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## Legislative Modification of Federal Habeas Corpus in Capital Cases

By THE COMMITTEE ON CIVIL RIGHTS

### SUMMARY

On September 21, 1989, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases of the Judicial Conference of the United States, chaired by former Justice Lewis F. Powell, Jr. (hereinafter "the Powell Committee"), released a report recommending legislation to create special procedures for federal habeas corpus litigation in capital cases.<sup>1</sup> On October 16, 1989, Senator Joseph Biden introduced S. 1757, a bill incorporating the Powell Committee's proposals with some modifications.

This statement sets forth the position of the Committee on Civil Rights on behalf of The Association of the Bar of the City of New York with respect to these proposals, and recommends actions that Congress should take to guarantee that the Great Writ remains unimpaired as a guardian of the liberties of us all.

It has long been the position of the Association that, for so long as the death penalty continues to exist in this country, capital inmates are entitled to procedures—including ones for the provision of competent counsel—that result in the full and fair review of their convictions and sentences.<sup>2</sup> Correlatively, any state which chooses to impose death sentences must accept the obligation of providing mechanisms for assuring that those sentences are legally and factually correct at the time of their execution. A speedy and efficient system is desirable, but a just one is indispensable.

Guided by these basic principles of fairness, we believe that the most important areas in which capital post-conviction practice requires legislative reform are:

1. The streamlining of the increasingly hyper-technical doctrines of "procedural default" and "abuse of the writ." Except in very unusual circumstances, justice requires that the federal courts decide capital cases solely on the merits of the prisoner's legal and factual claims.

2. The overruling of *Teague v. Lane*.<sup>3</sup> By adopting a retroactivity formula that largely denies to federal habeas corpus petitioners the same benefits of new rules of constitutional law that other prisoners enjoy, the Supreme Court has unjustifiably constricted the scope of the writ and fostered arbitrariness. Whether or not a state may execute a death sentence should depend exclusively upon the law and the facts at the moment it seeks to do so.

Neither of the current legislative proposals responds sufficiently to these issues. And, while both proposals do recognize the importance of counsel in post-conviction proceedings, each is insufficient to meet the need.<sup>4</sup>

It is our position that any new legislation should overhaul the current death penalty system in such a way that all citizens, whether or not they support capital punishment, can have confidence that the decision to put someone to death in their name has been made as scrupulously as the gravity of the task demands.

### THE POWELL COMMITTEE PROPOSALS<sup>5</sup>

The Powell Committee offers a choice to states with the death penalty. They may retain the existing system of collateral review, or they may join the new system suggested by the Powell Committee.<sup>6</sup>

States which chose to join the new system would be required to provide "a mechanism for the appointment, compensation, and payment of litigation expenses of competent counsel in state post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal." (§2256(b)) However, "the ineffectiveness or incompetence" of counsel so appointed would not provide a basis for collateral relief. (§2256(e))

Once counsel had been appointed (or waived), the inmate would be required to file a federal habeas corpus petition within six months.<sup>7</sup> Time spent in state post-conviction proceedings would not be included in this period, but time spent in seeking certiorari review of such proceedings would be. (§2258)

So long as the case continued to move through the state and

federal systems in a timely manner, the prisoner would be entitled to an automatic stay of execution. (§2257) In addition, the proposed legislation would guarantee an appeal as of right to the circuit court of appeals from the denial of a habeas corpus petition, eliminating the current requirement of obtaining a certificate of probable cause to appeal. (§2260)

Litigation in the federal courts would be confined to issues raised in the state courts. The only exceptions would be cases in which the prisoner could show that the failure to "raise or develop" a claim in state court was the result of "state action in violation of the Constitution or laws of the United States," or of "Supreme Court recognition of a new federal right that is retroactively applicable," or "based on a factual predicate that could not have been discovered through the exercise of reasonable diligence." If one of these conditions existed, the federal courts would take cognizance of the unexhausted claim, rather than remanding the prisoner to state court to exhaust it. (§2259)

Once a single round of state and federal post-conviction challenges had concluded, the process would end. Neither a stay of execution nor relief on the merits would be available in the federal courts unless all of the following conditions were met: (1) the claim had never been previously presented to any state or federal court; and (2) the failure to raise the claim previously was: "the result of state action in violation of the Constitution or the laws of the United States," or "the result of Supreme Court recognition of a new federal right that is retroactively applicable," or "based on a factual predicate that could not have been discovered through the exercise of reasonable diligence"; and (3) success on the claim would "undermine the court's confidence in the jury's determination of guilt." (§2257(c))

## THE ASSOCIATION'S RESPONSE

### A. *The Need for Legislation*

The Association is well aware that many aspects of the current death penalty system in this country are deeply disturbing. We have, for example, repeatedly called attention to the ways in

which existing procedures fail to insure that the death penalty is applied in a racially neutral fashion, that capital inmates will be competently represented by counsel, and that stays of execution will be granted in a manner which permits complete and orderly adjudication of the issues.<sup>8</sup> We are pleased to see that the Powell Committee shares many of these concerns, and, as described below, we have a number of specific suggestions that would increase the effectiveness of its proposals in attaining these ends.

