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**THE HIDDEN COSTS OF HABEAS DELAY**

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*Because habeas petitioners seek a court order for liberty rather than compensation, judges have a duty to decide habeas petitions promptly. But increasingly, the federal courts have fallen behind on their heavy habeas dockets, and many petitions—some of which are meritorious—remain undecided for years. First, this Article makes the normative and historical argument that speed must be, and always has been, central to the function of habeas. Second, it analyzes newly compiled Administrative Office of the United States Courts data on more than 200,000 habeas petitions and demonstrates empirically for the first time that there is a widespread and growing problem of delay in the resolution of habeas petitions in the federal courts. Third, this Article offers a specific and concrete remedy for the habeas delay problem, recommending that the Judicial Conference of the United States require judges to identify publicly all habeas petitions that have been pending in their chambers for more than six months, just as the Civil Justice Reform Act requires them to do for all other civil motions.*

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## INTRODUCTION

A prisoner seeking a writ of habeas corpus from a federal judge should have his petition decided quickly. The habeas petitioner, after all, contends that his detention is illegal and that every day he spends in prison is an uncompensable injury.<sup>1</sup> Of course, unreasonable delay in *any* civil matter is an injustice.<sup>2</sup> Delay costs litigants time and money, and it undermines public confidence in the administration of our judicial system.<sup>3</sup> But habeas—in which the petitioner’s very

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1. See *Ex parte Watkins*, 28 U.S. 193, 202 (1830) (stating that “the great object” of the writ of habeas corpus “is the liberation of those who may be imprisoned without sufficient cause”).

2. Federal habeas actions are categorized as civil matters, even though they frequently challenge detentions that are authorized by criminal convictions. See *Woodford v. Ngo*, 548 U.S. 81, 91 n.2 (2006); COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 12 (1976) (“The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.”).

3. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 1 (2009) [hereinafter IAALS STUDY] (“[F]or the general public, extended cases epitomize government inefficiency and drive reduced public confidence in the judicial system.”); TERENCE DUNGWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS, at iii (RAND Corp. 1990) (same). Critiques of the slowness of the courts abound in popular literature.

liberty is at stake—is a special category of case for which prompt adjudication is, in a real sense, the *raison d'être* for the cause of action.<sup>4</sup>

Increasingly, however, habeas petitions have languished on the dockets of the federal courts, often for years.<sup>5</sup> This delay has been most striking in the highly publicized Guantánamo cases, which have remained on the D.C. district courts' dockets for nearly a decade.<sup>6</sup> There are, of course, unique explanations for the slow resolution in the Guantánamo cases—not least that Congress has twice sought to strip the federal courts of jurisdiction to hear them.<sup>7</sup> But what is less explicable, and

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For example, in his famous soliloquy, Hamlet asks not only why a sane person would “bear the whips and scorns of time,” but also why he would brook “the law’s delay” rather than just dispatch himself with his sword. WILLIAM SHAKESPEARE, *THE TRAGICAL HISTORY OF HAMLET, PRINCE OF DENMARK* act 3, sc. 1, ll. 69–71 (Ann Thomson & Neil Taylor eds., Arden Shakespeare Third Series 2006) (1604–05); *see also* CHARLES DICKENS, *BLEAK HOUSE* 8 (George Ford & Sylvère Monod eds., W.W. Norton & Co. 1977) (1853) (recounting the fictional case of *Jarndyce v. Jarndyce*, which “drags its dreary length before the court” for generations).

4. *See infra* Part I.A.

5. *See infra* pp. 378–86.

6. The first of the Guantánamo habeas petitions was filed on behalf of four detainees in February 2002, only about a month after Guantánamo was opened as a War on Terror prison. *See Rasul v. Bush*, 542 U.S. 466, 471–72 & n.1 (2004) (noting petitions filed by two British and two Australian detainees). But it was not until October 2008 that a federal judge first ruled on the merits of a Guantánamo habeas petition. *See In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33, 34 (D.D.C. 2008) (holding the detention of seventeen Uighur nationals illegal).

7. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2006); Military Commissions Act of 2006, 10 U.S.C. § 948a (2006). The Guantánamo cases have raised threshold questions about the statutory availability of the writ. *See Rasul*, 542 U.S. at 484 (holding federal courts had jurisdiction to hear habeas petitions filed by Guantánamo prisoners pursuant to 28 U.S.C. § 2241). Guantánamo cases have also raised questions about the proper construction of congressional legislation designed to block the access of “enemy combatants” to the courts. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 582–83 (2006) (holding Congress did not intend the Detainee Treatment Act to bar federal courts from exercising jurisdiction over already pending habeas petitions filed by Guantánamo prisoners); *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (holding unconstitutional provisions of the Military Commission Act that stripped federal courts of jurisdiction to hear habeas petitions filed by Guantánamo prisoners). Additionally, the Guantánamo cases raised questions about the scope of the Suspension Clause of the U.S. Constitution. *Boumediene*, 553 U.S. at 795. Nonetheless, the slow pace of the litigation has not gone unnoticed by the judiciary. In *Boumediene*, Justice Kennedy wrote for the majority that “the costs of delay can no longer be borne by those who are held in custody.” *Id.* Two years earlier, a district court judge refused a government motion to stay proceedings in a Guantánamo habeas case, stating that, “[i]t is often said that ‘justice delayed is justice denied.’ Nothing could be closer to the truth with reference to the

rarely discussed among scholars, is a pandemic of delay infecting ordinary habeas litigation throughout the entire federal judicial system.<sup>8</sup>

This Article analyzes, for the first time, raw data made available by the Administrative Office of the United States Courts (Administrative Office) regarding all of the more than 200,000 state-prisoner, non-capital habeas cases that appeared on the federal courts' dockets from 1996 to 2008<sup>9</sup> and reaches some disconcerting conclusions. Key findings include the following:

- The number of state-prisoner habeas applications that remain undecided by the federal district courts as of the end of every fiscal year is large and has increased annually from 1996 (when there were 9,086 such petitions) to 2008 (when there were 15,824)—a 74% increase.<sup>10</sup>
- The proportion of habeas petitions appearing on the district courts' dockets that remained undecided for at least three years increased from 2.7% as of the end of 1996 to 7.8% as of the end of 2008.<sup>11</sup>
- The proportion of petitions that remained undecided for at least two years also increased markedly, from only 8.5% of the courts' habeas docket as of the end of 1996 to 18.7% as of the end of 2008.<sup>12</sup>
- The proportion of state-prisoner habeas applications that remained undecided for at least one year has likewise increased annually, from 25.7% of the courts' docket as of the end of 1996, to 39.4% as of the end of 2008.<sup>13</sup>
- While some districts have kept disposition times for habeas applications relatively low, in the ten "slowest" districts (as measured by mean number of days pending for habeas applications filed between 1997 and 2006), fewer than one-third are decided within six months of filing (29.9%), fewer than half are decided within one

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Guantánamo Bay cases." *Razak v. Bush*, No. 05-1601 (D.D.C. Dec. 1, 2006) (refusing a motion to stay proceedings in a habeas case).

8. See *infra* Part II.B–C.

9. These cases are filed in the district courts pursuant to 28 U.S.C. § 2254 (2006).

10. See *infra* p. 386.

11. See *infra* pp. 377–78, 385.

12. See *infra* pp. 379–80, 385.

13. See *infra* pp. 379–80, 385.

year of filing (49.2%) and nearly one-fifth require at least three years before decision (18.4%).<sup>14</sup>

This data reflect real suffering and injustice. It is a gruesome fact that some of these petitions become mooted because, after years of delay, the petitioner has died in prison before the judge has ruled on his habeas motion.<sup>15</sup> Equally disturbing are those instances in which a habeas petition, left undecided on a judge's desk for five or six years or more, is eventually granted, confirming that an already-unlawful imprisonment was extended by years due in part to the court's delay.<sup>16</sup> Granted, unlike in the Guantánamo context, where so far the success rate for habeas petitioners remains well over 50%,<sup>17</sup> the likelihood of a state prisoner winning the writ is quite small—certainly less than one in one hundred.<sup>18</sup> But even for the state prisoner who is destined to lose his habeas petition, inflicting years of uncertainty seems unnecessarily

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14. See *infra* pp. 392–95.

15. See, e.g., Judgment & Order at 1, *Olivencia v. Berbarry*, No. 99-CV-6415 (E.D.N.Y. May 20, 2003) (dismissing as moot a four-year-old habeas petition where the petitioner had died two years earlier).

16. In 2003, Senior Judge Jack B. Weinstein volunteered to clear a backlog of five hundred state-prisoner habeas applications that had remained pending in the district, often for years. See Order Withdrawing Power of Magistrates over Habeas Corpus Matters, *In re Habeas Corpus Cases*, 03-MISC-66 (May 9, 2003) (listing the five hundred 28 U.S.C. § 2254 cases reassigned to Judge Weinstein). Judge Weinstein granted the writ in nine cases, including three that had originally been filed about six years earlier. See *Thomas v. Kuhlman*, 255 F. Supp. 2d 99 (E.D.N.Y. 2003) (petition filed in 1997); *Harris v. Artuz*, 288 F. Supp. 2d 247 (E.D.N.Y. 2003) (same); *Batten v. Greiner*, Nos. 97-CV-2378, 2003 U.S. Dist. LEXIS 16923 (E.D.N.Y. Aug. 26, 2003) (same). Judge Weinstein also granted the writ in another case that had been pending for more than four years. See *Benn v. Griener*, 275 F. Supp. 2d 371 (E.D.N.Y. 2003) (petition filed in 1998). For synopses of these cases, see JACK B. WEINSTEIN, *IN RE HABEAS CORPUS CASES: REPORT ON 500 HABEAS CASES*, at 6–14 (2003) [hereinafter WEINSTEIN REPORT].

17. Of the sixty-one habeas applications decided through September 2011 by the D.C. district courts, the Guantánamo petitioners prevailed in thirty-eight of them, for a 62% success rate. The D.C. Court of Appeals subsequently reversed three of the grants and remanded with orders to deny the writ, reversed three of the grants and remanded with orders to reconsider, and reversed two of the denials and remanded with orders to reconsider. After taking account of this appellate action, the petitioners have succeeded in thirty-two of the fifty-seven petitions to have been decided on the merits, for a 56% success rate. (These numbers do not take into account petitions that became moot after the government released a detainee before being ordered to do so by the court.)

18. See NANCY J. KING ET. AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 58 & n.109 (Aug. 21, 2007) [hereinafter KING REPORT] (noting that non-capital state-prisoner habeas cases in her sample had a success rate of about 1 in 257).

cruel and suggests a kind of systemic contempt for the plight of petitioners who seek the court's protection.

It is all too easy to uncover anecdotal evidence of injustices caused by delay in federal habeas matters. Floyd Batten, for example, was serving a twenty-year sentence in a New York prison for the second-degree murder of a furniture store owner.<sup>19</sup> He learned, from a Freedom of Information Law Request,<sup>20</sup> that the prosecution in his case had never revealed to the defense a police report detailing their interviews with another suspect (an employee of the murder victim who had previously solicited help in robbing the store).<sup>21</sup> Batten filed a federal habeas petition in April 1997, alleging that the failure to provide these reports was a violation of the *Brady v. Maryland* requirement that the state turn over material evidence to a defendant.<sup>22</sup> It was not until December 2003, however, that he received a merits decision granting the writ.<sup>23</sup> Batten's order for a release from state prison did not come until *six years* after he first asked a federal court for help.<sup>24</sup>

To be sure, Batten's is an extreme case. Six years is an unusually long time for a habeas petition to be pending in a district court.<sup>25</sup> But increasingly, applicants across the country are facing multi-year delays before a federal district court decides their federal habeas petitions.<sup>26</sup> Quantifying the full sweep of this delay problem is critical, in particular because those charged with the functioning of the federal courts are not even sure there is a problem at all. Indeed, in opposing legislation that was designed to streamline the resolution of

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19. *Batten*, 2003 U.S. Dist. LEXIS 16923, at \*8.

20. Freedom of Information Law, N.Y. Pub. Off. § 84-90 (2008).

21. The police reports also indicated that this suspect was deported after the police alerted immigration authorities about him. *Batten*, 2003 U.S. Dist. LEXIS 16923, at \*45.

22. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

23. *Batten*, 2003 U.S. Dist. LEXIS 16923, at \*45 (holding there was "a reasonable probability that, had [the police reports] been disclosed to the defense, the result of the proceeding would have been different").

24. After losing its appeal, the State of New York chose not to retry Batten. See Denise Buffa, "Bum Rap" Suit—"Wrong Killer" Slaps City in '83 Bust, N.Y. POST, Dec. 31, 2004, at 23. Batten's habeas case was one of the five hundred that were backlogged in the Eastern District of New York and subsequently transferred in 2003 to Judge Jack B. Weinstein for disposition. See *supra* note 16.

25. See *infra* p. 380 (noting that only 10% of petitions filed from 1997 to 2006 required 2.3 years or more to be decided).

26. See *infra* pp. 377-80.

habeas cases, the Secretary of the Judicial Conference of the United States (Judicial Conference) has suggested it is unclear “*whether* there is any unwarranted delay occurring in the application of current law in resolving habeas corpus petitions filed in federal courts by state prisoners.”<sup>27</sup> If the federal judiciary is unaware that the problem exists, it is not likely to adopt any internal reforms to address the problem.<sup>28</sup>

A failure to address habeas delay disregards the historic office of the writ. Since the Parliament of England’s statutory efforts in the seventeenth century to establish strict time deadlines for the processing of habeas matters,<sup>29</sup> judges have been required to act promptly on habeas petitions in order to safeguard the liberty of the subject.<sup>30</sup> Indeed, the original purpose of habeas was at least as much to eliminate delay in resolving a prisoner’s status as it was to determine the legality of detention.<sup>31</sup> At its root, habeas corpus is fundamentally a process for ensuring a speedy trial (in the case of a criminal suspect) or a speedy hearing (in the case of non-judicial executive detention).<sup>32</sup> Coke and Blackstone both acknowledged the centrality of this principle<sup>33</sup> and, as is

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27. Letter from Leonidas Ralph Mecham, Sec’y, Judicial Conference of the U.S., to Hon. Arlen Specter, Chairman, Comm. on the Judiciary, U.S. Senate 1 (Sept. 26, 2005) (emphasis added); *see also id.* at 2 (stating that in 2004 the total number of non-capital habeas terminations was about the same as the number of such petitions filed by state prisoners annually, that median disposition times had remained constant since 1998 (at about six months), and that therefore “the statistics appear to indicate that the district . . . courts are handling non-capital habeas corpus petitions originating from state prisoners expeditiously”).

28. *Cf.* THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 5 (1978) (“If any one element is essential to the effort to reduce pretrial delay, it is concern by the court with delay as an institutional and social problem.”).

29. *See* Habeas Corpus Act, 1640, 16 Car., c. 10 (Eng.); Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.), discussed *infra* Part I.A.

30. *See infra* Part I.A.

31. *See infra* Part I.A.

32. *See infra* Part I.A.

33. *See* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 42 (Brooke, 5th ed. 1797) (English judges “have not suffered the prisoner to be long detained, but at their next coming have given the prisoner *full and speedy justice* . . . without detaining him long in prison.”) (emphasis added); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (Neill H. Alford, Jr., et al. eds., The Legal Classics Library 1983) (1768) (“And by [the Habeas Corpus Act of 1679], the methods are so plainly pointed out and enforced, that, so long as this statute remains unimpeded, no subject of England can long be detained in prison . . .”).

discussed below, in the United States our statutes, court rules, and case law all pay homage to it.<sup>34</sup>

Why then do federal judges seem to give such low priority to habeas petitions pending on their dockets? As is suggested in the last part of this Article, at least part of the explanation is, ironically, a provision of the Civil Justice Reform Act of 1990 (CJRA) that was intended to speed the resolution of civil matters generally. Section 476 of the CJRA requires judges to publish semi-annually a list of all motions appearing on their dockets that have been unresolved for six months or more.<sup>35</sup> The provision was designed to incentivize judges to resolve motions more promptly or face public shaming for failure to manage their dockets efficiently.<sup>36</sup>

Section 476 is one of the few reform measures instituted by the CJRA that seems to have worked to make the courts function more efficiently, and it is the only provision of the Act that Congress subsequently renewed.<sup>37</sup> But habeas is a glaring exception. The Judicial Conference has construed section 476 to exempt habeas petitions from the six-month reporting requirement<sup>38</sup>—with the result that habeas motions are sent to the back of the judges' to-do lists, even though by statute and rule they should be near the front. Recognizing this strange fact, this Article proposes a simple, effective, and low-cost reform for ameliorating the habeas delay problem: The Judicial Conference should reconsider its interpretation of section 476 of the CJRA and require district court judges to include habeas motions in their six-month reports to the public. Incentives matter, and even small and inexpensive changes can generate a large payback.

Part I below reviews the common law history of habeas and its ancient function as a kind of speedy trial analogue. It also surveys American statutes, rules, and decisional law to

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34. See, e.g., *Fay v. Noia*, 372 U.S. 391, 399–409 (1963) (noting that habeas provides “a swift and imperative remedy in all cases of illegal restraint or confinement”) (quoting *Sec’y of State for Home Affairs v. O’Brien*, [1923] A.C. 603, 609 (H.L.)).

35. 28 U.S.C. § 476(a) (2006).

36. See *infra* Part III.A.

37. See *infra* notes 172–80 and accompanying text.

38. See 18 ADMIN. OFFICE OF THE U.S., GUIDE TO JUDICIARY POLICIES AND PROCEDURES § 540.70 [hereinafter ADMINISTRATIVE OFFICE, POLICY GUIDE] (reflecting Judicial Conference policy to exclude from the CJRA semi-annual reporting requirement § 2254 habeas applications that have been pending more than six months, but making six-month-old “secondary” motions and any pending three-year-old § 2254 cases reportable).



show that, as a formal matter, our civil justice system is expected to move habeas petitions to the front of the courts' dockets for prompt action. Part II establishes empirically that swift resolution of habeas petitions is happening less and less often for thousands of state-prisoner applications nationwide and that delay is particularly pronounced in several problem districts. Part III proposes alleviating the delay problem through adoption of the same publication requirements to which judges must adhere for all other civil motions.

### I. HABEAS AND THE ROOTS OF THE SPEEDINESS REQUIREMENT

Speed has always been of the essence in habeas matters. Since at least the seventeenth century, a crucial function of the writ has been to assure that the courts promptly address prisoners' claims of illegal detention.<sup>39</sup> The Habeas Corpus Act of 1679—the English statute that provided the foundation for the right to habeas corpus enshrined in Article I of the U.S. Constitution<sup>40</sup>—was designed not only to address delaying tactics deployed by the King and his councilors, but also to mandate that the courts address habeas petitions immediately, with fines specified for judges who failed to act with dispatch.<sup>41</sup> Delay, in short, was one of the chief evils against which habeas historically was directed.

The first Section, below, briefly reviews the history of habeas corpus in England in the seventeenth century, explaining how the writ evolved into a set of procedures designed to ensure prompt review of allegedly illegal detentions. The next Section turns to the American context, showing that the same concern for assuring swift judicial review of detentions has served as a guiding principle for the courts throughout the evolution of habeas jurisprudence in America. The third Section reviews statutes and rules that have been authorized by Congress to assure that habeas petitions receive prompt attention from the federal district courts. The final Section observes that, notwithstanding the

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39. See *infra* notes 69–77 and accompanying text.

40. See THE FEDERALIST NO. 84, at 577 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (discussing the importance of protecting habeas in the Constitution by quoting Blackstone's encomiums to the Habeas Corpus Act of 1679); U.S. CONST. art. I, § 9, cl. 2 ("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.").

