Florida Law Review

Volume 72 | Issue 6 Article 4

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HABEAS MENTEM: REVISITING SUFFICIENCY-OF-COUNSEL STANDARDS IN POST-AEDPA HABEAS CORPUS PROCEEDINGS

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Abstract

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) has contributed to long-standing complexities in our understanding of habeas corpus and its function as a device for judicial inquiry into the constitutionality of imprisonment. Since its passage and subsequent interpretations by Congress and the courts, criminal defendants have faced heightened challenges in seeking federal review of their state convictions. The United States Supreme Court has yet to recognize a concrete right to counsel for post-conviction proceedings—during which most criminal defendants file their habeas petitions claiming, for example, ineffective assistance of trial counsel—meaning that a large number of defendants file their petitions without the aid of competent counsel. A criminal defendant in this position risks defaulting his right to litigate the merits of his habeas petition if represented by an attorney without the requisite experience in the procedural difficulties of habeas corpus at the state and federal levels and in the interplay between the two court systems.

This Note discusses these procedural deficiencies and their grave consequences against the backdrop of AEDPA's opt-in provisions. These provide that should a state hold itself out to the United States Attorney General as having in place an adequate mechanism for providing counsel in post-conviction proceedings, that state then has the opportunity to opt into AEDPA and receive expedited federal review of capital habeas petitions originating in the state. These provisions were instituted in an effort to liberate the federal docket from consideration of frequent state habeas petitions. But in its delegation to the Attorney General of this decision-making authority, Congress failed to provide comprehensive criteria by which the states and the Attorney General may assess the post-conviction mechanism of any given state and the attorneys that comprise it. Implicit in this unintelligible delegation of legislative authority is an unacceptable endorsement of unfettered Attorney General discretion in

* J.D., University of Florida Levin College of Law 2020; B.A., Cornell University 2017. Thank you to Professor John Stinneford for his mentorship throughout the note-writing process; to my family, for their profound support and love; and to my peers and friends on the *Florida Law Review*, especially AJ D'Amico, Anne Kelley, Patrick Hosch, Ana Paladino, and Amanda Kreger, for their brilliant commitment to preparing my piece for publication. I dedicate this Note to my father: my ultimate authority on the law and truest model of an inspired and honorable advocate.

deciding which states may qualify for quickened and arbitrary review of capital habeas petitions.

With lives on the line and criminal law reform at the forefront of the nation's conscience, Congress should revisit AEDPA's opt-in provisions and provide clearer guidelines by which a state may model its post-conviction proceedings to benefit from expedited federal capital habeas processing. Providing such a framework would reorganize the country's priorities away from an emphasis on an "effective" death penalty and towards the importance of providing criminal defendants, especially capital defendants, with adequate post-conviction counsel. This would ensure that state courts litigate habeas petitions to the fullest extent by lawyers experienced in complex habeas corpus proceedings before such proceedings ever need to reach federal review. If states truly desire the proposed benefits of opting into AEDPA, they must first provide their capital defendants with the tools and competent representation that they deserve and that the Constitution ensures.

> Down this road there will be more education and less priestly mandate, more advice and less control, more consultation and less prescription, more facts and fewer arcane pronouncements.[1]
>
> —Fillmore H. Sanford

INTRODUCTION

On April 19, 1995, Timothy McVeigh and his accomplices detonated a truck full of explosives adjacent to the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people and injuring hundreds more.[2] President Bill Clinton afterwards sought to assuage the fears of the nation with respect to domestic terrorism[3] by signing legislation to

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1. Fillmore H. Sanford, *Creative Health and the Principle of Habeas Mentem*, 46 AM. J. PUB. HEALTH 139, 142, 144 (1956). The title of this Note was derived from Sanford's article, in which he discussed his predictions for the future of public health and the manner in which psychological institutions will evolve alongside it to address its most pressing aspects. *See generally id.* (predicting the future of public health and psychological institutions). Though the piece is largely geared towards health professions, Sanford's statements and advice may be extrapolated to other institutions in American society striving for a means to provide for and protect both the collective as well as the individual body and mind. "Habeas mentem" means "the right of a man to his own mind" and was thought to be coined by George Kelly in 1955. *Id.* at 144 & n.*.

2. *Oklahoma City Bombing*, FBI, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing [https://perma.cc/T2G9-ZNP9]. In letters to his friend, Bob Papovich, McVeigh explained his motivations for bombing the federal building:

> [T]he bombing was a retaliatory strike; a counter attack for the cumulative raids (and subsequent violence and damage) that federal agents had participated in over the preceding years . . . .
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> . . . .
>
> . . . [T]his bombing was meant as a pre-emptive (or pro-active) strike against these forces and their command and control centres within the federal building.
> . . .
>
> . . . .
>
> It was in this climate . . . that I reached the decision to go on the offensive - to put a check on government abuse of power where others ha[d] failed in stopping the federal juggernaut run amok.

Tracy McVeigh, *The McVeigh Letters: Why I Bombed Oklahoma*, GUARDIAN (May 6, 2001, 1:21 PM), https://www.theguardian.com/world/2001/may/06/mcveigh.usa [https://perma.cc/PVY4-ZBQ3].

3.

> The bombing in Oklahoma City was an attack on innocent children and defenseless citizens. It was an act of cowardice, and it was evil.

ensure criminal perpetrators like McVeigh were brought to justice and kept behind bars for most of their lives, if not for good.[4] The result was the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[5] an act hastily[6] thrown together in the wake of tragedy to appease the myriad of agendas circulating in Washington, D.C. three years into President Clinton's tenure and two years following Republican majorities in the House of Representatives and the Senate.[7]

The Act reflected President Clinton's surprising acquiescence to conservative attitudes[8] towards the availability of federal habeas corpus for criminal defendants, perhaps to foment support for his presidency and its policies in the face of waning political influence[9] or because he truly believed, partisanship notwithstanding, that such stringent habeas corpus reform was the solution to burgeoning crime rates in the United States towards the end of the twentieth century.[10] Regardless, since its passage, AEDPA has wreaked havoc on the nation's understanding of habeas

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> The United States will not tolerate it, and I will not allow the people of this country to be intimidated by evil cowards.
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> . . . .
>
> . . . Let there be no room for doubt. We will find the people who did this. When we do, justice will be swift, certain, and severe.
>
> These people are killers, and they must be treated like killers.

Terror in Oklahoma City: Official Response; Statements by the President and Attorney General, N.Y. TIMES (Apr. 20, 1995), https://www.nytimes.com/1995/04/20/us/terror-oklahoma-city-official-response-statements-president-attorney-general.html [https://perma.cc/9UFP-KJED].

4. *See* Liliana Segura, *Gutting Habeas Corpus: The Inside Story of How Bill Clinton Sacrificed Prisoners' Rights for Political Gain*, INTERCEPT (May 4, 2016, 1:54 PM), https://theintercept.com/2016/05/04/the-untold-story-of-bill-clintons-other-crime-bill/ [https://perma.cc/F2CD-7MUK] (explaining how, in an appearance on *60 Minutes* the Sunday after the bombing, President Clinton identified McVeigh's crime as one fit for capital punishment).

5. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

6. *See* Segura, *supra* note 4 ("AEDPA's dizzying provisions . . . were certainly a hasty response to terrorism.").

7. *Id.*

8. *See id.*

9. *See id.*

10. *See id.*; *see also* Lynn Adelman, *Who Killed Habeas Corpus?*, DISSENT (2018), https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-states-rights [https://perma.cc/2STE-95NL] ("He wanted to be perceived as being 'tough on crime,' and habeas corpus had no politically significant constituency. A terrible bill thus became the law of the land.").

corpus and the constitutional role that the Framers intended it to play in the progression of defendants through the criminal justice system.[11]

Today, the country finds itself in paradoxical times mirroring those that it faced twenty-three years ago. Then, a Democratic president passed suffocating restrictions on a criminal defendant's right to contest the constitutionality of his imprisonment;[12] now, a Republican president has signed legislation[13] kicking off an overhaul[14] of the criminal justice system and implementing a scheme of release for thousands of federal inmates over an anticipated period of ten years.[15]

This Note argues that, with the First Step Act of 2018[16] in its prototypical stages, now is the time to revisit aspects of AEDPA—namely, its opt-in provisions[17]—and to restore habeas corpus to its intended purview. A perfect storm of circumstances is passing through the nation, affording opportunities for activists and legislators to collaborate on refining the collective attitude towards defendants' constitutional rights and to lobby Congress to reconsider at least some of the most egregious aspects of AEDPA that have proven inarticulable and

11. *See generally* James Landman, *You Should Have the Body: Understanding Habeas Corpus*, 72 SOC. EDUC. 99 (2008) (discussing the history of habeas corpus and its constitutional role).

12. *See* 28 U.S.C. §§ 2241–2266 (2012); *see also* Nathan Nasrallah, Comment, *The Wall That AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act*, 66 CASE W. RES. L. REV. 1147, 1148 (2016) (bemoaning the "virtually impenetrable wall of isolation" that AEDPA as well as subsequent Supreme Court interpretations of AEDPA have built around habeas petitioners).