Nonetheless, we are unpersuaded that the route to real reform lies in the direction that that Committee is taking. At bottom, the proposed legislation requires the prisoner to buy judicial attention, paying in the coin of procedural restrictions on his or her right to post-conviction review. Under the Powell Committee's proposal, by granting a number of rights that should be granted anyway, the states will be enabled to expedite executions. We do not believe that this is an area in which such a bargain can be justified.

As a matter of principle, death penalty cases deserve more complete judicial examination than others, not less.<sup>9</sup> And, as a matter of experience, there is no persuasive evidence that capital prisoners have systematically abused the opportunity to obtain such examination. On the contrary, although the Powell Committee provides a table of the average time from crime to execution,<sup>10</sup> it fails to address the statistic that we consider most relevant to any dispassionate examination of its proposals: even under the current flawed system, approximately 40% of all capital inmates obtain relief in post-conviction proceedings, compared to 5% or less for non-capital inmates. In light of this persuasive evidence of existing serious injustices, we see no basis for subscribing to the premises of the proposed legislation. If there must indeed be some trade-off between speed and justice, we would prefer a slower but fairer death penalty system to its opposite.

It is for these reasons that, as already indicated, we believe that the Powell Committee's report is deeply flawed by its failure to address two key areas.

First, any serious effort at reform must seek to eliminate the

legalistic, judge-made<sup>11</sup> “procedural default” doctrine that condemns clients to die when their lawyers are found to have misstepped by failing to preserve a claim properly during state proceedings.<sup>12</sup> For example, in *Smith v. Murray*,<sup>13</sup> the Supreme Court unanimously agreed that prejudicial evidence had been unconstitutionally admitted against the defendant. Nonetheless, by a 5-4 vote it denied federal habeas corpus relief and sent him to his death—because, years earlier, counsel in culling the issues down to those legally strongest had chosen to omit this one from his brief at a single stage of the state appeals process (a stage at which an *amicus* brief had presented the issue to the court). However serious counsel’s error may have been, it should not have killed Michael Smith.<sup>14</sup> Rather, in a capital case,<sup>15</sup> the only claims precluded by the doctrine of procedural default should be those that the defendant personally, voluntarily, knowingly, and intelligently waived.<sup>16</sup>

Second, *Teague v. Lane*<sup>17</sup> should be legislatively overruled with respect to capital cases. This recent opinion declares that federal habeas corpus relief must ordinarily be denied when granting it would require the courts to declare a “new rule” of law. Although we would normally take a wait-and-see attitude to a case of such recent vintage, particularly in light of the Supreme Court’s lengthy struggle with retroactivity principles in the field of criminal law, the arbitrary and perverse consequences of the *Teague* rule make that course unacceptable where life is at stake.<sup>18</sup>

As long as *Teague* is the law, whether one lives or dies will depend on the fortuity of the speed at which one’s case progresses through the legal system—with the rewards going to those whose cases move most slowly. A prisoner who has somehow managed to keep his or her case tied up in the state courts will benefit from favorable changes in the law, while his or her more diligent co-defendant, convicted on the same day of the same crime, will not. As we have long urged,<sup>19</sup> the rules of law governing the death penalty system should be designed to eliminate such disparities, not encourage them.<sup>20</sup>

We believe that the balancing test embodied in proposed new

§2262 of the Biden bill does not go far enough towards doing so.<sup>21</sup> Consistency of results is at the root of any fair death penalty system, but the labyrinth of judicial opinions in this area testifies to the fact that the proposed section will not be applied in a predictable manner. More fundamentally, it is our view that the risks of upsetting the “reliance on previous law by law enforcement authorities” or adversely affecting “the administration of justice” should be placed on the states, and not on their prisoners. If the courts create rules having such effects, the costs of complying with those rules should be borne by the states as part of the price of having a death penalty system. We find the opposite view—that prisoners should be executed because they failed to delay their cases sufficiently and it is now too expensive to give them justice—simply perverse.

