may Congress, while allowing courts to retain jurisdiction over certain cases, control the manner in which those cases are heard or the available remedies?

Courts have been addressing these questions in earnest since the 1996 laws were enacted. Thus far, the Supreme Court seems inclined to uphold some significant restrictions on

federal jurisdiction, but certainly there are limits on the authority of Congress to legislate in this manner. The landmark immigration decisions last term suggest that some form of judicial review must be preserved in some contexts.

Nineteenth Century Precedents

The debate over congressional power to limit the appellate jurisdiction of the Supreme Court is grounded in the language of Article III of the Constitution. Specifically, Article III, § 2 states “[T]he Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” The import of the Exceptions Clause has been hotly debated by scholars for decades, with only two older Supreme Court opinions – *Ex Parte McCardle*¹⁷⁰ and *United States v. Klein*¹⁷¹ – to anchor the debate.

McCardle upheld the right of Congress to restrict Supreme Court appellate jurisdiction pursuant to the Exceptions Clause, at least in some instances. *McCardle* was a Mississippi newspaper editor arrested by federal agents for writing articles critical of military rule in the South during Reconstruction. *McCardle* challenged his detention, relying on an 1867 statute permitting federal courts to hear habeas corpus petitions from prisoners held by state or federal government. The law also gave the Supreme Court jurisdiction to hear appeals in such cases.

The Supreme Court agreed to hear *McCardle*’s case but, before it could rule, Congress passed a law repealing Supreme Court appellate jurisdiction under the 1867 habeas statute. The Supreme Court subsequently dismissed the case in light of the congressional action. The dismissal validated Congress’s power under the Exceptions Clause and has stood for the proposition that Congress may restrict the appellate jurisdiction of the Supreme Court. But the *McCardle* Court noted that the congressional action only eliminated Supreme Court jurisdiction under the 1867 law; the High Court still had its pre-existing power to review habeas petitions under the 1789 Judiciary Act – a fact that the Court explicitly relied upon one year later in *Ex parte Yerger*.¹⁷² If Congress had eliminated all Supreme Court review of habeas petitions, the *McCardle* Court might have reached a different result.

While *McCardle* is typically cited in support of Congress’s authority over Supreme Court jurisdiction under the Exceptions Clause, *Klein* is generally invoked to suggest the limits of this authority. Specifically, *Klein* holds that Congress may not restrict the Supreme Court’s appellate jurisdiction so as to dictate a particular substantive result in a class of cases.

The *Klein* case involved an action to recover property seized from Southerners by the government during the Civil War.¹⁷³ Legislation provided that former landowners could receive compensation for such seizures upon proof of loyalty to the United States. The

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Supreme Court had held that anyone who received a presidential pardon must be treated as “loyal” for purposes of recovery cases under the statute. But Congress subsequently enacted a law providing that a pardon would not constitute proof of loyalty and, on the contrary, that acceptance of a pardon stating that the recipient had taken part in the rebellion would constitute proof of *disloyalty* unless the recipient issued a written disclaimer.¹⁷⁴ Of importance here, the statute directed the Supreme Court to dismiss any pending claims based on a pardon for want of jurisdiction.

The Supreme Court held that the statute was unconstitutional. The Court objected that Congress was attempting to prescribe rules of decision for certain cases, thereby intruding into the province of the judiciary. The Court interpreted the removal of jurisdiction as a means to an end, an improper attempt to dictate substantive outcomes.¹⁷⁵

In the decades since *McCardle* and *Klein* were decided, scholars have hotly debated the proper reach of the Exceptions Clause. One set of arguments centers on the constitutional limits imposed by Article III itself. The most widely held theory involving so-called “internal restrictions” is that the Exceptions Clause does not apply to essential or core functions of the Court. Prominent legal scholar Henry Hart was an early proponent of this concept, arguing in 1953 that the Exceptions Clause could not be used in a way that “will destroy the essential role of the Supreme Court in the constitutional plan.”¹⁷⁶

This view has more recent adherents as well, including President Reagan’s first Attorney General, William French Smith. Smith wrote to the Republican-controlled Judiciary Committee in the midst of a debate over legislation to withdraw Supreme Court appellate jurisdiction in school prayer cases that it would be unconstitutional for Congress to “make exceptions to Supreme Court Jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.” According to Attorney General Smith, Congress’s power to limit the Supreme Court’s appellate jurisdiction stops at the point “where it impairs the Court’s core functions in the constitutional scheme.”¹⁷⁷

James Madison, writing in the *Federalist Papers*, No. 80, argued that the core functions of the judiciary include ensuring the supremacy and uniformity of federal law, and that congressional action to undermine these functions would be impermissible. This view continues to enjoy broad support today.¹⁷⁸ Beyond the Exceptions Clause, some scholars argue that limits on congressional control of the judiciary are implicit in the tenure and salary protections of Article III.¹⁷⁹

Whatever limits may be implied from the text and structure of Article III, it seems clear that Congress’s power to control jurisdiction is also bounded by the “external” constraints imposed by other portions of the Constitution, such as the Due Process and Equal Protection Clauses. At its most obvious, this means that Congress could not pass a law barring Supreme Court jurisdiction over cases brought by plaintiffs of a certain race or religion. Subtler restrictions may also run afoul of constitutional protections,

especially when directed at unpopular groups or claims.

