CHAPTER 11

FEDERAL POLICY ON THE DEATH PENALTY

THE ISSUE

The irreversibility of the death penalty makes it critical that our criminal justice system administer this most severe sanction in a fair and equitable manner. Our system provides for adequate representation and the appropriate checks to remedy any errors or constitutional violations. There is no remedy for the execution of defendants to whom the criminal justice system did not afford all the processes, protections, and rights guaranteed by the Constitution. Most distressingly, dysfunctions in the criminal justice system can lead to the execution of defendants innocent of the crimes with which they were charged.

The death penalty, as currently applied, is in urgent need of reform. Capital defendants are too often not afforded adequate legal representation or a fair trial. Furthermore, alarming racial disparities exist in the application of the death penalty. The failure to provide even basic fairness in the system leads to an incontrovertible truth: the death penalty is a "broken system." Despite these grave concerns, since the 1996 passage of the Antiterrorism and Effective Death Penalty Act (AEDPA),[1] federal courts have been severely constrained in their ability to vindicate the constitutional rights of individuals convicted of crimes in state and federal courts.

HISTORY OF THE PROBLEM

A landmark study of capital cases from 1973 through 1995 revealed that in seven out of every ten cases that were fully reviewed, courts found serious, reversible error.[2] Even after state courts reversed 47% of the capital convictions due to these errors, federal courts found serious error in 40% of the remaining death sentences.[3] The most common errors prompting reversal of death sentences were "egregiously incompetent defense lawyers" and suppression of exculpatory evidence by prosecutors or police.[4] At the same time, too many death row inmates suffer from severe mental illness. Additionally death sentences are disproportionately imposed on people of color, with African Americans comprising more than 40% of today's death-row inmates while constituting only 12% of the national population.[5]

These findings reveal critical problems with capital punishment in the United States: 1) lack of sufficient review of capital convictions; 2) racial disparities in the application of the death penalty; 3) unjust application of the death penalty to the mentally ill; and 4) lack of adequate capital counsel for indigent defendants.

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[1] Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[2] JAMES S. LIEBMAN, ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000) at I, *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.
[3] *Id*.
[4] *Id*. at ii.
[5] AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEATH BY DISCRIMINATION – THE CONTINUING ROLES OF RACE IN CAPITAL CASES (2003) at 5, *available at* http://www.amnesty.org/en/library/info/AMR51/046/2003.

1. **Changes to *Habeas Corpus* Limit Access to Critical Review**

Despite grave concerns about the reliability and fairness of capital convictions, federal legislation, most prominently the AEDPA and the USA Patriot Reauthorization Act (PIRA),[6] along with U.S. Supreme Court decisions interpreting these statutes, have significantly limited federal review of state court convictions. As a result, defendants who have suffered serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and suppression of exculpatory evidence, are left with no recourse.

Since AEDPA's enactment in 1996, state and federal prisoners have been forced to navigate a labyrinth of complex procedural rules and stringent deadlines to assert claims of serious constitutional violations in post-conviction proceedings. AEDPA burdens state prisoners, in particular, by requiring greater deference to state court decisions, thus constraining federal review of constitutional violations. Indeed, federal courts may only grant *habeas* relief to state prisoners where the state court's decision was "contrary to, or involved 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 in light of the evidence presented in the state court proceeding."[7] This is particularly troublesome given that petitioners in state post-conviction proceedings do not have a right to counsel and therefore, are too often unrepresented in these proceedings.

The constraints on the ability of federal courts to serve as a final check on state capital convictions are particularly damning for prisoners who assert claims of actual innocence, when we know with certainty that defendants have been, and will be, wrongfully convicted of capital crimes.[8] Since 1973, 138 death-row inmates from 26 states have been exonerated and released from custody after serving years (often decades) on death row.[9] Even more disturbing are the cases of the men and women who have been executed despite concerns over their possible innocence. For example, in 2009, five years after Texas executed Cameron Todd Willingham for killing his three daughters by setting fire to his home, a report to the Texas Forensic Science Commission concluded there was no scientific basis for claiming the fire was arson.[10] A four-person panel of the Commission acknowledged that state and local arson investigators used "flawed science" in determining the blaze had been deliberately set.[11] Serious doubts about the accuracy of the arson investigation had been raised prior to Mr. Willingham's execution and, if heeded, could have prevented the death of a

