



**Statement to the Justice and Civil Rights Transition Team
Regarding Federal Capital Cases**

**The Association of the Bar of the City of New York
Committee on Capital Punishment**

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The Association of the Bar of the City of New York (the “Association”)¹ has for decades argued in opposition to the death penalty. This paper does not address that issue, but rather presents the following specific recommendations to the Obama Administration’s transition team regarding application of the federal death penalty:

A. The Obama Administration should return to the policies of the first Bush Administration, in that the new Attorney General should review only those cases in which U.S. Attorneys request authorization to seek the death penalty. Since 1995, every potential case in which the death penalty could be sought had to be reviewed in Main Justice by the Attorney General. Current policy has resulted in overburdened federal criminal trial dockets, and has substantially increased the cost of federal death penalty litigation. The process also substantially delayed the progress of such cases, as the parties and the court often wait until the Attorney General’s decision before proceeding with any other aspects of the case. We therefore urge the Obama Administration to streamline the procedures utilized by the DOJ in reviewing and authorizing capital cases by:

- i. Allowing individual U.S. Attorneys to decline seeking the death penalty in cases their offices are prosecuting. Main Justice should review only those cases in which there exist extraordinary situations.

¹ The Association, founded in 1870, has over 23,000 members. While most practice in the New York area, the Association’s membership includes lawyers from around the nation and in 50 foreign countries. The Association reports on legislative and regulatory issues on a local, state and national level. The Special Committee on Capital Punishment regularly analyzes and comments on legal issues pertaining to capital punishment.

- ii. Requiring that review of death eligible cases requested by U.S. Attorneys, where capital punishment is sought, be based upon the facts of the individual case, and that there be a very substantial federal interest in pursuing the death penalty in the case being reviewed.
- iii. Allowing U.S. Attorneys to engage in non-capital plea bargains without the Attorney General's approval in cases for which the death penalty has been authorized.

B. We urge the Obama Administration not to seek the death penalty in states which do not have death penalty laws, except in cases with substantial federal issues, i.e. treason. We believe that seeking the death penalty in states that do not have capital punishment:

- i. Infringes on a state's right to forego seeking the ultimate criminal punishment.
 - a. "Federal Interests," such as treason, terrorism, murder of a federal agent, should be the principle criterion for determining the use of the federal death penalty. The Attorney General needs to step back from prosecuting crimes which, until recently, were within the jurisdiction of the states.
- ii. Constitutes a futile attempt to create national uniformity because experience teaches that federal jury pools in states without capital punishment tend not to return death sentences in cases prosecuted in those districts (i.e., the District of Puerto Rico, the Southern District of New York). Making one region or state just like every other region or state in criminal matters is not necessarily desirable, especially where the death penalty is concerned. Nor should imposing such a single standard be a sufficient ground for seeking the death penalty in a case that would not otherwise be deemed to qualify for capital punishment.

C. Finally we urge the new Administration to establish protocols whereby the Department of Justice monitors racial data in federal capital cases and immediately acts to correct any disparity that arises. While we believe that Main Justice should monitor racial data, we also believe that the evidence shows that centralization of the decision

making process does not reduce racial disparity in capital case. Furthermore, we believe that adopting the other policies we advocate, particularly requiring a substantial federal interest before authorizing seeking death, would likely deal effectively with racial disparities.

In summation, we urge that the current Federal Death Penalty Protocols be reevaluated and that the Obama Administration adopt those protocols that were in effect prior to 1995.

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We welcome the opportunity to work with the Presidential Transition Team and the Obama Administration on these vitally important issues. Please contact us if you have any questions, would like more information, or would like to see further support for the matters we have raised above. You may reach the Capital Punishment Committee by contacting Martin Leahy, Committee Chair, at martin_j_leahy_esq@hotmail.com.

Thank you very much for your attention and concern.