

### Senate Action to Protect Innocent Inmates on Death Row

by Ossai Miazad\*

Since 1976, over 100 death row inmates in the United States have been exonerated before their sentences were carried out. Over the same period 796 death row inmates in the United States have been executed. These numbers have raised concern over how many of those 796 executed were wrongfully convicted. Some states, recognizing the urgency of the situation, have declared a moratorium on executions. The United States Congress has also taken notice of this crisis in the criminal justice system.

In February 2000, Senators Patrick Leahy (D-VT), Gordon Smith (R-OR), and Susan Collins (R-ME) introduced the Innocence Protection Act (S. 486). An amended version of this bill ultimately passed the Senate Judiciary Committee in July 2002, but did not make it to the Senate floor for a vote before the close of the 107th Congress. Representatives Bill Delahunt (D-MA) and Ray LaHood (R-IL) introduced a companion bill in the House of Representatives (H.R. 912). The House Judiciary Committee has not yet considered H.R. 912. With 31 co-sponsors in the Senate and 249 co-sponsors in the House, the Innocence Protection Act (IPA) has garnered bipartisan support. The IPA will be reintroduced in the 108th Congress during 2003.

In a Senate address on November 18, 2002 Senator Leahy stated, "Our bill, the Innocence Protection Act, proposes a number of basic commonsense reforms to our criminal justice system; reforms that are aimed at reducing the risk that innocent people will be put to death." The IPA was not drafted in opposition to the death penalty itself; rather it focuses on protecting the wrongfully convicted from execution. The IPA has two core elements: access to post-conviction DNA testing; and the improvement of defense counsel in capital trials.

#### Post-Conviction DNA Testing

Post-conviction DNA testing has proven successful in exonerating the wrongfully convicted. DNA testing, used in U.S. courts since the 1980s, has cleared 110 prisoners, 12 of whom had been sentenced to death. The IPA seeks to extend federal inmates' access to post-conviction DNA testing in appropriate cases where it could help expose wrongful convictions. Specifically, the Senate bill requires federal courts to order DNA testing upon a determination that: (1) the evidence is still in existence; (2) the evidence was never previously subjected to DNA testing; (3) the testing involves a scientifically valid technique; (4) the testing will potentially produce new, non-cumulative evidence that is material to the claim of innocence and that raises a reasonable probability that the applicant would not have been convicted; and (5) the identity of the perpetrator of the crime was or should have been a significant issue in the case. To ensure preservation of DNA evidence, the bill mandates that the government provide the inmate with 180-day notice before destroying criminal evidence that could be subjected to DNA testing. The government would otherwise be required to preserve for the duration of the individual's incarceration evidence used to convict the inmate.

The amended Senate version of the IPA seeks to bolster provisions addressing potentially frivolous requests. For example, if DNA test results inculcate an applicant, the court is directed to pass the cost of the test to the applicant. The bill also requires the courts to dismiss applications for post-convic-

tion DNA testing if "the Government proves by a preponderance of the evidence that application was made to interfere with the administration of justice rather than to support a claim with respect to production of such new evidence."

The IPA encourages states to follow its lead. Current laws in some states make it difficult to obtain post-conviction DNA testing. The IPA conditions state receipt of certain federal grants on the state's adoption of adequate procedures for preserving biological evidence and making post-conviction DNA testing available to any person convicted of a state crime. States would also be required to allow applications for post-conviction relief based on favorable DNA results. The IPA would also prohibit a state from denying a DNA testing application by a death row inmate if the proposed test has the scientific potential to produce new, non-cumulative material evidence that raises a reasonable probability that the prisoner would not have been convicted of the crime for which the person was sentenced to death. In addition, states would be required to establish a program under which state or local prosecutors would review cases in which a defendant was sentenced to death, identify cases in which DNA evidence is readily accessible and DNA testing is appropriate, and conduct DNA testing in such cases.

#### Effective Counsel Systems

According to Professor James Liebman's landmark study, *A Broken System: Error Rates in Capital Cases*, the quality of defense counsel was found to be a leading cause of error in capital cases. The IPA provides financial support for states to improve their criminal defense systems.

The IPA establishes a grant program for states to improve the systems by which they appoint and compensate lawyers in capital cases. States that accept grants would agree to comply with federal funding conditions. Compliance with those conditions would be enforced through citizen suits. An effective system would require the establishment of qualifications for attorneys who may be appointed to represent indigents in capital cases, the maintenance of a roster of qualified attorneys, and the provision of periodic training programs and monitoring of attorney performance.