Contemporary Precedents

The Supreme Court had an opportunity to confront these issues in *Felker v. Turpin*,¹⁸⁰ a case arising from one of the 1996 court-stripping laws (the Antiterrorism And Effective Death Penalty Act) but largely managed to avoid the long-running debate about court-stripping. As discussed in Chapter III of this report, the petitioner in *Felker* challenged the constitutionality of the so-called “gatekeeper” provision of the 1996 Act, which restricted the filing of second or successive habeas corpus petitions. The Supreme Court upheld the gatekeeper provision, noting that it has typically left it to Congress to determine the proper scope of the writ of habeas corpus. And it found that the statutory restrictions on second or successive petitions were not so severe as to amount to suspension of the writ in violation of Article I, §9.

However, the Supreme Court reached this determination only after specifying that the 1996 law did not restrict the Court’s original jurisdiction to hear habeas petitions, which it traced to the 1789 Judiciary Act: “We...conclude that the availability of such relief in this Court obviates any claim by petitioner under the Exceptions Clause of Article III, § 2, of the Constitution.”¹⁸¹ The Court went on to examine, and reject, the merits of the petitioner’s claim under the Court’s original jurisdiction.

The reasoning of the majority opinion in *Felker* basically tracked the 19th century *McCardle* and *Yerger* opinions and did not break new ground in clarifying the scope of congressional power under the Exceptions Clause. However, a concurring opinion written by Justice Souter, joined by Justices Stevens and Breyer, paid homage to the theory that the Exceptions Clause power does not extend to core or essential functions of the Court such as the need for Supreme Court review to ensure the uniformity of federal law. Souter agreed that the 1996 law had not foreclosed all avenues for the Court to review successive habeas claims. But he wrote that there might be a problem under the Exceptions Clause if it turned out that the Supreme Court were unable to review divergent interpretations of the “gatekeeper” rule by the circuits.

Lower Federal Courts

Just as the scope of congressional authority to limit the Supreme Court’s appellate jurisdiction remains imprecise, similar uncertainty surrounds the question of whether Congress may limit the jurisdiction of the lower federal courts.¹⁸²

Because the Constitution grants Congress discretion in deciding whether even to create lower federal courts, it is generally presumed that lawmakers may tailor the jurisdiction of these courts. The Supreme Court has endorsed this view, notably in the 1850 case of

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Sheldon v. Sill. In *Sheldon*, the Court backed the view that “Congress, having the power to establish the courts, must define their respective jurisdictions.”¹⁸³ The Court went on to state that, “having power to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.”¹⁸⁴

But questions about the extent of Congress’s power in this regard persist, and it is arguable that the Constitution requires lower federal court jurisdiction of at least some cases. Such arguments typically draw upon Justice Story’s reasoning in *Martin v. Hunter’s Lessee*.¹⁸⁵ Story focused on the Article III declaration that the judicial power of the United States “shall be vested” in one Supreme Court and in such inferior courts as Congress chooses to create. He concluded “[i]f, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*.” Story observed:

If it were otherwise, this anomaly would exist, that congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat jurisdiction as to all; for the constitution has not singled out any class on which congress are bound to act in preference to others.¹⁸⁶

Story also contended that the Supreme Court must be able to exercise its full appellate jurisdiction. Therefore, lower federal courts must be able to hear cases that can’t be heard in state court in order to permit Supreme Court appellate review of such cases. Story wrote:

[I]t would seem, therefore, to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.¹⁸⁷

Modern scholars have articulated a range of possible limits on the power of Congress to strip jurisdiction from the lower federal courts. For instance, the Equal Protection Clause may prohibit “jurisdictional gerrymandering” that channels some disfavored claims into state courts while other plaintiffs have a choice of federal or state court protection.¹⁸⁸ Moreover, lower federal courts may be needed to oversee state court resolution of federal constitutional challenges to government conduct.¹⁸⁹ Finally, lower federal courts may be necessary to ensure enforcement of Supreme Court decisions in complex areas such as desegregation and apportionment, and to hear some matters that implicate federal law, given the impossibility of Supreme Court review of all state court decisions implicating federal issues.¹⁹⁰

The Supreme Court has responded to these theories in an uneven fashion. It upheld significant restrictions on the jurisdiction of lower courts under the Norris-LaGuardia Act,

which restricted the role and powers of the federal courts in certain labor cases. Yet faced with other instances when Congress has seemingly enacted restrictions on lower court jurisdiction, the Supreme Court has struggled to construe these laws in a manner that avoids this troublesome question.¹⁹¹

One such case, *Oestereich v. Selective Service System*,¹⁹² arose from tensions surrounding the Vietnam War. The government sought to punish antiwar demonstrators by revoking their student deferments and moving to draft them. When various federal courts blocked this practice, Congress passed a law barring judicial review of such classifications. The Supreme Court nevertheless upheld one student's lawsuit challenging the legality of his reclassification. Surely, the court reasoned, the law was not meant to apply to a clearly illegal action by a draft board.