41. See *infra* notes 69–77 and accompanying text.

history, case law, statutes, and rules previously discussed, the courts have been reluctant to honor these provisions in practice, due at least in part to their heavy dockets.

A. *English Roots of Habeas and the Speed Requirement*

The deep roots of habeas corpus lie in Magna Carta's thirteenth century promise that "[n]o free man shall be seized or imprisoned . . . except by the lawful judgement of his equals or by the law of the land."<sup>42</sup> This provision famously struck against the arbitrary exercise of the King's power to deprive British subjects of their liberty, and it was the foundation on which the rule of law in England was built. The "law of the land" provision was not, however, self-interpreting or self-effectuating. Who, for example, was to determine whether a detention ordered by the King or his councilors was in accord with law of the land—the King himself or the King's Bench, the court that in theory derived its power from the monarch?<sup>43</sup>

Bringing the promise of Magna Carta to fruition has required centuries of grappling with questions large and small, ranging from the authority of the King's Bench and other courts to oversee executive detentions<sup>44</sup> to the technical wording of the writs that commanded jailers to explain why they were detaining a prisoner.<sup>45</sup> Eight centuries later, we are still wrestling with many of these same issues.<sup>46</sup>

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42. Magna Carta, cl. 39 (England 1215) ("Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre."), *photograph of original document available at* [http://www.archives.gov/exhibits/featured\\_documents/magna\\_carta/images/magna\\_carta.jpg](http://www.archives.gov/exhibits/featured_documents/magna_carta/images/magna_carta.jpg), *Latin transcript available at* <http://www.thelatinlibrary.com/magnacarta.html>, and *English translation available at* <http://www.law.ou.edu/ushistory/magnacarta.shtml>.

43. PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 75 (2010) ("If the king had a unique interest in his subjects' bodies, it stood to reason that enacting that interest when he no longer sat in court himself should become the function of the court claiming to be so close to his person that it was the king himself. Or so many thought . . .").

44. *See id.* at 11–38 (discussing jurisdictional battles); R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 4–15 (1976) (same).

45. HALLIDAY, *supra* note 43, at 51–53 (discussing modifications in language of the writ).

46. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) (recognizing the need to begin to determine the extraterritorial scope of the writ).

While this Article does not describe the ancient history of the writ of habeas corpus,<sup>47</sup> the battles among Parliament, the King, and the courts in the politically tumultuous seventeenth century are worth briefly revisiting for what they reveal about the importance of speed in the habeas process. On the eve of Parliament's passage of the first Habeas Corpus Acts, the power of the courts to check royal power over detention decisions was contested and tenuous. The common law writ of habeas corpus *ad subjiciendum* (the direct ancestor of what we now commonly refer to as the writ of habeas corpus) had only recently been developed by the King's Bench to review the legality of imprisonments ordered by the King and his councilors,<sup>48</sup> and the Crown's efforts to avoid judicial oversight were frequent.<sup>49</sup> The King, of course, did not want his powers circumscribed by the King's Bench any more than modern presidents want their wartime detention decisions to be reviewable by the federal courts. It was common in the sixteenth and seventeenth centuries, for example, for the King's Bench to order a jailer to explain on what grounds he was detaining a prisoner, only to be told that the prisoner was being detained on order of the King or his Privy Council, and that therefore the detention was *per se* legal.<sup>50</sup>

Two separate attempts were made by Parliament, in 1593 and 1621, to legislate executive compliance with the writ, but both were unsuccessful.<sup>51</sup> A constitutional crisis soon ensued, precipitated by the infamous *Darnel's Case* (also known as the

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47. For a fresh perspective on the history of the Writ, see generally HALLIDAY, *supra* note 43. For a discussion of the history of habeas in the executive detention context, see JONATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11*, at 81–100 (2011); Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 *DENV. U. L. REV.* 961, 966–88 (2009).

48. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 126 (2d ed. 1979) (describing the rise of this form of the writ in the sixteenth century). There were a number of distinct writs with different names. As cataloged by Blackstone, these included *ad respondendum* (for removing a prisoner from confinement to answer a complaint brought against him), *ad satisfaciendum* (for bringing a prisoner to a superior court for execution of a judgment), *ad prosequendum* (for bringing a prisoner to be prosecuted), *ad testificandum* (for bringing a prisoner to testify), and *ad deliberandum* (for bringing a prisoner into the proper jurisdiction for trial). 1 BLACKSTONE, *supra* note 33, at 129–30.

49. See HALLIDAY, *supra* note 43, at 159.

50. For a full discussion of the development of the Writ's "return" requirement (the obligation of the jailer to provide a full factual and legal justification for the detention of a subject), see Falkoff, *supra* note 47, at 967–72.

51. See SHARPE, *supra* note 44, at 9 n.3 (noting the defeat of such bills in 1593 and 1621).

*Five Knights' Case*) in 1627.<sup>52</sup> Charles I sought to raise revenue by demanding, without sanction from Parliament, a forced loan from his subjects. Five knights refused to make the loans and were arrested by Charles' agents. The knights sought a writ of habeas corpus, claiming that their detention was illegal.<sup>53</sup> The King's response was that if the King does it, then it's not illegal.<sup>54</sup> The King's Bench accepted this answer and held that the prisoners could not be bailed.<sup>55</sup>

Parliament was more successful in its legislative response in the aftermath of *Darnel's Case*. Later in 1627 it passed the Petition of Right, a declaration of grievances against Charles I. In the Petition, Parliament noted that subjects had been imprisoned "without any cause showed" and complained that the only answer the King had given to habeas corpus writs was that the prisoners were detained by his "special command."<sup>56</sup>

The King consented to the Petition, but he apparently did so only after concluding that his power to detain his subjects could not, as a result, be circumscribed by the King's Bench.<sup>57</sup> Indeed, in fundamental ways, the King subsequently refused to honor the Petition of Right in practice by deploying a host of strategies to avoid judicial oversight of detention decisions.<sup>58</sup> The King's Bench, in turn, sought to avoid confrontation with the executive by deploying habeas writs sparingly and thus delaying determination of the status of prisoners.<sup>59</sup>

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52. 3 St. Tr. 1, 31 (1627) (Doderidge, J.).

53. SHARPE, *supra* note 44, at 9.

54. The Executive's return stated only that the men were being detained "*per speciale mandatum domini regis*," or by special order of the King. Counsel for the prisoners argued, as per Magna Carta, that no detention was legal except "*per legem terre*," or by the law of the land. In response, the Attorney General noted that Magna Carta did not define "*legem terre*" and that the law of the land was that the King could detain his subjects without giving an accounting of why to the courts. *Darnel's Case*, 3 St. Tr. at 31.

55. *Id.*

56. 3 Car., c. 1 (1627).

57. See SHARPE, *supra* note 44, at 14 n.2 (noting that, before consenting to the Petition, Charles I had sought assurances from the King's Bench judges that it would not restrain his powers); *id.* at 13–15 (quoting Six Members' Case, 3 St. Tr. 235, 281 (1629)) (discussing legal arguments propounded by Charles I in the immediate aftermath of the Petition, including that he had "granted no new, but only confirmed the ancient liberties of my subjects").

58. See *id.* at 13–15.

59. See HALLIDAY, *supra* note 43, at 160 (noting that release rates on habeas corpus "plunged" during the reign of Charles I, and were not affected by the Petition of Right); *id.* at 223 (stating that "the Petition did little to change judicial work in the years immediately following" its passage).

An infamous example of abusive delay tactics that were countenanced by the King's Bench involved the case of John Selden, who was a Member of Parliament, one of the lawyers in the *Five Knights' Case*, and a moving force behind the drafting of the Petition of Right. In March 1629, Selden led a group in the House of Commons that held the speaker in his chair in an attempt to prevent the dissolution of Parliament, which Charles I had ordered.<sup>60</sup> Selden and the others were arrested on the King's command and charged with "notable contempte . . . and for stirreing up sedition against us."<sup>61</sup> The King refused to offer the King's Bench a particularized justification for the imprisonment, seemingly to test the limits of his detention powers under the Petition of Right,<sup>62</sup> and the King's Bench largely acquiesced. As Blackstone described it, the judges in Selden's case "delayed for two terms (including also the long vacation)"<sup>63</sup>—about six months from the time of his arrest<sup>64</sup>—"to deliver an opinion how far such a charge wasailable."<sup>65</sup>

Blackstone wrote that it was such "pitiful evasions" that gave rise to Parliament's passage of the Habeas Corpus Act of 1640,<sup>66</sup> which sought to strengthen the court's review power over executive detentions by requiring speedy compliance with the writ.<sup>67</sup> As Blackstone summarized the Act, any person committed by the King's order "shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*," and the judges were to "examine and determine the legality of such commitment, and do what to

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60. *Id.* at 224.

61. John Reeve, *The Arguments in the King's Bench in 1629 Concerning the Imprisonment of John Selden and Other Members of the House of Commons*, 25 J. BRIT. STUD. 264, 269 (1986).

62. See PAUL CHRISTIANSON, DISCOURSE ON HISTORY, LAW AND GOVERNANCE IN THE PUBLIC CAREER OF JOHN SELDEN, 1610–1635, at 182 (1996).

63. 3 BLACKSTONE, *supra* note 33, at 134.

64. Selden was arrested on March 3, 1629, before the start of Easter Term. CHRISTIANSON, *supra* note 62, at 180. He applied for a writ of habeas corpus on May 6, and the King's "return" to the writ was filed on May 7. *Id.* at 182. Selden's arguments for bail were heard before the King's Bench about a month later, on June 5, during Trinity Term, *id.* at 182–84; the King's arguments were heard on June 13, *id.* at 187. The King's Bench was set to issue its bail decision on June 24, but the day before the King removed Selden to the Tower of London, leaving the court unable to render its bail decision. *Id.* at 190. The court went on vacation during the summer and did not issue their decision—that Selden should be bailed—until the opening of Michaelmas Term, in October. *Id.* at 190–91.

65. 3 BLACKSTONE, *supra* note 33, at 134.

66. *Id.*

67. 16 Car., c. 10 (1640).

justice shall appertain, in delivering, bailing, or remanding such prisoner” within three days of the return of the writ.<sup>68</sup>

It soon became clear, however, that even this statutory supplement to the common law powers of the King’s Bench was not completely effective. It was disputed, for example, whether the writ could be awarded while the courts were in vacation—a practice that had led to lengthy detentions.<sup>69</sup> Abuses continued, including the movement of prisoners from jail to jail to avoid the writ, or transportation to Scotland or other areas where the writ in theory might not reach.<sup>70</sup> The King, in short, deployed a series of delay tactics in an attempt to undermine the effectiveness of the writ and its promise of court supervision over his detention decisions, and the courts were complicit to the degree that they countenanced tactics of delay and avoidance.

Parliament sought to cure such problems once and for all through passage of the Habeas Corpus Act of 1679.<sup>71</sup> As the preamble to the Act states, it was designed to combat the “great delays” that jailers had made by refusing to answer habeas writs until they had been reissued multiple times, and “by other shifts to avoid their yeilding [o]bedience to such Writts, . . . whereby many of the King’s subjects have been and hereafter may be long detained in prison, in such cases where by law they areailable, to their great charges and vexation.”<sup>72</sup>

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68. 3 BLACKSTONE, *supra* note 33, at 135. Blackstone went on to note that “[o]ther abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party: and many other vexatious shifts were practiced to detain state prisoners in custody.” *Id.*

69. As Paul Halliday has explained, prior to the mid-seventeenth century, the King’s Bench would in fact frequently issue a writ of habeas corpus during the court’s vacation, either with the actual *teste* date on it or by backdating it to the last day of the previous term. HALLIDAY, *supra* note 43, at 56. Confusion about whether the writ was available during vacation was sown by dictum from Sir Edward Coke, who in his *Institutes* wrote that “neither the King’s Bench nor Common Pleas can grant [the habeas] writ but in the term time.” *Id.* (quoting Coke). Coke’s dictum nonetheless led to the belief that, during the latter half of the seventeenth century, the writ had not been available during vacation. *See id.* at 236–37.

70. SHARPE, *supra* note 44, at 17.

71. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

72. *Id.* Thus, the Act “contained provisions which were designed to ensure that even where a prisoner was not entitled to immediate release, he would be brought to trial with as little delay as possible.” SHARPE, *supra* note 44, at 19 (citing §§ 6, 17, 18); *see also id.* at 133 (“[T]he most neglected aspect of habeas

The Act itself is lengthy and detailed, providing a series of particularized requirements, including specific timing provisions for, and penalties to be assessed against, both jailers and justices who failed to comply with the Act's requirements. These requirements included, for "the more speedy [relief] of all persons imprisoned" on criminal matters, that jailers "shall within [t]hree days after the [s]ervice" of a habeas corpus upon them "make [return] of such [writ]" (with longer periods allowed for imprisonments that are far from the court).<sup>73</sup> Failure to return the writ within these time periods made the jailers liable to the prisoner for one hundred pounds for a first offense and two hundred pounds for a second offense.<sup>74</sup> Any person who was detained "in the Vacation time and out of Terme" of the courts was explicitly entitled to apply for habeas corpus to any of the justices of the court; the justices were authorized to grant habeas corpus during this period and to require that the jailer provide an "immediate" return (that is, an explanation of the cause of detention).<sup>75</sup> The failure of a justice to issue the writ during vacation time when it was "required to be granted" by the Act made the justice liable to the prisoner for five hundred pounds.<sup>76</sup>

As these strict time deadlines suggest, combating delay was a chief purpose of the Act—the "very hub of the design."<sup>77</sup> After passage of the Act, no person could be held for more than two terms without trial or release.<sup>78</sup> At least for those prisoners detained on suspicion of having committed a crime, the Habeas Corpus Act of 1679 thus functioned, in short, much like the

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corpus has been its use as a device to secure the right of accused persons, detained pending their trial, to be either tried quickly or released.").

73. Habeas Corpus Act, 1679, 31 Car. 2, c. 2, ¶ 1 (Eng.).

74. *Id.* ¶ 4.

75. *Id.* ¶ 2 (emphasis added).

76. *Id.*

77. SHARPE, *supra* note 44, at 133. See also 1 J. CHITTY, CRIMINAL LAW 130–31 (1816) ("But the principal ground for bailing upon habeas corpus, and indeed the evil the writ was chiefly intended to remedy, is the *neglect* of the accuser to prosecute in due time.").

78. The "design of the Act," according to one English judge, "was to prevent a man's lying under an accusation for treason, &c. above two terms." Crosby's Case, [1694] 12 Eng. Rep. 66 (P.C.). According to another judge, its object "was to provide against delays in bringing persons to trial, who were committed for criminal matters." *Ex parte Beeching*, [1825] 107 Eng. Rep. 1010 (P.C.); 4 B. & C. 137. A third explained that the Act "was directed specifically to the abuse of detaining persons in prison without bail and without bringing them to trial." *In re Hastings*, [1959] 1 Q.B. 358, at 369 (U.K.).

modern speedy trial right.<sup>79</sup> It is unsurprising, given this history, that expeditious access to the habeas courts would be recognized in the American context as crucial to protecting the individual's liberty.

*B. Habeas and Speed in the American Context*

Judicial protection of a citizen's liberty by the writ of habeas corpus was part of America's patrimony from England. The framers of the Constitution knew the history leading up to Parliament's passage of the Habeas Corpus Act of 1679,<sup>80</sup> and they understood that prompt judicial review was integral to the functioning of the writ, since habeas was "the great remedy . . . by which the judicial power speedily and effectually protects the personal liberty of every individual."<sup>81</sup>

Indeed, the first draft of the Suspension Clause, as proposed by Charles Pinckney of Virginia, made the importance of speed explicit: "The privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding\_\_ months."<sup>82</sup> The first Congress immediately authorized the federal courts to issue the writ for federal prisoners in the Judiciary Act of 1789.<sup>83</sup> And, as Joseph Story explained, the

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79. See generally SHARPE, *supra* note 44, at 133–40 (discussing the derivation of the speedy trial right from habeas). By its terms the Habeas Corpus Act regulated only criminal detentions, and the protections of the writ of habeas corpus were not extended *by statute* to non-criminal detainees in England until the Habeas Corpus Act, 1816, 56 Geo. 3, c. 100 (Eng.). In practice, however, the procedural protections of the Habeas Corpus Act of 1679 were extended by judges to prisoners in non-criminal cases. See ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 219 & n.2 (London, Macmillan & Co. 4th ed. 1893).

80. See *Boumediene v. Bush*, 553 U.S. 723, 739–40 (2008).

81. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 117 (photo. reprint 2003) (2d ed. 1829). See also *Ex parte Randolph*, 20 F. Cas. 242, 252–53 (C.C.D. Va. 1833) (discussing the "celebrated habeas corpus act of 31 Charles II., . . . which, in practice, by reason of its valuable provisions for insuring speedy action, has almost superseded the common law").

82. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334 (Max Farrand ed., Yale University Press 1911). The provision was modified and came out of the Committee of Style as, "[t]he privilege of the writ of Habeas Corpus shall not be suspended; unless where in cases of rebellion or invasion the public safety may require it." *Id.* at 435. The word *where* would be changed to *when* in the ratified version of the Constitution. See U.S. CONST. art. I, § 9, cl. 2.

83. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.



Act was, “in substance, incorporated into the jurisprudence of every state in the Union; and the right to it has been secured in most, if not in all, of the state constitutions by a provision, similar to that existing in the constitution of the United States.”<sup>84</sup>

Praise for habeas as a guarantor of speedy justice is common in our early decisional law. As Chief Justice Taney stated, the “great and inestimable value” of our habeas corpus inheritance in America was that it “compel[led] courts and judges, and all parties concerned, to perform their duties promptly.”<sup>85</sup> Other courts noted that there was “no other remedy known to the law, which is so speedy and effectual,”<sup>86</sup> and even that the liberty of the people depended on the courts’ insistence on “ready compliance” with the writ.<sup>87</sup>

Until after the Civil War, the writ was available only for federal prisoners.<sup>88</sup> Congress did not give the federal courts statutory authority to grant the writ to state prisoners until it passed the Habeas Corpus Act of 1867, which in modern form

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84. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1335 (1833) (footnote omitted). The Massachusetts Constitution, for example, stated that the “privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner.” MASS. CONST. chp. VI, art. VII. *See also* N.H. CONST. of 1784, in 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2469 (Francis Newton Thorpe ed. 1909); VT. CONST. of 1793 § 41 (as amended through 2002) (stating that the legislature shall assure the writ provides “a speedy and effectual remedy in all cases proper therefor”); Act of Dec. 12, 1712, 2 S.C. STAT. 399-401 (adopting Habeas Corpus Act of 1679).

85. *Ex parte Merryman*, 17 F. Cas. 144, 150 (C.C.D. Md. 1861) (Taney, C.J.).

86. *Norris v. Newton*, 18 F. Cas. 322, 324 (C.C.D. Ind. 1850).

87. *In re Stacy*, 10 Johns. 328, 332 (N.Y. 1813) (*quoting* *King v. Winton*, 5 Term. R. 89 (1792)) (“[T]he courts always looked with a watchful eye at the returns to writs of *habeas corpus*; that the liberty of the subject essentially depended on a ready compliance with the requisitions of the writ . . .”).

88. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (providing that “writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States.”); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (stating that unless Congress had passed a statute authorizing the federal courts to grant the writ, “the privilege itself would be lost, although no law for its suspension should be enacted”). *But see* Eric M. Freedman, *Just Because John Marshall Said It, Doesn’t Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 537 (2000) (arguing that the federal courts had common law power to issue the writ for state prisoners).

has been codified in 28 U.S.C. § 2254.<sup>89</sup> Nonetheless, whenever the federal courts have reflected on their authority to determine the legality of a state prisoner's detention, they have acknowledged a correlate responsibility to exercise their duties expeditiously. Habeas applications challenging illegal detention, after all, are concerned with the arbitrariness of any kind of detention, whether authorized by the executive solely or by another judicial body.<sup>90</sup>

Thus, in case after case filed by state prisoners under section 2254, the Supreme Court has emphasized that the chief value of habeas is "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints,"<sup>91</sup> and that the state prisoner seeking federal court protection must be afforded "a swift and imperative remedy in all cases of illegal restraint upon personal liberty."<sup>92</sup> The Court has said, "time and again, that prompt resolution of prisoners' claims is a principal function of habeas."<sup>93</sup>

Accordingly, the lower federal courts have recognized that section 2254 cases must (at least in theory) jump to the front of the courts' dockets.<sup>94</sup> As the Court of Appeals for the Ninth Circuit has stated, an "application for the writ usurps the attention and displaces the calendar of the judge or justice who entertains it and receives prompt action from him."<sup>95</sup>

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89. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2254 (2006)).

90. CARY FEDERMAN, *THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE* 165 (Robert J. Spitzer ed., 2006) (noting, in discussion of habeas as a way to challenge both executive detentions and court-authorized detentions, that "there is no real divergence in either habeas' goal of freeing the unlawfully detained").

91. *Fay v. Noia*, 372 U.S. 391, 401–02 (1963).

92. *Price v. Johnson*, 334 U.S. 266, 283 (1948); see also *Fay*, 372 U.S. at 400 (using same "swift and imperative" language); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (purpose of 28 U.S.C. § 2254 "is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person") (citation omitted).

93. *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 814 (D.C. Cir. 1988) (citing *Rose v. Lundy*, 455 U.S. 509, 520 (1981); *Braden v. 30th Jud. Circuit Court of Ky.*, 410 U.S. 484 (1973)).

94. See *Post v. Gilmore*, 111 F.3d 556, 557 (7th Cir. 1997); *Chatman-Bey*, 864 F.2d at 814 ("Delay is undesirable in all aspects of our justice system, but it is especially to be avoided in the sensitive context of habeas corpus.").

95. *Ruby v. United States*, 341 F.2d 585, 587 (9th Cir. 1965); see also *Yong v. INS*, 208 F.3d 1116, 1120 (9th Cir. 2000) (noting, in denying a government request for a stay in a habeas deportation case, that "[s]pecial solicitude is required because the writ is intended to be a 'swift and imperative remedy in all cases of illegal restraint or confinement' ") (quoting *Fay*, 372 U.S. at 400 (1963)); *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (holding that fourteen-month

### C. *Speed Required by Statute and Rule*

Speedy disposition of state-prisoner habeas applications is mandated by both statute and rule. Most importantly, 28 U.S.C. § 1657 requires the federal courts to expedite habeas petitions: “Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 . . . .”<sup>96</sup> As the Court of Appeals for the Seventh Circuit has explained, “[l]iberty’s priority over compensation is why 28 U.S.C. § 1657 specifies that requests for collateral relief go to the head of the queue.”<sup>97</sup>

In addition to section 1657, the habeas statute itself sets strict time limits for the processing of habeas petitions. Pursuant to 28 U.S.C. § 2243, a court entertaining an application for a writ of habeas corpus must “*forthwith* award the writ or issue an order directing the respondent to show cause why the writ should not be granted.”<sup>98</sup> The prisoner’s custodian must then respond to the petition “within three days unless for good cause additional time, *not exceeding twenty days*, is allowed.”<sup>99</sup> Upon receiving the return certifying the cause of the prisoner’s detention, the court must set a date for hearing “*not more than five days* after the return unless for

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delay in deciding habeas petition denied state prisoner due process, and stating that “[t]he writ of habeas corpus, challenging illegality of detention, is reduced to a sham if the trial courts do not act within a reasonable time” (footnote omitted).

96. 28 U.S.C. § 1657(a) (2006). Chapter 153 consists of the habeas provisions that have been codified at 28 U.S.C. § 2241, *et seq.* Section 1657 also requires expedited consideration of actions brought under “section 1826 of this title, any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown.”

97. *Post*, 111 F. 3d at 557; *see also Ruby*, 341 F.2d at 587 (“The ordinary rules of civil procedure are not intended to apply thereto, at least in the initial, emergency attention given as prescribed by statute to the application for the writ.”); *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737–38 (9th Cir. 1954) (finding habeas is “a speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination”); *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970) (same); *Fischer v. Ozaukee Cnty. Circuit Court*, 741 F. Supp. 2d 944, 962 (E.D. Wis. 2010) (rejecting state’s motion to reconsider grant of habeas petition on the grounds that the court acted *too* swiftly, and “remind[ing] the respondent that in the context of petitions for writs of habeas corpus, courts are explicitly required by law to expedite the consideration of these cases. *See* 28 U.S.C. § 1657(a)”).

98. 28 U.S.C. § 2243 (2006) (emphasis added).

99. *Id.* (emphasis added).

good cause additional time is allowed.”<sup>100</sup> These specific deadlines recall, of course, those of the Habeas Corpus Act of 1679 itself.

Notwithstanding this specificity, the district courts routinely ignore the deadlines set forth by 28 U.S.C. § 2243.<sup>101</sup> District court judges rely instead on Rule 4 of the Rules Governing Section 2254 Cases, which has been assumed to supplant the statutory deadlines.<sup>102</sup> Rule 4 replaces the strict time limits of section 2243 with discretionary language:

The original petition shall be presented *promptly* to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined *promptly* by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading *within the period of time fixed by the court* or to take such other action as the judge deems appropriate.<sup>103</sup>

The Advisory Committee Notes to Rule 4 state that the rule was designed to give the district courts “greater flexibility than under § 2243 in determining within what time period an answer must be made.”<sup>104</sup> There is a strong argument to be made that Rule 4 should not be read as a license to district courts to ignore the time limitations of section 2243.<sup>105</sup>

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100. *Id.* (emphasis added); see also *Glynn v. Donnelly*, 470 F.2d 95, 99 (1st Cir. 1972) (stating that, in general, 28 U.S.C. § 2243 manifests policy that habeas petitions are to be heard promptly).

101. Senior Judge Jack B. Weinstein of the Eastern District of New York has made similar observations. See, e.g., Mem. to Special Master Respecting Timeliness of Decisions on Petitions of Persons in State Custody, *In re Habeas Corpus Cases*, 216 F.R.D. 52, 53 (E.D.N.Y. 2003).

102. See, e.g., *Kramer v. Jenkins*, 108 F.R.D. 429, 431 (N.D. Ill. 1985).

103. 28 U.S.C. § 2254 (Rules Governing § 2254. Rule 4. Preliminary Consideration by Judge) (1976) (emphasis added).

104. 28 U.S.C.A. § 2254 advisory committee’s note (Rule 4. Preliminary Review; Serving the Petition and Order) (2006).

105. Congress’s authorization to the Supreme Court to promulgate rules is restricted to “the power to prescribe general rules of practice and procedure” that “shall not abridge, enlarge or modify any substantive right” so that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072 (2006). As Judge Weinstein has observed, the Advisory Committee (and the district courts that have followed the Advisory Committee’s commentary) must have understood Rule 4 to be in conflict with, and

Nonetheless, whether the courts should be obliged to follow the explicit time limits in section 2243, or instead to respect the more general language requiring that judges act on habeas petitions “promptly,” it is clear that section 1657, section 2243, and the Rules Governing Section 2254 Cases, taken together, indicate that Congress intended that the federal courts decide habeas petitions in a speedy manner, consistent with historical practice.

*D. Busy Court Dockets Trump Statute and Rule*

The Judicial Conference, at least, believes that these rules and statutory provisions are sufficient to ensure that the federal courts act with disposition on habeas matters.<sup>106</sup> And, occasionally, the federal appellate courts have cited section 1657 when ordering district court judges to decide individual petitions that have been pending for lengthy periods.<sup>107</sup>

But, by and large, the federal courts have been unsympathetic to arguments from habeas petitioners that their applications should move to the front of the line for decision. The reason is a practical one—the district court judges believe

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thus to supplant, the stricter time limits of § 2243. *See In re Habeas Corpus Cases*, 216 F.R.D. at 54 (citing *Castillo v. Pratt*, 162 F. Supp. 2d 575, 577 (N.D. Tex. 2001); *Wyant v. Edwards*, 952 F. Supp. 348, 352–53 (S.D.W. Va. 1997)). It is, however, not clear that the rule and the statute are necessarily in conflict. *See id.* at 53 (noting that Rule 4’s requirement that respondent file an answer “within the period of time fixed by the court” is compatible with section 2243, allowing the district court to use its discretion to set a response date, but only up to 20 days from issuance of the court’s order to show cause).

106. *See* Streamlined Procedures Act of 2005: Hearing on H.R. 3035 Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary, 109th Cong. 1 (2005) (letter from Leonidas Ralph Mecham, Sec’y, to F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Judiciary) (objecting to provision in the proposed Streamlined Procedures Act of 2005 that would have required the circuit courts to decide habeas appeals within 300 days of the conclusion of briefing, by noting that “Section 1657 already requires courts, both trial and appellate, to expedite consideration of any action brought under chapter 153 [of Title 28, United States Code], which includes habeas corpus proceedings”) (internal quotation marks omitted).

107. The Court of Appeals for the Fourth Circuit, for example, granted a petition for a writ of mandamus to a section 2255 habeas petitioner whose application had been pending without action in the district court for more than three years. *In re Hicks*, 118 F. App’x 778, 778 (4th Cir. 2005). Ordering the district court to decide the motion within sixty days, the Fourth Circuit noted that “[w]rits of habeas corpus are intended to afford a speedy remedy to those illegally restrained,” and that “[p]ursuant to 28 U.S.C. § 1657(a) (2000), the district court must give priority to habeas corpus cases over other civil cases.” *Id.* (citation omitted).

they are simply overwhelmed with habeas applications. In *Marutz v. United States*, for example, a judge from the Eastern District of California expressed (understandable) exasperation with a petitioner who was expressing his own (understandable) frustration with the failure of the magistrate in his case to decide his habeas petition, which had been pending for more than two years without decision. The judge explained,

[T]his court faces an unprecedented backlog of habeas applications, all but a fraction of which are from prisoners proceeding without counsel. From January 1, 2004, through December 31, 2007, California prisoners commenced more than 2,600 actions seeking habeas corpus relief from the Sacramento Division of the United States District Court for the Eastern District of California. Thus, while the court is aware that movant's application has been submitted for some time now, others have been submitted longer. This court's general policy is to resolve habeas petitions in the order in which they were submitted for decision, regardless of whether the movant is represented by counsel. Counsel cites no precedent or rule which requires the court to permit a later-submitted habeas petition to usurp its attention from that of an earlier one . . . . There is no question that this court is not staffed adequately to resolve all, or even most, of the submitted habeas actions within 60, 90 or even 120 days.<sup>108</sup>

Heavy habeas dockets similarly led the Court of Appeals for the Fifth Circuit to dismiss a petitioner's argument that delay in deciding his section 2255 motion (the analogue for federal prisoners of a section 2254 petition) violated section 1657, stating that while "28 U.S.C. § 1657 requires that courts expedite such actions," the "requirement is relative, not specific," and the petitioner had failed to show that resolution of his petition "was delayed beyond the requirements of the court's docket."<sup>109</sup>

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108. *Marutz v. United States*, No. Cr. S-93-0016, 2008 U.S. Dist LEXIS 46890, at \*5-6 (E.D. Cal. May 27, 2008) (footnotes omitted) (discussing a § 2255 habeas application).

109. *United States v. Samples*, 897 F.2d 193, 195 (5th Cir. 1990); *cf. In re Gates*, No. 92-3179, 1992 WL 403016, at \*1 (D.C. Cir. Dec. 30, 1992) (denying mandamus petition filed by a section 2255 petitioner, stating that he had failed to show that "the district court has unduly delayed acting on his motion to vacate sentence," but noting also that "[i]n light of 28 U.S.C. § 1657(a) (requiring expedition of actions brought under 28 U.S.C. § 2255), however, we are confident that the district court will promptly dispose of Gates's motion"); *Hale v. Lockhart*,

Other appellate courts have been less forgiving of the “busy court dockets” rationale for failing to decide habeas petitions promptly.<sup>110</sup> In 1990, the Court of Appeals for the Tenth Circuit found that a fourteen-month delay in the processing of a habeas application was a due process violation, and held the district court’s backlog and heavy caseload were unjustified, because if such delay were acceptable, “the function of the Great Writ would be eviscerated.”<sup>111</sup>

As discussed below, however, fourteen-month delays in the resolution of habeas petitions have now become the norm rather than the exception.

## II. EMPIRICAL EVIDENCE OF HABEAS DELAY

The following Sections quantify the scope of habeas delay in the federal courts. Although by statute and rule, the district courts must accord priority treatment to habeas matters, from 1996 (the year that the Antiterrorism and Effective Death Penalty Act, or “AEDPA,” was passed into law) to 2008 (the last year for which the Administrative Office has made full civil case processing data available), an increasing proportion of the petitions on the courts’ habeas dockets have required one, two, three, or more years before decision.<sup>112</sup> During this same period, there has been a decreasing proportion of petitions terminated within six months of filing<sup>113</sup>—an amount of time that this Article will later suggest is reasonable for deciding a habeas petition (except in extraordinary cases) and that should serve as an appropriate benchmark for measuring the courts’ efficiency.<sup>114</sup> The increasing proportion of “aged” petitions is even more acute in certain districts, where a habeas petition will likely require more than a year to be decided.<sup>115</sup> This Part

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903 F.2d 545, 547–48 (8th Cir. 1990) (no due process violation where three years elapsed between filing of habeas petition and decision by the district court).

110. See, e.g., *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (holding that fourteen-month delay in processing of habeas petition was due process violation, and refusing to accept “busy court dockets” as a justification for the delay).

111. *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990). The *Rogers* court further stated, “[i]t may be that the district court will need to seek additional resources or reallocate its existing resources to enable it more promptly to resolve the large number of petitions for writ of habeas corpus pending on its docket.” *Id.* at 1285.

112. See *infra* pp. 378–86.

113. See *infra* pp. 383–85.

114. See *infra* Part III.C.

115. See *infra* Part II.C.

will fully discuss these and other observations about the lengthy delays in the resolution of habeas matters.

The first Section below describes the design of the study. The second Section looks at the state of the nationwide district court habeas docket as a whole. The third Section turns to individual districts with particularly fast and slow mean disposition times for habeas matters and highlights the depth of the delay problem in the “slowest” districts.

### A. *Study Design*

This study is the first to gather and analyze information about the entire population of non-capital federal habeas applications filed by state prisoners between fiscal years 1996 and 2008.<sup>116</sup> It is not a sampling study; instead, it describes

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116. Scholars have, of course, published empirical work on federal habeas before now. Among the earliest was a study of all federal habeas petitions filed in Massachusetts between 1970 and 1972, which concluded that the district was managing its habeas docket efficiently. David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 332, 333 tbl.III (1973) (finding that most of the 353 petitions had been decided “in a relatively short time,” with a median disposition time “somewhat less than one month,” with only eight petitions requiring more than one year to decide). In 1979, Paul H. Robinson reviewed all habeas petitions filed from 1975 to 1977 in six district courts, and found that the mean disposition time for the 1899 petitions was only about four and one half months. PAUL H. ROBINSON, FEDERAL JUSTICE RESEARCH PROGRAM, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 5, 42 (1979); *see also id.* 4(b) (observing that more than half of the petitions were dismissed quickly on procedural grounds, and concluding the “data support the beliefs that the actual processing of most petitions is performed with less investment of judicial time and resources than would be required in a traditional lawsuit, but that the sheer act of processing such a large number of complaints has impact upon courts”); Karen M. Allen et al., *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 704 (1982) (reviewing Robinson’s data and noting that mean disposition time was markedly different across districts, ranging from 99 to 227 days). A 1995 study produced for the Bureau of Justice Statistics (“BJS”) sampled eighteen federal district courts and found that the fastest ten percent of state-prisoner habeas petitions were decided in less than a month, while the slowest ten percent took on average more than two years to be decided. ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEPT OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS, at v (1995). Another BJS study from 1996 discussed disposition times for all petitions that were terminated by the courts in 1995, and found that for this limited population the mean processing time was about 293 days, with the fastest ten percent decided within 20 days, and the slowest ten percent within 735 days. JOHN SCALIA, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96, at 7 (1997); *see also* JOHN SCALIA, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 (2002) [hereinafter SCALIA, 1980–2000 REPORT] (not



and analyzes information about all of the 207,308 habeas applications filed in the federal district courts during this period, in part to document the absolute number of state-prisoner habeas petitions that have appeared on the courts' dockets since 1996.

This Article uses data sets compiled by the Administrative Office, made available for researchers at the website for the Inter-University Consortium for Political and Social Research.<sup>117</sup> There are two reasons 1996 was selected as the start date. First, 1996 was the year Congress passed AEDPA into law,<sup>118</sup> and information about cases appearing on the courts' docket in this year thus provides a useful baseline for assessing the state of the courts' docket in the wake of the profound procedural and substantive changes in habeas jurisprudence initiated by AEDPA. Second, as a practical matter, 1996 was the earliest year for inclusion in the study because it was the first year in which the Administrative Office gathered case-processing data that allowed a researcher to distinguish state-prisoner, non-capital habeas petitions from other types of habeas cases.<sup>119</sup> The study ends with 2008

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addressing disposition times). In 2006, a Congressional Research Service Report, relying on Administrative Office summaries of its civil processing data, compared median processing times for a set of non-capital habeas petitions filed pre-AEDPA (between 1990 and 1996) and post-AEDPA (1997 to 2004), and concluded that the median disposition time had remained steady over these periods. *See* LISA M. SEGHETTI & NATHAN JAMES, CONG. RESEARCH SERV., RL 33259, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 2 (2006) (finding median disposition time pre-AEDPA ranged from low of 5.6 months in 1995 to high of 6.6 months in 1992, with median disposition time post-AEDPA ranging from low of 5.2 months in 2000 to high of 6.9 months in 2002). But in 2007, an in-depth empirical study of federal habeas matters found that the mean processing time of a nationwide sample of cases filed in 2003 and 2004 was 11.5 months, with a median of 8.1 months, leading the authors to conclude that the overall disposition time per case had increased on average since the passage of AEDPA. *See* KING REPORT, *supra* note 18, at 43 (concluding, from their sample of 2384 noncapital federal habeas petitions filed by state prisoners, that post-AEDPA the fastest ten percent of cases were terminated more quickly, but that the slowest twenty-five percent took a month longer on average than before passage of AEDPA, with all non-capital petitions averaging at least a year in federal court before they were decided). The King Report, though it samples only cases that were initiated in fiscal years 2003 and 2004, provides a wealth of information about the processing of habeas cases post-AEDPA. *See id.* at 15.

117. The ICPSR website is <http://www.icpsr.umich.edu>.

118. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 18, 21 U.S.C. (2006)).