[6] USA Patriot Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 192 (2006).
[7] 28 U.S.C. § 2254(d).
[8] *See Innocence Issues*, SMART ON CRIME (2011).
[9] Death Penalty Information Center, Innocence: List of Those Freed From Death Row, *available at* http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.
[10] CRAIG L. BEYLER, ANALYSIS OF THE FIRE INVESTIGATION METHODS AND PROCEDURES USED IN THE CRIMINAL ARSON CASES AGAINST ERNEST RAY WILLIS AND CAMERON TODD WILLINGHAM (2009), *available at* http://www.docstoc.com/docs/document-preview.aspx?doc_id=10401390.
[11] Allan Turner, *Panel cites 'flawed science' in arson case*, HOUSTON CHRONICLE, July 24, 2010, *available at* http://www.chron.com/disp/story.mpl/metropolitan/7122381.html.

potentially innocent man.[12] The conviction and execution of innocent defendants is not only a moral travesty, but also a disservice to society's need for justice and public safety. These risks can be mitigated by eliminating the unreasonable restrictions currently placed on *habeas* petitions.

2. **Racial Disparities in the Federal Death Penalty**

The administration of the death penalty in the U.S. has also proven to be far too susceptible to the effects of race. Since 1988, approximately 73% of all approved federal capital prosecutions have been against defendants of color.[13] Today, African Americans comprise more than 40% of death-row inmates while constituting only 12% of the national population.[14] White federal defendants are almost twice as likely to have the death penalty reduced to life sentences through plea bargains.[15] An analysis for the Senate and House Judiciary Committees also revealed that, out of 28 studies on racial disparity in the death penalty, 82% found that the race of the victim influenced whether a defendant was charged and convicted of a capital murder.[16] In Georgia, for example, a defendant who murdered a white victim was 4.3 times more likely to receive the death sentence than a defendant who murdered an African American victim.[17]

A Department of Justice study of federal cases from 1988 to 2000 also revealed especially pervasive racial disparities at the stage when prosecutors were deciding whether to charge a homicide as a federal crime or leave it in a state's criminal justice system.[18] Unfortunately, the study did not examine the reasons for these racial disparities, and the Department has yet to conduct a follow up study on the role of racial bias in the application of the federal death penalty.

Despite the disturbing role race plays in the death penalty, in 1987, the U.S. Supreme Court held that statistical evidence of race disparities in the imposition of the death penalty did not violate the Eighth and Fourteenth Amendments to the U.S. Constitution.[19] The Court reasoned that these statistics did not demonstrate intentional race discrimination in a specific defendant's trial.[20] In response, Representative John Conyers, Jr. (D-MI) drafted the Racial Justice Act as an amendment to 1994 omnibus crime legislation.[21] The Racial Justice Act prohibited federal and state executions

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[12] David Grann, *Trial by Fire: Did Texas Execute an Innocent Man*, THE NEW YORKER, Sept. 7, 2009, *available at* http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

[13] U.S. DEPT. OF JUSTICE, SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM (2000); *see also*, U.S. DEPT. OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001).

[14] AMNESTY INTERNATIONAL, *supra* note 5, at 5.

[15] *Id*.

[16] U.S. GOVT. ACCOUNTING OFFICE, REPORT TO THE SENATE AND HOUSE JUDICIARY COMMITTEES: DEATH PENALTY SENTENCING RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

[17] See David Baldus, et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASHINGTON & LEE LAW REVIEW 359, 365 (1994).

[18] U.S. DEPT. OF JUSTICE, SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM, *supra* note 13.

[19] McClesky v. Kemp, 481 U.S. 279 (1987).

[20] *Id*.

[21] The omnibus bill was eventually passed as the Violent Crime Control and Enforcement Act of 1994, Public L. No. 103-322.

imposed on the basis of race, permitting the use of statistical evidence to support the inference that race was a factor in decisions to seek or impose the death penalty. Although the measure passed in the House, it failed in the Senate by a 58-41 vote.