13. On December 21, 2018, President Donald Trump signed into law the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (to be codified in scattered sections of 18, 34, and 42 U.S.C.). *See #FirstStepAct*, #FIRSTSTEPACT, https://www.firststepact.org [https://perma.cc/TW7T-CFJP]; *see also* Andrea Drusch, *Trump's Prison Plan to Release Thousands of Inmates*, MCCLATCHY DC BUREAU (Dec. 21, 2018, 12:18 PM), https://www.mcclatchydc.com/news/politics-government/congress/article223414935.html [http://web.archive.org/web/20190704063430/https://www.mcclatchydc.com/news/politics-government/congress/article223414935.html] (describing the signing of the First Step Act and potential long-term impacts of the Act).

14. *Cf.* German Lopez, *The Senate's Criminal Justice Reform Bill Is Not an "Overhaul." It's a First Step.*, VOX (Dec. 19, 2018, 12:30 PM), https://www.vox.com/future-perfect/2018/12/19/18148413/first-step-act-senate-criminal-justice-reform-sweeping-overhaul [https://perma.cc/G889-T9ZU] (emphasizing that the First Step Act, as the name implies, is the first step of hopefully many in making "America's federal criminal justice system less punitive").

15. *See* Drusch, *supra* note 13.

16. Pub. L. No. 115-391, 132 Stat. 5194 (to be codified in scattered sections of 18, 34, and 42 U.S.C.).

17. *See* 28 U.S.C. §§ 2261–2266; *see also* Alexander Rundlet, Comment, *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. 661, 664 (1999) (arguing that AEDPA's opt-in provisions did not accomplish the "accomodat[ion of] fairness" that Congress intended for habeas petitioners in drafting them, especially for indigent capital defendants).

practicably unworkable for both the states seeking opt-in status[18] and the most esteemed members of the legal profession: the Justices of the Supreme Court.[19]

Part I of this Note sets forth a brief history of habeas corpus, tracking the evolution of "the Great Writ"[20] once it reached the American colonies alongside the historical conditions warranting its elaboration and application to new crimes and new types of criminals.

Part II contextualizes the passage of AEDPA; analyzes more closely its controversial opt-in provisions, codified at 28 U.S.C. §§ 2261–2266; and identifies its delegation to the United States Attorney General the authority to determine competency standards for appointed counsel in habeas corpus proceedings as exceptionally detrimental to the national conception of habeas corpus as a federal remedy and as an exemplar of state courts working in tandem with federal courts to administer justice consistent with constitutional principles.

Part III introduces the recently enacted First Step Act and discusses how its promise for criminal law reform makes the present day an appropriate time to revisit federal habeas corpus procedure and its bearing on state and federal court systems.

Part IV suggests that Congress return to the drawing board, particularly to AEDPA and its opt-in provisions as they relate to sufficiency of counsel which, at the moment, do not contain intelligible

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18. Though several have tried, no state has been able to opt into AEDPA. *See infra* note 56 and accompanying text.

19. *See, e.g.*, Adelman, *supra* note 10 (describing the Supreme Court's interpretations of AEDPA as "disturbing"); Lincoln Caplan, *The Destruction of Defendants' Rights*, NEW YORKER (June 21, 2015), https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights [https://perma.cc/3BC5-2EQ8] ("[T]he . . . Supreme Court has 'repeatedly interpreted [AEDPA] in the most inflexible and unyielding manner possible' . . . ." (quoting Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 (2015))); Jonathan R. Nash, *Statutory Limit on Federal Court Review of State Convictions Stifles Ideological Differences*, HILL (Dec. 11, 2017, 1:20 PM), https://thehill.com/opinion/criminal-justice/364275-Statutory-limit-on-federal-court-review-of-state-convictions-stifles-ideological-differences [https://perma.cc/EGC7-RGGL] ("AEDPA's requirements are so stringent that they allow the Supreme Court to decide by unanimous per curiam opinion a habeas case."); *see also* Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1228 (2012) ("Federal courts have devoted substantial energy since 1996 attempting to understand the intricate mechanics of the statute of limitations as applied, as well as its interplay with the remaining procedural doctrines. The resulting body of law is inordinately complex and vexing to even the most experienced jurists.").

20. Eve Brensike Primus, *Litigating Federal Habeas Corpus Cases: One Equitable Gateway at a Time*, AM. CONST. SOC'Y, July 2018, at 3; *see* Landman, *supra* note 11, at 99.

principles[21] by which states may model their post-conviction processes in satisfaction of the opt-in requirements. The current statute has spawned several consequences that are scattered along the spectrum of attitudes towards the death penalty specifically. At one end lies relief: If no state can opt into AEDPA, capital defendants are not exposed to expedited (and oftentimes, reckless) federal review of their cases to keep the federal habeas docket moving. At the other end lies discontent with the impossibility of opting into AEDPA and, inherent in this, the inefficiency of federal review of habeas petitions. This inefficiency ensures that capital defendants remain on death row for decades, straining the state resources that were already exhausted on litigating their cases.

More specifically, this Note proposes as a next step that Congress amend the opt-in provisions of AEDPA to explicitly mandate the minimum acceptable competency standards for appointed counsel in habeas corpus proceedings. In setting forth uniform standards by which every state may assess post-conviction counsel, habeas petitions stand a better chance of being litigated thoroughly and honestly at the state level, meaning that, perhaps, states would be able to successfully opt into AEDPA and federal habeas petitions, benefited by expedited review. Ultimately, this would liberate the federal docket, legitimize any necessary federal review of state habeas proceedings, and put into place workable mechanisms by which states may consider habeas petitions at their very inception.

I. A HISTORY OF HABEAS CORPUS IN THE UNITED STATES

The history of the writ of habeas corpus is as long as it is complex. With origins in English common law,[22] it was created by medieval courts to grant incarcerated individuals the opportunity to contest the legality of

21. *See* Mistretta v. United States, 488 U.S. 361, 374 (1989) (holding that Congress's delegation of power to the United States Sentencing Commission did not violate the nondelegation principle and, further, was "sufficiently specific and detailed to meet constitutional requirements"); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (finding that Congress must provide, in its delegation of authority, "an intelligible principle" for agencies to use as a guide in developing regulations).

22. Landman, *supra* note 11, at 99.

their imprisonment.[23] Since its foundation, the prerogative writ[24] has evolved with the transplant of English common law to American circumstances and exigencies.[25] Pieced together from the language in Article I, Section 9 of the Constitution,[26] the writ has functioned over time, as initially conceived, as a device for judicial inquiry into the constitutionality of one's imprisonment,[27] an extension of executive war power premised on the Suspension Clause,[28] and a means of and inspiration for legislative coordination between federal and state governments on issues of prisoners' rights and due process application.[29]

Given that the writ has never been explicitly provided for in any governing document since its inception,[30] it is no surprise that American legislatures and courts have struggled over time with adequately defining the scope and allocation of the various rights that the writ affords to criminal defendants. The Constitution defines the writ of habeas corpus by when it may not be denied: effectively, during times of peace.[31] Though there was little occasion during the late eighteenth century to exercise the writ,[32] the fundamental lack of clarity regarding which

23. *See Magna Carta Translation*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/featured-documents/magna-carta/translation.html [https://perma.cc/TN4A-PBMD] ("No freeman is to be taken or imprisoned . . . save by lawful judgement of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice."); *see also* Landman, *supra* note 11, at 99 ("The basic purpose of the writ of habeas corpus is to afford a person who has been detained the chance to challenge the legality of his or her detention."); Robert D. Pursley, *The Federal Habeas Corpus Process: Unraveling the Issues*, 7 CRIM. JUST. POL'Y REV. 115, 116 (1995) (describing the origination of the writ); *Jurisdiction: Habeas Corpus*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-habeas-corpus [https://perma.cc/7RE8-HHTV] (describing the general judicial process for the writ).

24. A prerogative writ is "[a]n antiquated term for any writ (court order) directed to government agencies, public officials, or another court." Cornell Law Sch., *Prerogative Writ*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/prerogative_writ [https://perma.cc/GRL7-MVP4].

25. *See* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 670 (2008).

26. *See* U.S. CONST. art. I, § 9 ("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.").

27. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82; CASSIA SPOHN & CRAIG HEMMENS, COURTS: A TEXT/READER 501 (2d ed. 2012) ("[H]abeas corpus challenges the constitutionality of one's confinement.").

28. President Abraham Lincoln premised his suspension of the writ of habeas corpus during the Civil War on the language in Article I, Section 9, commonly referred to as the Suspension Clause. *See* Landman, *supra* note 11, at 100; *see also* Zachary Cloud, *What Exactly is Habeas Corpus?*, CRIM. L. & PSYCHOL. BLOG (Aug. 19, 2012), https://zacharycloud.wordpress.com/2012/08/19/what-exactly-is-habeas-corpus/ [https://perma.cc/8PEQ-RBLK].

29. *See* Landman, *supra* note 11, at 101–03, 105; Pursley, *supra* note 23, at 118.

30. *See* Pursley, *supra* note 23, at 117.

31. *See* U.S. CONST. art. I, § 9.

32. *See* Pursley, *supra* note 23, at 117.

governmental authority was responsible for considering and ensuring the constitutionality of imprisonment under federal law prompted Congress to enact the Judiciary Act of 1789,[33] explicitly granting federal courts the power to issue the writ.[34]

The Civil War engendered concern and debate over concentrating this power in the federal judiciary. On the one hand, President Abraham Lincoln opined that its exercise and, more importantly, its suspension should be a joint power shared by both Congress and the Executive.[35] On the other hand, acrimony among the states, the South's ultimate secession from the Union, and the war that followed gave rise to the concern that state incarceration rates of northerners and persons recently freed from slavery in the South would increase unless checked by the federal mechanism.[36] Ultimately, these concerns prompted Congress to extend the writ of habeas corpus in 1867 to federal court review of state incarceration.[37]

From this expansion of judicial influence emerged a new dynamic between the seemingly ever-expanding power of the federal judiciary to review state incarceration and the states' interest in determining by their own standards the grounds on which to incarcerate and sustain incarceration.[38] Since the Habeas Corpus Act of 1867,[39] courts across the country have grappled with the availability of federal habeas corpus review for state court convictions out of a multifaceted fear of encroaching on state court independence and deemphasizing judicial

33. Ch. 20, 1 Stat. 73.

34. *See* Pursley, *supra* note 23, at 117.