119. Unless otherwise noted, all references to years in the remainder of the Article should be understood to mean fiscal years (ending September 30) rather than calendar years.

because, as of the drafting of this Article, that is the last year for which the Administrative Office has made complete data available.<sup>120</sup>

The Administrative Office annually releases two sets of data on civil caseloads in the federal courts. The first includes information about all cases “terminated” in the fiscal year; the second includes information about all cases that remained pending on the courts’ dockets (that is, appeared on the courts’ dockets but were not terminated) as of the end of the fiscal year.<sup>121</sup> In order to paint a full portrait of the courts’ dockets, the annual data sets for “terminated” petitions from 1996 to 2008 were merged, along with the “pending” data set from 2008.<sup>122</sup> Only civil cases that were coded as 28 U.S.C. § 2254 petitions were retained for this study.<sup>123</sup> The information

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120. The Administrative Office makes summary statistical tables about civil case data available to the general public annually on its website, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>. As of the publishing of this Article, those summary tables are current through 2010, but, as noted above, the data sets from which the Administrative Office derived their tables have not been released to the ICPSR website. For a mild critique of the manner in which the Administrative Office makes statistical information available in a timely manner to the public, see Rebecca Love Kourlis & Pamela A. Gagel, *Reinstalling the Courthouse Windows: Using Statistical Data to Promote Judicial Transparency and Accountability in Federal and State Courts*, 53 VILL. L. REV. 951, 954–60 (2008) (noting that the information collected by the government “only scratch[es] the surface of federal statistical and case management data” and that a wealth of information is potentially available from PACER and the CM/ECF systems, but that “[u]nfortunately, the information available to the general public, court observers and academicians is not yet comprehensive and lacks some functionality”). See also *infra* note 200 (discussing the historic difficulty of accessing CJRA semi-annual reports on district court dockets).

121. See, e.g., INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE 2008 iii–iv (2009). For 2008, however, the Administrative Office released “pending” data that was collected for the calendar year (ending December 31, 2008) rather than the fiscal year (ending September 30, 2008). The Administrative Office has released a data set for “terminated” cases for fiscal year 2009, but has not released an updated “pending” dataset for fiscal year 2009.

122. See John Shapard, *How Caseload Statistics Deceive 1* (Aug. 9, 1991) (unpublished manuscript) (on file with the *University of Colorado Law Review*) (explaining that “terminated cases are not representative of the court’s caseload”). Because “pending” data for 2009 has not been released yet, petitions initiated in 2009 could not be included in this study.

123. Typically, cases were retained for the study as 28 U.S.C. § 2254 applications if they were coded by the Administrative Office as NOS=530, TITL=28, and SECTION=2254. For 2000, however, the Administrative Office’s raw data contained a (readily identifiable) coding error: a subset of cases that were coded as NOS=530 were also coded as TITL=282 and SECTION=254, and no

gathered includes filing and termination dates for each petition, as well as the identity of the district court in which the petition was filed.

The habeas petitions analyzed here do not include any filed by federal prisoners,<sup>124</sup> by detainees seeking to avoid deportation,<sup>125</sup> or by alleged “enemy combatants” challenging the legality of their war-time detentions.<sup>126</sup> Instead, this study focuses entirely on section 2254 petitions, where the applicant’s imprisonment has already been authorized by the state court after a criminal trial and appellate process.

Section 2254 applications may only be granted for violations of federal law, and the violations must not have been harmless.<sup>127</sup> In addition, pursuant to AEDPA,<sup>128</sup> an applicant may be granted relief pursuant to section 2254 only if he has “exhausted” all of his claims in the state courts before presenting them to a federal judge,<sup>129</sup> has not procedurally defaulted on those claims in state court,<sup>130</sup> and has proven to the federal judge that the state court’s ruling on the federal claims “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined

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cases were coded as TITL=28 and SECTION=2254. Cases that were coded in this manner were retained for the study.

124. Federal prisoner petitions are filed pursuant to 28 U.S.C. § 2255 (2006).

125. Challenges to avoid deportation are typically filed pursuant to 28 U.S.C. § 2241 (2008). See *INS v. St. Cyr*, 533 U.S. 289, 306–08 (2001).

126. Challenges to executive detentions during the War on Terror are properly raised through 28 U.S.C. § 2241. See *Rasul v. Bush*, 542 U.S. 466, 484 (2004), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739; *Boumediene v. Bush*, 553 U.S. 723, 799 (2008) (Souter, J., concurring).

127. 28 U.S.C. § 2254(a) (2006) (courts may entertain applications for writ from state prisoners only if the allegation is that the custody is “in violation of the Constitution or laws or treaties of the United States”); *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) (stating that habeas relief is available only where “constitutional error of the trial type” resulted in “actual prejudice” to defendant).

128. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 18, 21 U.S.C. (2006)).

129. 28 U.S.C. § 2254(b)(1)(A) (2006). The exhaustion requirement in the statute was previously recognized in decisional law in *Rose v. Lundy*, 455 U.S. 509, 522 (1982), *superseded by statute*, 28 U.S.C. 2254(c).

130. See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (“In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.”).

by the Supreme Court of the United States.”<sup>131</sup> The procedural obstacles the state prisoner must navigate are many, and the standards for obtaining the writ—and retrial or release from state prison—are difficult to meet. In addition, AEDPA introduced a one-year filing deadline (from the date that the criminal conviction becomes final) for state prisoners who wish to petition the federal courts for the writ.<sup>132</sup>

At the time of AEDPA’s passage in April 1996, the number of section 2254 petitions filed annually was impressive. More than 10,000 petitions had been initiated each year during the early 1990s, which was up from roughly 7000 to 9000 annually during the 1970s and 1980s.<sup>133</sup> Back in the early 1960s, fewer than 2000 such petitions were filed annually,<sup>134</sup> which in retrospect seems an almost trivial number. But everything is relative: In 1944, federal judges were complaining about an “avalanche” and “deluge” of 605 petitions that had been filed in total in the federal courts that year.<sup>135</sup>

If Congress’s ambition in passing AEDPA was to reduce the number of petitions filed in the federal courts, its goal was not met.<sup>136</sup> The one-year filing deadline (predictably) led to a spike in the number of habeas filings in the year following AEDPA’s effective date—from 12,276 in 1996 to 17,015 in 1997.<sup>137</sup> But since then, the filing rate has (less predictably)

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131. 28 U.S.C. § 2254(d)(1) (2006).

132. *Id.* State prisoners whose convictions became final prior to passage of AEDPA (on April 24, 1996) were given a one-year grace period in which to file a habeas petition (that is, until April 24, 1997). *See Carey v. Saffold*, 536 U.S. 214, 216–17 (2002).

133. VICTOR E. FLANGO, *HABEAS CORPUS IN STATE AND FEDERAL COURTS* 14 tbl.1 (1994).

134. *See id.*

135. *See id.* at 9.

136. *Habeas Reform: The Streamlined Procedures Act of 2005: Hearing on S. 1088 Before the S. Comm. on the Judiciary*, 109th Cong. 71-72 (2005), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da10cdeda&wit\\_id=e655f9e2809e5476862f735da10cdeda-1-1](http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da10cdeda&wit_id=e655f9e2809e5476862f735da10cdeda-1-1) (testimony of Ronald Eisenberg, Deputy Dist. Att’y, Phila., Pa.) [hereinafter *Eisenberg Testimony*] (“The Administrative Office points with apparent pride to its claim that disposition time for non-capital cases has remained relatively constant [over the last six years] . . . . [But] AEDPA was supposed to speed things up. Significant new provisions like the time bar, if honestly applied, should have reduced disposition times, especially for non-capital cases. If, as the Administrative Office says, we are seeing at best a holding action for non-capital cases . . . then there can be no clearer proof that habeas reform, as interpreted by the federal courts, has not succeeded.” (emphasis omitted)).

137. State prisoners whose convictions were final before passage of AEDPA had until April 24, 1997, to file a habeas petition without running afoul of AEDPA’s one-year filing deadline. *Carey*, 536 U.S. at 216–17.

remained steady at the elevated level, never returning anywhere close to pre-AEDPA rates.<sup>138</sup> In a word, since the passage of AEDPA, the federal district courts have simply been inundated with newly filed habeas petitions.<sup>139</sup>

How well have the federal district courts responded to the modern “avalanche” and “deluge” of section 2254 petitions? To the degree the courts have decided roughly as many habeas motions as are filed each year, has the mean or median age of the cases appearing on the courts’ dockets increased, decreased, or remained steady? Does the disposition rate remain uniform across the country, or all other things being equal, does the length of time that a petition remains open depend on the district in which it was filed? Absent a comprehensive study like the one presented here, it is impossible to gauge whether the courts are keeping current with their habeas caseloads.<sup>140</sup>

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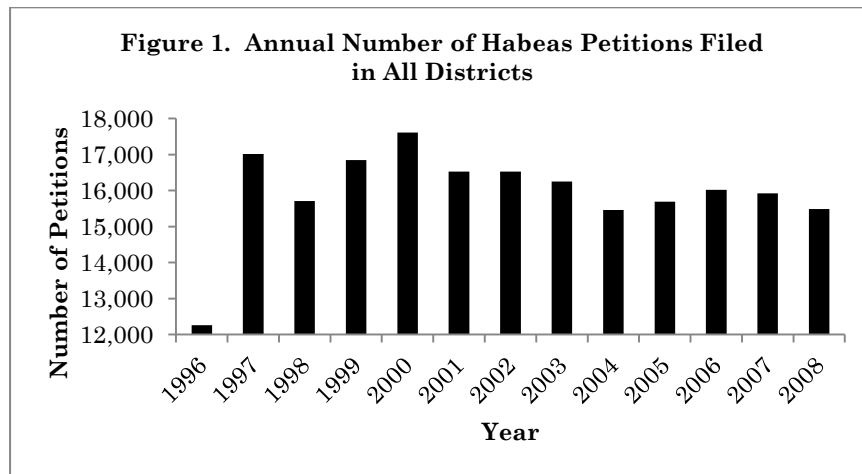
138. See *infra* notes 141–43 and accompanying text.

139. An analysis by John Scalia of the Department of Justice’s Bureau of Justice Statistics showed that both AEDPA and an increasing prison population had statistically significant effects on the number of habeas petitions filed between 1996 and 2000. See SCALIA, 1980–2000 REPORT, *supra* note 116, at 6–7 (estimating that between 1996 and 2000, an additional 18,000 habeas petitions were filed by state prisoners as a result of enactment of AEDPA, and that an additional 5,900 petitions were filed as a result of a 160,000-inmate increase in the state prison population during this period).

140. While the judiciary has registered uncertainty about whether the district courts are keeping abreast of their habeas dockets, see *supra* note 27 and accompanying text, some politicians perceive a delay problem. Senator Jon Kyl proposed legislation, called the Streamlined Procedures Act of 2005, S. 1088, H.R. 3035, 109th Cong. (2005), which would have imposed an enhanced series of limitations on the availability of the writ (including hard deadlines for the circuit courts to resolve habeas appeals) in part because of the perception that habeas petitioners were content to allow the courts to “drag out the [habeas] litigation for years.” *Eisenberg Testimony*, *supra* note 136, at 66–67. But unlike petitioners facing execution, non-capital petitioners have every incentive to proceed expeditiously in order to cut short the sentences they are serving. See, e.g., *Streamlined Procedures Act of 2005: Hearing on H.R. 3035 Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 65 (2005) (Statement of Ruth E. Friedman) (“Ninety-nine percent of state prisoners are serving prison sentences they hope to cut short by winning federal habeas corpus relief.”); *Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 386 (2005) (Testimony of John Pressley Todd, Esq., Assistant Att’y Gen., Ariz. Att’y Gen.’s Office) (“Unlike the non-capital defendant who is serving his sentence during the habeas process and has every incentive to proceed as quickly as possible to have a federal court vindicate a constitutional claim that the state courts wrongly decided, the capital defendant is not serving his sentence. [Rather,] he is avoiding it.”).

*B. The Big Picture: Delay Across the Nation*

*Annual Filings Surge, Steady, Then Ease.* The number of habeas petitions that the federal courts must deal with every year is stunning. In 1996, the year that Congress passed AEDPA, state prisoners filed just over 12,000 noncapital habeas petitions.<sup>141</sup> The next year, the number of petitions jumped to just over 17,000. The spike was an expected consequence of AEDPA's new one-year filing deadline, which would have closed off access to the district courthouse forever for state prisoners whose convictions became final before passage of AEDPA and who did not file within one year of AEDPA's effective date.<sup>142</sup> More surprising than the one-year jump, however, has been the fact that the annual number of habeas filings has remained elevated, never dipping below 15,000 through 2008. See Figure 1, below.



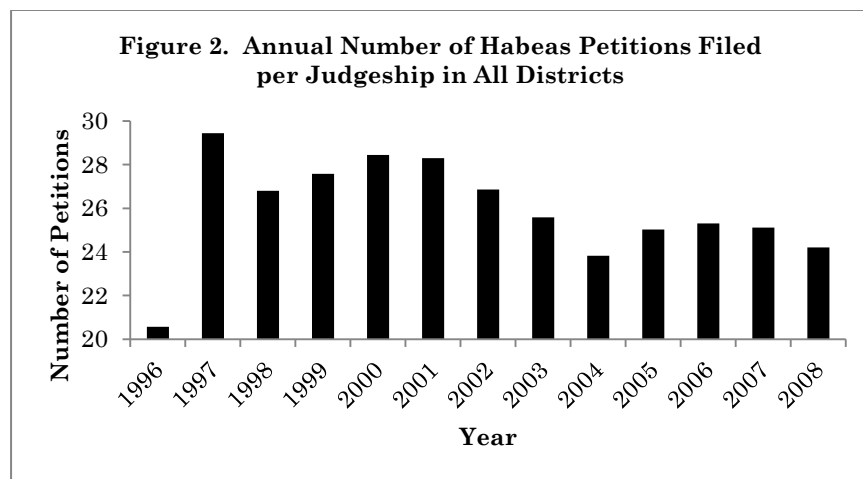
Note: Figure 1 shows the number of state-prisoner federal habeas petitions initiated nationwide each year by state prisoners. The jump in filings in 1997 coincides with AEDPA's new one-year deadline for filing petitions.

141. Unless otherwise noted, all of the statistics cited in the remainder of Parts II.B and II.C represent conclusions drawn from the descriptive statistical analysis described in Part II.A, *supra*.

142. The effective date of AEDPA was April 24, 1996, and the filing deadline for state prisoners whose convictions were final before that date was one year later, on April 24, 1997. *Carey*, 536 U.S. at 216–17.

That said, while the number of petitions filed annually has never come close to diminishing to pre-AEDPA levels, the trend since 2000 has been downward, from 17,610 in that year to 15,704 in 2008.<sup>143</sup>

The same spike and downward trend holds true with respect to the average annual number of new habeas filings per district court judgeship over this period. Figure 2, below, shows that there has not been a rise in the number of petitions filed annually per judge, which in theory might have been the case due to large numbers of judicial vacancies.

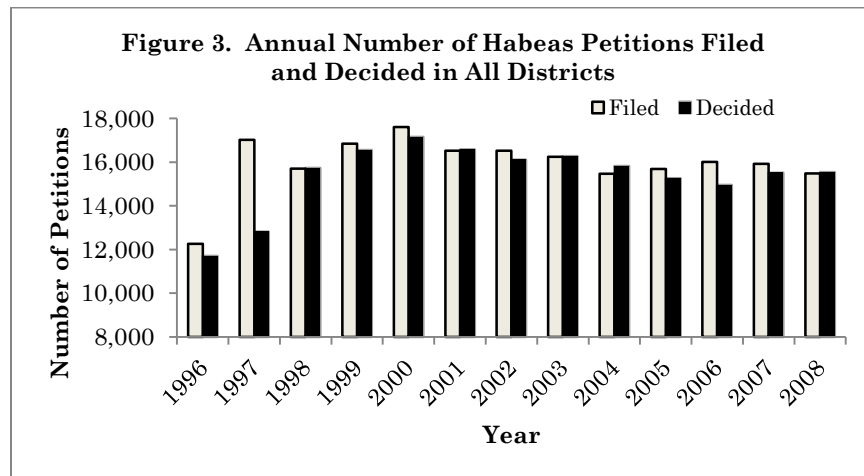


Note: Figure 2 shows the number of annual filings per district court judgeship nationwide (excluding senior judges).<sup>144</sup>

143. The largest number of petitions (17,610) was filed in 2000. From 2001 to 2003, the annual number of filings ranged from 16,247 to 16,258. From 2004 onward, the number of filings dropped, only once topping 16,000 (in 2006, when 16,015 petitions were filed). The year 2008 saw the second lowest number of habeas filings (15,488) since 1998, when 15,704 petitions were filed.

144. The number of “active” judgeships is necessarily imprecise, since vacancies are continuously created and filled over the course of a year. This estimate is, however, more useful than simply relying on the number of “authorized” judgeships, since many districts have vacancies authorized that have remained unfilled for years. The figures used here were derived from Administrative Office lists of judgeships and of judicial vacancies. The number of “active” judgeships was calculated by starting with the number of “authorized” judgeships for a district annually, and subtracting from that number any vacancy in that district that was reported as of the last day of the fiscal year. Senior judges and magistrates were not included in the calculation.

*Terminations Almost Keep Pace with Filings.* One intuitive way to assess whether the district courts, as a whole, are keeping up with their habeas caseload is to gauge whether they are deciding as many cases each year as are being filed. For reasons discussed below, that kind of assessment paints an incomplete portrait of the scope and nature of the delay problem, but it serves as a useful starting point for the analysis. Viewed from a nationwide perspective, the federal courts appear—more or less—to have kept pace with new habeas filings since 1998. See Figure 3, below.



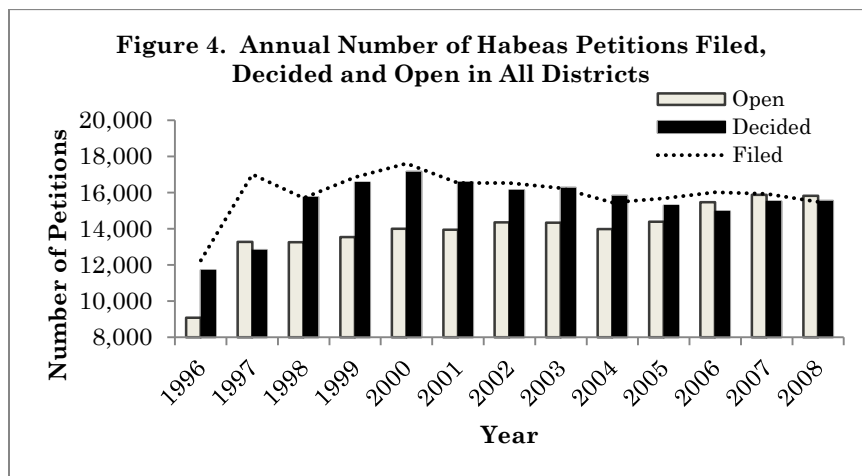
Note: Figure 3 shows the annual number of state-prisoner federal habeas petitions filed each year and the number of such petitions terminated each year by the district courts.

In 1997, the number of petitions filed by state prisoners far outnumbered the number of petitions terminated by the federal district courts (17,015 filed, compared with 12,820 terminated). This differential clearly was an artifact of AEDPA's new one-year filing deadline. Since 1998, however, the courts have been remarkably consistent in "keeping up" with the new filings (that is, deciding *almost* as many cases annually as are initiated). In every year except 2006, the number of new habeas filings exceeded the number of district court terminations by no more than 1,000 petitions, and in four years (1998, 2001, 2003, and 2004), the district courts actually decided more petitions than were filed. But, as explained below, the courts are not



“keeping current” with their habeas dockets, because the proportion of aging cases is likewise increasing annually.