Most recently, the Court faced this question in two landmark immigration cases, *Immigration and Naturalization Service v. St. Cyr*¹⁹³ and *Calcano-Martinez v. Immigration and Naturalization Service*.¹⁹⁴ These cases (discussed in Chapter IV of this report) did not present an opportunity for the Court to answer all questions regarding the authority of Congress to limit lower federal court jurisdiction, but the Court sent a strong signal that broad court-stripping measures would be constitutionally unacceptable.

There are yet other limits on court-stripping. First, some courts have held that legislative restrictions on the judiciary may not run afoul of other clear constitutional mandates. As the Second Circuit has stated: "...while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property without due process of law, or to take private property without just compensation."¹⁹⁵ The Supreme Court recently noted that judicial review of administrative action may be mandated by the Due Process Clause.¹⁹⁶

Power to Restrict Certain Remedies

Closely related to whether Congress may remove an issue from federal review is the question of whether Congress may control the manner in which federal courts enforce their rulings. On the one hand, "Congress cannot bar all remedies for enforcing federal constitutional rights."¹⁹⁷ On the other hand, Congress may well be empowered to alter judicial procedures and remedies in particular classes of cases.

Harvard Law School Professor Laurence Tribe argues that pursuant to Article III, courts must have the means to resolve cases efficiently and to vindicate constitutional rights. Congressional authority to legislate available remedies, Tribe states, "stops short of the power to reduce an Article III court to a disarmed, disembodied oracle of the law lacking all capacity to give tangible meaning to its decisions."¹⁹⁸ Thus, in the case of a woman

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seeking an abortion or a minority child seeking access to an integrated public school, it may be insufficient to grant courts authority to approve money damages while denying courts the authority to issue restraining orders or injunctions.¹⁹⁹

Congress ventured into this murky territory in 1996 when it enacted the Prison Litigation Reform Act. Although the PLRA does not forbid injunctive relief for unconstitutional prison conditions, it places new restrictions on when such relief may be imposed and retained. While the Act's far-reaching constitutional implications were scarcely debated in Congress, adversely affected litigants immediately challenged the validity of the Act's provisions terminating existing injunctions and consent decrees. They argued that the statute violated the separation of powers doctrine by effectively reopening final judgments or dictating a "rule of decision" in prison conditions cases.

The Supreme Court seemed unimpressed with these arguments in the recent case of *Miller v. French*.²⁰⁰ As discussed in Chapter V of this report, *Miller* involved a federal court order entered in 1982 (well before passage of the PLRA) to remedy unconstitutional conditions at the Pendleton Correctional Facility in Indiana.²⁰¹ In 1997, Indiana filed a motion under the PLRA to terminate the injunction. Under the PLRA's "automatic stay" provisions, that action would have automatically suspended the court-ordered relief if the court did not make certain findings within 90 days to reaffirm the order as constitutionally necessary. Pendleton inmates challenged the automatic stay provision itself as unconstitutional.²⁰²

The Seventh Circuit found the automatic stay unconstitutional, ruling that Congress had breached the proper separation of the branches by effectively giving itself power to review the decisions of Article III courts. The automatic stay "is a self-executing legislative determination that a specific decree of a federal court... must be set aside at least for a period of time, no matter what the equities, no matter what the urgency of keeping it in place. This amounts to unconstitutional intrusion on the power of the courts to adjudicate cases."²⁰³ The circuit court also found that the automatic stay provision imposed a rule of decision on a pending case in contravention of *United States v. Klein*.

But the Supreme Court rejected the separation of powers claim and reversed the Seventh Circuit in a 5-4 decision written by Justice O'Connor. While Congress may not order the courts to reopen final judgments in cases already decided, the majority concluded that the injunctive relief ordered by the district court regarding Pendleton was not a final judgment, since it was subject to ongoing oversight and possible revision by the court. "When Congress changes the law underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law."²⁰⁴ The Court left open the possibility that the 90 days deadline in the statute to prove the necessity of ongoing relief might prove to be an unconstitutional violation of due process.²⁰⁵

Of the four dissenting Justices, two (Souter and Ginsburg) found that the law implicat-

ed separation of powers as well as due process issues, while two (Breyer and Stevens) would not have reached the constitutional issues because they believed the Act could be construed to preserve a court's equitable powers to keep an injunction in place after 90 days, notwithstanding the automatic stay.²⁰⁶

Miller, therefore, does little to resolve the ultimate question of how much court-stripping is constitutional. Like *Felker* before it, *Miller* holds that some legislative regulation of the judicial process is permissible. But like *St. Cyr* after it, *Miller* suggests that at some point such regulations must fail. In none of these cases has the Court drawn a bright line to show Congress the limits of its efforts to restrict judicial authority.

Some forms of court-stripping may be constitutional and other forms may be unconstitutional. But all efforts to tinker with the carefully wrought architecture of the Constitution are unwise, for the reasons described in the body of this report.

ENDNOTES

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² 323 U.S. 214 (1944).

³ 354 U.S. 178 (1957).