35. *See Landman*, *supra* note 11, at 101 ("[A]re all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?" (quoting Abraham Lincoln, President, U.S., Address Before Congress (July 4, 1861))); *see also id.* at 101 (presenting the counterargument of Chief Justice Robert B. Taney in support of Congress's exclusive power to suspend the writ of habeas corpus).

36. Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 342 (1983).

37. Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385–86 (current version at 28 U.S.C. § 2241 (2012)); *see* Landman, *supra* note 11, at 102 (pointing out that, though the statute does not specifically reference the states or an explicit grant of federal power to review state convictions, the language "any person" who has been unlawfully "restrained" has been interpreted to encompass those at both the federal and state levels); Pursley, *supra* note 23, at 133 n.3 (pointing out the same).

38. *See* Landman, *supra* note 11, at 100.

39. Ch. 28, § 1, 14 Stat. 385, 385 (current version at 28 U.S.C. § 2241) ("That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus *in all cases where any person* may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ." (emphasis added)).

efficiency. This cautious approach to tackling the interstices of federal and state court systems via the habeas petition impeded the development of a seamless, uniform, and unambiguous habeas process.

The uncertainties in the scope and application of the writ—in particular, the exploitation of federal habeas corpus review by state court defendants—prompted the Judicial Conference of the United States to organize a committee over a century later in 1988 to discuss a means by which Congress could reduce the "unnecessary delay and repetition" that had been built into a federal court's review of state convictions.[40] Many of the recommendations that emerged from the subsequently titled "Powell Committee" were eventually codified in AEDPA, and they heavily emphasized the preeminence of state rights and resources in reviewing habeas corpus claims.[41] This emphasis sought to divert federal time and energy away from consideration of these petitions and streamlined the process of review at the state court level,[42] thus dealing a significant blow to the feasibility of effective review of many defendants' federal habeas claims.

II. THE PASSAGE OF AEDPA

Several political exigencies gave rise to the passage of AEDPA and its subsequent social consequences. Further, many of its provisions have complicated its application for most of those involved in the criminal justice system—most importantly, criminal defendants.

A. *The Predecessor Crime Bill of 1994*

AEDPA is a heavily criticized law.[43] It was passed the year after the Oklahoma City bombing and two years after the enactment of the controversial Violent Crime Control and Law Enforcement Act of 1994 (the 1994 Crime Bill).[44] The latter was passed in response to an uptick in crime, which culminated in a collection of what many have called

40. *See* Jon B. Gould, *Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus*, 29 JUST. SYS. J. 273, 274 (2008) (quoting AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT (1989), *reprinted in* 135 CONG. REC. 24,694 (1989)).

41. *Id.* at 274–75.

42. *Id.* at 274.

43. *See, e.g.*, Samuel R. Wiseman, *What is Federal Habeas Worth?*, 67 FLA. L. REV. 1157, 1160 (2015) ("AEDPA has failed at reducing the volume, pace, or complexity of federal review."); Larry Yackle, *AEDPA* Mea Culpa, 24 FED. SENT'G REP. 329, 329 (2012) ("[AEDPA] has been a conceptual and practical nightmare—crippling the ability of federal courts to enforce federal rights, disserving legitimate state interests, delivering unjust and bizarre results even in the run of ordinary cases, and, at best, squandering resources on endless and pointless procedural digressions.").

44. Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of the U.S. Code).

"punitive" provisions—unconcerned with the rehabilitation of criminals or the prevention of recidivism.[45] Some of the 1994 Crime Bill's more salient features provided billions of dollars in funding for prisons, the employment of 100,000 police officers, an itemization of offenses for which one could be considered for the death penalty, and a mandatory life sentence for particular repeat offenders.[46] Since its passage in 1994, the federal prison population has doubled.[47]

B. *A Closer Look at AEDPA's Disruptive Provisions*

While the 1994 Crime Bill largely targeted federal crime reform and had a relatively minimal impact on state court proceedings,[48] AEDPA appeared to bridge that federalist gap more effectively by identifying exactly how state court proceedings would bear on federal court regard for any one habeas petition. The law imposed, among other provisions, a one-year statute of limitations on filing a federal habeas petition,[49] a restriction on successive habeas filings,[50] and a condition to the availability of the petition that the state court's determination be inconsistent with established constitutional principles before it may be reconsidered by the federal court sitting in review.[51] The law also included several "opt-in provisions," terms that functioned as a means by which a state could hope to improve its own collateral review proceedings in exchange for a well-oiled system of capital punishment.[52] In other words, if a state opted into a set of terms—providing indigent capital defendants with paid attorneys who were *neither* their trial nor their appellate attorneys for their post-conviction proceedings and ensuring that these attorneys were appointed in conformity with professional standards of competency—that state would be afforded speedy consideration of any subsequent federal capital habeas filings.[53] These perks for opt-in states—whose qualification as such is determined not by

45. *See* Jessica Lussenhop, *Clinton Crime Bill: Why Is It So Controversial?*, BBC NEWS (Apr. 18, 2016), https://www.bbc.com/news/world-us-canada-36020717 [https://perma.cc/332M-HCF4].

46. *Id.*

47. *Id.*

48. *See id.*

49. *See* 28 U.S.C. § 2244(d)(1) (2012).

50. *See* 28 U.S.C. §§ 2244(b), 2255; *see also* Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 88–91 (2005) (discussing the implications of this restriction).

51. *See* 28 U.S.C. § 2254(d); *see also* Gould, *supra* note 40, at 275 (discussing the implications of this provision).

52. Gould, *supra* note 40, at 275–76; *see* 28 U.S.C. §§ 2261–2266.

53. *See* Gould, *supra* note 40, at 275–76.

the state itself but by the United States Attorney General and the Justice Department[54]—would require habeas petitioners to file their claims in federal court within *six months* of the denial by the state court of their direct appeal, after which the federal district court need only spend up to 180 days considering the case and the federal appellate court up to 120 days.[55] Though a number of states have sought qualification under this portion of AEDPA, not a single state has been admitted as an opt-in state as of last year.[56]

This insinuates that the less-laudable elements of the opt-in provisions—the reduced deadline for filing and the timeframe in which federal courts must rule on a capital habeas petition, both holding critical implications for defendants facing life sentences or death—have not been taken advantage of by any state as of yet. However, this also means that no states have successfully held themselves out as having a mechanism for appointing post-conviction counsel in compliance with the opt-in provisions. As of 2018, Arizona and Texas, two states with significant numbers of defendants on death row, have renewed their applications to opt into AEDPA,[57] backed by support from former Attorney General Jeff Sessions. But, at the same time, these states' actions remain vulnerable to intense attack from critics concerned with the adequacy of these states' proposed state mechanisms for appointing post-conviction counsel.[58]

54. The USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 507, 120 Stat. 192, 250 (2006) (codified as amended at 28 U.S.C. § 2261), transferred the authority to decide opt-in certification from the federal courts to the Attorney General. *See* Andrew Cohen, *Death Sentences Are Down. Jeff Sessions Has a Plan to Change That*, ROLLING STONE (Apr. 5, 2018, 5:25 PM), https://www.rollingstone.com/politics/politics-features/death-sentences-are-down-jeff-sessions-has-a-plan-to-change-that-629353/ [https://perma.cc/3T2Z-5SLU].

55. Gould, *supra* note 40, at 276.

56. *See* Rundlet, *supra* note 17, at 678–79 (pointing out how "death belt" states like Texas, Louisiana, Mississippi, Georgia, Alabama, and Florida, in addition to California, which houses the most inmates on death row in the United States, have not opted into AEDPA); *see also* Douglas A. Berman, *AEDPA Accelerant: Examining Prospects for Speedier Capital Appeals for "Opt-in" States*, SENT'G L. & POL'Y (Apr. 3, 2018, 11:09 AM), https://sentencing.typepad.com/sentencing_law_and_policy/2018/04/aedpa-accelerant-examining-prospects-for-speedier-capital-appeals-for-opt-in-states.html [https://perma.cc/7UTY-GG88] (noting how no state has been approved as an opt-in state but that some states have sought or are seeking qualification).

57. *See* Keri Blakinger, *'Express Lane to Death': Texas Seeks Approval to Speed up Death Penalty Appeals, Execute More Quickly*, HOUS. CHRON. (Apr. 2, 2018, 8:40 PM), https://www.chron.com/news/article/Express-lane-to-death-Texas-seeks-approval-12799384.php [https://perma.cc/J9XG-EXZ2].

58. *See infra* Section IV.B.

C. *Interpretation and Application of AEDPA*

The procedural complexities associated with navigating AEDPA underscore the urgent need for legal counsel and political officials who are well-versed in post-conviction procedure. Pursuit of this goal would serve to protect petitioners' rights, promote systemic efficiency, and generate positive change.