The Association believes that both simplicity and justice require the rule that every execution must meet contemporary legal standards. We urge the Congress to enact it.

### B. *The Provision of Counsel*

We have previously documented the importance of competent and adequately compensated state-appointed counsel in capital post-conviction proceedings,<sup>22</sup> and are pleased that the Powell Committee has accepted this view.<sup>23</sup> As already indicated, however, we do not consider the states’ provision of such counsel to be a matter of grace in return for which they are entitled to some benefit.

Rather, the Association believes that it would be a fundamental injustice for a state to execute an indigent unrepresented inmate who had legitimate avenues of legal redress still open. While averting such injustices still too frequently falls to the voluntary efforts of the private bar, the states have increasingly begun to recognize their obligations in this area. Although we think it would be entirely appropriate for Congress to mandate a right that is already mandated by considerations of basic fairness, efficiency, and constitutional law,<sup>24</sup> we think it would be entirely inappropriate to require prisoners to pay a procedural price to obtain that right.

We are particularly disturbed that the Powell Committee report, while recognizing the importance of counsel's being effective, provides no mechanism to assure this. Without such a mechanism, the bargain being struck with the prisoner is an illusory one.

The Powell Committee's proposal states that the prisoner may not litigate the effectiveness of appointed counsel, but only raise it before the appointing court. Since no provision is made for counsel in such a proceeding, since no standards are suggested for resolving the issue, and since the appointing court is likely to have an investment in its original choice, this remedy is—as case after case has demonstrated—inadequate.<sup>25</sup>

All actors in the system share an interest in the effective performance of post-conviction counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed.<sup>26</sup>

Unfortunately, experience has repeatedly shown severe systemic barriers to obtaining effective performance. The post-conviction handling of capital cases is a legal specialty requiring mastery of an intricate body of fast-changing substantive and procedural law, but, because of the relatively small number of cases and the inadequacy of available compensation, there is little economic reason for lawyers to achieve such mastery. Furthermore, taking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must endure the draining emotional effects of one's personal responsibility for the outcome.<sup>27</sup>

The best solution to these problems, we believe, is to design capital post-conviction review procedures in such a way that all those who benefit from effective performance of defense counsel share incentives to obtain it.

Specifically, the legislative promise of competent counsel should be given substance by being made judicially enforceable

in ways that encourage the states to guarantee it. In light of the suggestions we have already made, we recommend that, if post-conviction counsel is found to have been ineffective,<sup>28</sup> then, with respect to any proceedings in which that attorney participated, the state should not be entitled to the benefits of any: (1) presumption of the correctness of factual findings, (2) procedural defaults, or (3) failures to exhaust issues. It might also be desirable for states wishing to opt into the Powell Committee system to be required to provide, as California does, for a resource center whose functions include monitoring the performance of post-conviction counsel.

### *C. Stays of Execution and Certiorari Review of State Post-Conviction Proceedings*

We agree with the Powell Committee that the current mechanisms for obtaining stays of execution are irrational and indefensible. At best, they lead to an enormous waste of legal effort by all participants in the system, and at worst they result in inconsistencies that have fatal consequences.<sup>29</sup> We therefore support the Powell Committee's proposal for an automatic statutory stay throughout the initial round of state and federal post-conviction review.<sup>30</sup> We also agree that such a system requires that there be a fixed period for the initial filing of a petition, and would be willing to experiment with the committee's suggestion for a six-month limit subject to a sixty-day extension for good cause.<sup>31</sup>

We do object, however, to the committee's exclusion from the six-month period of the time required to obtain certiorari review of the denial of state post-conviction relief.<sup>32</sup>

The Powell Committee offers two justifications for this proposal: "[1] of the 106 capital cases in which the Supreme Court has granted certiorari since 1972, only 2 came to the Court from state post-conviction review. [2] Elimination of this step does not result in disadvantage to the state prisoner, since all issues raised in state post-conviction review can be carried forward in [a federal] petition and ultimately presented to the Supreme Court."

The first justification ignores the many cases in which certiorari petitions from state post-conviction review proceedings have resulted in cases being summarily vacated and remanded,<sup>33</sup> thereby giving the states additional opportunities to review the correctness of their own convictions. The second justification is doubly flawed. If its premises are correct, it will foster inefficiency by getting cases resolved at a later rather than an earlier stage in the proceedings. But its premises are probably wrong. The substantive legal standards applicable to Supreme Court review of state post-conviction and federal habeas corpus proceedings are not necessarily the same. For example, there is no reason to believe that the Court would apply the restrictive retroactivity rules of the *Teague* case to state post-conviction proceedings.<sup>34</sup>

Accordingly, we see no reason to deny capital prisoners the same right to seek certiorari review at this stage that every other state prisoner in the country enjoys.