⁴ Lancaster, “Anti-Terrorism Bill is Approved,” *Washington Post*, October 13, 2001, at A1.

⁵ 319 U.S. 624, 638 (1943).

⁶ Erwin Chemerinsky, Appendix to “Balancing Act: Legislative Power and Judicial Independence,” Report of the Task Force of Citizens for Independent Courts, in *Uncertain Justice*, 225-6 (2000).

⁷ 1 Annals of Cong. 458 (Gales & Seaton ed.) (June 8, 1789).

⁸ 5 U.S. (1 Cranch) 137 (1803).

⁹ 5 U.S. at 177.

¹⁰ Chemerinsky, *supra*, at 226.

¹¹ California Bar Journal, January 2000, at 1. *See also* Chapter III discussion of Tennessee Supreme Court Justice Penny White.

¹² Abner J. Mikva, “The Judges v. the People: Judicial Independence and Democratic Ideals,” Benjamin N. Cardozo Lecture before the American Bar Association, Nov. 13, 1997.

¹³ *See, Dickerson v. United States*, 530 U.S. 428 (2000).

¹⁴ Statement of Bruce Fein, “Judicial Activism: Defining the Problem and Its Impact,” Hearings before the Subcommittee on the Constitution, Federalism and Property Rights of the Committee on the Judiciary, U.S. Senate, 105th Cong., June 11, July 15 and 29, 1997, S. Hrg. 105-261, p. 26.

¹⁵ Fallon, Meltzer and Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 7-9 (4th ed. 1996).

¹⁶ U.S. Constitution, Article III, §1.

- ¹⁷Task Force Report of Citizens for Independent Courts, *Uncertain Justice* 131 (2000).
- ¹⁸Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 896-7 (April, 1984).
- ¹⁹See Appendix for a discussion of *McCardle* and related constitutional issues.
- ²⁰See Hart & Wechsler, *supra*, at 363 (1996).
- ²¹303 U.S. 323 (1938).
- ²²See Vicky Jackson, *Congressional Control of Jurisdiction and the Future of the Federal Courts – Opposition, Agreement and Hierarchy*, 86 Geo. L.J. 2445, 2446 n. 4 (1998). See also Hart & Wechsler, *supra*, at 382-4.
- ²³See Barry Friedman, ‘*Things Forgotten*’ in the Debate Over Judicial Independence, 14 Ga. State U. L. Rev. 737, 750-52 n.78 (1998).
- ²⁴See, Gunther, *supra*, 36 Stan. L. Rev. at 897 n.6.
- ²⁵Gerald Gunther, *Constitutional Law*, 46 (12th ed., 1991).
- ²⁶*Id.* at 47.
- ²⁷See Gunther, *supra*, 36 Stan. L. Rev. at 895 (quoting 130 Cong. Rec. S2901 (daily ed. Mar. 20, 1984) (statement of Sen. Helms)).
- ²⁸S. 481, 97th Cong. (1981); H.R. 4756, 97th Cong. (1981).
- ²⁹S. 158, 97th Cong. (1981), H.R. 3225, 97th Cong. (1981).
- ³⁰Greenhouse, “How Congress Curtailed the Courts’ Jurisdiction,” *New York Times*, October 27, 1996, at E5.
- ³¹Sentencing Reform Act of 1984, Pub. L. No. 98-225.
- ³²Kate Stith and Jose A. Cabranes, *Fear of Judging* (University of Chicago Press 1998). See also, Ronald Weich, *Managed Care and Managed Sentencing – A Tale of Two Systems*, 11 Federal Sentencing Reporter 139 (1998) (arguing that in enacting mandatory sentencing laws, Congress has deprived judges of needed authority and unwisely arrogated too much power to itself).
- ³³Edwin Meese III, “Putting the Federal Judiciary Back on the Constitutional Track,” Report to the Senate Committee, Committee Brief No. 29, June 30, 1997 (adapted from

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testimony before the Senate Judiciary Subcommittee on the Constitution, Federalism and Property Rights, June 11, 1997).

³⁴ American Civil Liberties Union, *Not Moderate, Not Compassionate, Not Conservative: John Ashcroft's Radical Revisionism Of Basic Constitutional Values in America* 15 (January 2001).

³⁵ "Judges: Attacks on Baer Go Too Far," *Legal Times*, April 1, 1996, at 12.

³⁶ "Buchanan Declares Himself 'Future of This Party'," *U.S.A. Today*, October 15, 1996.

³⁷ Pub. L. No. 106-120, § 805.

³⁸ Abraham, "Reclaiming the Conservative Constitution," Heritage Lecture No. 591, April 19, 1997.

³⁹ HR 1252, 105th Cong. (1998). *See also*, Jackson, *supra*, 86 Geo. L. J. at 2450, n.26 (citing to 144 Cong. Rec. H2253, H2272, H2285-86 (1998)).

⁴⁰ Joan Biskupic, "Hill Republicans Target 'Judicial Activism'," *Washington Post*, Sept. 14, 1997, at A-1.

⁴¹ "Judicial Improvement Act of 1998," S. 2163, 105th Cong. (1998); reintroduced in 106th Congress as S. 248.