In 1995, the Department of Justice amended its regulations to require the U.S. Attorney General to review every federal death-eligible case throughout the nation, and to decide whether the death penalty will be sought in any or all of such cases, regardless of the recommendation of the local U.S. Attorneys.[22] This over-centralization of the federal death penalty's decision-making process has proved cumbersome, slow, and extremely costly. It may also exacerbate racial disparities by placing the decision-making authority to not pursue capital charges in too few hands. Since the 1995 change in regulations, 31 federal defendants of color have been sentenced to death, compared with 25 white defendants.[23]

3. **Mental Illness and the Federal Death Penalty**

It is estimated that up to 10% of death row inmates suffer from serious mental illness.[24] This is true despite the fact that diminished mental capacity is a mitigating factor that juries can consider when determining whether to sentence a defendant to death.[25] In recent years the Supreme Court has cited evolving standards of decency to protect vulnerable populations from sentences of death based on their lack of judgment and culpability.[26] While perhaps criminally culpable for their conduct, like juveniles and those with mental retardation, the severely mentally ill can lack the judgment, understanding, and self-control that would warrant the imposition of the death penalty.[27] This is particularly true when severely mentally ill defendants were suffering from psychotic delusions or other debilitating psychological conditions at the time they committed their crimes. It is unjust to exercise the most severe of sanctions on a population whose diminished capacity makes them less culpable.

4. **Access to Capital Counsel for Indigent Defendants**

Further exacerbating the problems in pursuing capital prosecutions, capital defendants are predominately poor and must rely upon a dysfunctional indigent defense system that is in crisis. Indigent defense attorneys are overworked, underpaid, and too often lack independence and the

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[22] USAM 9-10.010 *et seq*.
[23] Death Penalty Information Center, Federal Death Row Prisoners, *available at* http://www.deathpenaltyinfo.org/federal-death-row-prisoners#1994 (last visited Jan. 4, 2011).
[24] Mental Health America, Death Penalty and People with Mental Illness, *available at* www.nmha.org/go/position-statements/54.
[25] *See* 18 U.S.C. § 3592(a)(1).
[26] *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that it is unconstitutional to execute persons who committed their crimes while juveniles); and Atkins v. Virginia, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute persons with mental retardation).
[27] THE NAT'L ALLIANCE ON MENTAL ILLNESS, DOUBLE TRAGEDIES: VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY FOR PEOPLE WITH SEVERE MENTAL ILLNESS, 1 (2009).

necessary experience and skills to effectively represent their clients—especially in capital cases. With such inadequate resources, capital defendants are at a greater risk of facing death sentences that are arbitrary and unfair. Moreover, the absence of a right to counsel in post-conviction proceedings, coupled with the myriad procedural and substantive hurdles in raising a claim of ineffective assistance of counsel, leaves capital defendants with little recourse when they are deprived of the necessary legal resources.

Federal support for capital representation is critical to ensuring that every capital defendant receives a fair and just trial. A recent report by the Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services of the Judicial Conference of the United States found that defendants whose defense costs were in the lowest one-third were more than twice as likely to be sentenced to death than those with greater defense resources.[28] The report also found that attorneys for defendants in low cost cases were less likely to have "distinguished prior experience" in capital cases, placing these defendants at a disadvantage.[29]

In 2004, with large bipartisan support, Congress passed and President George W. Bush signed the Justice for All Act (JFAA).[30] The JFAA authorized $75 million in annual grants to improve standards for prosecutors and defense counsel appointed to state capital cases over a five year period. Unfortunately, Congress never appropriated full funding for this provision.[31] Additionally, many post-conviction defender organizations, known as capital resource centers, which procured and provided legal representation to death row inmates at the post-conviction stage, were forced to close when Congress eliminated their federal funding in 1996.[32] These organizations demonstrated how proper training and support for competent death penalty counsel can cost-effectively and dramatically increase the quality of capital representation in state and federal post-conviction proceedings, as well as direct representation of capital defendants.

For federal defenders, a lack of independence is also an obstacle to effective representation of their clients. At the federal level, judges control many of the decisions regarding a federal defender's budget and resources for a particular case.[33] Rules vary among federal circuits regarding presumptive limits on expenditures for cases and the ability of attorneys to obtain authorization to

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[28] JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 44 (2010), *available at* http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf#page=1 (finding that individuals facing federal capital prosecution and whose defense costs were in the lowest one-third, had a 44% chance of being sentenced to death at trial, while the remaining two-thirds of defendants had a 19% chance of being sentenced to death).

[29] *Id*. at 49.

[30] Justice for All Act, Pub. L. No. 108-405, 118 Stat. 2260 (2004).

[31] In fiscal year 2009, for example, the Department of Justice was able to award $1,828,433 in grants for capital training under JFAA based on the amount Congress appropriated. U.S. DEPT. OF JUSTICE, FY 2009 CAPITAL CASE LITIGATION INITIATIVE FUNDING RESULTS, *available at* http://www.ojp.usdoj.gov/BJA/funding/09CCLIAwards.pdf.