#### D. *Exhaustion of Remedies*

The Powell Committee proposes to alter the current rule<sup>35</sup> requiring the federal courts to dismiss habeas corpus petitions if any of the claims in them have not been previously presented to the state courts.<sup>36</sup> Under the committee's proposed bill, the federal courts could entertain such claims in specified circumstances: illegal state action, new Supreme Court law, or newly discovered facts. (§2259(1)) While those circumstances would be reasonable if coupled with the changes we have suggested regarding the provision of counsel, the committee's proposals are unclear; whether or not we can support them depends on what they mean.

The Powell Committee fails to describe what the federal courts should do if they conclude that one of the defined special circumstances exists. If the proposal is that the federal courts should reach the merits, we support it. But if the proposal is that the federal courts should consider the case in the way they believe the state courts would if the litigation were remanded—that is, that the federal courts should forgive the lack of exhaustion only to refuse to consider the merits on the basis of proce-

dural default<sup>37</sup>—we oppose it. Since, under the Powell Committee's legislation, all of the circumstances excusing a failure to exhaust are ones for which the prisoner bears no responsibility, the federal courts should not be permitted to apply hypothesized state procedural default rules.<sup>38</sup>

Regrettably, the Biden bill adds a new section (§2259(c)) that may inadvertently make matters worse. The intent of that section appears to be to add two excuses for failure to exhaust: "the ignorance or neglect of the prisoner or counsel," and that "the failure to consider such a claim would result in a miscarriage of justice." (§2259(c)(2)) Under a system that fails to guarantee adequate counsel, these are important and worthwhile additions. Unfortunately, the section speaks in terms of permitting the federal courts to hypothesize whether the state courts "would" entertain the claim. (§2259(c)(1)(B)) As noted, we oppose this approach. Moreover, the Biden bill lists its two excuses for procedural default as replacements for, rather than additions to, the Powell Committee's list, thereby obscuring the intent of the author.<sup>39</sup> Only if these two concerns were addressed could we support the proposed new section of the bill.

#### E. *Successive Petitions*

In our view, the limitations that the Powell Committee proposes to place on successive petitions are far too stringent. During the past year alone, Randall Dale Adams of Texas, James Richardson of Florida, and Ronald Monroe of Louisiana have all persuaded responsible legal actors that there is substantial reason to doubt their guilt. Each of them did so in the context of a successive petition. And each of them might arguably have been unable to bring his petition under the Powell Committee's rules.<sup>40</sup>

The committee's basic proposal limits successive claims to ones that arise from illegal state action, new Supreme Court rulings, or newly discovered evidence. (§2257(c)) Although these justifications for successive petitions are reasonable ones, we see no need to attempt by legislation to predict all such justifications

that may arise.<sup>11</sup> Rather, the focus should be on whether or not the petitioner is making the filing in subjective bad faith.

That, indeed, is the current law as it has been declared by Congress and the Supreme Court. And, if there is to be legislative intervention, it should be to correct the outright refusal on the part of some courts to enforce that law. "In an apparent attempt to reduce the disproportionate habeas burdens imposed on them by the nation's starkly sectional system of capital punishment," the judicial circuits of the Old South have decided to adopt a so-called "objective" standard for the dismissal of successor habeas corpus petitions that was specifically rejected by Congress in 1976, and that is at odds with all governing statutory and judicial authority.<sup>12</sup>

If, however, the Congress chooses a different course, and—abandoning its long-held views—limits the grounds for successive petitions to those suggested by the Powell Committee, it should at least delete the further conditions that the committee seeks to impose.

Under the committee's proposal, even a prisoner whose claims met its test would be required to satisfy two additional requirements. The first of these is that "the basis for the stay and request for relief is a claim not previously presented in the state or federal courts." (§2257(c)(1)) This limitation can only frustrate justice. If the claim was presented in a previous proceeding but illegal state action prevented it from being made successfully, or new court rulings make it more meritorious than it was previously perceived to be, or newly discovered evidence makes it more persuasive than it once was, the petitioner should be as entitled to pursue the issue as one who never made the claim at all.