⁴² 144 Cong. Rec. S6187-88 (June 11, 1998) (statement of Sen. Hatch).

⁴³ 145 Cong. Rec. H4486 (daily ed. June 17, 1999) (Aderholt amendment to H.R. 1501, adopted 248-180).

⁴⁴ Berkman, "Nominating Judges is Taking Longer," *National Law Journal*, September 27, 1999.

⁴⁵ Task Force of Citizens for Independent Courts, *Uncertain Justice*, Table 10 at 58 (2000).

⁴⁶ *See generally*, *Conserving Judicial Resources, the Caseload of the U.S. Court of Appeals for the District of Columbia Circuit and the Appropriate Allocation of Judgeships: Hearing before the Subcommittee on Administrative Oversight and the Courts, Senate Judiciary Committee*, 104th Cong. 827 (October 17, 1995).

⁴⁷ Hon. Ruth Bader Ginsburg, "Remarks on Judicial Independence: The Situation of the U.S. Federal Judiciary," Address at the University of Melbourne Law School, January 2001.

- ⁴⁸ See, e.g., H.J. Res. 71, 102nd Cong. (1991).
- ⁴⁹ See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001); See generally, Stephen B. Bright, *Is Fairness Irrelevant?*, 54 Wash & Lee L. Rev. 1, 19-20 (1997).
- ⁵⁰ See *Williamson v. Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995), *aff'd. sub nom. Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997), *rev'd as stated in Ross v. Ward*, 165 F.3d 793 (10th Cir. 1999).
- ⁵¹ See *State v. Burrell*, 561 So.2d 692 (La. 1990), *cert. denied*, 498 U.S. 1074 (1991).
- ⁵² Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innoc.html>.
- ⁵³ Federal prisoners may also file a habeas petition to challenge their convictions under federal law, but most of the federal habeas petitions – and most of the controversy – involve state prisoners. Technically, a federal habeas petition by a state prisoner is not an appeal of the original conviction, but a separate civil action charging that the conviction and subsequent incarceration was unconstitutional.
- ⁵⁴ 28 U.S.C. §§ 2241-2254. These provisions date to an 1867 law (since amended) providing federal habeas review for state prisoners. An earlier law, the Judiciary Act of 1789, had provided habeas relief for those in federal custody claiming constitutional violations. See Erwin Chemerinsky, *Federal Jurisdiction* 780 (2d ed. 1999).
- ⁵⁵ James Liebman, Jeffrey Fagan and Valerie West, *Broken System: Error Rates in Capital Cases, 1973-1995*, 9 (Columbia Law School 2000).
- ⁵⁶ See, *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986).
- ⁵⁷ See, Stephen B Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, but for the Worst Lawyer*, 103 Yale L. J. 1385, 1845, n.56 (May 1994).
- ⁵⁸ See, *Commonwealth v. Nieves*, 746 A.2d 1102 (Pa. 2000).
- ⁵⁹ See, e.g., American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990); Bright, *supra* 103 Yale L. J. 1385; Bright, *supra* 54 Wash. & Lee L. Rev. 1.
- ⁶⁰ For a comprehensive critique of the quality of trial counsel in capital cases, see Bright, *supra*, 103 Yale L. J. 1385.
- ⁶¹ See *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).
- ⁶² Bright, et. al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial*

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Independence Preclude Due Process in Capital Cases?, 31 Colum. Hum. Rts. L. Rev. 123, 137-42, 156 (1999). See also Chapter I discussion of California Chief Justice Rose Bird.

⁶³ Freedberg, "DNA Clears Inmate Too Late," *St. Petersburg Times*, December 15, 2000.

⁶⁴ See *Miller v. Wainwright*, 798 F.2d 426 (11th Cir. 1986).

⁶⁵ Butterfield, "Death Sentences Being Overturned in 2 of 3 Appeals," *New York Times*, June 12, 2000, at A-1.

⁶⁶ Hansen, "Death Knell for Death Row?" *ABA Journal*, June 2000, 40-41.

⁶⁷ Vivian Berger at "Closing the Courthouse Doors: Contemporary Congressional Limits on Federal Jurisdiction," symposium at Harvard Law School, March 10, 2001.

⁶⁸ See 28 U.S.C. § 2244 (d)(1).

⁶⁹ See 28 U.S.C. § 2254 (e)(2). The inmate must show (1) the new claim rests either on a rule of law that the Supreme Court has made retroactive or on facts that could not have been discovered earlier; and (2) the facts underlying the claim establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact-finder would have found the petitioner guilty of the underlying offense.

⁷⁰ See 28 U.S.C. § 2244 (b)(3)(B) - (E).

⁷¹ See *Brown v. Allen*, 344 U.S. 443 (1953).

⁷² See 28 U.S.C. § 2254 (d)(1).

⁷³ 141 Cong. Rec. S7840-42 (daily ed. June 7, 1995).

⁷⁴ The Appendix to the report discusses these cases in the context of addressing the constitutional limits on court-stripping. The discussion here highlights how the cases will shape the content of federal habeas review.

⁷⁵ 518 U.S. 651 (1996).

⁷⁶ 518 U.S. at 654, 663-64.