[32] Alex J. Hurder, *Whatever you think about the death penalty, a system that will take life must first give justice*, Human Rights (Winter 1997) *available at* http://www.abanet.org/irr/hr/winter97/death.html.

[33] *See* 18 U.S.C. §§ 3005, 3006A, 3599; 28 U.S.C. § 2254.

hire experts and investigators. This creates inconsistencies in the quality of representation for defendants in different circuits and can prevent counsel from providing the zealous advocacy to which defendants are entitled.

Because death is different, there is an even greater urgency for the federal government to implement the following reform proposals to protect the constitutional rights of each individual at risk of execution. The guiding principle behind these recommendations is the need to administer the death penalty in a fair and equitable manner, with assurances of adequate and fully-funded legal representation and checks within the system to remedy constitutional violations and serious, reversible errors.

RECOMMENDATIONS

1. **Amend *Habeas Corpus*-related provisions of AEDPA**

A. ***Limits to* Habeas Corpus *Threaten Justice***

The passage of AEDPA and PIRA, and the manner in which the Supreme Court and lower federal courts have interpreted these statutes, has created an unduly high burden for petitioners to obtain federal *habeas* relief. The Byzantine rules and procedures that have resulted create uncertainty and confusion for courts, prosecutors, and defense attorneys. Moreover, the one-year statute of limitations and prohibitions against successive *habeas* petitions can serve as an absolute bar to federal *habeas* review for some people. As a result, federal courts are unable to grant relief despite meritorious substantive claims—including claims of racial bias in jury selection, ineffective assistance of counsel, and prosecutorial misconduct—due to substantial deference to state court proceedings or mere technicalities.

B. ***Reform* Habeas Corpus *to Address Damage Caused by AEDPA***

Legislative

Congress should amend the federal *habeas* statute,[34] to address the damage AEDPA has wrought in federal *habeas corpus* over the past fifteen years. Congress should revise restrictions on successive *habeas* petitions, the statute of limitations, exhaustion requirements, and procedural default standards, as well as eliminate federal court deference to state court interpretations of constitutional and federal law. These revisions will simplify a *habeas* regime that is currently failing to provide certainty and clarity for petitioners, states, or courts.

[34] *See* 28 U.S.C. § 2241 *et. seq*. These provisions govern procedures for post-conviction collateral review from convictions obtained in both state and federal court.

Congress should amend the federal *habeas* statutes to permit second or successive *habeas corpus* petitions. Allowing petitioners, particularly capital defendants, access to federal *habeas* review in instances where credible evidence of actual innocence has surfaced is a sensible and fair-minded reform designed to remedy miscarriages of justice. Despite the efforts of a defendant and his or her attorneys to discover all evidence prior to trial, new evidence— such as DNA evidence, confessions by the actual perpetrator, new eyewitnesses, recantation by prior witnesses, and new physical evidence—can emerge after all appeals and initial post-conviction reviews have been exhausted. A bar to successive petitions for claims of actual innocence[35] does not serve justice and risks the execution of innocent people in service of procedural rules.

Additionally, Congress should eliminate the restriction in 28 U.S.C. § 2254(d) that makes *habeas corpus* relief available only for those state court convictions that are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "based on an unreasonable determination of the facts." If Congress does not pursue full repeal of this provision, it should create a committee with substantive input from members of the criminal defense bar to draft amending language. Among other possible reforms, this amending language should add decisions of the U.S. Courts of Appeals as part of "clearly established Federal law." It should also make § 2254(d) applicable only to decisions from states that qualify to opt-in to the expedited *habeas* procedures under Chapter 154, to ensure that states truly provide effective post-conviction counsel consistent with the U.S. Constitution. These reforms are critical in allowing federal courts to consider and properly apply federal law to claims that directly implicate federal and U.S. Constitutional concerns.

To ensure that individuals have a fair opportunity to have their post-conviction claims considered in federal court, Congress should repeal the one-year statute of limitations for post-conviction review of state and federal criminal convictions. If complete repeal is not pursued, Congress should pass legislation that amends the statute of limitations in 28 U.S.C. §§ 2244(d), 2255(f) to:

- Extend the one-year statute of limitations or mirror applicable state statutes of limitations, and begin running only from the date a state court denies a timely-filed *habeas* petition.

