

turned record surpluses into record deficits and that has floated us down a river of red ink, we have the bill that is before us. It gives no real help to our debt and deficits, and it targets programs that need help the most.

By cutting less than one half of one percent of the projected \$14.3 trillion in federal spending over the next five years, we are not returning to fiscal sanity, as supporters of this bill claim.

And despite what some on the other side of the aisle might think, slashing programs that help low-income Americans and our seniors stay healthy and help our young go to college is not sound policy. A \$12.7 billion cut to student loans will not help educate Americans. A \$6.9 billion cut in Medicaid and the State Children's Health Insurance Program will not keep low-income Americans healthy. And a \$6.4 billion cut in Medicare is not beneficial to the well-being of our nation's seniors.

Instead, this bill shows a lack of compassion and a lack of vision for the long-term health and productivity of our Nation. It would be more beneficial if we returned to the sound, balanced-budget vision that guided us through the prosperous '90s.

I urge my colleagues to vote "no" on this uncompassionate bill and to instead focus on a revision of our economic direction.

CONFERENCE REPORT ON H.R. 3199,
USA PATRIOT IMPROVEMENT
AND REAUTHORIZATION ACT OF
2005

SPEECH OF

HON. JEFF FLAKE

OF ARIZONA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, December 14, 2005

Mr. FLAKE. Madam Speaker, I would like to comment on section 507 of today's PATRIOT Act conference report, which authorizes the U.S. Attorney General to certify whether a state has qualified for the expedited habeas corpus procedures in chapter 154 of title 28 of the U.S. Code. Section 507 is of particular importance to my home State of Arizona, which for many years has satisfied the post-conviction counsel requirements of chapter 154, but which has been unfairly denied the procedural benefits of that chapter by the Ninth Circuit.

Section 507 is similar to a section of the Streamlined Procedures Act, a general habeas corpus reform bill that was introduced earlier this year in the House by Mr. LUNGREN of California, and in the Senate by my Home state colleague, Senator KYL. Section 507 is also virtually identical to an amendment that I filed and sought to offer last month to H.R. 1751, the Secure Access to Justice and Court Security Act of 2005. My amendment had been made in order by the Rules Committee and was listed in House Report 109-279. At the last minute, however, various political objections were made to my amendment and Chairman SENSENBRENNER asked me not to offer it to H.R. 1751. The Chairman assured me that he would accommodate me with regard to this matter on some other legislation. I am pleased to see that he was able to do so on the PATRIOT Act, which now appears that it will be enacted into law sooner than H.R. 1751.

My amendment is designed to give States a real incentive to provide quality counsel to

death row prisoners in State habeas proceedings. It is also designed to keep a bargain that the Federal Government made with the States in 1996. The amendment assigns the U.S. Attorney General to evaluate whether a State is providing qualified counsel to capital prisoners in State habeas proceedings, a condition for receiving the benefits of the expedited habeas procedures of chapter 154 of the U.S. Code. The amendment thus gives States a real chance to qualify for chapter 154 treatment. By ensuring that States will receive streamlined proceedings in Federal court if they provide quality counsel in State habeas court, the amendment will reduce delays in death penalty appeals.

This is a goal that everyone, left and right, should agree with. Even those who passionately oppose the death penalty should want the system to be fair to victims. No one should support a system that routinely forces the family of a murder victim to endure 10, 15, or even 20 years of appeals. Yet in too many cases, that is exactly how our current system works even in cases where there is no real dispute over guilt. In my home State of Arizona, over two-thirds of death row prisoners have finished all of their State appeals and are engaged in Federal habeas litigation. Most of these cases have now been in the Federal courts for five years or more. Ten cases have been in Federal court for 8 years or more, and 5 cases have been in Federal court for more than 15 years. And this is all on top of the time that it takes to complete all state appeals, which usually requires 5 or 6 years.