1. What Seems to Be the Problem?

The complexity of habeas corpus as a tool for federal inquiry into the constitutionality of state imprisonment stems from the procedural quagmire[59] that courts have read into and upheld on review of issues concerning the availability of habeas corpus ever since the passage of AEDPA.[60] Plotting the progression of a habeas petitioner's claim of ineffective assistance of trial counsel illustrates the difficulty that petitioners face in convincing a federal court to review their case and the grave circumstances under which a petitioner pursues an ineffective-assistance-of-counsel claim, as well as the consequences of its failure.[61] This particular petition further emphasizes the value of having effective assistance of counsel at every stage of litigation,[62] not only for the

59. *See* Casey C. Kannenberg, *Wading through the Morass of Modern Federal Habeas Review of State Capital Prisoners' Claims*, 28 QUINNIPIAC L. REV. 107, 109 (2009) ("The problems associated with the modern morass of federal habeas review of state prisoners' claims are far from novel.").

60. *See, e.g.*, Wilson v. Sellers, 138 S. Ct. 1188, 1193–94 (2018) (holding that a "look through" presumption must be employed when reviewing an unexplained state court decision).

61. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837–41 (1994) (detailing, in this pre-AEDPA paper, the variety of ways in which trial counsel may fail a capital defendant and emphasizing that poor representation is most often embodied in counsel's failure to distinguish his client's case from those in which the death penalty would otherwise be appropriate for consideration); *see also* Michael C. Dorf, *Supreme Court to Consider When a Criminal Defendant Must Pay with His Life for His Lawyer's Error*, VERDICT (Jan. 25, 2017), https://verdict.justia.com/2017/01/25/supreme-court-consider-criminal-defendant-must-pay-life-lawyers-error [https://perma.cc/5E8Z-NEFC] ("One . . . case[] . . . presents a fundamental question: whether a criminal defendant should pay with his life for an error made by his lawyer?").

62. Whether such a right to counsel exists at every stage of litigation has been contested in light of the Sixth Amendment's "Assistance of Counsel" provision. *See* U.S. CONST. amend. VI. For an engaging blog post on the right to counsel debate, see Steve Vladeck, *Opinion Analysis: A New Remedy, but No Right*, SCOTUSBLOG (Mar. 21, 2012, 10:30 AM), https://www.scotusblog.com/2012/03/opinion-analysis-a-new-remedy-but-no-right/ [https://perma.cc/5WV3-6MHQ], which identified how the Supreme Court has drawn a "bright line" in recognizing the right to effective assistance of counsel for direct appeals but not for collateral challenges. Vladeck also discussed *Martinez v. Ryan*, 566 U.S. 1 (2012). *Id.* In *Martinez*, the Court was tasked with deciding whether a right to counsel exists when state collateral proceedings present the first opportunity for a criminal defendant to challenge his conviction by filing a habeas petition

defendant's benefit but also for the efficiency of the judicial system as a whole.

Habeas filings specifically claiming ineffective assistance of counsel are ubiquitous.[63] Inherent in a habeas petition alleging ineffective assistance of counsel is a request for review of the underlying actions (or more often than not, omissions) of one's trial lawyer.[64] Several of AEDPA's provisions, codified at 28 U.S.C. §§ 2241–2256, lay out the contours of and eligibility for filing a habeas petition.[65] But, again, any one petition's trajectory is ultimately determined by a criminal defendant's capitalization on the interstices between state court proceedings and federal opportunities to review them. These interstices are often exceedingly difficult to take advantage of when uncounseled at the post-conviction stage.

To begin, habeas petitioners generally may not file for reconsideration of their incarceration on direct appeal.[66] Rather, they must await the opportunity to correct any perceived defect in their trial representation by filing a post-conviction petition.[67] Though both are subsequent to a criminal defendant's conviction, post-conviction petitions and direct

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claiming ineffective assistance of trial counsel. *See Martinez*, 566 U.S. at 5, 9. The Court held, somewhat ambiguously and without recognizing that such a right exists, that a *lack* of adequate post-conviction counsel could excuse a defendant in federal habeas proceedings for any procedural default of his ineffective-assistance-of-trial-counsel claims. *See id.* at 9; *see also* Davila v. Davis, 137 S. Ct. 2058, 2065–66 (2017) (drawing another bright line in holding that a lack of adequate post-conviction counsel would *not* excuse the same procedural default of ineffective-assistance-of-*appellate*-counsel claims); JK, *Extending* Martinez, HABEAS CORPUS BLOG (Jan. 27, 2017, 10:58 AM), https://habeascorpusblog.typepad.com/habeas_corpus_blog/2017/01/index.html [https://perma.cc/NT3G-D6AJ] (anticipating the Court's consideration of *Davila v. Davis*). This Section further discusses the concept of procedural default and its consequences.

63. *See* Justin F. Marceau, *Embracing A New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1161–62 (2012) ("[I]neffective assistance of counsel is 'by far the most common basis for relief sought in habeas petitions . . . .'" (quoting Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic*'s Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 832 (2003))); Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIM. JUST., Fall 2009, at 6, 7 ("Ineffective assistance of trial counsel is one of the most frequently raised claims in state and federal postconviction petitions.").

64. *See* Primus, *supra* note 63.

65. *See, e.g.*, Cornell Law Sch., *Habeas Corpus*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/habeas_corpus [https://perma.cc/J779-AQLE] (noting that a habeas petition must be filed by a petitioner in custody after he has exhausted all state remedies, including an appeals process; that "[t]he . . . petition must be in writing and signed and verified either by the petitioner . . . or by someone acting on his . . . behalf"; and that the petition must include the legal grounds for filing—mirroring the requirements set forth in AEDPA).

66. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 680 (2007).

67. *See* Primus, *supra* note 63.

appeals differ in their timing and in the scope of what is considered from the record below.[68]

A direct appeal must be filed within a short timeframe following the rendering of a conviction.[69] On appeal, a court is limited to a review of the record from the trial court, including its conclusions of law based on the facts explicitly contained in the record.[70] Direct appeals are improper vehicles for addressing a trial lawyer's subpar representation of a criminal defendant because, more often than not, the record will not contain explicit references to or demonstrations of ways in which counsel erred procedurally or substantively at trial.[71] These shortcomings are usually aired by the defendant once an unfavorable conviction has been rendered, meaning that the trial record will likely not adequately support a defendant's claim if raised on direct appeal.[72] As a result, criminal defendants often must await the post-conviction motions process to address the correction of an alleged error in a defendant's trial representation.[73] A post-conviction motion typically affords the defendant the opportunity to have an evidentiary hearing,[74] during which testimony and proof of a trial lawyer's subpar representation of the criminal defendant may supplement the trial record.[75]

However, petitioners typically file post-conviction motions with a trial court *after* a defendant has lost on direct appeal,[76] thus elongating

68. *Id.* at 1–2; *see also The Difference Between a Direct Appeal and Post-Conviction Relief in Florida*, SPATZ L. FIRM, PL (May 7, 2018), https://www.spatzlawfirm.com/blog/2018/05/the-difference-between-a-direct-appeal-and-post-conviction-relief-in-florida.shtml [https://perma.cc/8FDZ-NNFT].

69. *See, e.g.*, *The Difference Between a Direct Appeal and Post-Conviction Relief in Florida*, *supra* note 68.

70. *See generally, e.g.*, Christina Gomez, *Vexed and Perplexed: Reviewing Mixed Questions of Law and Fact on Appeal*, COLO. LAW., March 2018, at 25 (discussing standards of review).

71. *See* Primus, *supra* note 63, at 7.

72. *See id.*

73. *See id.* at 7–8.

74. See 28 U.S.C. § 2254(e)(2) (2012) for an exception to the availability of evidentiary hearings in habeas corpus proceedings. This Note addresses this AEDPA provision in upcoming pages.

75. *See, e.g.*, *Post Conviction Remedies*, A.B.A., https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_postconviction_blk/#22-4.1 [https://perma.cc/R4VJ-SRC2] (recommending evidentiary hearings that could supplement the record). *But see* Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 83 (2009) (underscoring a trial lawyer's tendency towards self-preservation when his representation has been called into question during state post-conviction proceedings by a claim of ineffective assistance of counsel).

76. *See The Difference Between a Direct Appeal and Post-Conviction Relief in Florida*, *supra* note 68 (acknowledging that post-conviction proceedings vary from state to state). Post-conviction motions are appealable. *Cf.* Primus, *supra* note 63, at 10–11 (discussing the difficulty

the amount of time that a defendant must wait to make a case contending ineffective assistance of counsel.[77] By the time that a post-conviction motion has the chance to be considered, a defendant may have already served a substantial portion of his sentence. Moreover, witnesses critical to the substantiation of a defendant's claims may be impossible to contact, or corroborative evidence may be tainted, lost, or destroyed.[78] AEDPA's one-year statute of limitations on filing a post-conviction habeas petition in federal court appears to mitigate some of these concerns inherent in having to wait too long to have the facts of one's case reconsidered.[79] If uncounseled, however, a defendant is often completely unaware that this statute of limitations begins to run as soon as his conviction is affirmed, and an overwhelming number of such claims end up expiring at the state level before these defendants can do anything about it.[80] Criminal defendants are not constitutionally guaranteed the right to counsel for litigating the petition at this stage of their cases,[81] contributing to default of the claims themselves or filing of the claims without a lawyer to help them comprehend post-conviction proceedings.

