



The Association of the Bar of the City of New York

Office of the President

PRESIDENT

Bettina B. Plevan
(212) 382-6700
Fax: (212) 768-8116
bplevan@abcny.org
www.abcny.org

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Hon. Charles Schumer
313 Hart Senate Building
Washington, DC 20510

Dear Senator Schumer:

I am writing on behalf of the Association of the Bar of the City of New York to express our strong opposition to S. 1088, and to what we understand to be a substitute to be offered by Senator Specter that would include many, although not all, of the extremely troublesome provisions of S. 1088. If enacted, S. 1088 or the Specter substitute would remove to a very substantial extent the federal courts' ability to grant relief when presented with meritorious federal habeas corpus petitions. It is unconscionable that Congress would consider stripping the federal courts of the ability to provide relief to prisoners whose constitutional rights have been prejudicially violated.

The Association has expertise relevant to this issue, not only because of its members' handling of numerous federal habeas corpus matters of various types, but also because of our recruitment and training over more than last two decades of literally hundreds of lawyers who have represented death row inmates *pro bono*.

Time, and the unavailability of a final draft of Senator Specter's substitute, do not permit us to make complete comments at this time. But what is clear already is that there is no need to rush to change the federal habeas laws in the drastic fashion proposed by S. 1088 and to be proposed by Senator Specter. It is only nine years since major changes were made in federal habeas corpus jurisprudence by virtue of the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). There have been no studies about the implementation of the AEDPA that would justify making further, extreme, changes now. Rather, the testimony presented in favor of S. 1088 at the recent Senate hearing suggested that the impetus for this legislation is unhappiness with how one circuit court (the Ninth) has dealt with some habeas corpus cases, and some anecdotal complaints from certain prosecutors elsewhere.

This is not a plausible basis for a drastic reduction in the federal courts' ability to adjudicate meritorious constitutional claims. For example, both S. 1088 and reportedly the Specter substitute would strip federal courts of the power to rule on meritorious constitutional claims whenever a state court purports to deny relief due – in whole or in the alternative – to what it says is a procedural default. Indeed, it would mandate this result even where the state court ruled on the federal constitutional issue under a plain error rule, and thus did not apply a procedural bar. Long experience has shown that procedural default rules are often applied inconsistently, are sometimes created for use in a particular case, and are often extremely inequitable in their effects. Moreover, whereas present jurisprudence allows a procedural default to be overcome by a showing of "cause" and "prejudice," this exception would be largely eliminated under S. 1088 and the Specter substitute. For example, if the reason that a prisoner did not raise constitutional issue earlier was withholding of key information by the government, that would be "cause" under existing law, but the claim would be barred under S. 1088 and the Specter substitute.

There are similar egregious fairness problems with other aspects of both S. 1088 and the Specter substitute, including their using the exhaustion doctrine, limitations on amendments to habeas petitions, and arbitrarily limited tolling provisions to remove federal courts' jurisdiction over meritorious habeas corpus claims.

Both are also severely flawed by giving the United States Attorney General, the nation's chief prosecuting officer, the power to decide whether a state's death penalty system qualifies for "opt-in" habeas corpus status. The Attorney General, whose office repeatedly has filed *amicus curiae* briefs in support of state prosecutors in capital punishment cases, is a poor substitute for the federal courts in deciding whether states have developed sufficiently effective systems for representation of death row inmates in post-conviction proceedings.

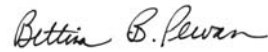
To be sure, S. 1088 has other, disastrously unfair, provisions that we believe will not be in the Specter substitute. These include the removal of federal habeas corpus jurisdiction in "opt-in" states in virtually all capital punishment cases, and the elimination of federal habeas courts' ability to grant relief with regard to constitutional violations affecting sentences – including the death penalty – whenever the state courts find the constitutional violations to be harmless or insufficiently prejudicial. Long, sad history has shown that the state courts cannot be relied on to make the final determinations on the merits of federal constitutional issues in these cases or on the question of harmless error or prejudice.

In short, in the name of "streamlining," the supporters of S. 1088 and the drafters of the Specter substitute are actually proposing drastic curbs on federal habeas jurisdiction. Since they have not admitted that these would be the effects of their proposals, they have not provided any justifications for such far-reaching curtailments of the federal courts' powers.

Under these circumstances, the Senate Judiciary Committee should, at the very least, avoid a rush to "mark-up" and approve either of these proposals. Rather, if it wishes to consider changing the statute governing habeas corpus cases, it should take up the offer of former Solicitor General Seth Waxman to undertake a thorough review of habeas corpus in the era of the AEDPA, and should defer any action until that review is completed.

Representatives of the Association would be pleased to meet with you, or to discuss this with you by some other means, at your convenience.

Sincerely,

A handwritten signature in cursive script that reads "Bettina B. Plevan".

Bettina B. Plevan
President