*Number and Percentage of Undecided Cases Increases.* While the district courts seem to be treading water by deciding roughly as many cases as are filed annually, closer inspection reveals that an increasing proportion of all cases appearing on the docket remain undecided each year. The number of undecided (or “open”) cases on the federal courts’ dockets (determined by taking a statistical “snapshot” of the docket as of the September 30 reporting date for the year) has been trending upward since 1998. As shown by Figure 4, below, from 1998 to 2001, the number of open petitions ranged from 13,249 (in 1998) to exactly 14,000 (in 2000). From 2002 to 2005, the number of open cases had increased, ranging from a low of 13,974 (in 2004) to a high of 14,396 (in 2005). And from 2006 to 2008, the number of open cases ranged from a low of 15,461 (in 2006) to a high of 15,875 (in 2007).



Note: Figure 4 shows three things: the annual number of state-prisoner federal habeas petitions filed each year (the dotted line), the number of petitions terminated each year by the district courts, and the number of petitions left undecided on the courts’ dockets as of the September 30 reporting date for each year. This figure does not provide information about the age of the “open” petitions as of the September 30 reporting date.

Thus, although the federal courts over this period were deciding *nearly* as many cases as were being filed annually, the

number of cases that remained open on their dockets continued to increase, as did the proportion of undecided cases on the dockets. Indeed, by 2008, more petitions remained open on the district courts' dockets than were either filed or terminated in that year. As Figure 4 shows, although the number of annual habeas filings has been trending downward, the number of undecided petitions on the dockets each year has been trending upward.

*Age of Undecided Cases Increases.* The mere fact that an increasing number of habeas petitions remain undecided on district court dockets as of the end of each fiscal year does not, in itself, tell us whether the state of the courts' habeas dockets is healthy. Certainly, the fact that the number of undecided petitions has increased from 13,249 in 1998, to 14,335 in 2003, to 15,824 in 2008, suggests that the courts are not, in fact, keeping up with their habeas caseload. Nonetheless, until we get a sense of the age of these open petitions, we cannot determine how serious a problem the courts have. Assume, for argument's sake, that the filing dates of petitions initiated in 2008 were heavily skewed toward the end of the reporting year. (Perhaps, for example, 15,000 of the 15,824 "open" petitions were filed within a month of September 30, 2008, when the Administrative Office took its statistical snapshot of the courts' dockets.) On this hypothetical, the average age of the undecided petitions for 2008 would in fact be quite low, and might not reflect poorly on the overall health of the district courts' dockets.

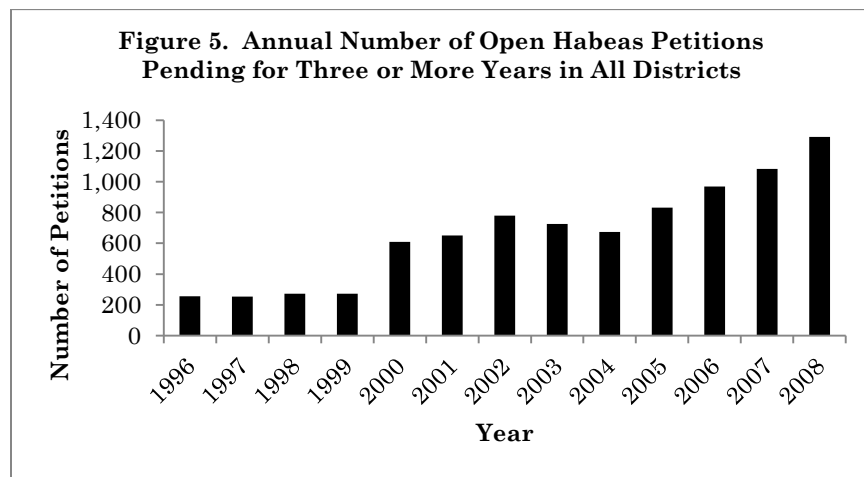
If, however, we found that the open petitions as of September 30 were on average much older, we might conclude that the district courts were adept at terminating a significant proportion of newly filed petitions, but at the same time, were struggling to dispose of older cases. There might, in other words, be a real delay problem in the district courts' docket that remains obscured by the relatively positive filing-to-termination ratio.

In fact, the age of the open petitions is rising, and many of the petitions that remain pending on the district courts' dockets annually have been there for years.<sup>145</sup> For example,

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145. Multiple factors may contribute to the increasing age of open habeas petitions. For example, because habeas filing rates per judgeship differ across districts, some of the delay in disposition may be due to high concentrations of petitions in several "problem" districts. See *infra* Part II.C. Identifying the full panoply of reasons for the habeas delay problem is beyond the scope of this

Figure 5 shows that the number of open petitions on the courts' dockets (that is, the number of petitions that remained undecided as of the September 30 reporting date for the fiscal year) that were at least three years old has trended upward since 1996, and was more than five times as large in 2008 (1,291 petitions) as in 1996 (only 255 petitions). The nature of the increase remains dramatic even after we take into account the surge in filings that resulted from AEDPA's one-year filing deadline in 1997, which was reflected three years later (in 2000) in the jump in the number of three-year-old undecided petitions to more than 600.



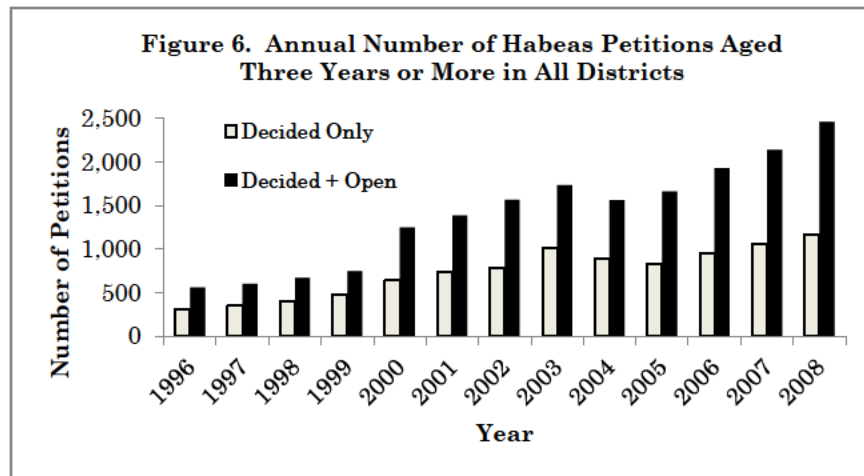
Note: Figure 5 shows the number of state-prisoner federal habeas petitions nationwide that remained open annually on the courts' dockets and that had been pending for at least three years as of the September 30 reporting date. The number of three-year-old petitions remained steady from 1996 to 1999, but jumped markedly in 2000. This increase in 2000 is an effect we might expect as a result of the spike in filings three years earlier, in 1997, when the AEDPA one-year filing deadline expired.

*Number of All Cases Pending at Least Three Years Increases.* As of the end of 2008, more than 1,200 habeas petitions that had been pending for three years or more

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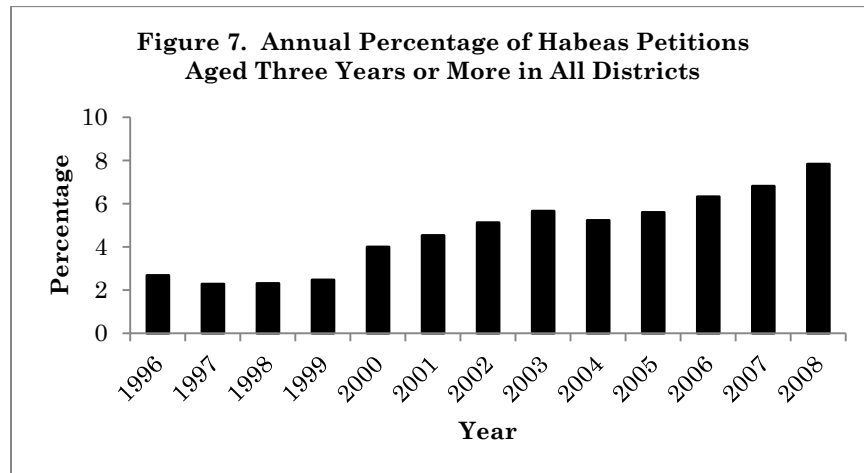
Article, but this Article suggests below that a significant factor causing the delay is the refusal of the federal courts to publicly report on the status of six-month-or-older habeas petitions in the same manner that other civil motions are reported, pursuant to the Civil Justice Reform Act of 1990. *See infra* Part III.

remained undecided. But the increasing number of undecided petitions that have remained on the dockets for at least three years does not begin to capture the depth of the delay problem, because an almost equal number of the petitions that are terminated each year were likewise on the dockets for at least three years before being decided. As Figure 6 shows, when the numbers of terminated and open petitions that have been pending for at least three years are summed, we find a steady increase in the number of three-year-old petitions—from 558 in 1996, to 1,247 in 2000, to 1,559 in 2004, to 2,460 in 2008. There has, in short, been an almost five-fold increase since 1996 in the number of petitions appearing on the courts' dockets that were aged at least three years.



Note: Figure 6 shows two things: (1) the number of state-prisoner federal habeas petitions nationwide that were decided in the fiscal year and that had also been on the courts' dockets at least three years before decision, and (2) the full number of all three-year-old petitions that appeared annually on the courts' dockets (that is, the number of cases that were decided in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year). By including decided petitions in the calculation of the number of three-year-old petitions, this Figure shows that since 2000 there have been at least one thousand petitions that remained undecided for at least three years, and that the number of such petitions has increased markedly since then.

Just as the number of terminated and open petitions appearing on the courts' dockets each year that have aged to at least three years has risen, so has the proportion of such petitions of all habeas cases appearing on the dockets. As Figure 7 shows, in 1996 fewer than 3% of all petitions had aged to at least three years, with that percentage rising to 4% in 2000, more than 5% in 2002, more than 6% in 2006, and nearly 8% in 2008.



Note: Figure 7 shows the proportion of state-prisoner federal habeas petitions nationwide appearing annually on the courts' dockets (that is, the number of cases that were terminated in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year) that had been pending for at least three years. Since 1999, the percentage of petitions three years old or more has increased from under 3% to nearly 8% in 2008.

*Number of One-Year-Old and Two-Year-Old Petitions Pending Increases.* The increasing number of petitions that take three years or more to decide is large, but these petitions represent a relatively small (albeit growing) proportion of all petitions appearing annually on the courts' dockets.<sup>146</sup> More

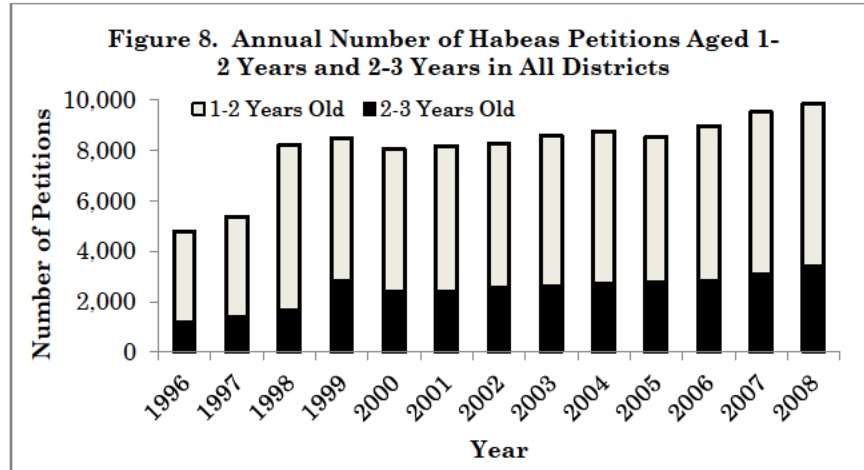
146. A plausible explanation for this population of petitions is that they are on the dockets for so long because they are particularly knotty cases that, notwithstanding appropriate judicial attention, simply cannot be resolved quickly. The evidence discussed in this study is not adequate to draw conclusions about this hypothesis, but it should be noted that it may well not be valid. In 2003,

concerning is the growing number of petitions that remain open for slightly less time, but that still are not being resolved promptly.

Figure 8 shows that the number of “one-year-old” petitions on the courts’ dockets annually (that is, those pending for at least a year but less than two years), and the number of “two-year-old” petitions (that is, those pending for more than two but less than three years) has been growing at a rapid pace over the past dozen years. In 1996, there were only about 1,200 two-year-old petitions, but by 2008 there were more than 3,400. Similarly striking, in 1996 there were just under 3,600 one-year-old petitions, but by 2008 there were more than 6,400. The total number of one-year-old and two-year-old petitions rose from just under 5,000 in 1996 to just under 10,000 in 2008.

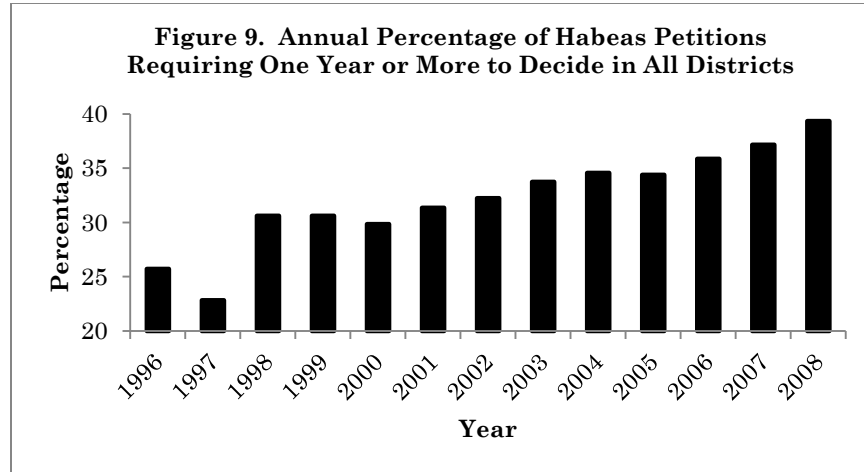
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Judge Jack B. Weinstein of the Eastern District of New York agreed to resolve a 500-petition backlog in the district. As of May 9, 2003, when he took control of the habeas petitions, 170 of the 500 petitions had already been pending for more than three years. Nonetheless, each of those petitions was resolved, along with the balance of the 500, by Judge Weinstein by December 2003. *See* WEINSTEIN REPORT, *supra* note 16, at 6.



Note: Figure 8 shows the number of state-prisoner federal habeas petitions nationwide appearing annually on the courts' dockets (that is, the number of cases that were terminated in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year) that remained undecided for one to two years (more precisely, 365 to 729 days, which I refer to as "one-year-old" petitions here) and for two-to-three years (730 to 1094 days, which I refer to as "two-year-old" petitions). The values for each set of petitions are graphed here in a stacked manner so that the full height of each column represents the cumulative number of petitions that remained undecided for between one and three years.

The *proportion* of cases on the docket that were undecided for at least one year has likewise increased steadily, as shown in Figure 9. In 1996, just over one quarter of all cases appearing on the courts' dockets had been pending at least one year. By 2000, the proportion of such cases had risen to almost 30%, and by 2008 the proportion was just shy of 40%. Stated simply, since the passage of AEDPA, the proportion of aging cases on the docket has grown steadily.



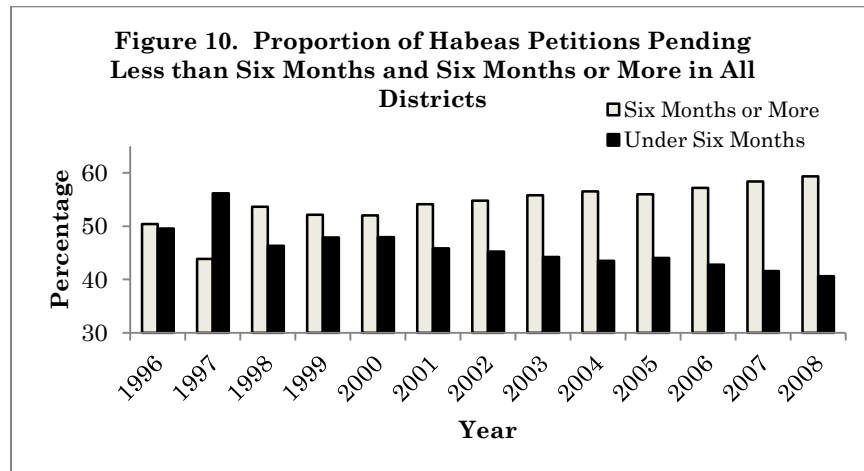
Note: Figure 9 shows the percentage of state-prisoner federal habeas petitions nationwide appearing annually on the courts' dockets (that is, the number of cases that were terminated in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year) that remained undecided for at least one year. In 1997, the proportion of such cases fell below 25%, in part because of the huge spike in the filing of habeas petitions that year that corresponded to AEDPA's filing deadline. (By definition, none of the petitions filed in that year could have been pending for at least one year as of September 30, 1997.) The number of petitions requiring at least one year to terminate rose steadily thereafter, from about 30% in 2000 to almost 40% in 2008.

*Proportion of Petitions Decided in Less Than Six Months Plummets.* Another measure of the relative health of the district courts' habeas dockets is the proportion of petitions appearing annually on the dockets that are aged less than six months. As Figure 10 shows, in 1996, almost exactly half of the petitions remained open on the courts' dockets for less than six months. In 1997, the proportion of such petitions jumped to 56.2%. On first glance, 1997 looks like it was an efficient one for the district courts. Upon reflection though, we can see that the reason for the high proportion of petitions aged less than six months is not that the courts were deciding more petitions promptly, but rather, that the huge number of petitions filed in the latter half of 1997 (as a consequence of the April 24, 1997 filing deadline for prisoners whose convictions became final



before the effective date of AEDPA) had by and large not been on the dockets long enough to have aged to six months.

By 1998, when one would first expect to see the effects of the AEDPA filing deadline on the age of undecided petitions, there were significantly more petitions remaining on the dockets for six months or more (53.7%) than for less than six months (46.3%). The proportion of petitions pending for six months or more trends upwards thereafter, reaching 54.1% in 2001, 56.5% in 2004, and 59.4% in 2008. These numbers are of particular interest if we assume, as this Article suggests we should, that six months is a presumptively reasonable amount of time for a district court to take to resolve a state-prisoner habeas application.<sup>147</sup>

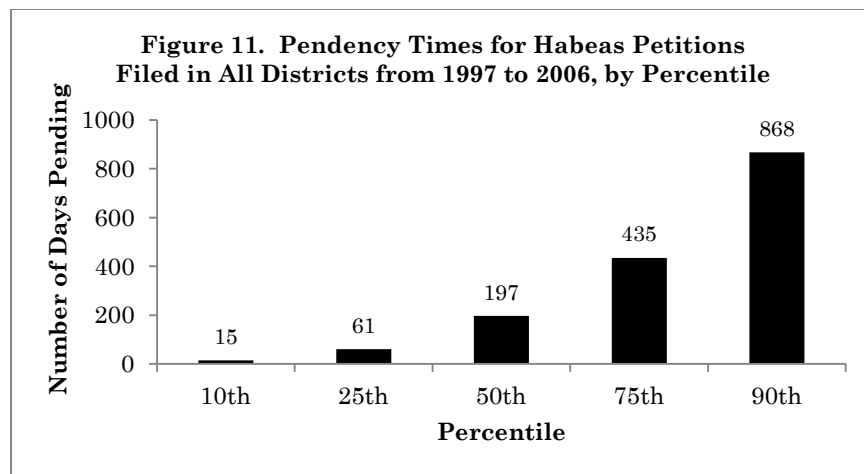


Note: Figure 10 shows the proportion of state-prisoner federal habeas petitions nationwide appearing annually on the courts' dockets (that is, the number of cases that were terminated in the fiscal year *plus* the number of cases that remained undecided as of the September 30 reporting date for each year) that remained on the dockets for less than six months, and the number of such petitions that remained on the dockets at least six months. In 1996, roughly half the petitions appearing on the docket had aged to six months or more. By 1998, when we would first expect to see the effect of the 1997 AEDPA filing deadline that had led to a jump in the number of habeas filings that year, 54% of the petitions had been pending for six months or more. The proportion of

147. See *infra* Part III.

cases that remained undecided on the courts' dockets increased steadily from 2000 (52%) to 2008 (59.4%).