The IPA also authorizes new grant programs to train state and local prosecutors, defense counsel, and judges to better handle capital cases. If a state does not apply or qualify for funds, the Department of Justice would be authorized instead to fund nonprofit capital defender organizations in that state.

While the focus of the legislation is on post-conviction DNA testing and improving the defense counsel system, additional safeguards provide for: increasing the amount of compensation authorized to be paid to exonerated federal prisoners, with encouragement for states to do the same; and authorization for law student loan forgiveness to encourage qualified individuals to enter and continue employment as prosecutors and public defenders.

#### Conclusion

Opposition to the IPA has been leveled on grounds that it infringes on states' rights and that the reforms would be too

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U.S. domestic courts, the Commission challenged the U.S. government's claim against its jurisdiction by noting that the main issue the Danns' case raises—the 1962 ICC “award”—occurred subsequent to the United States' ratification of the OAS Charter in 1951, which therefore provides the Commission with jurisdiction over the matter.

### Enforcing the Rights of American Indians in the Inter-American System

The American Convention establishes both the procedures and substantive rights that govern the adjudication of complaints by the Inter-American Commission and the Inter-American Court of Human Rights (Court) with respect to state parties. However, the principal instrument that sets forth the applicable substantive rights of countries not party to the American Convention is the American Declaration. As such, the Inter-American Commission considers the American Declaration to articulate OAS member states' general human rights obligations under the OAS Charter, a multilateral treaty with the force of law.

As an OAS member state, the United States is legally bound to uphold the organization's human rights principles and obligated to comply with the Commission's recommendations. The primary obstacle to enforcing the rights of American Indians in the inter-American system, however, is that the United States has not accepted the jurisdiction of the Court. Although the Commission has reviewed the United States' treatment of American Indians, the U.S. government does not consider itself obligated to respond to the Commission's findings. The ultimate challenge facing the Danns and other American Indians is utilizing the Commission's preliminary merits report to persuade the United States to change its actions.

Regardless of the U.S. government's response to the Commission's findings, or its failure to accept the Court's jurisdiction, it may be argued that the organs of the inter-American system are porous. The Commission's actions thus far in the Danns case, and any future action by the Commission or the Court on such issues, will in fact affect the United States indi-

rectly. Although the decisions may not be binding on the United States, the Commission's decision in the instant case will contribute to the inter-American system's perspective and approach to informing the rights of Indigenous Peoples in the Americas. The Commission draws from the decisions of the Court in preparing its reports and recommendations, and the United States may gradually be forced to respond to the Commission's findings. To whatever degree the Commission is influenced by the Court, the Court's decisions touch even those countries that have yet to accept its jurisdiction.

The Commission's recognition of violations of the Danns sisters' rights may prove substantial to the developing jurisprudence on Indigenous Peoples' rights in the Americas. Further, the Danns' act of bringing their claims before the Commission, and thereby bringing the United States within the ambit of its jurisdiction, is significant. Being a player in the international community entails accepting certain obligations to respond to developments within the systems to which a state is party, and also to honor the responsibilities a member state accepts by committing itself to respecting a set of rights enumerated in particular international instruments. It is important that the United States begin to acknowledge the development of the inter-American system's jurisprudence concerning the rights of indigenous populations and its domestic application. 🌍

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DHS. The Office of Refugee Resettlement of the Department of Health and Human Services is designated to care for unaccompanied immigrant children. Additionally, the Act requires the secretary of DHS to appoint an officer for civil rights and civil liberties to assess information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by DHS employees and officials. The Act explicitly prohibits implementation of Operation TIPS (Terrorism Information and Prevention System), a proposed program that would have recruited letter carriers, utility workers, and others with access to private residences to report suspicious activity to law enforcement. Finally, the Act expresses the sense of Congress reaffirming the continued importance of the Posse Comitatus Act, which prohibits the use of the Armed Forces for civilian law enforcement except as authorized by the U.S. Constitution or Congress. 🌍

costly. Both of these arguments are questionable, as the IPA does not tamper with state death penalty laws and focuses on providing resources for states to use toward their criminal justice system. Further, as Senator Leahy has responded, “The costs of providing DNA testing and competent counsel are relatively small, especially when you compare them to the costs of retrials that are necessitated by the lack of adequate counsel at trial, or the cost of locking up innocent people for years or even decades.” The IPA would begin to address some of the flaws in the U.S. capital punishment system. Moreover, it is particularly difficult to harmonize a nation's role as a defender of international human rights with its failure to employ means available to it in an effort to exonerate an innocent person whose life it will otherwise end. 🌍

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