Under the current system, victims' families are forced to repeatedly relive an awful event throughout the progress of this lengthy litigation. During that process, they must wonder if they will be forced to appear at another hearing, if there will be another trial, or if the person who killed their son or daughter will even be released. They literally are denied closure, the right to forget about the person who killed their loved one and to move on with their lives. And this frequently goes on for more than 15 years. A system that treats crime victims this way is intolerable.

The amendment that I offer today is particularly important to my home State of Arizona. Arizona is both a State that has experienced extreme delays in Federal-court review of capital cases, and a State that has acted to provide quality counsel in state habeas proceeding in response to the offer that the congress made in 1996. The habeas reform of that year created chapter 154 of title 28. This chapter told the States that, if they provide qualified state habeas counsel to capital defendants, the Federal government would streamline Federal court review of capital cases. In Federal court, chapter 154 would limit the claims that defendants could raise, barring virtually all claims that were not properly raised and addressed on the merits in state court. Chapter 154 would apply strict deadlines to Federal court review, requiring the district court to decide the case in 6 months and the court of appeals to rule in 4 months.

Shortly after the 1996 reforms were enacted, the Arizona legislature and the State supreme court implemented a system that would allow the State to opt in to chapter 154. The State created mandatory competency standards for capital post-conviction counsel, and provided funds to attract good lawyers

and allow them to hire necessary experts. The State now spends a lot of money on post-conviction representation for death-row inmates—the median case costs the State \$64,000, while one case cost \$138,000. Again, this is just for State habeas review. It does not include the State's expenses to provide counsel at trial or on direct appeal from the trial. For example, Arizona also guarantees a capital defendant two highly qualified attorneys at trial.

One might think that, in light of all that the State of Arizona has done to provide high-quality counsel to capital defendants, surely it must have qualified for chapter 154 by now and must be enjoying the benefits of that chapter. But that is not what has happened. The problem is simple: under current law, the local Federal court of appeals decides whether a State has opted in to chapter 154. In Arizona, the Ninth Circuit has refused to grant Arizona the benefits of chapter 154. Even though Arizona has lived up to its end of the bargain, the Ninth Circuit refuses to allow the Federal government to abide by its end of the deal.

A case that illustrates the problem is the Ninth Circuit's extraordinary decision in *Spears v. Stewart*, 283 F.3d 992 (2002). The three-judge panel in *Spears* found that Arizona's system for providing post-conviction counsel complied with chapter 154. The court concluded that Arizona's system sets mandatory and binding competency standards for counsel, provides reasonable compensation to counsel, pays reasonable litigation expenses, and offers such counsel to all capital defendants. The court nevertheless managed to find that Arizona could not receive the benefits of chapter 154 because of a delay in appointing counsel. Defense lawyers initially had boycotted this system, and in some cases this resulted in delays. The defendant in *Spears* did not even allege that this delay prejudiced his case. But the Ninth Circuit found this delay a sufficient excuse to deny Arizona the benefit of chapter 154, even though Arizona's system complied with that chapter.

The decision of the *Spears* three-judge panel alone is troubling. The chapter 154 qualification decision is supposed to be a one-time decision. Once a State's system qualifies, the issue is not supposed to be litigated again on a case-by-case basis. Even more disturbing than the three-judge panel's decision, however, is a dissent from the full court's refusal to rehear the case that was signed by 11 active judges of the Ninth Circuit. These 11 judges stated that the panel's decision that Arizona's system qualifies for chapter 154 is merely dicta and not binding in future cases. Although the issue of Arizona's 154 status was squarely before the three-judge panel and was decided by that panel, this gang of 11 judges declared that they would not follow that decision in future cases. As they said: "To put it bluntly, neither we, nor any other court is bound by the panel's advisory declarations in this case." *Spears*, 283 F.3d at 998 (Reinhardt, J., dissenting from denial of rehearing).

A statement by 11 judges that they will refuse to follow their own court's final decision itself is extraordinary, as several other judges noted in *Spears* a concurrence to the denial of rehearing. If a court refuses to abide by its own precedents, litigants can have no way of knowing what the law is and how they should

arrange their affairs. Such behavior does substantial damage to the rule of law.