- Eliminate the absolute bar to federal *habeas* review due to the running of the statute of limitations.

[35] 28 U.S.C. § 2244(b)(2) bars any successive petitions for claims where new evidence is presented, unless the petitioner can show that "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

- Waive the statute of limitations for petitions related to convictions in states that do not automatically appoint post-conviction counsel in capital cases or have a prerequisite that the petitioner make a *pro se* filing before post-conviction counsel is appointed.

- Permit the reopening of *habeas* cases based on any new rules the U.S. Supreme Court articulates, irrespective of *Dodd v. United States*.[36]

- Require states to plead or forfeit statute-of-limitations defenses and prohibit the *sua sponte* dismissal of *habeas* petitions based on a forfeited statute-of-limitations defense, irrespective of *Day v. McDonough*.[37]

- Clarify that a state petition dismissed by an inadequate state procedural rule does not render that petition improperly filed, irrespective of *Pace v. DiGuglielmo*.[38]

- Make ineffective assistance by state post-conviction counsel a cause to excuse a procedural default.

- Permit claims of innocence or racial bias to overcome any statute of limitations or other procedural bar.

Legislation to reform federal *habeas* should also permit the tolling of the statute of limitations in three circumstances: 1) where a state petition is pending, even if the state petition is ultimately dismissed as time-barred and improperly filed; 2) where failure to file within the statute of limitation was due to attorney error; and 3) in cases of mixed petitions, which contain both exhausted and unexhausted claims. In the case of mixed petitions, the statute should require federal district courts to advise petitioners of the stay-and-abeyance procedure (dismissal of the unexhausted claims, stay of exhausted claims pending exhaustion of dismissed unexhausted claims, and amendment of original petition to include newly exhausted claims), and the risk of violating the statute of limitations if they decline the stay-and-abeyance procedure. This would reverse current law, under the Supreme Court decision in *Pliler v. Ford*, that district judges are not required to advise petitioners of the risk of declining the stay-and-abeyance procedures.[39]

Congress should also repeal the Chapter 154 Special *Habeas Corpus* "Opt-In" Procedures that expedite federal post-conviction proceedings.[40] This Opt-In Procedure originated in AEDPA, and was

[36] Dodd v. United States, 545 U.S. 353 (2005) (holding statute of limitations runs from date new rule is recognized by U.S. Supreme Court, not when the rule is made retroactive).
[37] Day v. McDonough, 547 U.S. 198 (2006) (holding courts may dismiss *habeas* petition *sua sponte* for statute of limitations violation even if state forfeited the defense).
[38] Pace v. DiGuglielmo, 544 U.S. 408 (2005) (holding state petition that is dismissed as time-barred was not properly filed and, thus, cannot toll statute of limitations for federal *habeas* petition).
[39] Pliler v. Ford, 542 U.S. 225 (2004).
[40] 28 U.S.C. §§ 2261-66.

amended in 2005 as part of PIRA. Under AEDPA, federal judges would certify that a state provides counsel to indigent capital defendants for state post-conviction review. In exchange, the states would enjoy procedural advantages to speed federal *habeas corpus* review of capital cases. The 2005 amendment moved the authority to certify the programs to the Attorney General. No state has yet to adopt a sufficiently adequate program for providing counsel to qualify for certification under the Opt-In Procedures. Absent full repeal, Congress should consider repealing the provisions from PIRA that moved authority to determine state qualification for Opt-In Procedures from the federal courts to the U.S. Attorney General.[41]

Overall, the current federal *habeas* regime continues to adversely impact individuals who have been denied opportunities to raise their constitutional claims. For this reason, any amendments to AEDPA and PIRA Congress adopts must be retroactively applicable to ensure individuals, particularly those facing execution, have a fair opportunity for their claims to be heard.

Executive

The President should encourage Congress to pass legislation to reform federal *habeas corpus* law as outlined above and commit to signing those reforms into law.

Absent congressional action, the Attorney General should adopt regulations pursuant to Chapter 154 that ensure states provide both qualified post-conviction counsel and adequate resources for counsel to fully litigate their client's state *habeas* petitions. The goal of Chapter 154 is to provide *habeas* petitioners full and fair state post-conviction review before expediting and limiting federal *habeas* review.[42] Therefore, any regulations should clearly require that states appoint and compensate competent counsel who have the resources to completely investigate and present all claims before the Attorney General will certify such regimes. Additionally, any regulations must make clear that future changes to such a regime will require recertification by the Attorney General.