⁷⁷ 529 U.S. 362 (2000) (*Williams I*).

⁷⁸ 529 U.S. at 369-373.

⁷⁹ 529 U.S. at 410-412.

⁸⁰ 529 U.S. 420 (2000).

⁸⁰ 529 U.S. at 426-28.

⁸² 529 U.S. at 433-442.

⁸³ Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 *Buff. L. Rev.* 381, 388 (1996).

⁸⁴ See Bright, *supra*, 54 *Wash. & Lee L. Rev.* at 8.

⁸⁵ See Alexander Rundlet, *Opting for Death: State Responses to the AEDPA's Opt-In Provisions and the Need for a Right to Post-Conviction Counsel*, 1 *U. Pa. J. Const. L.* 3 (1999).

⁸⁶ See Chapter VI, *infra*.

⁸⁷ See *Neal v. Puckett*, 239 F.3d 683, 694 (5th Cir. 2001).

⁸⁸ See *Tucker v. Catoe*, 221 F.3d 600, 612 (4th Cir.), *cert. denied*, 531 U.S. 1054 (2000).

⁸⁹ See *Tran v. Lindsey*, 212 F.3d 1143 (9th Cir.); *cert. denied*, 531 U.S. 944 (2000).

⁹⁰ Larry Yackle at “Closing the Courthouse Doors: Contemporary Congressional Limits on Federal Jurisdiction,” symposium at Harvard Law School, March 10, 2001.

⁹¹ See Weich, “Innocence Protection Act: Death Penalty Reform on the Horizon,” *The Champion* (April 2001) at 18.

⁹² See S. 486, § 204, which would amend 28 U.S.C. § 2254(e) to state that “the court shall neither presume a finding of fact made by a State court to be correct nor decline to consider a claim on the ground that the applicant failed to raise such claim in State court at the time and in the manner prescribed by State law” if the state has not complied with standards to be formulated by a National Commission on Capital Representation.

⁹³ See <http://www.aclu.org/features/imstories.html> at 2.

⁹⁴ See Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 *Conn. L. Rev.* 1411, 1441 n. 154 (1997).

⁹⁵ See 1996 *Cong. Qtrly. Almanac* at 5-16.

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⁹⁶ See Benson, *supra*, 29 Conn. L. Rev. at 1494, n.159.

⁹⁷ See Lawyers' Committee for Human Rights, *Is This America? The Denial of Due Process to Asylum Seekers in the United States* § I.B. (October 2000).

⁹⁸ A detailed analysis of the immigration provisions in the terrorism bill, and the transitional rules, can be found in Lucas Guttentag's "The 1996 Immigration Act: Federal Court Jurisdiction – Statutory Restrictions And Constitutional Rights," Interpreter Releases, vol. 74, No. 6.

⁹⁹ Perhaps mindful that the term "summary exclusion" had a harsh ring to it, lawmakers replaced the abbreviated procedures first enacted in the terrorism bill with a new procedure called "expedited removal."

¹⁰⁰ See IIRIRA § 302(a), amended INA § 236(b)(2), 8 U.S.C. § 1252 (b)(1).

¹⁰¹ See IIRIRA § 306 (a)(2) amended INA § 242 (a)(2)(A)(i), 8 USC § 1252 (a)(2)(A)(i).

¹⁰² See IIRIRA § 306 (a)(2), amended INA § 242 (e)(1)(B), 8 USC § 1252 (e)(1)(B).

¹⁰³ See Benson, *supra*, 29 Conn. L. Rev. at 1446.

¹⁰⁴ See 8 U.S.C. § 1252 (a)(2)(B)(i).

¹⁰⁵ See 8 U.S.C. § 1252 (g). See also, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

¹⁰⁶ See amended INA §242(f)(1), 8 USC §1252(f)(1).

¹⁰⁷ The law does flatly prohibit class action lawsuits over another set of potential claims, namely certain claims filed under the Immigration Reform and Control Act of 1986. See, 8 U.S.C. §1255a(f)(4)(C).

¹⁰⁸ See 8 USC §1252(f)(2).

¹⁰⁹ 121 S. Ct. 2271, 2279 (2001) (emphasis added)

¹¹⁰ See, e.g., *Salameda v. INS*, 70 F. 3rd 447, 449 (7th Cir. 1995) (pre-1996 judicial oversight of discretionary decision resulting in reversal of government action).

¹¹¹ Lawyers' Committee for Human Rights, *supra*.

¹¹² *Id.*

¹¹³ See Hedges, “Condemned Again for Old Crimes,” *New York Times*, August 30, 2000, at A1.

¹¹⁴ See <http://www.aclu.org/features/imstories.html> at 5.

¹¹⁵ See Hedges, *supra*.

¹¹⁶ A related abuse, the indefinite detention of deportees whose countries of origin will not accept them, was recently struck down by the Supreme Court in *Zadvyas v. Davis*, 121 S. Ct. 2491 (2001).

¹¹⁷ McCollum went further on behalf of a well-connected immigrant facing deportation, sponsoring a private relief bill to halt the deportation of the son of a prominent Florida Republican who was convicted on 13 felony drug charges of theft and fraud. Anthony Lewis, “The Quality of Mercy,” *New York Times*, February 27, 1999.