What such behavior also demonstrates is a refusal to enforce the laws enacted by Congress. It shows that chapter 154 will remain a dead letter so long as the obligation to enforce it remains in the hands of courts such as the Ninth Circuit. It is clear that, if any two of the 11 judges who joined the Spears rehearing dissent are assigned to a future Arizona 154 case, they will not feel obligated to follow Spears and the State will be relitigating the issue of its 154 status from scratch. Indeed, portions of the Spears dissent argue that Arizona's "statutory scheme did not comply with Chapter 154's requirements." *Spears*, 283 F.3d at 1002 (Reinhardt, J., dissenting from denial of rehearing). The tone of the 11-judge dissent also betrays an open hostility to the chapter 154 system.

The trouble with chapter 154 is that the courts assigned to decide when it applies are the same courts that would be bound by the chapter's strict deadlines if a State is found to qualify. Simply put, the regional courts of appeals have a conflict of interest. They decide whether the States are entitled to a benefit which places a burden on the courts themselves. Some prosecutors also believe that refusal to enforce chapter 154 also reflects a hostility to the death penalty—that some judges are ignoring the law because they do not want to see death sentences carried out. If this is true, it is absolutely unacceptable. A judge has an obligation to uphold and enforce a valid law, whether or not he agrees with it.

My amendment makes several changes to chapter 154 to ensure that it provides real and meaningful benefits to States that provide quality post-conviction counsel. First and most importantly, it assigns the 154 certification decision to the U.S. Attorney General and the DC Circuit, rather than the local courts of appeals that have an interest in the case. The Attorney General receives no benefits from chapter 154, and he has expertise in evaluating State criminal justice systems. Just last year, for example, Congress assigned the Attorney General to evaluate State DNA testing and capital counsel systems in the Justice for All Act. Review of the Attorney General's decision in the DC Circuit also is appropriate. Because there is no Federal habeas review of criminal convictions in the District of Columbia, the DC Circuit also has no stake in whether or not a State qualifies for chapter 154.

My amendment, like subsection (d) of section 507, also makes clear that a determination that a State has satisfied the chapter 154 standard as of a particular date will apply retroactively to all pending habeas cases for which the prisoner received State habeas after the certified date. This will ensure that a State will receive all of the procedural and litigation benefits that it should have received had the Federal habeas claim been governed by chapter 154 from the day that it was filed, as it should have been. The proposed paragraph 28 U.S.C. 2265(a)(2) in my amendment makes clear that, once the Attorney General determines that a State established a post-conviction capital-counsel system by a particular date, the chapter 154 eligibility certification shall be effective as of that date. Thus, if a capital prisoner received State habeas counsel after that effective date, the case is governed by chapter 154 in Federal proceedings.

However, some courts might construe 2265(a)(2) to mean that while the chapter 154 system thereafter governs Federal habeas applications that have already been filed, the actual procedural benefits of that chapter—especially the claims limitations and amendment limits would only apply on a going-forward basis—i.e., only to claims or amendments filed after the date of enactment of this law. Thus when I added a few other provisions to the amendment, I also inserted subsection (g), which is the same as subsection (d) of section 507. This subsection, by explicitly applying section 507 and the changes that it makes to all qualified pending Federal habeas cases, should make clear that when Congress says that it wants the new law to apply retroactively, it means that the law will apply retroactively—that it will govern new claims as if it had been in effect as of the effective date of the chapter 154 certification.