Habeas petitions that successfully migrate from state post-conviction review to federal court review face another set of procedural obstacles to being heard in a timely and deferential fashion. AEDPA's exhaustion requirement provides that if defendants have not, for whatever reason, complied with state remedial processes or state procedural rules at trial, then they have effectively waived the chance for federal review of their claim premised in any part on the prejudicial effects of failing to adhere to those guidelines.[82] A pertinent example of procedural default lies at the heart of many federal habeas petitions claiming ineffective assistance of counsel: a state procedural rule mandates invocation of an ineffective-assistance-of-counsel claim in a post-conviction proceeding, but if that same state does not provide defendants with post-conviction counsel, an

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of appealing a petition alleging ineffective assistance of counsel because of the specter of possible procedural default).

77. *See* Primus, *supra* note 63, at 7; *The Difference Between a Direct Appeal and Post-Conviction Relief in Florida*, *supra* note 68 (asserting that "time is of the essence" in filing post-conviction motions to, presumably, preserve the momentum of a petition seeking reevaluation of evidence, jurisdiction, or attorney demeanor at trial—to name a few bases for seeking post-conviction relief).

78. *See* Primus, *supra* note 63, at 7–8.

79. *See* Primus, *supra* note 20, at 4 (discussing AEDPA's one-year statute of limitations).

80. *See* Lee Kovarsky, *AEDPA'S Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 482 (2007).

81. *See* Primus, *supra* note 63, at 8.

82. *See* 28 U.S.C. § 2254(b), (c) (2012); *see also* Primus, *supra* note 20, at 5 (discussing the doctrine of procedural default as an obstacle to judicial review).

unaided defendant who has not been cautioned to preserve his claim, upon entreating a federal court to hear it, will have defaulted it without even realizing the consequences of his passivity.[83]

Another salient difficulty habeas petitioners face at the threshold of federal review under AEDPA is the unavailability of evidentiary hearings should defendants fail to prove the factual merits of their ineffective-assistance claims at trial or supplement their trial records with evidence of substandard trial representation.[84] As mentioned before, trial counsel deficiency is often not reflected in any tangible format, let alone the trial record.[85] To meet AEDPA's requirement contained in 28 U.S.C. § 2254(e)(2) and qualify for a federal evidentiary hearing despite an undeveloped record, a defendant must additionally prove by "clear and convincing evidence" that he is innocent of his charged crimes and that his habeas claim is supported by a retroactively applied Supreme Court holding or by factual evidence that, despite the exercise of due diligence, could not have been unearthed at trial.[86] An uncounseled defendant lacking access to records, evidence, and argumentation opportunities will likely have an exceptionally difficult time proving the arduous prongs of this statutory test.[87]

Finally, if a habeas petition manages to reach federal consideration, federal courts employ AEDPA's highly deferential standard of review to preceding state court adjudications of the petition's merits.[88] Section 2254(d) of 28 U.S.C. states that a federal court will not grant review of a petition that has been adjudicated at the state level unless it:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

83. *See* Primus, *supra* note 63, at 10.

84. *Id.*

85. *Id.* at 7.

86. Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 430 (2018) (quoting 28 U.S.C. § 2254(e)(2)(B)); Primus, *supra* note 63, at 10; *see also* Joseph L. Hoffmann, *Innocence and Federal Habeas After AEDPA: Time for the Supreme Court to Act*, 24 FED. SENT'G REP. 300, 303 (2012) (arguing for federal habeas courts' recognition of a "[b]are [i]nnocence" claim); Primus, *supra* note 20, at 16 (confirming that such a claim has been recognized by the Supreme Court's creation of the "innocence bypass" for the habeas statute of limitations).

87. Primus, *supra* note 63, at 10–11.

88. *See* Gregory J. O'Meara, *You Can't Get There from Here: Ineffective Assistance Claims in Federal Circuit Courts After AEDPA*, 93 MARQ. L. REV. 545, 554–55, 555 nn.56–57 (2009).

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[89]

Prior to AEDPA, federal courts employed de novo review of habeas petitions.[90] Now, habeas petitioners must prove the state court's legal conclusions were in direct contravention of either Supreme Court precedent or were violative of jurists' reasonable interpretation of the facts at bar, which is a seemingly insurmountable standard to meet.[91]

Habeas petitions claiming ineffective assistance of counsel routinely state dissatisfaction with trial counsel's failure to present witnesses, seek testing of critical evidence (for example, DNA testing), object to prosecutorial evidence, suppress evidence, or interview key witnesses.[92] Others take issue with the jury that was selected for trial, point to timing issues with trial counsel's filing of certain motions, allege that trial counsel argued inconsistently or to the defendant's detriment, failed to investigate a defendant's mental competence to stand trial, erred at the capital sentencing phase, counseled the client incorrectly to plead guilty, or overall provided poor and uninformed advice as to how the defendant should treat a plea offer.[93]

Perhaps the most disturbing accounts of trial counsel deficiencies—recounted in Professional Responsibility courses as cautionary tales for budding lawyers—involve deficiencies at trial that reflect on the fitness and character of the trial lawyers themselves. Courts have rightfully found prejudice to the defendant when trial counsel has *slept* through portions of trial, been neglectful of his licensing such that the representation was technically unlawful, had such aggravating health conditions that he could not adequately follow the arc of trial and properly

89. 28 U.S.C. § 2254(d).

90. *See* O'Meara, *supra* note 88, at 554–55; Patrick J. Fuster, Comment, *Taming Cerberus: The Beast at AEDPA's Gates*, 84 U. CHI. L. REV. 1325, 1333 (2017).

91. *See, e.g.*, Ram Eachambadi, *Supreme Court: Federal Habeas Court Should "Look Through" Unexplained State Court Judgment*, JURIST (Apr. 17, 2018, 8:06 PM), https://www.jurist.org/news/2018/04/supreme-court-federal-habeas-court-should-look-through-unexplained-state-court-judgment/ [https://perma.cc/652L-LJLP] (explaining the Supreme Court's holding in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), that a federal court sitting in review of an unexplained state court decision on the merits of a habeas petition should "look through" the decision to the most recent related state court decision that articulated a rationale, raising a presumption that the unexplained decision followed the same rationale as the predecessor decision (quoting *Wilson*, 138 S. Ct. at 1192)).

92. *See* EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 4 (2010).

93. *See* TERESA L. NORRIS, SUMMARIES OF PUBLISHED SUCCESSFUL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS PRE-WIGGINS V. SMITH 100–83 (2015).

respond to procedural cues as a consequence, or failed to appear at all to represent clients at key stages of the case.[94]

Since its passage, the United States Supreme Court has applied AEDPA's text in a strictly mechanical manner, no matter the assumed political proclivities of its Justices.[95] Such mechanical application of AEDPA's provisions over the span of two decades has established the maze of procedural pitfalls described above that habeas petitioners must navigate to make the jump from state conviction to federal pursuit of relief for, more often than not, an ineffective-assistance-of-trial-counsel claim. The manner in which the Supreme Court has interpreted AEDPA has had particularly startling consequences[96] for individuals sentenced to death at the state level, claiming that their sentences resulted from ineffective counsel. Further, current tension over the death penalty and its future relevance for the criminal justice system stems in large part from the rules that the Supreme Court has read into AEDPA as applicable to defendants across the board, no matter the distinguishable facts of their cases.[97]

2. The Attorney General's Role

AEDPA originally intended federal courts to determine state opt-in qualifications.[98] But in 2001, the Ninth Circuit Court of Appeals held that, although Arizona had, in its opinion, met the requirements in AEDPA for opting into 28 U.S.C. §§ 2261–2266, the Court would not confer opt-in status or benefits because Arizona failed to comply with the timeliness requirement of its *own* post-conviction system in the case at bar.[99] Congress responded to this and other thwarted attempts to opt into AEDPA[100] by transferring the decision-making power to the Attorney

94. *See id.* at 91, 344–46, 348.

95. *See* Adelman, *supra* note 10; *see also* Emily Bazelon, *The Law That Keeps People on Death Row Despite Flawed Trials*, N.Y. TIMES MAG. (July 17, 2015), https://www.nytimes.com/2015/07/17/magazine/the-law-that-keeps-people-on-death-row-despite-flawed-trials.html [https://perma.cc/38B3-YMNV] (criticizing the Supreme Court's application of AEDPA's text).

96. *See, e.g.*, Reinhardt, *supra* note 19, at 1239.

97. *See, e.g.*, Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018); Dunn v. Madison, 138 S. Ct. 9, 11–12 (2017) (per curiam); Kernan v. Cuero, 138 S. Ct. 4, 6–7, 9 (2017) (per curiam); Cullen v. Pinholster, 563 U.S. 170, 174 (2011); Harrington v. Richter, 562 U.S. 86, 92 (2011); Carey v. Musladin, 549 U.S. 70, 72, 77 (2006); Lockyer v. Andrade, 538 U.S. 63, 66, 68, 77 (2003).

98. *Cf.* Jennifer Ponder, *The Attorney General's Power of Certification Regarding State Mechanisms to Opt-in to Streamlined Habeas Corpus Procedure*, 6 CRIM. L. BRIEF, Spring 2011, at 38, 41 (noting that Congress reallocated this power from "the federal courts to the Attorney General").

99. *See* Spears v. Stewart, 283 F.3d 992, 1019 (9th Cir. 2002).

100. *See* sources cited *supra* note 56.

General in 2005 via the USA PATRIOT Improvement and Reauthorization Act of 2005,[101] likely hoping that states would find the Attorney General a more pliable arbitrator.