Judicial

Federal courts should apply the Supreme Court's recent decision in *Holland v. Florida*[43] to ensure that individuals whose *habeas* claims would otherwise be time-barred as the result of attorney error may still seek review under the equitable tolling doctrine. In *Holland*, the Supreme Court recognized that extraordinary circumstances may prevent a petitioner from filing a *habeas* petition within the statute of limitations, and in such cases, out of fairness, the petition should not be

[41] *Id*. at § 2265.
[42] As originally passed, the Opt-In Procedure was designed to establish "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners," and required "standards of competency for the appointment of such counsel." Pub L. No. 104-132, 110 Stat. 1214, § 107 (1996).
[43] Holland v. Florida, 130 S.Ct. 2549 (2010).

barred.[44] As federal courts begin to hear cases seeking equitable tolling, they should keep the goal of fairness in mind.

2. **Addressing Inequities in the Federal Death Penalty**

A. ***The Federal Death Penalty Disproportionately Affects Defendants of Color***

Since the resumption of the federal death penalty in 1988, nearly 73% of all approved capital prosecutions have been against defendants of color.[45] Additionally, white federal defendants facing capital prosecution are almost twice as likely as defendants of color to successfully plea bargain for a life sentence.[46] Regulations adopted in 1995 that require the Attorney General to review every federal death-eligible case to decide whether to seek capital prosecution have served only to exacerbate problems with the application of the federal death penalty.

B. ***Create Safeguards Against Racially Biased Capital Prosecutions***

Legislative

Congress should seek to address the disproportionate application of the federal death penalty to defendants of color. To establish the extent to which race affects decisions to seek federal capital prosecutions and obtain death sentences, Congress should commission an independent study of the federal death penalty system. The study should examine racial disparities, prejudicial errors, adequacy of counsel, and other inequities in capital prosecutions, and make recommendations for legislative reform.

Congress should also require the Department of Justice to collect data on all factors relevant to the Department's decision to seek and impose the death penalty in all capital prosecutions. A statutory requirement that the Department collect and maintain this data would ensure the consistency and availability of the data from administration to administration. Such data should include the race, ethnicity, national origin, gender, marital status, parental status, occupation, and criminal record of both the defendant and victim. It should also include aggravating and mitigating circumstances identified at trial as well as the type of defense counsel, whether federal public defender, community defender, appointed counsel, retained counsel, or *pro se* representation. Upon the conclusion of the prosecution, the Department must make that data publicly available.

Congress should amend Title 28 of the United States Code to expressly prohibit the imposition of the death penalty based on race, ethnicity, or national origin. This amendment should allow a

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[44] *Id*. at 2553.
[45] U.S. DEPT. OF JUSTICE, SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM, *supra* note 13; *see also*, U.S. DEPT. OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW, *supra* note 13.
[46] *Id*.

defendant to use evidence that race, ethnicity, or national origin of either the defendant or the victim was a statistically significant factor in the decision to impose the sentence to establish an inference of impermissible bias. This amendment should also bar the government from rebutting such an inference through mere assertions that it did not intend to discriminate or that the imposed sentence satisfied the statutory criteria for the death penalty, unless it can prove that death sentences were sought in all cases fitting such criteria.

Congress should eliminate the excessive number of peremptory challenges given to federal prosecutors in capital cases. Currently, under Federal Rule of Criminal Procedure 24(b), in non-capital cases, the government is provided six peremptory challenges and the defense is provided ten. In capital cases, however, each party is allowed 20 peremptory challenges. This substantial increase in the government's peremptory challenges creates a perverse incentive to seek death sentences when they are not warranted. Additionally, more peremptory challenges increase the risk that jurors, while ostensibly being excluded for legitimate reasons, could in fact be excluded based on race, whether consciously or unconsciously.

Executive

The President should encourage Congress to pass legislation to address inequities in the federal death penalty, as outlined above, and commit to signing these reforms into law.

Even absent congressional action, the Department of Justice can revise its policies and regulations to ensure greater consistency and fairness in the application of the federal death penalty. To achieve these goals, the Attorney General should work in an open and transparent manner with the Department's Capital Case Unit, which reviews and recommends to the Attorney General whether to seek the death penalty, the Death Penalty Working Group, which is currently evaluating internal Department protocols related to pursuing capital prosecutions, and the Access to Justice Initiative, which is charged with improving the availability and quality of indigent defense, including capital defense.