The second objectionable limitation is that the successive claim be one which, if successful, would "undermine the court's confidence in the jury's determination of guilt." We perceive no justification for this limitation. If the sentencing phase was tainted by state misconduct (*e.g.*, the withholding of mitigating evidence), or violated a newly announced constitutional rule,<sup>13</sup> or was flawed in some other way that has excusably just been

uncovered, then the prisoner should be entitled to relief from his or her death sentence.<sup>14</sup>

The overwhelming experience of our members has been that successive petitions without a strong *prima facie* showing of merit are quickly disposed of by the court system, while those successive petitions that are granted are usually ones that correct the most serious sorts of error. If enacted as proposed, the Powell Committee's suggestion would, we fear, be productive of little efficiency but grave injustice.

Nor do we believe that the provisions of the Biden bill are sufficient to avert this result. That bill retains the Powell Committee's three grounds for a successive petition, and retains the requirement that the claim not have been previously raised in any court. However, it makes the element that the new claim undermine the court's confidence in the finding of guilt an additional ground, rather than a prerequisite, for relief, and adds the further ground that "a stay and consideration of the requested relief are necessary to prevent a miscarriage of justice."

There are at least three reasons why these changes, although improvements, are insufficient to address our concerns. First, the objectionable requirement that the claim not be previously raised in any court remains intact. Second, the problem of claims that undermine the accuracy of the sentencing process remains unaddressed. And, third, the hope that these and other injustices will be addressed by enactment of the "miscarriage of justice" standard is misplaced. It was precisely that standard that the Supreme Court purported to apply in *Smith v. Murray*, where it proved insufficient to save the life of the client from the slip of his counsel. Thus, there is every reason to believe that the addition of this new ground will add nothing of substance to the bill.

The inadequacy of this attempt to repair the structure put forward by the Powell Committee confirms us in our view that the correct approach would be for Congress to enact legislation explicitly re-confirming its long-established views in this field, and overruling the recent judicial innovations that have proved manifestly insufficient to insure fairness.

## CONCLUSION

Justice is indivisible. If the death penalty system is to be overhauled, it should be overhauled as a system. It was the failure of lawmakers to think about the system-wide effects of individual legislative enactments that led to the Supreme Court decision in *Furman v. Georgia*,<sup>15</sup> invalidating the death penalty nationwide on the basis that it produced unacceptably arbitrary results on an overall basis. The system as a whole is little if any better today.<sup>16</sup> Our legislators would be wise to heed the warning of history.

November, 1989

### *The Committee on Civil Rights*

Janice Goodman, *Chair*

Anne Faith Jacobs, *Secretary*

|                    |                    |
|--------------------|--------------------|
| Joel Berger        | Steven R. Levi     |
| Reginald Bodie     | Suzanne M. Lynn    |
| Noran Joseph Camp  | Linda C. McClain   |
| Audrey S. Feinberg | Charles M. Newman  |
| Julie R. Fenster   | John A. Powell     |
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## ENDNOTES

<sup>1</sup> Senator Strom Thurmond has announced his intention to introduce the Powell Committee's proposed legislation as a bill. See Remarks of Senator Thurmond, *Congressional Record*, October 16, 1989, at S 13475.

<sup>2</sup> See, e.g., *The Death Penalty*, 39 *The Record* 392, 425-27 (1984). The Association has a special interest in this matter because much of the exhaustive *pro bono* legal work required by the present system has been undertaken by its members. Recognizing its obligation to assist these members in providing representation commensurate with the seriousness of the obligation they are assuming, the Association has for a

number of years conducted an extensive series of continuing legal education programs in the death penalty field.

<sup>3</sup> 109 S. Ct. 1060 (1989).

<sup>4</sup> The Association considers the Biden bill to be the better of the two proposals, since the changes it makes in the Powell Committee report are generally desirable ones. Nonetheless, its provisions are inadequate to rectify the problems that concern us.

<sup>5</sup> Because the Biden bill largely incorporates the Powell Committee's proposal, we do not describe it separately. Instead, we discuss in our comments the areas where the two differ.

<sup>6</sup> The Powell Committee's legislation would add new sections 2256-60 to Title 28 of the United States Code. These proposed sections are referred to hereinafter by section number.

<sup>7</sup> A sixty-day extension would be available upon a showing of good cause. (§2258(c))

<sup>8</sup> See, e.g., *The Death Penalty*, note 2, *supra*, at 420-23.

<sup>9</sup> See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Schiro v. Indiana*, 110 S.Ct. 268, 270, n. 9 (1989) (Opinion of Justice Stevens respecting denial of certiorari) (Quoting Justice Powell); 1 J.S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* §2.2 (1988).

<sup>10</sup> The suggestion in this table that federal, rather than state, habeas corpus proceedings are responsible for most of the time spent on the post-conviction litigation of capital cases is contrary to the experience of our members.

