Statement of John H. Blume
December 8, 2009

I appreciate the opportunity to address the Committee on the important issue of habeas corpus. The writ of habeas corpus has a long and storied history in this Country, but its significance and vitality has been significantly diminished in the last few decades due to the combined effect of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and a number of judicial decisions – both pre and post AEDPA – that have limited the scope of the "Great Writ."

Representative Johnson's bill, H.R. 3986, is a laudable effort to address a significant problem facing the criminal justice system: the conviction and execution of those who are, or may well be, actually innocent of the offense for which they were convicted and sentenced to death. But the problems with the current habeas corpus regime are much more widespread than the conviction of the innocent, and Congress should examine a number of different areas of that system and make necessary changes to allow individuals convicted of crimes and sentenced to death by the state courts meaningful access to the federal courts. In my testimony today, I would like to address several of the more significant problems with the current habeas regime.

First, is the statute of limitations. AEDPA created for the first time, a statute of limitations for federal habeas corpus cases. In broad strokes, the current statute requires prisoners to file a federal petition within one year of their case becoming final on direct review. There are several complicated tolling provisions. Due to the lack of clarity in the statute, even today, thirteen years after AEDPA's enactment, there is still substantial confusion as to when a petition must be filed. The Supreme Court has yet another case on its docket this term, *Holland v. Florida*, dealing with the meaning of the limitations provision. While it is not unreasonable to want to prevent "stale" or untimely claims, AEDPA's statute of limitations has resulted in numerous shocking and unfair results. Numerous death sentenced inmates, and literally thousands of non-capital habeas petitioners, have been deprived of any federal review of their convictions and death sentences because a federal court determined the habeas petition was not filed on time. Let me briefly discuss one of those cases, *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2003). Rouse raised a claim in his federal petition that one of the jurors who convicted him of murder and sentenced him to death lied during voir dire. And it was not just any lie. Rouse, who was African-American, was charged with murdering and attempting to rape an elderly white female. In his federal petition, Rouse alleged, and provided evidence supporting his claim, that one of the jurors intentionally concealed that his own mother had been murdered, robbed and raped by an African-American, and that he – the juror – harbored intense racial bias against African-Americans as a result of his mother's murder. And, to make matters worse, if they could be worse, he lied to get on the jury for the purpose of sentencing Rouse to death as an indirect act of revenge for his mother's death. However, despite this disturbing and shocking evidence, he received no federal review of his conviction and death sentence. Why? Because his lawyers filed his habeas petition one day – yes one day – late. And they did so based on at least a facially plausible understanding that the petition was timely filed. Injustices such as the one revealed in Rouse's case should not be allowed to be swept under the proverbial rug due to such a hyper-technical violation of the habeas statute.

The second problem I would like to address is that of procedural default. Even before AEDPA, the Supreme Court, in a number of decisions, created barriers to federal review of cases where the habeas petitioner allegedly violated some state procedural rule. Most of the rules involve failure to follow some state rule of procedure such as the contemporary objection rule or rules requiring federal claims to be presented to the state courts at particular times in particular ways. Again, I admit that respect for some state rules of procedure is important. But, in the current system, many clearly meritorious claims are barred from any habeas review by the federal courts for trivial failures to comply with state rules. John Eldon Smith was executed in Georgia because his lawyer failed to object to unconstitutional discrimination in the jury selection process because they were not aware of Supreme Court decisions prohibiting the systematic exclusion of women from juries. His co-defendant's lawyers did object. The result? The co-defendant was awarded a new trial by the federal courts in her habeas challenge to her conviction and death sentence and was subsequently resentenced to life imprisonment. Mr. Smith was executed. It is clear that it would not have made a bit of difference to the state courts if his lawyer had objected. The same state judge presided over the jury selection in both cases, and he paid no heed to his co-defendant's objection. But because his lawyers, due to lack of familiarity with the governing law, failed to object, Mr. Smith went to his death. Even death sentenced inmates with claims challenging their categorical ineligibility for the death penalty are sometimes denied federal habeas review of their claims. In *Hedrick v. True*, 443 F.3d 342 (4th Cir. 2006), a federal court determined that it would not consider Hedrick's claim that he was mentally retarded, and thus not eligible for the death penalty pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* was decided while Hedrick's state post-conviction challenge was pending in the Virginia Supreme Court and thus there was uncertainty as to what the procedure was for raising a mental retardation claim. But because the federal courts determined that Hedrick had not "fairly presented" his claim to the state courts, the claim was deemed procedurally defaulted.

