

Streamlined Procedures Act of 2005
S. 1088 / H.R. 3035
Section-by-Section Analysis

Summary of concerns. The bill would virtually eliminate the ability of federal courts to determine federal issues in cases in which state prisoners (*either* facing death sentences *or* serving prison terms) seek relief by means of habeas corpus. It would: overrule numerous Supreme Court cases; increase the number of habeas corpus petitions; complicate and delay litigation; disregard long-established principles of federalism; and invite constitutional challenge on the theory that it impairs the independence of the federal courts. The bill exhibits deep distrust of the federal courts and thus attempts to tie their hands, whatever the circumstances of a case. It would further entangle the federal habeas corpus courts in procedural complexity and distract attention from what they should be deciding: the merits of federal constitutional claims. Many sections of this bill would strip federal courts of jurisdiction to decide federal issues. Those sections and others would raise serious constitutional questions and thus would invite even more protracted litigation. Numerous pending cases (particularly death penalty cases) would be held up while the courts resolve questions about the meaning of the new law.

Section 6 and Section 9, as well as other sections of this bill, would evoke constitutional challenges on the theory that they invade the independence of the federal courts under Article III. Courts with the responsibility of decision necessarily must be entitled to address issues crucial to an appropriate judgment. Congress cannot ask them to adjudicate cases and, in the same breath, tell them what results to reach. The Supreme Court has thus far declined to consider whether provisions in AEDPA, particularly 28 U.S.C. §2254(d), violate the Constitution. Those questions are before the lower courts. The enactment of these additional provisions would do nothing to defuse the constitutional objections to AEDPA, but rather would magnify concerns that Congress is attempting to overreach the courts in service of short-run political goals. That would invite more lawsuits challenging not only AEDPA, but also the new provisions in this bill.

The essence of the constitutional difficulty with this bill is straightforward. The bill contemplates that federal courts would take jurisdiction of cases in order to decide whether previous state court judgments are valid, but then it would deny those courts jurisdiction to decide questions of federal law that are crucial to reaching proper results. That state of affairs would deprive federal courts of their Article III authority to decide cases within their jurisdiction according to the Constitution (thus also violating the separation of powers), and it would arguably suspend the writ of habeas corpus (without a justifying national emergency). It would also embolden state courts to resolve cases on grounds that, in light of the provisions in this bill, federal courts would have no power to examine.

Finally, some of these sections appear to address issues that, although troublesome to prosecutors in particular cases that they may have lost, are not systemwide problems. The prudent course with respect to questions whose seriousness is subject to empirical study would be for Congress to direct that a study be conducted.

SEC. 1: This section states the bill’s title as the “Streamlined Procedures Act of 2005.” That implies that the bill would improve the efficiency of the habeas corpus process. But in application it would more probably frustrate streamlining efforts that have been under way in the courts for nearly a decade. Congress enacted a comprehensive reform program for habeas corpus in 1996. That program (AEDPA) contained numerous new provisions, many of which were ambiguous. Since then, federal courts, including the Supreme Court, have devoted extraordinary time and effort to deciphering those provisions in an attempt to make the system operate effectively. This bill would upset many of the decisions the Court has made to smooth out the wrinkles in AEDPA and introduce a host of additional provisions that, in turn, would require yet more time and effort to interpret.

SEC. 2: This section would require state prisoners (most of whom have no lawyers) to press each of their federal claims in state court with special care and to explain in their federal petitions how they have complied with that mandate. The effect is to impose a federal pleading rule on the state courts that they themselves may not have. The only exceptions would be for prisoners whose claims rest on “new rules” of law that have retroactive effect or on newly discovered evidence clearly demonstrating that the prisoner did not commit the crime of which he was convicted. Even then, no exception would be allowed unless a claim is so plainly meritorious that it would be unreasonable to reject it. Since 1989, when the Supreme Court announced its current doctrine regarding “new rules,” the Court has never given a “new” procedural rule retrospective effect. Only novel rules of substantive law (like the prohibition on executing mentally retarded prisoners) apply to older cases. Accordingly, the only procedural claims that would fall into the exception this section allows would be claims going to factual innocence—irrespective of whether a prisoner’s federal constitutional rights were violated.

Existing law already requires a prisoner to “exhaust” state court avenues for litigating a federal claim before he presents the claim to a federal court. The “exhaustion doctrine” is a rule of timing. If a prisoner has not been to state court with his claim, a federal court will postpone action until the prisoner gives the state courts an opportunity to examine it. Then, however, the federal court will entertain the claim. This section would direct a federal court to dismiss an “unexhausted” claim “with prejudice.” That means the claim would be cut off entirely; the federal court would not examine it even after the state courts have been consulted.