<sup>11</sup> The law in this area is not "premised on any constitutional or statutory limitation on the power of the federal courts," but rather exists as "a matter of judicial discretion," which the Supreme Court self-consciously has exercised in inconsistent ways," 2 J.S. LIEBMAN, note 9, *supra*, §24.1.

<sup>12</sup> We have similar concerns about the doctrine of "abuse of the writ," which has been misapplied by the southern circuits in a way that also permits intolerably unjust results. Section E, *infra*, addresses this issue.

<sup>13</sup> 477 U.S. 527 (1986).

<sup>14</sup> See *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (Writ of habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty"); see also *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

<sup>15</sup> Cf. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1222 (1986) ("[F]ederal law should expressly provide that in matters of procedural default, as in other matters, death is different.") This view is not only well accepted among scholars, see, e.g., Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F"*, 36 U. Fla. L. Rev. 252 (1984), but finds solid support in Supreme Court precedent as well. See *Patterson v. Alabama*, 294 U.S. 600 (1935).

<sup>16</sup> This proposal is both consistent with the earlier views of the Supreme Court, see *Fay v. Noia*, 372 U.S. 391 (1963), and in keeping with the longstanding practice in many states of having supreme courts on the direct appeal of capital cases review the record for all significant errors, whether preserved or not. We recognize, of course, that comity concerns may make it desirable for the state courts to have the initial opportunity to address the claims of a federal habeas corpus petitioner. The normal operation of the existing rules of exhaustion of remedies would have this effect, and we see no reason to change them. As further discussed in Section D, *infra*, our objective is simply to assure that the federal courts do not disable themselves from reaching the merits.

<sup>17</sup> 109 S.Ct. 1060 (1989).

<sup>18</sup> Furthermore, Justice White's controlling opinion in *Trague* seems to be based on a reading of the federal habeas corpus statute, a circumstance that makes congressional intervention particularly appropriate. As noted below, we are pleased

that the Biden bill recognizes these considerations, but believe that its proposed remedy does not go far enough.

<sup>19</sup> See *The Death Penalty*, note 2, *supra*, at 422-23 and nn. 25-26.

<sup>20</sup> Moreover, capital defendants are unable to take full advantage of an important limitation on the *Teague* doctrine. The Court has stated that even "new rules" will be applied retroactively on federal habeas corpus in cases of "actual innocence," but has been unable to craft a clear statement of how this concept applies to errors affecting the penalty phase of a capital trial. Since, as discussed in note 45, *infra*, the Court is working actively to improve the fairness of the death-sentencing process—creating "new rules" all the while—this failure will add the disparities of the views of lower court judges to the disparities identified in the text.

<sup>21</sup> That section provides: "In cases subject to this chapter, all claims shall be governed by the law as it was when the petitioner's sentence became final, supplemented by any interim change in the law, if the court determines, in light of the purpose to be served by the change, the extent of reliance on previous law by law enforcement authorities, and the effect on the administration of justice, that it would be just to give the prisoner the benefit of the interim change in the law."

<sup>22</sup> See *The Death Penalty*, note 2, *supra*, at 426-27. We consider it axiomatic that adequate compensation for counsel also includes the provision of necessary expert assistance. See *Ake v. Oklahoma*, 470 U.S. 68 (1985).

<sup>23</sup> The Powell Committee has, however, failed to provide for the provision of counsel to pursue certiorari on direct appeal. This oversight should be corrected, since the importance of counsel at this stage will be greatly increased if the courts adopt a strict reading of *Teague*.

<sup>24</sup> The 4-1-4 opinion in *Murray v. Giarratano*, 109 S.Ct. 2765 (1989), leaves unsettled the extent to which the Constitution requires the provision of counsel to death penalty inmates in state post-conviction review. The controlling opinion of Justice Kennedy suggests that the right does exist in some factual situations.

<sup>25</sup> The Biden bill adds to the Powell Committee proposal a new §2261, setting forth criteria that appointed counsel must meet. Although some criteria are better than none, we find this proposal inadequate in two respects. First, the criteria themselves, based on the 1988 federal drug legislation, are less stringent than they should be; a far better model would be the standards recently set forth by the American Bar Association. Second, and far more importantly, this approach to the problem is misdirected. Any lawyer, no matter how experienced or effective in the past, can perform incompetently in a particular instance. Unless the individual prisoner has the right to challenge the performance of counsel in his or her particular case, a life may be sacrificed on the altar of statistical probability.

<sup>26</sup> More narrowly, many states have discovered that providing counsel for the post-conviction review of capital cases is in their own self-interest because it speeds up the process and enables them to enforce their procedural default rules more effectively.