The Attorney General's first attempt to promulgate a list of the standards by which the Department would assess opt-in applications occurred in 2007.[102] To the disappointment of many, Attorney General Alberto Gonzales did little to help elucidate the vague provisions already set forth in 28 U.S.C. §§ 2261–2266. His proposed regulations reiterated their purpose, provided a definitions section, and described the certification requirements and the "mechanics of the certification process" for states seeking qualification.[103] However, instead of addressing how certain highly debatable terms in AEDPA could be interpreted and applied uniformly going forward, the definitions section only defined two largely uncontested concepts: "appropriate State official" and "State postconviction proceedings."[104] Similarly, the certification requirements added little to the existing text of AEDPA: states were still required to appoint counsel, compensate them appropriately, and ensure that they conformed to standards of competency.[105]

Lastly, the Attorney General illustrated the deceptively simple application process for states wishing to opt in: The state's "appropriate State official" must submit a request for certification attesting to the official's proper authority and confirming that the official notified the state's highest court of the state's intention to opt in.[106] Next, the Attorney General must publish notice in the Federal Register of the state's pending application, which in turn would provide the public the opportunity to submit supplemental materials and commentary on the state's qualifications for opting into AEDPA.[107] Should the Department of Justice grant the state opt-in status, the Attorney General would not have the right to subsequently decertify that state, even if the state's post-conviction mechanisms evolved out of conformity with AEDPA.[108]

Attorney General Gonzales's "proposed regulations incited a nearly riotous response."[109] Thirty-two thousand entities criticized the

101. Pub. L. No. 109-177, § 507, 120 Stat. 192, 250 (codified as amended at 28 U.S.C. § 2265 (2012)).

102. *See* Kannenberg, *supra* note 59, at 153.

103. Certification Process for State Capital Counsel Systems, 72 Fed. Reg. 31,217, 31,218 (proposed June 6, 2007) (to be codified at 28 C.F.R. pt. 26).

104. *Id.* at 31,218, 31,219.

105. *See* Kannenberg, *supra* note 59, at 154–55.

106. *See* Certification Process for State Capital Counsel Systems, 72 Fed. Reg. at 31,220.

107. *See* Kannenberg, *supra* note 59, at 155–56.

108. *See id.* at 156.

109. *Id.*

regulations' lack of substance as well as the inappropriateness of consolidating this power in the Attorney General.[110] In 2008, Gonzales was replaced by Michael Mukasey, and the Department purported to take the public's comments into account when editing the regulations for republication.[111] When the Department unveiled the finalized regulations to the public on December 11, 2008, it was clear that Attorney General Mukasey had changed little, if anything, about the original proposal.[112] He cited to AEDPA itself in explaining his reticence to expound on anything in the regulations:[113] Section 2265(a)(3) of 28 U.S.C. stated that "[t]here are no requirements for certification or for application of this chapter *other than those expressly stated in this chapter*."[114] Though this interpretation of the Attorney General's role has received pushback,[115] it is not completely unfounded: Congress provided little guidance for how an Attorney General may elaborate on his duties and on the requirements already contained in AEDPA. Further, any provision seemingly addressing this role contained diction that, at least on its face, appeared to circumscribe the Attorney General's ability to stray away from the plain language of the statute.

Regardless, by early 2009, a district judge in California enjoined Attorney General Mukasey's regulations from taking effect,[116] and Attorney General Eric Holder withdrew the regulations from review in 2010, ultimately releasing an updated version in 2013.[117] Arizona renewed its opt-in application under these new "guidelines" and faced opposition from the Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona.[118] Litigation over the issues of these entities' standing to challenge the viability of the regulations and Arizona's qualification under them resulted in the district court issuing a temporary restraining order, indefinitely halting the progression of opt-in applications.[119] In 2016, the district court's order was vacated because the entities did not have standing[120] to challenge the Attorney General's regulations and had not brought forth issues ripe for

110. *See id.* at 156–57.

111. *See id.* at 168 & n.414.

112. *See id.* at 168.

113. *Id.* at 169.

114. 28 U.S.C. § 2265(a)(3) (2012) (emphasis added).

115. *See, e.g.*, Kannenberg, *supra* note 59, at 169–70.

116. *See* JOSEPH A. MELUSKY & KEITH A. PESTO, THE DEATH PENALTY: DOCUMENTS DECODED 123 (2014).

117. *See* 28 C.F.R. §§ 26.22–26.23 (2018).

118. Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice, 816 F.3d 1241, 1246 (9th Cir. 2016).

119. *Id.* at 1247.

120. *See id.* at 1251.

dispute, as the Attorney General had yet to make a decision regarding Arizona's certification.[121]

Since then, opt-in certification procedure as enunciated by the Attorney General has faded into the background of executive priority. Last year, Arizona and Texas reapplied for certification at the behest of former Attorney General Jeff Sessions but did so under the regulations as they have stood since 2013.[122] Several entities have filed commentary severely undercutting the credibility of Texas's proposed state mechanism for appointing post-conviction counsel,[123] with one lawsuit specifically arguing that validating the mechanism under AEDPA would violate the Constitution and the separation of powers doctrine.[124] Such an argument encapsulates what is at stake in approving any one opt-in application without a template for what the Department should expect from proposed post-conviction mechanisms.

The life of a capital defendant is imperiled by this chain reaction of habeas calamities: the general disregard for the quality of counsel received at the trial or appellate levels;[125] the defaulted opportunity to argue through habeas corpus these deficiencies in representation;[126] and finally, the willingness of departmental executives to overlook substandard post-conviction counsel, appointed in apparent conformity with unprincipled AEDPA provisions in impulsive pursuit of federal docket expediency. Capital defendants and, frankly, the integrity of the criminal justice system as a whole deserve more attention to detail than this.

III. INTRODUCING THE FIRST STEP ACT OF 2018

The First Step Act was passed in December of 2018.[127] It reflects bipartisan collaboration on the critical issue of federal prison reform,[128] as concerns over the staggering amount of federally incarcerated prisoners serving decades or life sentences for minor drug offenses have

121. *Id.* at 1254.

122. *See* Cohen, *supra* note 54.

123. *See, e.g.*, Texas Defender Service et al., Comment Letter on Texas's Request for Certification of Texas Capital Mechanism (Feb. 26, 2018), https://www.regulations.gov/document?D=DOJ-OLP-2017-0010-0048 [https://perma.cc/PUE9-9FKX].

124. *See* Cohen, *supra* note 54.

125. *See supra* Section II.C.1.

126. *See id.*

127. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (to be codified in scattered sections of 18, 34, and 42 U.S.C.).

128. *See* Lopez, *supra* note 14.

been voiced in Washington and over social media by those debating the objectives of the federal prison system.[129]

The Act's website promises to prepare federal prisoners to "come home from prison job-ready . . . [with] major incentives to pursue the life-changing classes that will help them succeed on the outside."[130] Such language already stands in stark contrast to prior criminal reform that emphasized the heavy-handedness of the government in ensuring that people remain behind bars.[131] Further, a page from the Act's website explicitly emphasizes the importance of rehabilitating those making their way through the criminal justice system and offers several provisions for ensuring that the focus remains on rehabilitation.[132]

The Act capitalizes on an existing "Good Time Credits" program in moving towards liberating people who have already accumulated credit for good behavior, refines prerelease custody, and institutes incentives within prisons for participation in First Step programs.[133] These programs include courses focused on skill-building, education, and vocational training that are geared towards those most at risk of recidivism.[134] The Act further hopes to ensure that people are incarcerated closer to home, provide more amenities for women and pregnant women, institute a system of providing prisoners who are scheduled for release with identification cards to help facilitate re-assimilation, and lower the age for "compassionate release" of elderly prisoners.[135]

Additionally, the Act completely dismantles the "three strikes rule" passed under AEDPA.[136] This rule once ensured that those being tried for a third felony would automatically receive a life sentence and was one of the most hotly contested provisions of AEDPA.[137] Now, judges may only automatically impose a twenty-five-year sentence on three-time felons.[138]

The First Step Act, though indicative of Congress's willingness to collaborate on prison and sentencing reform, has been criticized by some

129. *See, e.g.*, Brenden Gallagher, *Why the Senate's First Step Act Isn't True Criminal Justice Reform*, DAILY DOT (Dec. 19, 2018, 6:48 AM), https://www.dailydot.com/layer8/first-step-act-senate/ [https://perma.cc/7X28-CMWZ]; Sentencing Project (@SentencingProj), TWITTER, https://twitter.com/sentencingproj?lang=en [https://perma.cc/AW7B-XQN9] (demonstrating reform efforts on social media).

130. *S.2795 – The First Step Act*, #FIRSTSTEPACT, https://d3n8a8pro7vhmx.cloudfront.net/rebuildthedream/pages/19887/attachments/original/1538770173/cut50_FSA_1_pager_-_both_sides_-_v5_6518.compressed.pdf?1538770173 [https://perma.cc/F3KW-HZLX].

131. *See supra* Section II.A.

132. *See S.2795 – The First Step Act*, *supra* note 130.

133. *Id.*

134. *Id.*

135. *Id.*

136. Gallagher, *supra* note 129; *see* Lopez, *supra* note 14.

137. *See* Gallagher, *supra* note 129; Lopez, *supra* note 14.