This section would overturn the Supreme Court’s decision in *Rhines v. Weber*, which adopted the consensus of the circuits and allowed a federal district court to hold a habeas petition on its docket while a prisoner returned to present claims to state court. Proponents of the bill contend that it takes too long for prisoners to exhaust state remedies and that it would be more efficient simply to dismiss all claims that are not yet ready for federal adjudication. That would have made sense before AEDPA but as *Rhines* decision recognizes to adopt that procedure today would transform the “exhaustion” doctrine from a device that keeps federal courts from adjudicating claims before the state courts have had a chance to correct their own errors into an absolute prohibition on federal court consideration of federal claims – which is precisely what this section does. This would seem to be doubly inconsistent with basic principles of federalism: federal courts should defer to state courts when that is reasonably possible and adjudicate the

merits when circumstances prove otherwise.

SEC. 3: This section would allow prisoners to amend habeas corpus petitions only once and then only if they act before the state files its answer. It would not allow prisoners to add new claims, unless they meet the (extremely tight) standards for filing second or successive habeas petitions. A provision in AEDPA established a similar restriction on amendments in cases involving prisoners under sentence of death—but only in cases from states that, in exchange, give indigent prisoners competent lawyers in state postconviction proceedings. This section would impose essentially the same limitation on amendments across the board—for non-capital as well as capital cases and without any guarantee of counsel in state court.

This section is addressed, in part, to a problem the Supreme Court recently solved. Under Rule 15 of the Federal Rules of Civil Procedure, an amendment “relates back” to the time of the original complaint. There had been concern that prisoners might extend the one-year filing period for federal habeas petitions by adding new claims to petitions by amendment more than a year later and relying on the “relation back” feature of Rule 15 to argue that the new claims are timely. In *Mayle v. Felix*, the Supreme Court held that amendments to habeas petitions usually do not “relate back.” So that problem has been fixed. Notwithstanding *Felix* and the exceptions it permits, this section would limit amendments in all cases, without regard for any applicable filing deadline.

SEC. 4: This section would strip federal courts of jurisdiction to consider a claim that a state court previously refused to entertain on the basis of some procedural error committed by the prisoner or his lawyer in state court—for example, a failure to raise the claim at the time prescribed by state procedural rules. A federal court would have to accept at face value a state court’s decision that some state procedural rule established a procedural requirement, that the prisoner or his attorney failed to comply with that requirement, and that, in consequence, the state court declined to consider the prisoner’s federal claim. The section at one stroke eliminates with respect to habeas corpus petitioners only a great deal of Supreme Court law (much of it developed in contexts other than habeas) concerning the circumstances under which the federal courts do or do not have to defer to state procedural rulings.

Of great practical importance, this section would also eliminate federal court jurisdiction to consider an argument that the prisoner’s procedural “default” in state court was attributable to his lawyer’s ineffective representation in violation of the Sixth Amendment. This is inconsistent, and possibly unconstitutionally so, with *Murray v. Carrier*, which held precisely the opposite. The only exceptions would be for prisoners whose claims rest on “new rules” of law that have retroactive effect or on newly discovered evidence showing that the prisoner is innocent. Under this section, accordingly, federal constitutional claims would be barred from *both* state and federal court, irrespective of their merit.

Overtaking long-settled law, the section would further strip federal courts of jurisdiction to consider claims that a state court rejected on the merits, if the state court also explained that the prisoner committed procedural default by failing to raise the claim properly in state court. And it would deprive federal courts of jurisdiction to examine a claim that a state

court was willing to review for “plain error”—unless the claim rests on a “new rule” of law that has retroactive effect or on newly discovered facts showing that the prisoner shouldn’t have been convicted. It would thus erect greater procedural bars to adjudication on the merits than the states have chosen to impose on themselves. The effect would be that a state court decision on the merits of a federal constitutional question could not be reviewed in federal court, irrespective of whether it is correct, except in cases in which the prisoner proves that he is actually innocent.

And even then, this section bars federal courts from granting relief on any claim that a state court refused (or might have refused) to consider because of some failure to comply with state procedural rule unless the claim is so plainly valid that it would be unreasonable to reject it. Abraham Lincoln might have commented that one could make a thicker soup of innocence protection by boiling the shadow of a pigeon that had starved to death.