*National Disposition Times Show Many Petitions Decided Quickly, but Many Require Years.* A final measure of the health of the federal district courts' habeas dockets is the distribution of the actual disposition time of petitions. On the positive side, Figure 11 shows that for all petitions initiated between fiscal years 1997 and 2006, fully 10% were terminated within 15 days of filing, and 25% within 61 days, with a median disposition time for all petitions of 197 days, or just over six months. The federal courts, in other words, dispatched a great many of the petitions filed over this decade relatively promptly. More problematic, though, are the numbers on the other side of the chart. Only 75% of the petitions were terminated within 435 days of filing, and fully 10% remained pending for more than 868 days (or about 2.4 years).



Note: Figure 11 shows by percentile the number of days that all state-prisoner federal habeas petitions filed between fiscal years 1997 and 2006 remained pending before termination. The fastest 10% of petitions were decided within 15 days, half of the petitions were terminated within 197 days, and 90% of the petitions were terminated within 868 days (which means that 10% of the petitions filed during this period required at least 2.3 years to be decided).

*Summary.* This review of all of the state-prisoner habeas petitions that appeared on the district courts' dockets from 1996 to 2008 establishes that a large and increasing number of

petitions remain undecided for a very long time. The number of undecided petitions as of the end of each reporting year, for example, has increased from 9,086 in 1996 to 15,824 in 2008. The proportion of petitions that remain pending for lengthy periods before decision has likewise increased substantially during this time period. As of 2008, fully 39.4% of petitions required at least one year for decision, compared with only 25.7% in 2006. The proportion of petitions requiring at least two years for decision more than doubled during this time period, increasing from 8.5% of petitions in 1995 to 18.7% in 2008. And the proportion of petitions requiring at least three years to decide increased more than threefold, from 2.7% in 1996 to 7.8% in 2008.

### *C. Habeas Delay District by District*

The national statistics reveal that, even though the number of new habeas filings (and the number of new habeas filings per judge) has been trending downward since 2000, an increasing number and percentage of cases remain undecided on the district courts' dockets for years. While the observations from the previous Section therefore show that there is in fact a serious habeas delay problem, closer scrutiny of the dockets district by district reveals that the problem is much more pronounced in individual districts. As is shown below, all other things being equal, the amount of time that a petitioner's habeas application will remain pending without decision depends upon the district in which he files his petition (which, in turn, is generally determined by the district in which he is incarcerated).<sup>148</sup>

*Sharp Differences by District in Mean and Median Number of Days Habeas Petitions Remain Undecided.* For habeas petitions that were filed between 1997 and 2006, the mean amount of time that they remained pending (either until decision, or until September 30, 2008, if they had not been decided by that date) was 325 days nationwide, with a median of 197 days. As Figure 12 reveals, however, the mean and

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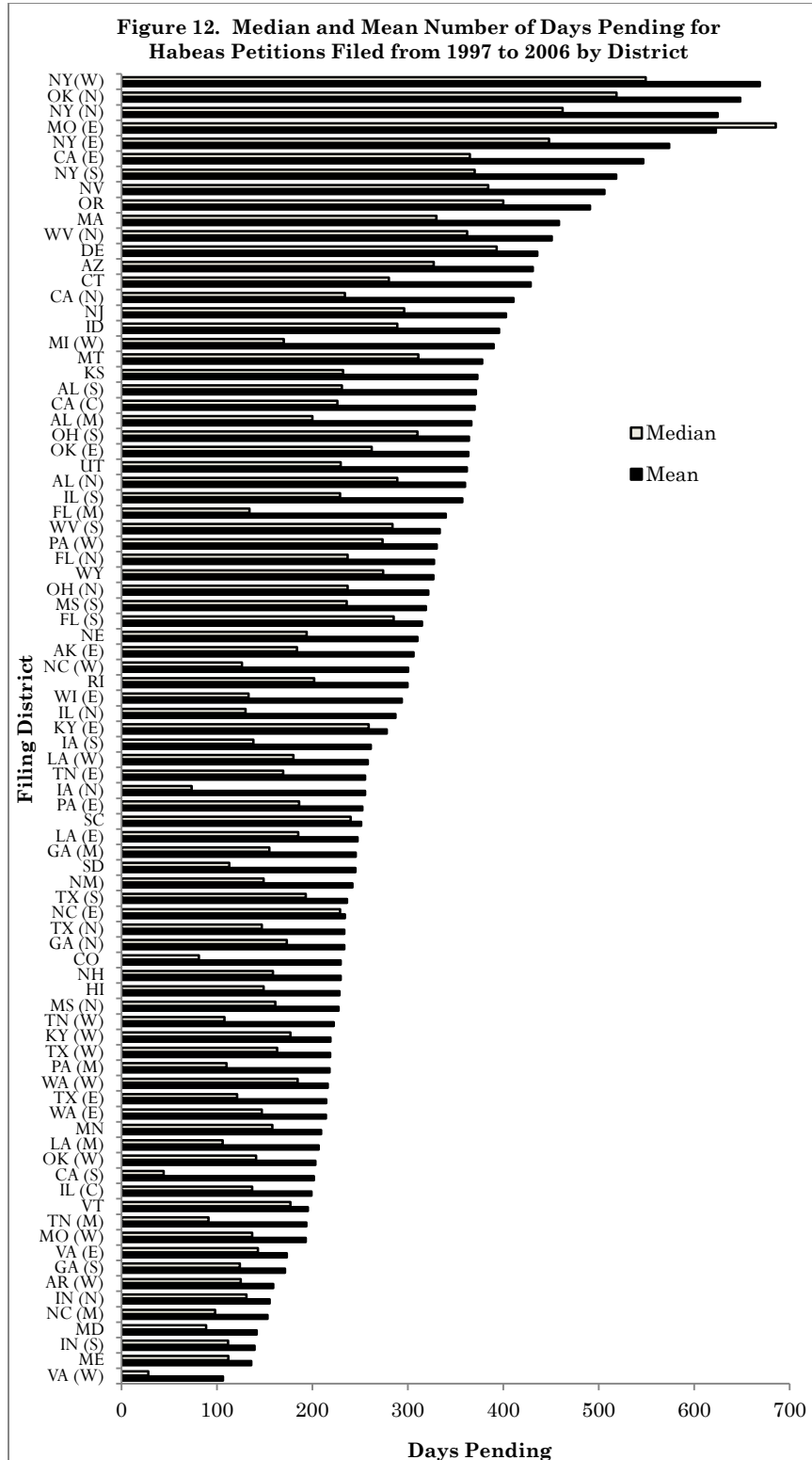
148. See 28 U.S.C. § 2241(d) (2006) (petitioner serving a state criminal sentence in a state containing more than one federal district may file a habeas petition not only "in the district court for the district wherein [he] is in custody," but also "in the district court for the district within which the State court was held which convicted and sentenced him"); *Rumsfeld v. Padilla*, 542 U.S. 426, 442–44 (2004) (discussing proper jurisdiction for filing habeas challenges).

median days pending for petitions was not uniform by district. The mean number of days that petitions remained open in the “slowest” ten districts—as measured by the mean number of days pending until decision—ranged from 451 days (in the Northern District of West Virginia) to 669 days (in the Western District of New York). The median processing times in these “slowest” ten districts was likewise much longer, ranging from 330 days (in the District of Massachusetts) to 686 days (in the Eastern District of Missouri).

In contrast, the ten “fastest” districts had mean processing times considerably below the national average—ranging from 193 days (in the Western District of Missouri) to a low of 106 days (in the Western District of Virginia). Medians for these “fastest” districts ranged from 143 days (in the Eastern District of Virginia) to just 28 days (again, in the Western District of Virginia).<sup>149</sup>

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149. The Virginia districts’ low disposition time for resolving state-prisoner habeas matters is consistent with its overall efficiency in civil matters. See Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CALIF. L. REV. 225, 233 (1997).



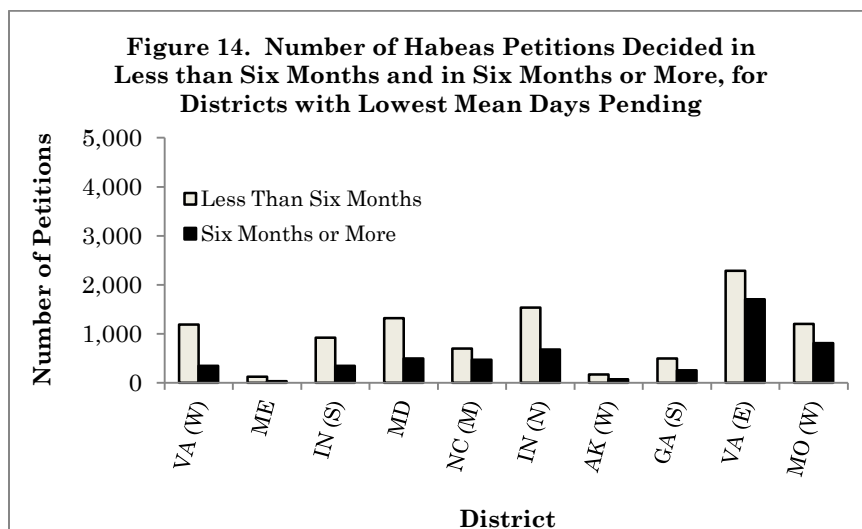
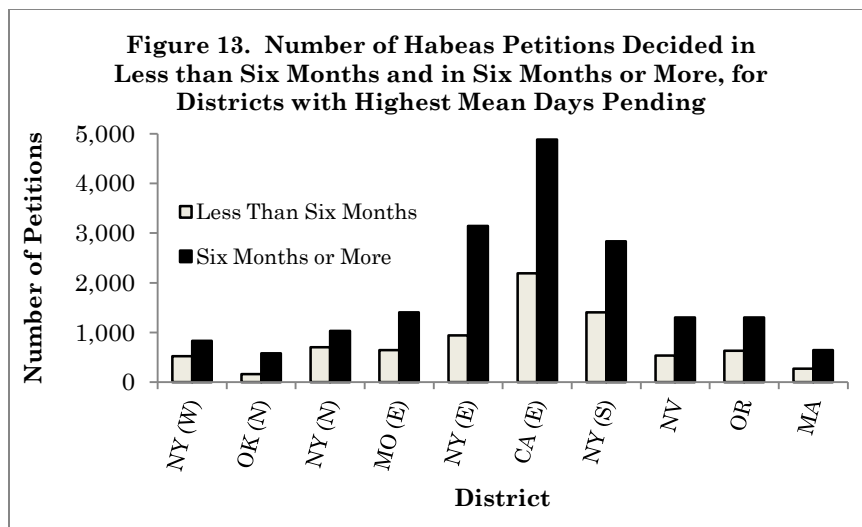
Note: Figure 12 shows the median and mean number of days pending, by district, for the 163,443 state-prisoner federal habeas petitions filed from 1997 to 2006. Districts with fewer than 100 petitions filed during this period have been excluded.

*District in Which Petition is Filed Appears to Determine How Long the Petition Will Remain Pending.* There is wide variation among the districts in the number of petitions that are decided promptly, whether measured by the number decided within six months or within one year of filing.

Unsurprisingly, the “slowest” districts have a smaller proportion of petitions pending for under six months than do the “fastest” districts. Figure 13 includes data for the ten districts with the highest mean number of days pending for habeas petitions; it shows the total number of petitions filed between 1997 and 2006 that were pending: (1) for less than six months, and (2) for six months or more. Figure 14 shows the same information for the ten districts with the lowest mean number of days pending.<sup>150</sup>

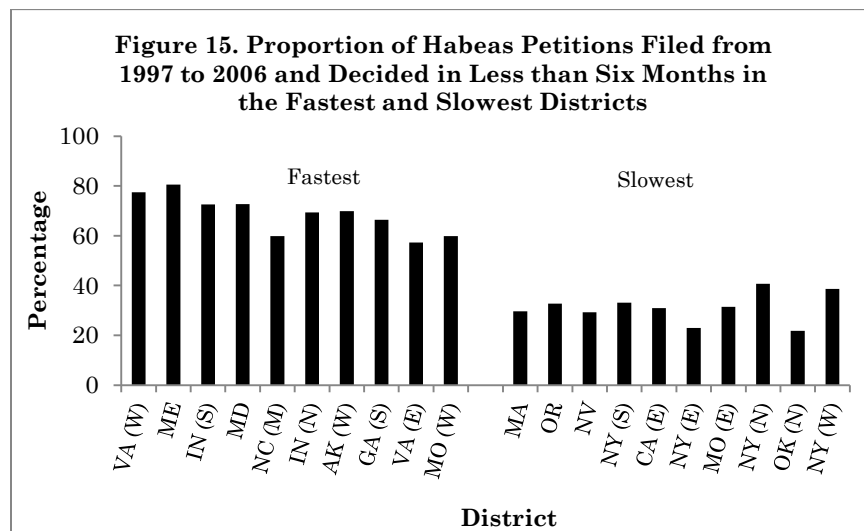
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150. There is a statistically significant positive correlation between the mean number of habeas filings per judge per year in a district and the mean disposition times for the petitions. *See infra* Figure 18 and accompanying text.



Note: Figures 13 and 14 show the number of state-prisoner federal habeas petitions (filed between fiscal years 1997 and 2006) terminated in less than six months and the number of such petitions that remained open for six months or more, for the ten slowest districts (those with the highest mean days pending per petition) and for the ten fastest districts (those with the lowest mean days pending per petition), respectively. Without exception, the fast districts resolve more habeas petitions in less than six months than in six months or more, while the opposite holds true for the slowest districts.

Taken together, what is most striking about these figures is that none of the “slowest” districts had more petitions decided in less than six months than in six months or more, while the opposite holds true in the “fastest” districts. Figure 15 highlights this difference by expressing this same information proportionally. For the “fastest” districts, the proportion of petitions requiring less than six months to terminate ranged from 57% (in the Eastern District of Virginia) to 81% (in the District of Maine). In contrast, for the “slowest” districts, the range was from 41% (in the Northern District of New York) to only 22% (in the Northern District of Oklahoma).

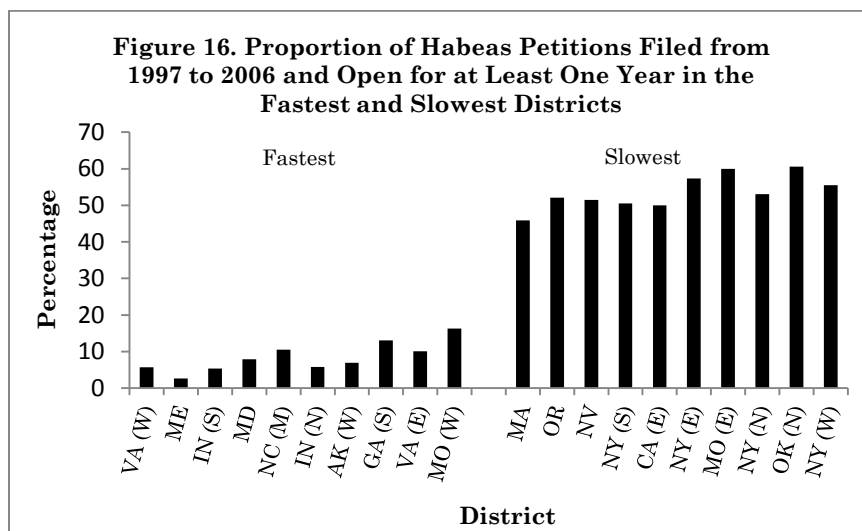


Note: Figure 15 shows the percentage of state-prisoner federal habeas petitions (filed between 1997 and 2006) terminated in less than six months for the ten fastest districts (those with the lowest mean days pending per petition) and for the ten slowest districts (those with the highest mean days pending per petition).

The same pattern can be seen for the number and proportion of petitions that require at least one year until termination, though in this regard, the differences between the “fastest” and “slowest” districts are even more pronounced. Figure 16 shows that in each of the ten “fastest” districts, fewer than 20% of the petitions filed between 1997 and 2006 required more than one year to be decided. In fact, for the ten “fastest” districts, the proportion of petitions requiring more than one



year ranged from just 16% (in the Western District of Missouri) to as low as 3% (in the District of Maine). In contrast, for the ten “slowest” districts, the proportion of petitions requiring more than one year for decision was drastically higher, ranging from 46% (in the District of Massachusetts) to 61% (in the Northern District of Oklahoma).



Note: Figure 16 shows the percentage of state-prisoner federal habeas petitions (filed between fiscal years 1997 and 2006) requiring at least one year before termination for the ten fastest districts (those with the lowest mean days pending per petition) and for the ten slowest districts (those with the highest mean days pending per petition).

In addition (though it is not shown in any of these figures), the proportion of petitions requiring at least *three* years to be decided in the “slowest” districts ranged from 9% (in the District of Massachusetts) to 29% (in the Northern District of Oklahoma). For four of the ten “slowest” districts, at least 25% of all petitions appearing on their dockets required at least three years to be decided.

*Statistical Significance of Differences in Disposition Times Among Grouped Districts.* Although the discussion up to this point has been primarily descriptive in nature, as a predictive matter, there is in fact a statistically significant positive correlation between the district in which a petition is filed and the number of days that it is likely to remain pending on the

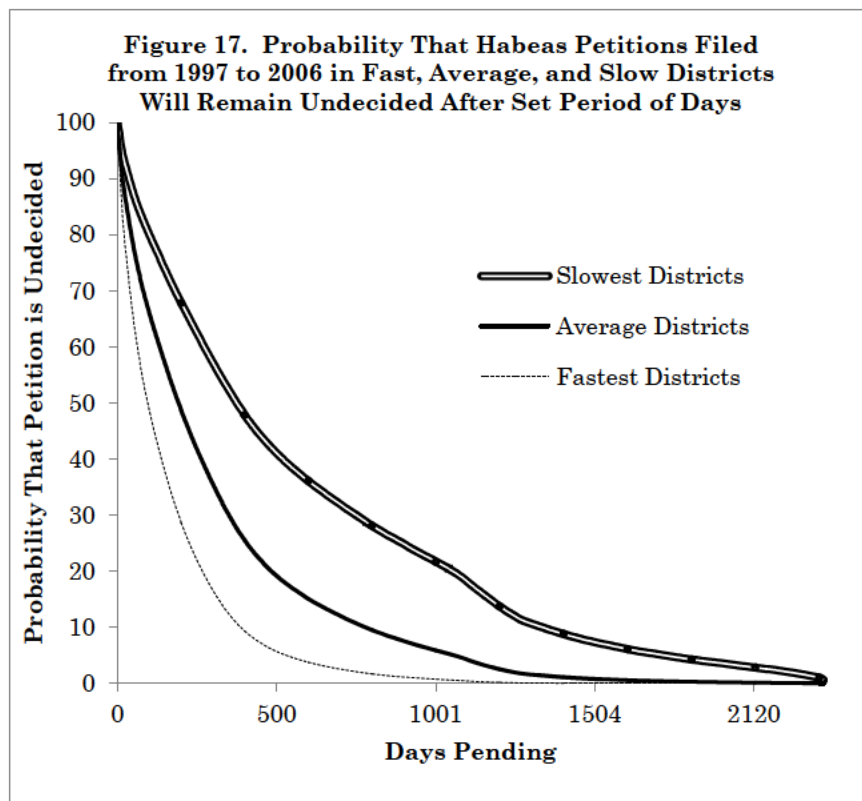
district court's docket. Figure 17, below, divides the universe of all petitions that were filed between 1997 and 2006 into three groups: The first group includes petitions filed in the ten "fastest" districts (by mean number of days pending); the second includes petitions filed in the ten "slowest" districts; and the third includes petitions filed in the "average" districts (which includes all districts that are in neither the "fastest" nor the "slowest" categories).<sup>151</sup> Figure 17 shows the likelihood that a petition filed in one of these groups will remain open at any point in time.<sup>152</sup> For example, the median amount of time that a petition filed in one of the ten "fastest" districts is about three months (94 days), the median in one of the "average" districts is more than double that (190 days), and the median in one of the "slowest" districts doubles that again, to more than a year (374 days).<sup>153</sup>

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151. Districts in which fewer than one hundred petitions were filed between 1997 and 2006 were excluded from the analysis.