<sup>27</sup> In light of all these factors, as well as the psychological ones peculiar to the situation of a condemned inmate, the courts should scrutinize with extreme care any attempt by a capital prisoner to conduct his or her post-conviction proceedings *pro se*. The Biden bill specifies procedural safeguards to be followed in such circumstances; we believe that these are in the interests of all concerned, and support them.

<sup>28</sup> In recognition of the characteristics of capital litigation described above, we believe that this finding should be made realistically and pragmatically, undistorted by the strong presumptions of attorney effectiveness mandated by *Strickland v. Washington*, 466 U.S. 668 (1984). Whatever benefits counter-factual presumptions may have in other areas of the law, they are certainly out of place when a human life hangs in the balance.

<sup>29</sup> See, 2 J.S. LIEBMAN, note 9, *supra*, at §33.2(c); Higginbotham, *Stays of Execution: A Search for Predictability and Rationality*, 20 Texas Tech. L.R. vii (1989);

Freedman, "Capricious" Infliction of the Death Penalty, N.Y. Times, October 14, 1982 (letter to the editor).

<sup>30</sup> In this connection, we applaud the Powell Committee's proposal to abolish the anachronistic requirement that a federal habeas corpus petitioner obtain a certificate of probable cause to appeal the denial of relief.

<sup>31</sup> Since, however, the six-month period runs from the denial of certiorari on direct appeal—rather than from the appointment of counsel, as it should—and since there will inevitably be some delay between the denial of certiorari and the appointment of counsel, the Biden bill's provision for a one-year filing period and possible ninety-day extension is more realistic.

<sup>32</sup> The provisions of the Biden bill on this point are in accord with our views.

<sup>33</sup> E.g., *Copeland v. Dugger*, 108 S.Ct. 55 (1987); *Yates v. Aiken*, 474 U.S. 896 (1985); *Williams v. Kemp*, 474 U.S. 806 (1985).

<sup>34</sup> As stated above, see note 18, *supra*, the controlling opinion of Justice White seemingly rests on the view that the Court's result is a reasonable reading of the federal habeas corpus statute.

<sup>35</sup> See *Rose v. Lundy*, 455 U.S. 509 (1982).

<sup>36</sup> The Powell Committee's draft legislation speaks in terms of "claims actually presented and litigated" in the state courts, and of a prisoner's "failure to raise or develop a claim in the state courts." (§2259(a)(1)) We assume that this language is not intended to change the current rule that the prisoner need do no more than to fairly direct the state court's attention to his or her federal claim. See *Daye v. Attorney General of the State of New York*, 696 F.2d 186 (2d Cir. 1982) (*en banc*), cert. denied, 464 U.S. 1048 (1984).

<sup>37</sup> Justice O'Connor, joined by Justices Rehnquist and Scalia, advocated this approach in her concurring opinion in *Harris v. Reed*, 109 S.Ct. 1038, 1048 (1989).

<sup>38</sup> If they were permitted to do so, the result would be contrary to the committee's expressed intent, since the change would tighten, not loosen, the existing exhaustion requirements. Under present law, a prisoner remanded to the state courts at least has the opportunity to persuade them not to apply their procedural default rules, and, if unsuccessful, to argue to the federal courts that the state courts have been arbitrary. If the effect of the proposed legislation were that the federal courts neither remanded nor reached the merits, the prisoner would lose both rights without gaining any compensating benefits.

<sup>39</sup> See Remarks of Senator Biden, *Congressional Record*, October 16, 1989, at S 13473.

<sup>40</sup> The same might be said of many other death-sentenced inmates in recent years whose guilt was not disputed but whose successive petitions presented substantial and meritorious constitutional claims. See, e.g., *Ford v. Strickland*, 734 F.2d 538, 539 (11th Cir. 1984), *rev'd* *Ford v. Wainwright*, 477 U.S. 399 (1986) (Execution of the insane unconstitutional).

<sup>41</sup> For example, in the interests of national uniformity, and in keeping with the continuing duty of the states to police their death sentences, where a circuit split on an issue has come into existence since a prior petition, or the Supreme Court has granted certiorari on a question, all prisoners with the claim—and not just those in the circuits ruling favorably on it—should be entitled to stays of execution.

<sup>42</sup> 1 J.S. LIEBMAN, note 9, *supra*, §26.6. A typical recent example, in a case which also illustrates many of the other difficulties with the current death penalty system, is the plurality opinion in *Moore v. Zant*, 855 F.2d 1497 (11th Cir., 1989) (*en banc*) (Announcing adoption of "objective standard" for abuse of the writ).