138. Gallagher, *supra* note 129; *see* Lopez, *supra* note 14.

as not doing enough to address mass incarceration rates nationwide.[139] Because the number of federal prisoners is significantly lower than the number of state prisoners,[140] some criticize the Act for not accounting for its limited impact on the lion's share of America's prison population.[141] However, as its name implies, it is hoped to be the first of many steps that Washington is willing to take to reform the way in which the country thinks about imprisonment and its purpose.

Many people have feared for the Act's long-term viability in light of William Barr's recent appointment as Attorney General.[142] Barr shares many of the same views on criminal reform as his predecessor, Jeff Sessions.[143] These views include a need to pursue more arrests, abide by more stringent sentencing standards, and promote the public-safety policy goal behind incarceration.[144] It seems intuitive enough to connect these views, already manifested at this early stage of reform, to future agendas if, say, Arizona and Texas sustain their applications for opting into AEDPA's capital punishment provisions. If they do, Barr will likely encourage these states to move their applications through just as Sessions did before him.

Because congressional leaders and the Trump administration presented the Act as a step in a series of criminal justice reforms, the forthcoming steps should include some sort of consideration for capital punishment and the interplay between state and federal court systems implicated by AEDPA over twenty years ago. Specifically, the next step in criminal justice reform should contemplate providing states and the United States Attorney General with standards by which they may assess the sufficiency of state post-conviction proceedings and the adequacy of post-conviction counsel to successfully opt into AEDPA. Such standards

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139. *See* Gallagher, *supra* note 129.

140. *Id.*

141. *Compare id.* (arguing that few inmates will be impacted by the First Step Act because it does not apply to state prison systems), *with* James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 414 (2001) (pointing out the irony of AEDPA in that it was drafted as a means of facilitating capital punishment for federal defendants like McVeigh, but its procedural and substantive provisions ultimately reaped severe consequences on noncapital state prisoners attempting to have their habeas petitions heard).

142. *See, e.g.*, Edward Chung, *Trump Fails the First Step of the First Step Act*, HILL (Jan. 10, 2019, 8:30 AM), https://thehill.com/opinion/criminal-justice/424612-trump-fails-the-first-test-of-the-first-step-act [https://perma.cc/X3L9-Q4BF]; *see also infra* text accompanying notes 167–71 (discussing the long-term future with William Barr as Attorney General).

143. *See, e.g.*, Tammy Kupperman et al., *Barr directs federal government to reinstate death penalty, schedule the execution of 5 death row inmates*, CNN POL. (July 25, 2019, 1:55 PM), https://www.cnn.com/2019/07/25/politics/justice-department-capital-punishment-barr/index.html [https://perma.cc/U498-HF3N] (identifying Barr's recent announcement to reinstate the federal death penalty as a continuation of Sessions' efforts to "restart [federal] executions by lethal injection").

144. *See* Chung, *supra* note 142.

would mitigate an Attorney General's improper certification of states that do not, in reality, conform to expectations of an adequate post-conviction mechanism under AEDPA. Further, these standards would encourage the manufacture of seamless habeas corpus review, insulate capital defendants specifically from falling prey to an unintelligible post-conviction mechanism, and realign habeas corpus with constitutional principles.

IV. THE NEXT STEP

In light of ongoing criminal law reform, Congress should reconsider AEDPA's opt-in provisions insofar as they contemplate states' post-conviction mechanisms for adjudicating habeas petitions. Imbuing these provisions with ascertainable standards of competency for attorneys litigating state habeas petitions affords petitioners across the country with a necessary degree of due process and eliminates potential arbitrariness in the qualification of a state for expedited federal review of habeas petitions.

A. *The Need to Articulate a Standard*

Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[145] The nondelegation principle[146] was extracted from this provision, curtailing Congress's ability to delegate legislative authority to the other branches of government.[147] *J.W. Hampton, Jr., & Co. v. United States*[148] later sanctioned particular delegations of legislative authority so long as Congress provided in the delegation "intelligible principle[s]" of guidance for the receiving agency such that any resulting legislation would assuredly have an imprimatur of congressional influence.[149]

AEDPA, as amended by the USA PATRIOT Improvement and Reauthorization Act of 2005, certainly contains a delegation of legislative authority to the Attorney General in its opt-in provisions. Section

145. U.S. CONST. art. I, § 1.

146. The nondelegation doctrine generally holds "that Congress cannot delegate its legislative powers to other entities," but subsequent cases have qualified this general prohibition with standards by which Congress may constitutionally delegate some of its policymaking functions. *See* Cornell Law Sch., *Nondelegation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nondelegation_doctrine [https://perma.cc/Q78H-HMRE].

147. *See generally* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004) (explaining the textual, historical, and judicial support for the nondelegation principle).

148. 276 U.S. 394 (1928).

149. *Id.* at 409.

2261(b)(1) of 28 U.S.C. specifically identifies the Attorney General as capable of certifying that "a State has established a mechanism for providing counsel in postconviction proceedings" pursuant to regulations that he himself must promulgate according to 28 U.S.C. § 2265(b).[150] However, it is nearly impossible to discern any guiding principles in AEDPA that may aid the Attorney General and the Department in devising and promulgating these opt-in regulations in accordance with Congress's intent. This is because Congress failed to articulate any expectations for the Attorney General's role in authoring regulations for state post-conviction mechanisms seeking opt-in status. The only requirements that Congress established for these mechanisms are found in 28 U.S.C. § 2265(a)(1)(A), and they mandate that the Attorney General expect candidate states to (1) appoint and compensate; (2) competent counsel in post-conviction proceedings; and (3) for indigent capital prisoners.[151]

The Attorney General's most recent promulgated regulations reflect an effort to articulate this delegation of legislative authority.[152] For example, in seeking to qualify AEDPA's requirement for competent counsel, the regulations incorporate a presumption of adequacy for state standards of competency if the state's post-conviction lawyers *either* "have been admitted to the bar for at least five years and [possess] at least three years of postconviction litigation experience"[153] *or* conform with state attempts to appoint competent counsel from public defender programs, statutory entities devoted to capital case litigation, or judge-approved rosters of lawyers.[154]

The issues with this requirement specifically, as a microcosm of the regulations' deficiencies as a whole, are twofold. Firstly, this provision for competency has spawned varying interpretations about which programs and entities qualify under this standardless expectation of counsel.[155] Some states believe that they have satisfied the vague notion of competency embodied in the provision, whereas opponents to their post-conviction mechanisms vigorously point to the deficiencies in adeptness and relevant experience of these allegedly qualified habeas attorneys.[156] But because AEDPA does not contain objective, quantifiable criteria by which to measure the true competency of these

150. 28 U.S.C. § 2261(b)(1) (2012).

151. *See id.* § 2265(a)(1)(A).

152. *See* 28 C.F.R. §§ 26.22–.23 (2018).

153. *See id.* § 26.22(b)(1)(i).

154. *See id.* § 26.22(b)(1)(ii); *see also* 42 U.S.C. § 14163(e)(1), (2)(A) (providing the public health and welfare requirements cited to in the Attorney General's regulation).

155. *See infra* Section IV.B.

156. *Id.*

habeas attorneys, the debate will continue among states that believe the AEDPA standards are both adequate and satisfied in states soliciting to opt in and those that exhort further consideration of these mechanisms' sufficiency. Secondly and facially, the Attorney General's expectations for habeas attorneys' experience—either five years admitted to the bar and with three years of post-conviction experience or appointment from state-approved lists of attorneys[157]—are dangerously generic and overinclusive.

B. *Where to Begin?*

To further pursue criminal reform and recommend objective and effective competency standards by which post-conviction attorneys must abide, Congress should revisit AEDPA's opt-in provisions to prescribe minimum experiential requirements for lawyers appointed to handle capital habeas cases. Doing so would start the process of unifying the standards to which state post-conviction mechanisms are held, thereby improving the quality of state post-conviction counsel and, hopefully, reducing the incidence of federal habeas petitions as a result. Furthermore, this would serve to narrow congressional attention to the issue of defendants' rights, especially capital defendants' rights, by reiterating the importance of holding counsel to a certain standard of competency at every level of litigation lest defendants bear the brunt of attorneys' negligence or inexperienced default of habeas claims.

Critics of Texas's and Arizona's opt-in applications pending before the Attorney General have provided scathing feedback on their respective post-conviction mechanisms. In their *Comments in Opposition to [Texas's] Certification*, the Texas Defender Service, Federal Public Defender for the Northern District of Texas, and Federal Public Defender for the Western District of Texas detailed how "Texas's Appointment Scheme Fails To Provide Standards Of Competency And Does Not Assure The Appointment Of Competent Counsel."[158] Specifically, these entities pointed out Texas's blatant disregard for the "benchmark" requirements for counsel contained in the Attorney General's regulations (that is, five years admitted to the bar and three years of post-conviction experience)[159] and Texas's woefully "[i]nadequate" standards for proficiency under the Texas Government Code.[160]

Likewise, the American Bar Association (ABA) submitted comments in early 2019 on Arizona's proposed post-conviction mechanism and

157. *See* 28 C.F.R. § 26.22(b)(1).

158. *See* Texas Defender Service et al., *supra* note 123, at 89.

159. *Id.* at 89–90.