152. The analysis was performed using the Cox Proportional Hazard method.

153. The difference among each of these categories ("fastest," "slowest," and "average") is statistically significant, with a p-value of <.0001.



Note: Figure 17 shows the “survival probability” for habeas petitions filed in the ten fastest districts by mean disposition time (see Figure 14), in the ten slowest districts (see Figure 13), and in the “average” districts (that is, districts that are among neither the fastest nor the slowest). The probability indicated by the y-axis is that a petition will remain undecided. The calculations were made using the Cox Proportional Hazard Model, with the number of days pending used as the response variable, and the average number of filings per judge per year and the district category (fastest, average, and slowest) used as independent variables. The differences among all groups (fastest-slowest, fastest-average, and average-slowest) were statistically significant, with p-value of <.0001 for each.

A comparison of the “fastest,” “slowest,” and “average” groups shows that the likelihood that a petition that is filed in one of those districts will be decided within any given period of time varies markedly and significantly by group. Table 1 shows, for example, that for the “fastest” districts, fully 68.2% of petitions are decided within six months, while 48.3% of

petitions in the “average” districts are decided that quickly, and only 29.9% of petitions in the “slowest” districts are terminated within that time frame. Similarly, the likelihood that a petition will be decided within two years of filing is 97.8% in the “fastest” districts, 89.3% in “average” districts, and only 69.2% in the “slowest” districts.

**Table 1. Likelihood That a Habeas Petition Will Be Decided Within Set Number of Days, by Category of District**

District	6 Months	1 Year	2 Years	3 Years
Fastest	68.2	88.7	97.8	99.6
Average	48.3	71.5	89.3	95.7
Slowest	29.9	49.2	69.2	81.6

Note: The information set out in Table 1 and in Table 2, below, is the same as that shown in graphic form in Figure 17.

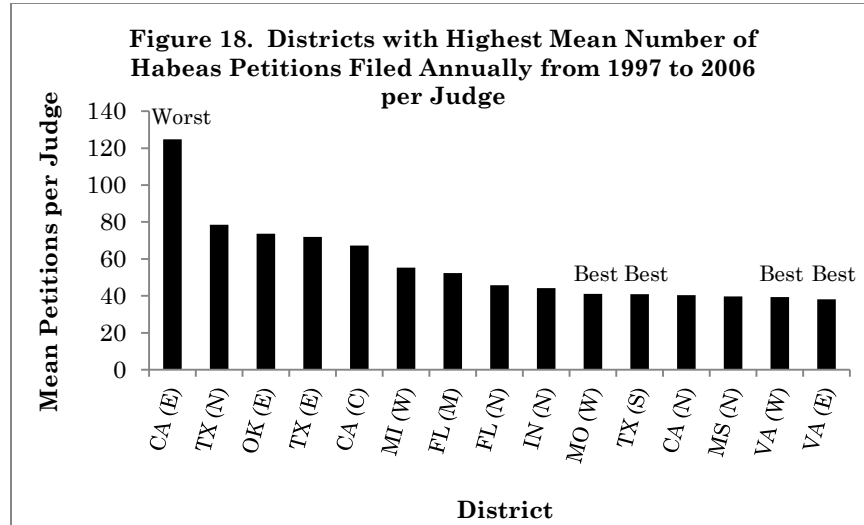
Table 2 tells the same story in slightly different form. For example, 90% of habeas petitions that are filed in one of the “fastest” districts will be decided within 387 days, but it will take more than double that (779 days) for 90% of the petitions in an “average” district to be decided, and fully 1,337 days to reach that percentage in the “slowest” districts. Similarly, in the “fastest” districts, one quarter of all petitions are decided within a month (28 days) while in the “average” districts it takes nearly two months (59 days) to reach this percentage, and in the slowest districts it takes more than four months (139 days).

**Table 2. Expected Number of Days Until Decision for a Habeas Petition Filed in Each Category of District, by Percentile**

District	10th	25th	50th	75th	90th
<b>Fastest</b>	7	28	94	225	387
<b>Average</b>	14	59	190	405	779
<b>Slowest</b>	35	139	374	896	1337

In fact, the likelihood that a habeas petition will be decided within a set number of days is 3.2 times higher for a petition filed in one of the “fastest” districts than for a petition filed in one of the “slowest” districts; it is 1.7 times higher for a petition filed in one of the fastest districts than for a petition filed in one of the “average” districts. A petition filed in an “average” district is 1.8 times more likely to be decided by any given date than a petition filed in one of the “slowest” districts.

*Age of Petitions is Correlated with Density of Filings in District.* Districts with the highest mean number of habeas filings per judge per year might be expected to have the highest mean disposition times for those petitions. In the case of the Eastern District of California, this common sense expectation turns out to be true. From 1997 to 2006, the district had by far the highest mean number of filings per judge annually—an astonishing 125 per judge, which is fully 100 petitions per year per judge more than the 25-petition median for districts nationwide. Unsurprisingly, the Eastern District of California was also among the ten “slowest” districts, as measured by mean processing time. See Figure 18, below, showing the fifteen districts with the highest mean number of habeas petitions filed annually per judge for this period.



Note: Figure 18 shows the mean number of habeas petitions filed per judgeship annually between 1997 and 2006 for the fifteen districts with the highest such mean. The label “Worst” denotes a district that is among the ten districts with the slowest mean processing times for habeas petitions; the label “Best” denotes a district that is among the ten fastest. Of the fifteen districts with the highest number of petitions filed per judgeship, only one (the Eastern District of California) is also among the districts with the worst processing times for habeas petitions, while four (the Western District of Missouri, the Southern District of Texas, the Western District of Virginia, and the Eastern District of Virginia) are among the ten districts with the *best* mean processing times.

That said, Figure 18 also reveals that, of the remaining districts with the highest mean number of new habeas filings per judge, none of them are also among the ten “slowest” districts by mean processing time. Moreover, four of the districts with the highest mean number of habeas filings annually per judge (Western District of Missouri, Southern District of Texas, Western District of Virginia, and Eastern District of Virginia) were among the ten “fastest” districts by mean processing time. Still, notwithstanding the success of these high-density districts in resolving habeas petitions quickly, regression analysis shows that the average number of filings per judge per year *is* a statistically significant indicator

of the number of days that a petition is likely to remain pending.<sup>154</sup>

*Summary.* This Section has shown that the scope of the habeas delay problem nationwide is not distributed uniformly across judicial districts; in some districts the delay is quite profound, and in others it is not. While filing rates and the number of judges in each district provides some explanation for the delay, many of the districts with the highest ratio of filings per judgeship have processed their habeas caseloads with the best efficiency in the country. It is beyond the scope of this Article to identify the reasons for the differences in processing times across districts, but the mere fact of the disparities establishes that for state prisoners who unluckily must file in one of the least efficient districts, the likelihood of having their petitions decided in a reasonable period of time is astonishingly slim.

### III. PUBLIC REPORTING AND THE CIVIL JUSTICE REFORM ACT

While there is no panacea for relieving the habeas delay problem detailed in Part II,<sup>155</sup> the following Sections offer a simple proposal for improving the disposition rate of habeas petitions: require federal court judges to produce semi-annual, easily-accessible, public reports that identify by name and case number all state-prisoner habeas petitions that have been pending in their chambers for six months or more. The purpose of such a requirement would be to hold judges accountable to the public (and to their fellow judges) for the state of their habeas dockets, and to incentivize them to reach decisions on their habeas petitions more expeditiously.

The proposal is simple and straightforward. In fact, federal district court judges *already* must supply exactly this information for all other civil motions that have been pending

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154. The p-value was <.0001, meaning that the annual number of habeas filings per judge is a statistically significant indicator of the length of time that a petition will remain pending.

155. Such an effort would surely be quixotic. Although “[l]iterally hundreds of articles have been written since the early part of this century that directly or indirectly address court delay,” JOHN GOERDT ET AL., EXAMINING COURT DELAY: THE PACE OF LITIGATION IN 26 URBAN TRIAL COURTS, 1987, at 3 (1989), civil matter processing times remain less than ideal. *See, e.g.*, IAALS STUDY, *supra* note 3, at 38 tbl.4 (providing distribution of cases by overall time from filing to disposition for sample of about 7,700 federal civil matters—excluding prisoner petitions—that were terminated in 2006).

for six months or more on their dockets as of the semi-annual reporting dates. A fair reading of the federal statute that sets out this requirement—section 476 of the CJRA<sup>156</sup>—would seem to mandate that the status of undecided habeas petitions be treated in like manner. However, the Judicial Conference and the Administrative Office, as the bodies responsible for implementing section 476, have thus far interpreted the provision to exempt habeas petitions.

The result of the combination of the CJRA reporting requirement and the Judicial Conference's exemption of habeas from its ambit is that judges are encouraged to promptly decide motions in every type of civil case *except* habeas. Indeed, the perverse effect of exempting habeas petitions is that judges are more likely to leave such petitions *unexamined*, at least while other civil motions that will be imminently reportable remain on the docket. Reinterpreting section 476 of the CJRA to require public reporting on habeas motions that remain undecided for at least six months would remove the disincentive that judges now have to decide habeas cases promptly.<sup>157</sup> Of course, there will be a corresponding cost: Disposition times for non-habeas civil matters may be affected if district court judges are no longer incentivized to turn to them first before habeas matters.<sup>158</sup>

The first Section below reviews the history of the CJRA reporting requirement, and notes the general consensus that it has been successful in reducing some of the delay in civil cases in the federal courts. The second Section discusses the Judicial Conference's decision not to include habeas petitions among the motions reportable under the CJRA, and suggests that a more faithful construction of the statute would not exempt habeas

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156. 28 U.S.C. § 476 (2006).

157. This observation should not be understood to suggest that current interpretations of the CJRA reporting requirement are the sole explanation for the increasing habeas delay problem. Other factors might include any number of the following: an increasing federal criminal caseload, which must be given priority by judges pursuant to the Speedy Trial Act; the increased complexity of, and time commitment needed to resolve, other civil matters; a high judicial vacancy rate; understaffing in states' Attorney General offices, and a concomitant difficulty in filing timely responses to prisoner petitions; the arguably difficult nature of habeas decision making itself, which since the passage of AEDPA has required judges to apply increasingly complex rules; and the near-total lack of lawyers to assist habeas petitioners and prod judges to reach decisions promptly.

158. Of course, that is precisely the result envisioned by 28 U.S.C. § 1657, which requires the district courts to expedite habeas applications. *See supra* Part I.C.



petitions. The final Section applies the results of this Article's analysis of Administrative Office data and provides a normative argument encouraging the Judicial Conference to revisit its interpretation of the CJRA's reporting requirement, so that habeas petitioners are not made to suffer disproportionately for the district courts' heavy civil caseloads.

*A. The CJRA and Its Reporting Requirement*

The CJRA grew out of a broad consensus in the legal community that "civil litigation costs too much and takes too long."<sup>159</sup> In 1989, at the behest of then-Senator Joseph Biden, a task force from the Brookings Institution, a nonprofit public policy think tank, offered Congress a series of recommendations for reducing inefficiencies and inequities in federal civil litigation, including having judges take a more active role in managing their caseloads and by requiring each district court to develop its own "Civil Justice Reform Plan."<sup>160</sup> These plans would mandate, among other things, "tracking" cases by degree of difficulty, scheduling conferences, setting early and firm trial dates for all cases, providing firm time guidelines for discovery, and devising "procedures for resolving motions quickly."<sup>161</sup> The CJRA as a whole was envisioned to be a "civil analogue to the federal Speedy Trial Act."<sup>162</sup>

Brookings also found relatively broad support in the legal community for "increasing judicial accountability" by publicizing court dockets.<sup>163</sup> Brookings therefore also recommended that judges be required to submit quarterly reports of all pending submitted motions that had remained unresolved after thirty, sixty, and ninety days, "and all succeeding 30-day increments" thereafter.<sup>164</sup> Interest groups

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159. BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 1 (1989).

160. *Id.* at 3.

161. *Id.* See generally Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1290–94 (1994) (discussing the origins of the CJRA).

162. Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721, 724 (1993).

163. *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the S. Comm. on the Judiciary*, 101st Cong. 159 (1990) [hereinafter *Hearings on S. 2027 and S. 2648*].

164. BROOKINGS INST., *supra* note 159, at 27.

like Public Citizen backed the reporting proposal, and suggested the reports would be even more valuable if they were to include case identification information and the identity of the judges whose motions remained pending.<sup>165</sup>

The federal judiciary launched a strong lobbying effort against the entire CJRA project. Among other concerns, the judges expressed initial skepticism about the proposed reporting requirement of section 476. In testimony before a House subcommittee, for example, Judge Robert F. Peckham (a respected jurist and former Chief Judge for the United States District Court for the Northern District of California) noted “the unfortunate implications of the title” of the section.<sup>166</sup> The title, “Enhancement of judicial accountability through information dissemination,” suggested to Judge Peckham that the legislature believed there was a “shortfall in judicial accountability and that it is sufficiently significant to warrant being highlighted and addressed in a federal statute.”<sup>167</sup> (The title of the section would later be changed.) On the substance of the proposal, Judge Peckham suggested that his colleagues on the bench were concerned about the effect that “artificial deadlines” would have on “the quality of judicial work and on the morale of the conscientious.”<sup>168</sup>

The CJRA as a whole was passed in 1990, in much the same form as recommended by Brookings.<sup>169</sup> The final version of the Act included the reporting requirement, though it mandated only semi-annual rather than quarterly reports.<sup>170</sup>

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165. See *Hearings on S. 2027 and S. 2648*, *supra* note 163, at 474–77 (letter from Alan B. Morrison, Public Citizen Litigation Group). This modification would eventually be included in the statute, providing the first formal way to hold judges publicly accountable for the management of their caseloads. Katherine J. Henry, *Judicial Discipline Through the Civil Justice Reform Act's Data Collection and Dissemination Requirements*, 1 RES. PAPERS OF THE NAT'L COMMISSION ON JUD. DISCIPLINE & REMOVAL 859, 859 (1993).

166. *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 133 (1990) (statement of the Hon. Robert F. Peckham).

167. *Id.*

168. *Id.* at 134.

169. See *Judicial Improvements Act of 1990*, tit. I, 103(a), Pub. L. No. 101-650, 104 Stat. 5089, 5090–98 (codified as amended at 28 U.S.C. §§ 471–482 (1994)). Absent congressional reauthorization, the CJRA was designed to sunset in 1997. See *id.* at 5096 (“[The] requirements set forth in [the CJRA] . . . shall remain in effect for seven years after the date of the enactment of this title [December 1, 1990].”).

170. See H.R. REP. NO. 101-732, at 8 (1990) (concluding that “periodic assessment of docket conditions” would ensure “continuous renewal of the

As enacted, section 476 of the CJRA (now re-titled “Enhancement of Judicial Information Dissemination”) required that the Director of the Administrative Office:

prepare a semiannual report, available to the public, that discloses for each judicial officer—(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending; (2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and (3) the number and names of cases that have not been terminated within three years after filing.<sup>171</sup>

After seven years of living with the CJRA experiment, judges and practitioners were skeptical about its benefits. In 1996, the RAND Corporation—a nonprofit think tank—was asked by the Administrative Office and the Judicial Conference to evaluate the implementation and effectiveness of the case management reforms the Act had required.<sup>172</sup> The RAND study gave mixed marks to the programs, concluding that for the most part the reforms “had little effect on time to disposition, litigation costs, and attorneys’ satisfaction and views of the fairness of case management.”<sup>173</sup> According to a commentator, experience with the CJRA had confirmed the “unvarnished truth” that “we have no idea how to make a substantial dent in either cost or delay.”<sup>174</sup>

The RAND analysis also found, however, that the reporting requirement may have worked.<sup>175</sup> Others similarly observed that while most provisions of the CJRA had been “somewhat disappointing,” the “publication requirement seems

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commitment to reduce . . . delays”); *see also* Gordon Hunter, *Judges Clog Federal Docket*, TEX. LAW., Nov. 18, 1991, at 1 (quoting senior aide to Senate Judiciary Committee as calling public disclosure “an incentive [for judges] to work a little faster’ and enhance their accountability”).

171. 28 U.S.C. § 476(a) (2006).

172. JAMES S. KAKALIK ET AL., RAND CORP., JUST, SPEEDY, AND INEFFECTIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 1 (1996) [hereinafter RAND STUDY].

173. *Id.*

174. Paul Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 61 (1997).

175. *See* RAND STUDY, *supra* note 172, at 24 (noting that the “number of cases pending more than three years has dropped by about twenty-five percent from its pre-CJRA level,” and concluding, in the absence of other explanations for the drop, that the CJRA reporting requirement may have been responsible); IAALS STUDY, *supra* note 3, at 77–78; Jeffrey J. Connaughton, *Judicial Accountability and the CJRA*, 49 ALA. L. REV. 251, 253 (1997).

to have resulted in the clearest reduction in case delays.”<sup>176</sup> Even the Judicial Conference agreed that the statistical reporting of cases had been useful, acknowledging there was evidence that case processing times had dropped as a result of public reporting on the state of the judges’ dockets.<sup>177</sup> The Judicial Conference therefore planned to continue with its statistical reporting even after the provisions of section 476 had expired<sup>178</sup> along with the rest of the CJRA provisions.<sup>179</sup> This independent action turned out to be unnecessary, however, because Congress reauthorized the reporting requirement of section 476 in December 1997, even as it allowed the balance of the CJRA provisions to expire.<sup>180</sup>

Recent scholarship suggests that the CJRA reporting requirement continues to influence the behavior of judges. The Institute for the Advancement of the American Legal System (IAALS), for example, sampled 7,700 federal civil cases and noted a significant increase in the rate of decision on motions within two weeks before the semi-annual CJRA reporting deadlines.<sup>181</sup> The decision rate during those two weeks ranged from 11% to 15%, when the predicted decision rate was only 8.5%.<sup>182</sup> In addition, the IAALS study found that 35% to 40% of the motions that were decided in the two weeks before a CJRA reporting deadline *would* have gone on the judges’ section 476 reporting list if they had not been decided when they were.<sup>183</sup> The authors concluded from these observations that there was “strong circumstantial evidence that judges rush to complete

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176. Robert E. Litan, *Foreword* to HON. DANIEL B. WINSLOW, JUSTICE DELAYED: IMPROVING THE ADMINISTRATION OF CIVIL JUSTICE IN THE MASSACHUSETTS DISTRICT AND SUPERIOR COURTS (1998).