¹¹⁸ *Yellen v. Ada County*, No. 83-1026 (Idaho 1985)

¹¹⁹ *Cason v. Seckinger*, No. 84-CV-313 (M.D. Ga. 1994) (consent decree).

¹²⁰ Although eventually enacted in 1996, the Act continued to carry a short title referring to 1995, the year it was introduced and passed the Senate.

¹²¹ See James Robertson, *Psychological Injury and the Prison Litigation Reform Act: A ‘Not Exactly,’ Equal Protection Analysis*, 37 Harv. J. on Legis. 105, 108 (Winter 2000).

¹²² *Id.* at 110.

¹²³ See *Monroe v. Pape*, 365 U.S. 167 (1961).

¹²⁴ John J. Dilulio, Jr., “Conclusion: What Judges Can Do to Improve Prisons and Jails”, cited in Robertson, *supra* 37 Harv. J. on Legis. at 112. See also Robertson, *supra*, 37 Harv. J. on Legis. at 112, n. 53.

¹²⁵ See Administrative Office of the U.S. Courts, Sourcebook of Criminal Justice Statistics.

¹²⁶ See Pub. L. No. 96-247 (1980) (codified as 42 U.S.C. § 1997-1997j (1994)).

¹²⁷ 141 Cong. Rec. S14626 (daily ed. Sept. 29, 1995).

¹²⁸ See, e.g., *Women Prisoners of the D.C. Dep’t of Corrections v. District of Columbia*, 968 F. Supp. 744 (D.D.C. 1997).

¹²⁹ See *Robert K. v. Bell*, No. 83-287 (South Carolina 1984.)

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¹³⁰ See *Austin v. Dept of Corrections*, 1992 U.S. Dist. LEXIS 14971 (E. D. Pa. 1992).

¹³¹ This summary includes the 1997 amendments to the PLRA. For an excellent and more detailed guide to the PLRA and the court decisions interpreting it, see John Boston, “The Prison Litigation Reform Act” in *The Legal Aid Society, Prisoners’ Rights Project* (updated November 24, 2000) (“Boston Report”).

¹³² 18 U.S.C. § 3626(b) et. seq.

¹³³ 18 U.S.C. § 3626(e).

¹³⁴ The provision to extend the automatic stay an additional 60 days was added in the 1997 amendments, along with language specifying that state legislators could challenge a court order or consent decree. Pub. L. 105-119, Title I, § 123(a), November 26, 1997.

¹³⁵ 18 U.S.C. § 3626(a)(3).

¹³⁶ 18 U.S.C. § 3626(f).

¹³⁷ See *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (barring claim for damages for violation of the right to religious freedom); *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998) (barring damages claim that right to privacy was violated by disclosure of HIV-positive status); *but see Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999) (refusing to bar damages claim for First Amendment freedom of speech violation); *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998) (refusing to interpret statute to bar damages claim for religious freedom claim, but dismissing claim on another ground).

¹³⁸ 530 U.S. 327 (2000).

¹³⁹ See *French v. Owens*, 538 F. Supp. 910 (S.D. Ind. 1982). This original injunction was later modified by the trial court, then portions were affirmed by the Seventh Circuit. See *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985).

¹⁴⁰ See generally, the Boston Report, *supra*.

¹⁴¹ 121 S. Ct. 1819 (2001).

¹⁴² See *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), *cert. granted sub nom. Porter v. Nussle*, 121 S. Ct. 2213 (2001).

¹⁴³ See Survey in *Corrections Compendium*, Vol. 25, No. 7 (July 2000).

¹⁴⁴ 530 U.S. at 357 (dissent by Justice Breyer).

¹⁴⁵ See Testimony of Mark Soler, President of the Youth Law Center, before the Senate Judiciary Committee, September 12, 1996.

¹⁴⁶ See Elizabeth Alexander, *A Troubling Response to Overcrowded Prisons*, *Civil Rights Journal* 25, 28 (Fall 1998).

¹⁴⁷ See Administrative Office of the U.S. Courts, *Sourcebook of Criminal Justice Statistics*.

¹⁴⁸ See *Abdul-Akbar v. McKelvie*, 239 F.3d 307 (3d Cir.) (en banc), *cert. denied*, 121 S. Ct. 2600 (2001).

¹⁴⁹ See *Luong v. Hatt*, 979 F. Supp. 481 (N.D. Tex. 1997).

¹⁵⁰ 979 F. Supp. at 483-486.

¹⁵¹ 145 Cong. Rec. S9103 (daily ed. July 22, 1999).

¹⁵² H.R. 1252, 105th Cong. (1998).

¹⁵³ Mikva, "Welcome to the Dark Side of Judicial Reform," *Legal Times*, June 1, 1998, at 29.

¹⁵⁴ "Four Guards Held in Sexual Abuse of Women in County Jail," *New York Times*, January 27, 2000.

¹⁵⁵ "Mass Move Adds Inmates to Alabama's Crowded State Prisons," *New York Times*, May 9, 2001, at A21.