160. *Id.* at 95–96.

expressed concern with Arizona's intention to recruit pro bono counsel to represent capital defendants in satisfaction of the opt-in provisions.[161] As the ABA stressed,

> Pro bono law firms often do remarkable work on behalf of their pro bono clients, but their lawyers are typically inexperienced in criminal law and capital defense, and there are numerous inefficiencies and challenges involved that typically do not exist in a well-functioning system that relies on experienced, adequately compensated capital defenders to provide representation.[162]

In projecting reliance on pro bono counsel to litigate habeas petitions, Arizona is ignoring the difficulties that several organizations, including the ABA's Death Penalty Representation Project, have experienced in the past when attempting to recruit pro bono counsel for these capital cases: the ABA wrote that its Death Penalty Representation Project has at times spent "years . . . looking for a pro bono firm to take on a single [capital] case," sometimes failing to locate pro bono counsel that is up for the task at all.[163] Putting aside the argument that counsel secured on a pro bono basis (that is, uncompensated) would, facially, appear to be at odds with the language of AEDPA,[164] it would simply be impossible to control for adequate experience and commitment levels to post-conviction proceedings amongst pro bono lawyers, even if such a pool of lawyers willing to litigate habeas petitions existed.

However, Congress could eliminate a significant amount of ambiguity regarding the suitability of post-conviction counsel if it amended AEDPA to prescribe an objective and effective minimum experiential standard by which attorneys involved in post-conviction proceedings could be measured at the state level. Allowing Congress to take back control over this one aspect of AEDPA would install a much more effective screening process for counsel than the one currently proposed in the Attorney General's regulations. Five years of admission to the state bar and three years of experience in post-conviction litigation does *not* ensure competency for the myriad of lawyers who qualify under this umbrella:

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161. American Bar Association, Comment Letter on Arizona's Supplemental Information Submission Regarding Arizona Capital Counsel Mechanism 2 (Jan. 7, 2019), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2019jan7-ABACommentletterAZDP.pdf [https://perma.cc/5RMR-WFZH].

162. *Id.* at 3.

163. *Id.*

164. *See* 28 U.S.C. § 2261(c) (2012) ("Any mechanism for the appointment, *compensation*, and *reimbursement* of counsel . . . must offer counsel to all State prisoners under capital sentence . . . ." (emphasis added)).

the lawyer whose first habeas case does not present itself until his *sixth* year in practice, the lawyer who has never served as lead counsel or assistant lead counsel on a capital habeas case despite his three years of "experience" in post-conviction proceedings, and the lawyer who might have taken six hours of CLE classes every two years "devoted to the law and practice of writs of habeas corpus" but who has never actually litigated one.[165] Allowing attorneys with such inadequate experience in post-conviction habeas proceedings to represent indigent capital defendants is a disservice to the states' post-conviction mechanisms for adjudicating their petitions, undermines defendants' right to competent counsel, and threatens federal review of these petitions. But such a process would be authorized under the current scheme of unprincipled congressional delegation of legislative authority to the Attorney General.

Congress must set the bar much higher for states to opt into AEDPA. Specifically, Congress should consider writing into AEDPA a requirement, which the Attorney General will subsequently implement upon review of opt-in applications, that counsel appointed for post-conviction capital habeas proceedings have served as lead counsel or assistant lead counsel on a minimum of three capital cases instead of only possessing three years of amorphous post-conviction experience. Further, Congress should require a competent attorney to have dealt substantially and significantly with habeas corpus issues during his five years of bar admission. These sorts of standards will ensure that those appointed to litigate a capital habeas petition will do so with adequate knowledge of what is at stake, knowledge that is surmised not by subjective states' standards of adequacy but by a national standard of competency provided by Congress and consistently applied by the Attorney General.

C. *A Legacy of Coexistence*

Reconsideration of AEDPA in the manner contemplated above by future iterations of the First Step Act or similar legislation would not necessarily jeopardize AEDPA's operation. Though many have called for AEDPA's dismantling, this Note proposes a modification of its provisions in respect of federal habeas corpus review for more evenhanded application of its standards and expectations. Specifically, AEDPA, beginning with its opt-in provisions, must hone its focus on incentivizing states to ensure adequate post-conviction mechanisms and competent counsel in post-conviction proceedings so that habeas

165. *See* Texas Defender Service et al., *supra* note 123, at 97 (quoting *Procedures Regarding Eligibility for Appointment of Attorneys as Counsel under Article 11.071, Section 2(f), Code of Criminal Procedure, and Regarding the Maintenance of a Statewide List of Attorneys Eligible for Appointment as Required by Section 78.056*, TEX. JUD. BRANCH ¶ 6 (Nov. 10, 2017), https://www.txcourts.gov/media/1439687/procedures-capital-writs-appt-list-revised-11-10-17.pdf [https://perma.cc/36NZ-3ZT9]).

petitions and their processing at the state level remain deferential to defendants' rights. This level of respect for and devotion of resources to defendants exhibited at the state level of habeas corpus processing would benefit the court system's efficiency as a whole. Effective litigation of habeas corpus claims, such as ineffective-assistance-of-trial-counsel claims, would be adjudicated on their merits by experienced lawyers, thus lowering the incidence of habeas filings at the federal level. Those that do make it to federal court would be afforded the time and attention that they deserve, no matter the statute of limitations, by a less-burdened federal docket liberated by effective disposition of most petitions at the state level.

AEDPA's intention—to expedite federal review of capital habeas petitions originating in state court—will remain attainable by states wishing to opt in, but only if those states abide by the objective criteria for counsel competency written into AEDPA by Congress. This would inform the Attorney General's discretionary certification decision for any given state but also bind him to some articulated congressional intent on the matter regardless of his personal political leanings. AEDPA's opt-in provisions and effective state post-conviction mechanisms, attainable via the sort of criminal reform that the First Step Act heralds, would be able to coexist within the framework of an intelligible principle.[166]

CONCLUSION

On February 14, 2019, the Senate confirmed William Barr as the United States Attorney General.[167] With this new turnover in power, it is unclear which issues he will tackle first upon his return to the Attorney General position,[168] especially given the national media attention of other issues over the past couple of years.[169] Sources identifying the issues with which Barr is most commonly associated overwhelmingly point to his history of promoting "tough-on-crime" policies and discuss whether this propensity will characterize his renewed tenure as Attorney General.[170]

166. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (setting forth the intelligible principle doctrine).

167. David Shortell, *William Barr Confirmed as Attorney General*, CNN POL. (Feb. 14, 2019, 1:44 PM), https://www.cnn.com/2019/02/14/politics/william-barr-senate-confirmation-vote/index.html [https://perma.cc/XU45-CHUD].

168. *See* Jon Schuppe, *William Barr Was Confirmed as U.S. Attorney General. Here's What to Expect on Crime, Immigration and Marijuana*, NBC NEWS (Feb. 14, 2019, 3:00 PM), https://www.nbcnews.com/news/us-news/william-barr-was-confirmed-u-s-attorney-general-here-s-n971066 [https://perma.cc/GAL7-697R] (explaining that Barr previously served as Attorney General under President George H.W. Bush).

169. *See id.* (identifying the Mueller investigation and immigration as two dominating issues).

170. *Id.*

When asked about the First Step Act during his confirmation hearing, Barr assured the senators that he "ha[d] no problem with the approach of reforming the sentencing structure and [that he would] faithfully enforce that law."[171] Of course, only time will tell whether such reform will involve AEDPA, its elucidation, and its future bearing on capital defendants seeking federal review of their habeas petitions.

Regardless, the time is ripe for Congress to revisit AEDPA and its provisions for opting into expedited federal habeas review. Policymakers must reorient their focus to the fact that no state has been able to opt into AEDPA, either because their applications have failed or because the law does not incentivize states to meet the requirements in contemplation of an application,[172] further signifying that these states have been unable to establish post-conviction mechanisms staffed by competent counsel in satisfaction of AEDPA's current requirements. Congress should write into AEDPA clearer expectations for competency of counsel to ensure that states are held to a uniform, national standard of adequacy when promoting their post-conviction mechanisms. This would, in turn, increase their chances of certification under AEDPA's opt-in provisions while also providing their capital defendants with legitimate representation during critical stages of their cases.

AEDPA's provisions have increased the difficulty that any one habeas petitioner may experience in having his claim heard in federal court, far beyond the expectations of its drafters and scholars alike.[173] The consequences of such procedural difficulties are magnified for capital defendants, who face the finality of the death penalty[174] if their habeas claims are defeated by a blanket application of AEDPA's timing and substantive provisions[175] or are subjected to inadequate counsel unconcerned with the gravitas of the particular case.[176] In untangling the web that AEDPA has spun around habeas petitioners, Congress and the country as a whole may start by addressing the standards of competency to which post-conviction counsel is held. This next, intelligible step in

171. *Id.*

172. *See supra* note 56 and accompanying text.

173. *See* John H. Blume & W. Bradley Wendel, *Coming to Grips with the Ethical Challenges for Post-Conviction Representation Posed by* Martinez v. Ryan, 68 FLA. L. REV. 765, 815 (2016) ("It is not a hyperbole to classify the current regime as 'Kafkaesque.'"); *see also* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 291 (2006) ("At the time the statute was enacted, few scholars (or habeas practitioners) fully understood or appreciated the effect that the various limitations provisions would have.").

174. *See* Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F,"* 36 FLA. L. REV. 252, 254–55 (1984) ("[T]he process resulting in an execution must be above reproach. No reasonable suspicion that the state has executed an innocent person or one condemned to death by unconstitutional means can be tolerated.").

175. *See supra* Section II.C.1.

176. *See supra* Section IV.B.

criminal law reform has the potential to satisfy the various egos—federal, state, and individual—involved in the discussion, and most importantly, to restore to defendants convicted of capital offenses the federal constitutional safeguards expressed in the writ of habeas corpus.