As a first step in the revision of its policies and regulations, the Department should stay all federal executions and place a moratorium on federal capital charges pending an independent study of the death penalty system to examine racial disparities, prejudicial errors, adequacy of legal representation, and other inequities in capital prosecutions. The Department should develop metrics and methodologies to prospectively and retrospectively examine the process by which the Department initiates and prosecutes federal capital charges. This includes collecting and regularly reviewing all data concerning factors relevant to the imposition of the death penalty.

To the extent that the Department continues to pursue capital prosecutions, it should adopt policies and regulations that expressly prohibit imposition of the death penalty based on race, ethnicity, or national origin, as evidenced by statistical analysis. Similar to the legislative proposal above, under this standard, data collected regarding the prosecution of capital cases that reveals

race, ethnicity, or national origin as a statistically significant factor in the decision to impose the sentence would create an inference of impermissible bias. In order to proceed with the capital prosecution, the Department would require a showing that the crime satisfied the statutory criteria for the death penalty and that the Department sought death sentences in all cases fitting such criteria.

The Department should also decentralize the decision to pursue capital prosecutions by removing the requirements in the U.S. Attorneys' Manual that the Attorney General review all cases eligible for the death penalty.[47] Rather, the U.S. Attorneys should be permitted to pursue non-capital charges and enter into plea agreements in death-eligible cases. Only in cases where a U.S. Attorney wished to pursue a capital prosecution would the Attorney General review and authorize or deny the request to seek the death penalty. This system would increase the discretion of local U.S. Attorneys, who are better equipped to weigh the factors at play in potential capital cases. Such a change would also reduce unnecessary cost to the courts, prosecution and defense, given that delays in making a decision to pursue the death penalty caused by mandatory review by the Attorney General increases pretrial costs for additional attorneys, mitigation specialists, and other experts. These additional expenditures are unnecessary if the Attorney General decides not to pursue a capital case. Removing the requirement that all capital cases be reviewed by the U.S. Attorney General would restore capital-case procedure to the more streamlined system that prevailed prior to 1995, when only affirmative requests to seek the death penalty required approval by the U.S. Attorney General.

3. Mental Illness and the Federal Death Penalty

A. *The Mentally Ill are Unjustly Executed*

It is estimated that up to 10% of death row inmates suffer from serious mental illness.[48] While perhaps criminally culpable for their conduct, like juveniles and those with mental retardation, the severely mentally ill can lack the judgment, understanding, and self-control that would warrant the imposition of the death penalty.

B. *Protect the Mentally Ill from Unjust Execution*

Legislative

Congress should amend 18 U.S.C. § 3596 to exempt people with severe mental illness and/or developmental disabilities from capital sentences. In the case of defendants with severe mental illness and/or developmental disabilities, like juveniles[49] and those with mental retardation,[50] the

[47] USAM 9-10.010 *et seq*.
[48] MENTAL HEALTH AMERICA, DEATH PENALTY AND PEOPLE WITH MENTAL ILLNESS *available at* www.nmha.org/go/position-statements/54.
[49] *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that it is unconstitutional to execute persons who committed their crimes while juveniles).

death penalty represents a disproportionate punishment for individuals who are less culpable for their crimes, as compared to those without mental illness.

Executive

The Department of Justice should also adopt a policy that exempts people with severe mental illness and/or developmental disabilities from capital prosecutions. As explained above, the death penalty represents a disproportionate punishment for individuals who are less culpable for their crimes than those without mental illness.

4. **Access to Counsel in Capital Prosecutions**

A. ***Inadequate Counsel Puts Innocent Lives at Risk***

Capital defendants are predominantly poor and rely on an indigent defense system that is overworked, under-resourced, inexperienced, or sometimes non-existent.[51] The absence of adequate capital counsel increases the risk that innocent people will be sentenced to death. A recent report found that federal capital defendants whose representations cost the least were more than twice as likely than other capital defendants to receive the death penalty.[52] The report also found that defendants in low cost cases were less likely to be represented by lawyers with "distinguished prior experience" in capital cases.[53] Access to qualified counsel with sufficient resources vastly increases a capital defendant's chances for a fair trial.