¹⁵⁶ Alvin Bronstein and Jenni Gainsborough, *Prison Litigation: Past, Present and Future*, *Overcrowded Times*, Vol. 7, No. 3 (June 1996).

¹⁵⁷ *Johnson v. Phelan*, 69 F. 3d 144, 152 (7th Cir. 1995) (concur/dissent).

¹⁵⁸ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §504, 110 Stat. 1321-53 (1996).

¹⁵⁹ 531 U.S. 533 (2001).

¹⁶⁰ *Id.*

¹⁶¹ *Velazquez v. Legal Services Corp.* 121 S. Ct. 1224 (2001) (denying cert.).

¹⁶² David S. Udell, *Implications Of The Legal Services Struggled For Other Government Grants For Lawyering For The Poor*, 25 *Fordham Urban Law Journal* 901, 903 (1998).

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¹⁶³ *Id.* at 904.

¹⁶⁴ 145 Cong. Rec. H7006 (daily ed. Aug. 4, 1999).

¹⁶⁵ See Robert Bork, Speech at the Federalist Society Symposium: Tenth Anniversary Banquet, 13 J.L. & Pol. 513, 517 (1997); see, Julian Velasco, *Congressional Control Over Federal Court Jurisdiction*, 46 Cath. U. L. Rev. 671, 754-5 (Spring 1997).

¹⁶⁶ See Task Force of Citizens for Independent Courts, *Uncertain Justice*, *supra*, at 218.

¹⁶⁷ See Gunther *supra* 36 Stan. L. Rev. at 921.

¹⁶⁸ See Amicus Brief of the American Civil Liberties Union in *Felker v. Turpin*, *supra*, at 10.

¹⁶⁹ Winston S. Churchill, Hansard column 1354, 20 July 1910.

¹⁷⁰ 74 U.S. (7 Wall) 506 (1869).

¹⁷¹ 80 U.S. (13 Wall) 128 (1872).

¹⁷² Task Force of Citizens for Independent Courts, *Uncertain Justice* 231 (2000).

¹⁷³ See *Klein*, *supra*, 80 U.S. at 132.

¹⁷⁴ *Id.* at 131-34. See also Fallon, Meltzer and Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 367-8 (4th ed. 1996).

¹⁷⁵ *Id.* at 146-48.

¹⁷⁶ Gunther, *supra*, 36 Stan. L. Rev. 895, 901-02 (1984) (citing Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953)).

¹⁷⁷ Gunther, *supra*, 36 Stan. L. Rev. at 902, n.29 (citing letter from Attorney General William French Smith to Sen. Strom Thurmond (May 6, 1982) reprinted in 128 Cong. Rec. S4727-30 (daily ed. May 6, 1982)).

¹⁷⁸ American Civil Liberties Union Amicus Brief in *Felker v. Turpin* (October 1995) at <http://www.aclu.org/court/felker.html>, p.12.

¹⁷⁹ Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts* 95 Harv. L. R. 17, 67-8 (1981).

¹⁸⁰ 518 U.S. 651 (1996).

¹⁸¹ 518 U.S. at 654.

¹⁸² An extensive discussion of this question is found in Erwin Chemerinsky, *Federal Jurisdiction* §3.3 (2d. ed. 1999).

¹⁸³ *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850).

¹⁸⁴ *Id.* at 449.

¹⁸⁵ 14 U.S. (1 Wheat) 304 (1816).

¹⁸⁶ *Id.* at 330.

¹⁸⁷ *Id.* at 331.

¹⁸⁸ Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129 (1981).

¹⁸⁹ See Sager *supra*, 95 Harv. L. Rev. at 64.

¹⁹⁰ Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 513 (1974).

¹⁹¹ See *Uncertain Justice*, *supra*, at 233-4, citing *Johnson v. Robison and Oestereich v. Selective Service System*.

¹⁹² 393 U.S. 233 (1968).

¹⁹³ 121 S. Ct. 2268 (2001).

¹⁹⁴ 121 S. Ct. 2271 (2001).

¹⁹⁵ *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

¹⁹⁶ *Zadvydas v. Davis*, 121 S. Ct. 2491, 2500 (2001).

¹⁹⁷ See *Gunther*, *supra*, 36 Stan. L. Rev. at 921, n. 113.

¹⁹⁸ See Tribe *supra* 16 Harv. C.R.-C.L. L. Rev. at 137.

¹⁹⁹ See *Id.* at 138-39; Sager *supra* 95 Harv. L. Rev. at 85-86.

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²⁰⁰ 530 U.S. 327 (2000).

²⁰¹ See *French v. Owens*, 538 F. Supp. 910 (S.D. Ind. 1982). This original injunction was later modified by the trial court, then portions were affirmed by the Seventh Circuit. See *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985).

²⁰² See *Miller v. French supra*, 530 U.S. at 334.

²⁰³ 530 U.S. at 349-50.

²⁰⁴ *Id.* at 348.

²⁰⁵ *Id.* at 350.

²⁰⁶ Souter and Ginsburg concurred with parts of the majority opinion, but split with the majority over whether separation of powers concerns were implicated by the automatic stay. *Id.* at 351.