177. JUDICIAL CONFERENCE OF THE UNITED STATES, THE CIVIL JUSTICE REFORM ACT OF 1990, FINAL REPORT 10, 18 (1997) [hereinafter JUDICIAL CONFERENCE, FINAL REPORT]. See also Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511, 533 (1993) (noting a seven percent decline in the number of motions pending more than six months during the first and second CJRA reporting periods).

178. JUDICIAL CONFERENCE, FINAL REPORT, *supra* note 177, at 19.

179. See Judicial Improvements Act of 1990, tit. I, 103(a), Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (1994)) (describing the sunset provisions of the CJRA).

180. See Act of Oct. 6, 1997, Pub. L. No. 105-53, § 2, 111 Stat. 1173, 1173 (“The requirements set forth in section 476 of title 28, United States Code, as added by subsection (a), shall remain in effect permanently.”).

181. IAALS STUDY, *supra* note 3, at 8.

182. *Id.*

183. *Id.*

rulings on motions immediately prior to those reporting deadlines.”<sup>184</sup>

*B. Habeas Motions Excluded from Reporting Requirement*

However, section 476 has not helped speed the disposition of habeas applications. The Judicial Conference and the Administrative Office have advised district court judges that a habeas petition, even though it is a request for a judge to issue an order, need not be considered a “motion” for purposes of the CJRA reporting requirement.<sup>185</sup> Judges do not, in other words, have to include on their published lists of undecided motions habeas petitions that have been pending for at least six months as of the semi-annual CJRA reporting date. And, of course, judges accordingly do *not* report this information.<sup>186</sup>

This interpretation of section 476 does not seem consistent with the language and purpose of the provision, nor is it consistent with the habeas-priority requirements of 28 U.S.C. § 1659. To be sure, responsibility for implementing the section 476 reporting requirement lies with the Judicial Conference and the Administrative Office. The CJRA authorizes the Director of the Administrative Office to prescribe standards for categorizing or characterizing judicial actions for recording purposes,<sup>187</sup> including “a definition of what constitutes a

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184. *Id.* at 8, 78, 79 tbl.31. The authors excluded prisoner suits (including habeas petitions) from their study. *See id.* at 23.

185. *See* ADMINISTRATIVE OFFICE, POLICY GUIDE, *supra* note 38; JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 46 (1991) (noting that the Committee on Court Administration and Case Management defined “motions pending,” “bench trials submitted,” and “three-year-old cases” for CJRA reporting purposes). The Judicial Conference has offered no public explanation of its rationale for exempting habeas applications from the CJRA’s six-month reporting requirements.

186. However, pursuant to 28 U.S.C. § 476(a)(3) (2006), judges must report habeas petitions that are at least three years old. In addition, the Judicial Conference requires judges to report on “secondary” habeas motions (that is, motions besides the habeas application itself) that have been pending for more than six months.

187. *See* 28 U.S.C. § 476(b) (stating that “[t]o ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semiannual report prepared under subsection (a)”); 28 U.S.C. § 481(b)(1) (“In carrying out subsection (a), the Director shall prescribe—(A) the information to be recorded in district court automated systems; and (B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.”).

dismissal of a case and standards for measuring the period for which a motion has been pending.”<sup>188</sup> In addition, the Judicial Conference is statutorily authorized to supervise the administration of the federal courts.<sup>189</sup> As a practical matter, therefore, the Administrative Office will have the last word on which aged “motions” must be reported by district courts. That said, it is not immediately clear how much deference should be owed to these bodies. As an entity within the judicial branch, the Administrative Office is not an “administrative agency” for *Chevron* deference purposes.<sup>190</sup> Nonetheless, Congress has charged it with administering the CJRA, and accordingly, it seems appropriate to recognize a kind of quasi-*Chevron* deference for the Administrative Office’s construction of the statute.<sup>191</sup>

The reasonableness of the Judicial Conference and the Administrative Office’s exemption of habeas petitions from the “motions” reporting requirement seems, at any rate, questionable. A state-prisoner habeas petition (which is referred to as an “application” in section 2254) is a request to the district court for an order (usually release from custody).<sup>192</sup> As such, the Federal Rules of Civil Procedure would characterize a habeas application as a “motion” rather than a

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188. 28 U.S.C. § 481(b)(2) (2006).

189. *Id.* § 331.

190. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (holding courts must defer to agency’s interpretation of statute); *Brooks v. United States*, 757 F.2d 734, 742 (5th Cir. 1985) (noting that the “views of the Administrative Office are not entitled to the deference of an administrative agency charged with administering a statute,” even though its opinion could be helpful as an indication of the practice of the federal courts); *Litton Sys., Inc. v. AT&T Co.*, 568 F. Supp. 507, 514 (S.D.N.Y. 1983) (“Although the views of the Administrative Office are not entitled to the deference normally given to those of an administrative agency interpreting either its own regulations or a statute which it is charged with administering, its opinion is, nevertheless, that of a government body that has considered the issue and reached a conclusion consistent with this Court’s result.”).

191. Cf. *Mills v. United States*, 547 F. Supp. 116, 119–20 (N.D. Ill. 1982) (“The approach taken by the Administrative Office is especially significant because the United States Supreme Court repeatedly has stated that when a question of statutory construction arises great deference should be given to how the statute is interpreted by the officers or agents charged with its administration. . . . Since this court has found no compelling indications that [the Director of the Administrative Office’s] interpretation [of the Criminal Justice Act] is wrong, due deference must be given to such an administrative determination.”).

192. See 28 U.S.C. § 2254(a), (b), (d), (e) (referring to an “application for a writ of habeas corpus”).

“pleading.”<sup>193</sup> The Supreme Court, too, has observed that the “term ‘*motion*’ generally means [a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant.”<sup>194</sup> In fact, petitions brought pursuant to 28 U.S.C. § 2255 (the analogue to section 2254 petitions for federal prisoners) are referred to as “motions” within the statute,<sup>195</sup> but are likewise exempted by the Judicial Conference from treatment as “motions” for CJRA reporting purposes.

Whether or not deference is appropriate, it is clearly within the power of the Judicial Conference and the Administrative Office to revisit the question of what counts as a “motion” and to assure that habeas applications are treated in the same way as other motions. Indeed, there is precedent for the Judicial Conference to do just that. The Judicial Conference initially exempted both social security and bankruptcy appeals from the section 476 reporting requirement, but subsequently reconsidered its position. For bankruptcy appeals, it explained that “[r]equir[ing] that all bankruptcy appeals pending over six months in the district courts be included in the [CJRA] reports” would “assist in directing judges’ attention to bankruptcy appeals and avoid undue delays.”<sup>196</sup> For social security cases, the Judicial Conference similarly concluded that a change from past practice was appropriate because “including social security appeals in public reports may encourage courts to remain attentive to their prompt disposition.”<sup>197</sup> Precisely the same reasoning should be adopted by the Judicial Conference for habeas petitions.

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193. See FED. R. CIV. P. 7(a)–(b) (distinguishing between a pleading—which includes only forms of a complaint, answer, or reply—and a motion, which is a “request for a court order”).

194. *Melendez v. United States*, 518 U.S. 120, 126 (1996) (emphasis added) (quoting BLACK’S LAW DICTIONARY 1013 (6th ed. 1990)); see also *In re Vogel Van & Storage, Inc.*, 59 F.3d 9, 12 (2d Cir. 1995) (“A motion is an application for an order.”).

195. See, e.g., 28 U.S.C. § 2255(a) (stating that a federal prisoner “may move the court which imposed the sentence to vacate, set aside or correct the sentence”) (emphasis added); *id.* § 2255(c) (“A court may entertain and determine *such motion* without requiring the production of the prisoner at the hearing.”) (emphasis added).

196. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1998).

197. *Id.* at 63.

Because habeas petitions are not treated as “motions” for section 476 reporting purposes, there is no incentive for the district courts to decide them before other civil motions. To the contrary, by exempting habeas applications from the reporting requirement, the practical effect is to encourage judges to turn to aging motions in every *other* type of civil matter first. This is a perverse result for a category of cases that by statute is supposed to receive *expedited* treatment.<sup>198</sup>

### C. Proposal to Include Habeas in Reporting Requirement

As a matter of policy, the Judicial Conference should reconsider its interpretation of section 476 and include habeas petitions among the courts’ reportable motions. As presently construed by the Judicial Conference, the provision actually provides a disincentive for judges to address habeas petitions while other civil motions that might be reportable remain pending on their dockets.

Concededly, the public may not notice the inclusion of habeas motions on judges’ six-month reporting lists,<sup>199</sup> even though the reports have recently been made more accessible than in the past.<sup>200</sup> And there is a reasonable argument that enhanced public scrutiny of the state of the federal courts’ dockets may, in fact, be undesirable.<sup>201</sup> Nonetheless, including

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198. See 28 U.S.C. § 1657; see also *supra* Part I.C; see also Dungworth & Pace, *supra* note 3, at iii (noting that delay in civil cases is not distributed uniformly, either among classes of litigants or among the various districts in this country).

199. See, e.g., R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687, 698–700 (1993) (noting that, despite judges’ concerns, relatively little media attention has been paid to the section 476 reports).

200. See Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 13 n.29 (2009) (“Given the notion of transparency and accountability inherent in the CJRA, it is ironic that the Director’s semiannual reports are not available to the public on the official U.S. Courts website.”); IAALS STUDY, *supra* note 3, at 39 n.71 (showing that while CJRA reports are “available in theory,” they are “difficult for the public to find” and often delayed by up to nine months); Henry, *supra* note 165, at 864 (encouraging the Administrative Office to make these reports easily available to the public). The reports have now, however, been made available on the courts’ website. See *Judiciary Approves Free Access to Judges’ Workload Reports; Courtroom Sharing for Magistrate Judges*, THIRD BRANCH NEWSLETTER (Admin. Office of the U.S. Courts), Sept. 15, 2009, at 1–2 (stating that all future CJRA reports will be made available to the public without charge on the judiciary’s public website beginning with the period ending March 31, 2010).

201. Some commentators have noted the tension between accountability and judicial independence. See Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431,



habeas applications in the publication requirement would likely have a beneficial effect, since the audience for the CJRA semiannual reports is not only the public at large, but also other judges.<sup>202</sup>

Judges, like any other peer group, are influenced by the behaviors and norms of their colleagues. Since passage of the CJRA, judges do appear to be sufficiently concerned about their image that they will go about remedying congested dockets in order to avoid appearing on the six-month lists.<sup>203</sup> As Judge James Robertson of the U.S. District Court for the D.C. Circuit observed recently in the *Buffalo Law Review*, habeas matters are routinely allowed to “linger for months, or even years,” which is in part due to the perverse incentives created by the CJRA:

Each district judge is required to report semiannually his or her ‘old motions’ in civil cases—those that have been pending undecided for longer than six months. It’s a negative incentive—a shaming device—and it has been quite effective in getting judges to move their cases along. Habeas corpus cases and § 2255 applications, however, are not regarded as ‘motions.’ They are not reportable, so, if they are sitting on remote corners of our desks gathering

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458 (2004) (“If judges were completely ‘accountable’ in a political sense, they would become passive tools of the popular will.”). And there may be unpalatable results to enhancing judicial accountability to the public. See David A. Hoffman et al., *Docketology, District Courts and Doctrine*, 85 WASH. U. L. REV. 681, 706 n.122 (2007) (noting several news articles about “dilatatory judges”). For example, the public may not understand the docket reports because judges with heavier caseloads (or those who are willing to take on time-consuming multidistrict litigation) may appear to be delinquent when in fact they are providing extraordinary help to their colleagues. Judicial backlogs, in addition, may be an unreliable indicator of judicial quality. See Miller, *supra* at 475 (“Judges whose principal concern is to clear cases off their desk may have excellent records for timeliness but still be bad judges because they do not give sufficient attention to decisions.”).

202. See Henry, *supra* note 165, at 862–63 (“Judges themselves believe that the reporting requirements will improve performances by stimulating peer pressure.”); Hoffman et al., *supra* note 201, at 705–06 (“[S]cholars have been insufficiently attendant to the shaming sanctions that judges face if they fall too far behind on their docket. In essence, Congress (through the Administrative Office) publishes a list naming judges whose dockets are too full. Such dilatatory judges face the gentle ribbing of their fellows at the judicial lunch table and the harsh glare of the media spotlight.”); see also PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 39 (1973) (discussing the origins of the Judicial Conference and noting Chief Justice Taft’s “confidence” that publicizing the state of the courts’ dockets would promote efficiency through “peer-group influence”).

203. See, e.g., *supra* notes 183–86 and accompanying text.

dust, there is no public accountability. Transparency does wonders.<sup>204</sup>

As Judge Robertson suggests, inclusion of habeas petitions on the CJRA six-month motions list would cultivate an attitude of efficiency and a legal culture where the judges would care about habeas delay.<sup>205</sup> In addition, to the extent the public is paying attention, inclusion of habeas petitions in the section 476 reports would enhance public confidence in the fair administration of justice in the courts.<sup>206</sup> Because the Judicial Conference does not require that habeas petitions be included on the six-month list, however, the self-policing effects of the reporting requirement in the habeas context have been lost.

Other considerations also suggest the wisdom of adding habeas applications to the definition of “motions” for the reporting requirements of the CJRA. Expanding the reporting requirement presents no separation of powers issues, unlike proposed legislation that would set firm time limits on judges to decide habeas matters.<sup>207</sup> Adding habeas to the reporting requirement will not force judges to *do* anything. Judges may continue to allow habeas applications to sit undecided for six months, a year, two years, or more, without being required to turn to those matters before others deemed more pressing.<sup>208</sup> While allowing old habeas motions to sit on the docket may prove embarrassing when the semiannual reports are issued, it is difficult to see how judicial independence would be chilled by

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204. James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1083 (2008).

205. See IAALS STUDY, *supra* note 3, at 8–9.

206. Federal judges who have commented on section 476 uniformly embrace it. See, e.g., Avern Cohn, *Advice to the Commission—A Sentencer’s View*, 8 FED. SENT’G REP. 14, 14 (1995) (recommending expansion of public reporting of “judge identifier data” about sentencing decisions, and noting that “[e]xperience under the Civil Justice Reform Act using judge identifiers in connection with cases pending more than three years, bench trials undecided, and motions pending more than six months, has resulted in substantial improvement in shortening the time that judges take to dispose of motions and cases”).

207. See H.R. 3035, 109th Cong. § 8(a) (2005) (requiring Courts of Appeal to decide the appeal from an order granting or denying a habeas writ “not later than 300 days” after briefing is completed).

208. Modifications for reporting on habeas matters might nonetheless be appropriate. The Judicial Conference has instructed courts that the “pending” clock for civil motions will not begin running until “30 days after the motion is filed,” see JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 57 (1999), but for social security cases, the clock does not begin to run until 120 days after the filing of the transcript, *see id.* at 58.

expanding the reporting requirement. To the extent judges are concerned that the public or their peers will draw unfair conclusions from their inclusion on the list, they may submit explanations for the number of undecided habeas petitions they have been forced to report.<sup>209</sup>

Indeed, this proposal is decidedly less intrusive than other measures that, at least in theory, might be available to habeas petitioners whose applications have been sitting unresolved for lengthy periods of time—including mandamus, impeachment, and civil liability.<sup>210</sup> In contrast, the reporting requirement is precisely the kind of self-executing, “informal” method for resolving delay that seems most likely to be effective in actually reducing systemic delay.<sup>211</sup> In the last analysis, judges may still handle their dockets in any way they like, but their failure to speedily resolve habeas petitions—along with any explanations for the delay—will at least be transparent to the public and their colleagues.<sup>212</sup>

Including habeas petitions in the section 476 reports would not require new administrative costs, since identical reports are already required for all other civil matters. Still, it cannot be said that this proposal would promote efficiency entirely without costs. Judges have only a limited amount of time to spend on resolving motions and cases on their dockets, so time devoted to one set of cases will, absent increased efficiency, require other matters to remain unresolved for longer. Just as the Speedy Trial Act requires district court judges to put criminal matters at the front of their dockets, thereby necessarily adding some degree of delay to their civil dockets,<sup>213</sup> any procedural device that encourages the speedier

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209. See Dessem, *supra* note 199, at 697–98 (giving examples of circuits that include explanatory notes with their section 476 reports).

210. Miller, *supra* note 201, at 458–64; see also RUSSELL R. WHEELER & A. LEO LEVIN, *JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES* 7–9 (1979) (discussing the formal mechanisms used to regulate judicial conduct); Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PENN. L. REV. 243, 248–59 (1993) (discussing the Judicial Conduct and Disabilities Act).

211. Charles Gardner Geyh has suggested that formal disciplinary procedures, like those authorized by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, are ill-suited to address the problem of docket delay. See Geyh, *supra* note 210, at 261. Instead, “informal actions by the chief circuit and district judges appear to be used with the most frequency and to the greatest effect.” *Id.* at 276.

212. Cf. Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 682–83 (1979) (arguing against formal regulation of the judiciary).

213. See, e.g., J. Clifford Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 B.Y.U. L. REV. 39, 51 (noting that

resolution of habeas matters will, presumably, mean that other civil matters get resolved less expeditiously.

Of course, as was demonstrated above in Part I, moving habeas petitions through the courts promptly is precisely the result that our federal habeas statute, habeas rules, and case law all seem to envision. That said, the proposal to include habeas petitions in the CJRA six-month reports does not, in itself, privilege habeas petitions over other civil motions. Rather, it does no more than level the playing field so that judges are not discouraged from addressing habeas petitions while other civil motions remain pending. In the last analysis, all that this proposal calls for is fair treatment of habeas petitions.<sup>214</sup>

None of the foregoing observations or recommendations should be construed as denigrating the work ethic of federal district court judges. Their workloads are tremendous, and their dedication to the “just, speedy, and inexpensive”<sup>215</sup> resolution of motions is beyond dispute. But incentives matter, and habeas petitioners should not be made to bear a disproportionate share of the burden, in the form of delay in the resolution of their habeas petitions, caused by the district courts’ heavy caseloads.

## CONCLUSION

Speedy judicial attention to a prisoner’s claim of illegal detention must be, and has always been, central to the function of the writ of habeas corpus. As this empirical study has shown, however, since the passage of AEDPA, the federal courts have not kept current with their habeas dockets, instead

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the Speedy Trial Act, “while not directly increasing the judiciary’s workload per se, will cause immense problems of caseload management because it severely compresses the disposition time permitted in criminal cases”).

214. Adoption of this proposal would not preclude the courts’ adoption of other measures that would speed the resolution of habeas cases. Judge Weinstein, for example, has suggested a number of reforms, with the goal of closing each state-prisoner habeas case within 100 days of filing. *See* WEINSTEIN REPORT, *supra* note 16, at 17. Among his proposals are (1) that each court’s Clerk’s Office designate a staff member to assure that habeas files (including state court hearing transcripts, briefing, and decisions) are gathered promptly; (2) that adjournment requests be denied except in extraordinary circumstances; (3) that the practice of assigning petitions to magistrates be abandoned, unless magistrates’ reports are treated as binding; and (4) that Chief District Court Judges take a more active role in reassigning habeas cases that have been pending overlong. *Id.* at 16–25.

215. FED. R. CIV. P. 1.

allowing an increasing number of petitions to remain undecided for extraordinary lengths of time. Although, by statute and court rules, judges should be moving habeas petitions to the front of their dockets, they have been discouraged from doing so by the Judicial Conference's exclusion of habeas petitions from the reporting requirements of the CJRA. The Judicial Conference should reconsider its interpretation of the CJRA's reporting provision so that habeas petitioners do not bear a disproportionate share of the burden of delay caused by the courts' heavy civil caseload.