B. ***Provide Adequate Counsel in Capital Prosecutions***

Legislative

Congress should increase federal defender independence from the federal judiciary. Giving the judiciary control over defense functions creates a conflict of interest. Federal defenders will be able to operate more effectively and efficiently if the judiciary no longer appoints counsel or approves budgets for experts and other resources at any stage of a federal death penalty case, including post-conviction review.[54]

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[50] *See* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute persons with mental retardation).
[51] American Bar Association, Death Penalty Representation Project, *available at* http://new.abanet.org/DeathPenalty/RepresentationProject/Pages/FAQ.aspx (last visited Jan 5, 2011); National Center for State Courts, Indigent Defense FAQ, *available at* http://www.ncsc.org/topics/access-and-fairness/indigent-defense/faq.aspx.
[52] GOULD & GREENMAN, *supra* note 28, at 43-44.
[53] *Id*. at 49.
[54] *See* 18 U.S.C. §§ 3005, 3006A, 3599, and 28 U.S.C. § 2254.

Congress should amend current law to vest authority over the appointment and budgets of federal defenders in local federal defender organizations, or the Administrative Office of U.S. Courts, for those districts without federal defender organizations.[55] Congress may also transfer the defense function from the federal courts to a new Office of the Defender General.[56]

In the alternative, if authority remains in the judiciary, Congress should require federal courts to accept recommendations for counsel made by a federal public defender, a federal defender community organization, the Capital *Habeas* Unit, or the Administrative Office, absent good cause. Congress should also allow any lawyer appointed to represent state death-row prisoners in federal court, including without limitation Capital *Habeas* Unit attorneys, to appear in state court.

Congress should provide adequate funding for federal defenders, including funds for attorneys' fees, investigative expenses, and experts witness. This will give full effect to federal law that provides counsel for capital defendants at all stages of the legal process in federal court through post-conviction proceedings.[57]

Under the Capital Case Litigation Initiative, states are currently required to divide the federal grant money they receive for capital training equally between prosecutors and defenders.[58] States are also restricted from using the money for anything other than training.[59] To increase the quality of representation at the state level, Congress should allow for exceptions to the required equal allocation. Additionally, Congress should permit states to use grants under this program to hire counsel for capital defendants, whether through existing public defender organizations or appointed counsel. States would then be permitted to use the grants to address the lack of parity in training and personnel resources that currently exists between prosecution and indigent defense.

Finally, to ensure consistent quality in capital counsel in federal and state cases, Congress should create a grant, administered by the Department of Justice's Bureau of Justice Assistance, that would help fund a National Capital Bar. This Bar would identify qualified and experienced attorneys to represent capital defendants in state and federal court. To qualify for inclusion in the bar, attorneys would need to demonstrate that they meet standards similar to those outlined in the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, including a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases, and the necessary skills and knowledge of the various complex components of capital litigation.[60]

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[55] *Id*.
[56] *See generally Indigent Defense*, SMART ON CRIME (2011).
[57] *See* 18 U.S.C. § 3599.
[58] *See* 42 U.S.C. § 14163 *et seq.*
[59] *Id*.
[60] AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003).

Executive

The President should encourage Congress to pass legislation to reform capital representation, as outlined above, and commit to signing these reforms into law.

The President, with the assistance of the Attorney General, could also seek to strengthen the Access to Justice Initiative within the Department of Justice, giving the office greater authority to implement reforms that strengthen state and federal capital representation.[61]

Additionally, if authority over federal defender budgets remains with the judiciary, the Attorney General should make public the costs it expects to incur in each capital prosecution, to provide judges a better sense of the resources available to prosecutors as those judges make decisions about defender budgets.

Judicial

Absent congressional action, federal judges should give substantial weight to the recommendations of federal defender organizations with regard to the appointment of counsel and setting of budgets in capital prosecutions.

[61] *See generally Indigent Defense*, SMART ON CRIME (2011) (discussing the Access to Justice Initiative).

APPENDICES

Experts

Habeas Corpus

Stephen B. Bright, President and Senior Counsel, Southern Center for Human Rights, http://www.schr.org/about/who

Ruth Friedman, Director, Federal Public Defender for the District of Maryland, Southern Division, Federal Capital Habeas Project

Michael Laurence, Executive Director, Habeas Corpus Resource Center, http://www.ccfaj.org/m-MichaelLaurence.html

Larry W. Yackle, Professor of Law, Boston University School of Law, http://www.bu.edu/law/faculty/profiles/bios/full-time/yackle_l.html

Federal Death Penalty

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