<sup>43</sup> Because this area of law is a relatively new one, the Supreme Court still regularly announces rules which are designed to insure basic fairness in capital sentencing, e.g., *Booth v. Maryland* 107 S.Ct. 2529 (1987) (Sentencing jury may not hear victim impact evidence; extended to prosecutorial argument in *Gathers v. South Carolina*, 109 S.Ct. 2207 (1989)). Often, moreover, the claims on which it rules favorably have been pressed by other litigants as well. Thus, for example, many

prisoners from Texas and Florida had made the arguments that the Supreme Court ultimately found persuasive in *Franklin v. Lynaugh*, 108 S.Ct. 2320 (1988) (Texas statute unconstitutionally restricts presentation of mental retardation as mitigating circumstance) and *Hitchcock v. Dugger*, 107 S.Ct. 1821 (1987) (unanimous) (Florida instructions unconstitutionally prevent jury from considering non-statutory mitigating circumstances). See 2 J.S. LIEBMAN, note 9, *supra*, at §33.2(c) n. 33 (Thirteen prisoners executed after unsuccessfully asserting claim eventually found meritorious in *Hitchcock*). We are unable to see any reason why any of those prisoners were more deserving of execution than the ones who had the good fortune to have their petitions for certiorari granted. All were equally the victims of sentencing proceedings that did not fully and fairly consider whether they should be put to death. Yet the Powell Committee would impose on the first group the additional burden of undermining the finding of guilt.

<sup>14</sup> This is particularly true because, as a result of the existing doctrine that a claim of factual innocence is not cognizable on federal habeas corpus, see 1 J.S. LIEBMAN, note 9, *supra*, at §2.2(c), even prisoners who do have a substantial issue as to their guilt are most likely to couch the attack as one on the sentencing proceedings.

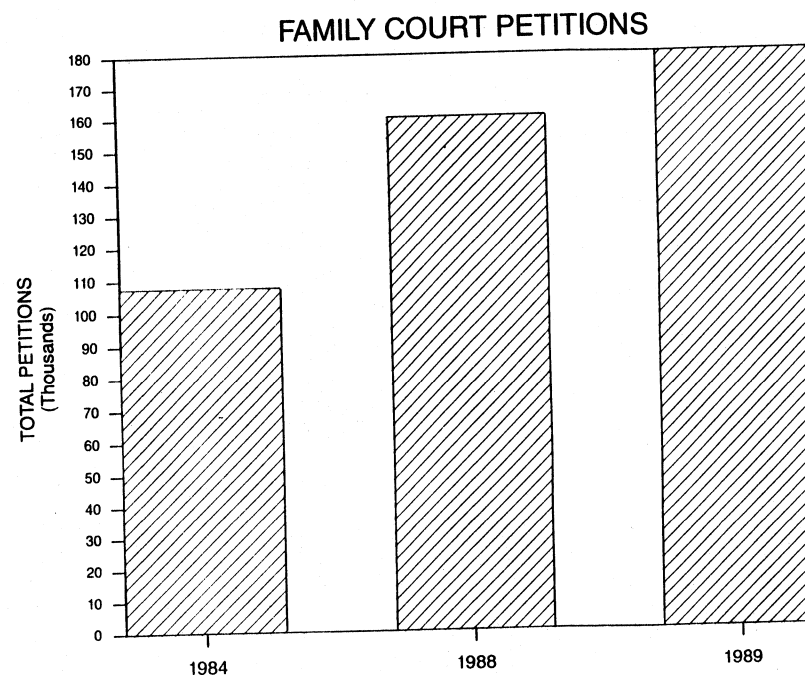
<sup>15</sup> 408 U.S. 238 (1972).

<sup>16</sup> See *The Death Penalty*, note 2, *supra*, at 420-25.

## The New York City Family Court

By THE COMMITTEE ON FAMILY COURT AND FAMILY LAW and THE COMMITTEE ON JUVENILE JUSTICE

The New York City Family Court is in critical need of substantial increase in fiscal, personal, and judicial resources. The court has experienced an explosion in caseload over the past five years, from 106,909 filings in 1984 to a projection of 179,500 filings in 1989.<sup>1</sup> This is an increase of 70%. Between 1987 and 1989, the caseload will have increased 35% (132,950 to 179,500).



The Committee on Family Court and Family Law—of The Association of the Bar of the City of New York joined by the Committee on Juvenile Justice—recognizes that all of the courts in New York City are under tremendous pressure and have overwhelming caseloads due to the drug epidemic that is engulf-