Any non-retroactive application of chapter 154 would be fundamentally unfair to States such as Arizona, which has been providing post-conviction counsel to State prisoners for nearly a decade but has been inappropriately denied the benefits of chapter 154 for some cases that already have progressed to Federal habeas. In the Spears case, for example, the Ninth Circuit even found that Arizona's counsel system met chapter 154 standards, but the court nevertheless came up with an excuse for refusing to apply chapter 154 to that case. If the Attorney General and the DC Circuit conclude that Arizona met chapter 154 standards prior to Spears's receipt of counsel, as I am confident that they will, Arizona should receive all of the benefits of chapter 154 for that case and subsequent cases, as if chapter 154 had governed the Federal petition as of the day it had been filed (as it should have). Chapter 154, for example, does not allow cases to be remanded to State court to exhaust new claims (a considerable source of delay on Federal habeas), and it places very sharp limits on amendment to petitions. Arizona should not be forced to litigate claims in Spears's petition that were defaulted, that were unexhausted and sent back to State court, or that otherwise were not addressed by State courts when Spears first filed the petition (unless those claims meet the narrow exceptions in subsection 2264(a)). Nor should the State be forced to litigate claims that were added to the petition in amendments that do not satisfy chapter 154's limits on amendments.

Applying chapter 154 retroactively may seem harsh, but it is important to recall that any prisoner whose Federal petition will be governed by 154 necessarily received counsel in State post-conviction proceedings. Unlike the typical uncounseled State habeas petitioner, who may not have been aware of State procedural rules or of all the potential legal claims available to him, a chapter 154 habeas petitioner will have no excuse for not making sure that all of his claims were addressed on the merits in State court. (Or rather, any excuse will be limited to those authorized in 28 U.S.C. 2264(a).) I believe that, given the resources Arizona has devoted to providing post-conviction counsel, the State should easily qualify for chapter 154. The Ninth Circuit has treated Arizona unfairly by denying it chapter 154 status. If the U.S. Attorney General and DC Circuit agree that Arizona should have been 154-certified when Spears filed his Federal petition, Arizona should be placed in

the same position that it would be in today had the Spears case proceeded under chapter 154 from the beginning.

My amendment also extends the time for a district court to rule on a 154 petition from 6 months to 15 months. I have been informed that the bill that became the 1996 Act originally adopted 6 months as the limit as an initial bargaining position. The intention had been to eventually extend this to 12 months, but because of the politics of the enactment of AEDPA, it was not possible to change this deadline later in the legislative process. My amendment is even more generous than the original authors' intention, giving the district courts 15 months, in recognition of their burdensome caseloads and the fact that they do the real work in Federal habeas cases—they are the courts that hold hearings, if necessary, to identify the truth of a case. This same change was included in subsection (e) of section 507.

Subsection (f) of section 507 is the same as a provision in subsection (e) of my amendment. This subsection codifies the rule of *McFarland v. Scott*, 512 U.S. 849 (1994), which allows a stay to issue on the basis of an application for appointment of Federal habeas counsel (without the actual filing of a petition), but it limits such stays to a reasonable period after counsel is actually appointed or the application for appointment of counsel is withdrawn or denied.

PERSONAL EXPLANATION

HON. LOUISE MCINTOSH SLAUGHTER

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Friday, December 30, 2005

Ms. SLAUGHTER. Mr. Speaker, I was unavoidably detained and missed rollcall votes Nos. 664 and 671. Had I been present, I would have voted "aye." Mr. Speaker, I ask unanimous consent that my statement appear in the permanent RECORD immediately following these votes.

H.R. 2520, on Passage, rollcall No. 664, "aye."

H. Con. Res. 275, rollcall No. 671, "aye."

CONFERENCE REPORT ON H.R. 2863, DEPARTMENT OF DEFENSE AP- PROPRIATIONS ACT, 2006

SPEECH OF

HON. JOSEPH CROWLEY

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Sunday, December 18, 2005

Mr. CROWLEY. Mr. Speaker, shame! That is all I can say—both on the way the Republican leadership has governed this country this year—and on how they are using the troops as a political tool to provide huge taxpayer benefits to the oil and gas industry.

Over 2,100 Americans killed in Iraq, and the Republican leadership waits until the last night of Congress—3 months after we needed to fund the military—to pass the spending bill for our troops.

This is called a "must pass" bill, as it is one Congress MUST pass as if we don't, the military will literally run out of money and not be