In the current habeas system, a tremendous amount of time and attorney and judicial resources are expended wrangling over issues related to the procedural default doctrine such as: a) did the petitioner in fact violate a state rule of procedure; b) if so, is the state rule "independent," "adequate" and "consistently and regularly applied;" c) if so, is there cause and prejudice for the failure to comply with the state rule. This is not only time consuming and wasteful, it frequently obscures what should be the most important consideration: was there a violation of the petitioner's constitutional rights? The process would be simplified and streamlined by the elimination of procedural default. Cases would move faster and more fair and just results would be achieved.

Finally, I would like to talk about what many say is the "centerpiece" of the AEDPA – 28 U.S.C. §2254(d). This section provides that an application for a writ of federal habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings, unless the adjudication resulted in a decision that was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States or was based on an unreasonable determination of the facts. I realize that is quite a mouthful. This particular provision, unlike many other parts of AEDPA, had no habeas pedigree. It was not rooted in prior Supreme Court decisions, nor was it contained in any prior legislation that had been proposed to modify habeas corpus. This particular section of AEDPA has produced draconian

results. When §2254(d) was being debated in Congress, its proponents assured members who expressed skepticism that meritorious constitutional claims would still be vindicated under §2254(d). President Clinton's signing statement contained similar assurances that AEDPA would not bar review of meritorious claims. In many cases, however, that promise has been broken. In *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002), the petitioner raised a claim of ineffective assistance of counsel. It was not disputed that his attorneys failed to investigate and present evidence of the shocking physical, sexual and emotional abuse to which their client was subjected, including being brutally and repeatedly gang raped when he was a juvenile at a state mental institution, and evidence of his very low intellectual functioning. The federal court determined that his trial lawyers had conducted an unreasonable investigation and that there was a reasonable probability that had his counsel presented this evidence, Neal would have been sentenced to life imprisonment rather than the death penalty. But, despite the federal court's conclusion that Neal had presented a meritorious claim of ineffective assistance of counsel, Neal's claim was rejected. Why? Because the federal court concluded that the state court's decision was definitely wrong, but it was not completely off the mark and thus was not objectively unreasonable. This is an intolerable result.

Furthermore, §2254(d) has created a perverse incentive system. Because it has been construed to focus only on the state court result, and not necessarily the reasoning used by the state courts, AEDPA has created what is effectively a reward system for state courts to say as little as possible about the merits of a particular individual's federal constitutional claims. If the state court says nothing, most circuits have construed §2254(d) as creating a presumption that the state courts correctly identified and applied controlling Supreme Court precedent even when there is no objective reason to believe they did so. Summary adjudications by state courts thus are treated more deferentially than are detailed and carefully reasoned state court decisions. Even when a state court's reasoning is facially defective and patently unreasonable, the focus on the bottom line result also insulates many state court decisions that are inconsistent with governing constitutional law.

Section §2254(d) should be revisited by the Congress. In its current form, and as currently applied by the federal courts, it leaves many clearly meritorious federal constitutional claims without a remedy. This makes the "Great Writ" of habeas corpus nothing more than a shadow of the historic remedy which has played a significant role in the development and protection of constitutional rights, and has produced numerous fundamentally unfair and unjust results.

Given the importance of federal habeas corpus to our constitutional system, I would urge this Committee and the Congress to engage in meaningful habeas corpus reform and untie the hands of the federal courts to review meritorious claims of constitutional error.

Thank you.