Congress has always left the problems associated with procedural mistakes in state court to the Supreme Court, which has handled those problems under well-developed doctrine established in a long line of decisions. This section would overrule that large body of Supreme Court cases and start afresh under new statutory rules that would have to be interpreted in yet another potentially large body of judicial decisions. Proponents of the bill recognize that the Court’s cases require a federal court to dismiss a claim if a state court had an “adequate and independent” state procedural ground for declining to consider it. But they argue that federal courts get around that prohibition by finding state procedural grounds “inadequate.” The implicit albeit unsupported message is that the Supreme Court’s doctrine is unsound and that lower federal courts can’t be trusted to follow it honestly, anyway.

This section would also overrule the Supreme Court’s decision in *Artuz v. Bennett*, which resolved a question about the filing period for federal habeas corpus petitions. Under the statute governing filing deadlines, a prisoner has one year after his conviction is affirmed to file a federal petition. Within that year, the prisoner may press a federal claim in state postconviction proceedings in order to satisfy the “exhaustion” requirement. If that happens, the time during which his application is “properly filed” in state court does not count against the one-year filing period. Sometimes, a prisoner will make some procedural mistake in state court so that his application is not “properly filed” in a formal sense. Nonetheless, the state court may have authority to consider it anyway, and may actually do so (or consider doing so and then decide against it). Federal courts struggled with what to do in such cases until the decision in *Bennett*. Writing for a unanimous Court, Justice Scalia explained that a state application is “properly filed” if it is directed to the right court at the right time, notwithstanding that it may be subject to dismissal on procedural grounds. Otherwise, the federal courts in making the relatively mechanical determination of whether a federal filing was timely would become enmeshed in state law determinations.

This section would force a federal court to ignore a state court’s ability or willingness to entertain the prisoner’s application in state court, to make its own determination about whether that application met the formal requirements of state law, and, if the federal court decides that it did not, to charge the time the application was pending against the one-year filing period allowed

for the prisoner's federal petition. In the end, the federal court might conclude that the prisoner missed the federal filing deadline, even though he spent significant time litigating his claim in state court. Proponents of this bill contend that this section would only codify a more recent decision, *Pace v. DiGuglielmo*, in which the Supreme Court held that an *untimely* application in state court is not "properly filed" and thus does not suspend the federal filing period. But this section goes much further; it would overturn the holding in *Bennett* that a *timely* state application is "properly filed" though it may be subject to dismissal on other procedural grounds.

SEC. 5: This section would overrule yet another recent Supreme Court decision: *Carey v. Saffold*. Under the existing provision of AEDPA, the one-year period for filing a federal petition is suspended while a "properly filed" application for state relief is "pending." If a prisoner is unsuccessful before the lowest level state court, he usually can either seek appellate review of that court's decision or start afresh with an independent application in a higher state court. Either way, there is a gap between the date he formally leaves one court and the date he begins in the next. (For example, a prisoner whose postconviction petition is dismissed at the state trial level may have 30 days to file a notice of appeal). In *Saffold*, the Court held that so long as a prisoner proceeds according to state law (meeting all the filing deadlines the state itself may establish), the federal filing period is suspended from the date the prisoner first goes to a state court until the highest state court acts. This section, by contrast, would require a federal court to examine the state court records, compute any period of time (however brief) when a prisoner was not formally before some state court, and charge that time against the one-year federal filing period.

This section would also mandate that if an application for relief in state court is to suspend the filing period for a federal habeas corpus petition, it must contain alleged violations of the prisoner's federal rights. Under existing law, such a petition might contain only claims based on state law. That makes sense. If the state courts find a state-law claim meritorious and grant relief on that basis, there will be no need for federal courts to become involved at all. This section would frustrate that means of reducing the number of federal habeas petitions.

This section would often put prisoners to a perverse choice between seeking relief from state courts or bypassing those courts and going immediately to federal court. Under current law, an application in state court advancing any claim against a prisoner's *judgment* of conviction suspends the filing period for a federal habeas petition advancing any claims going to the same judgment. Accordingly, a prisoner who has already satisfied the exhaustion doctrine with respect to one claim (e.g., in connection with earlier appellate review of his conviction) needn't worry that, if he goes to state court to press a different claim, he will stop the clock only for the claim in the state application and not for the claim that is ready for federal court. This section would keep the federal clock running for any claim not actually presented in a state court application. Accordingly, prisoners would be forced to abandon any attempt to put some claims before the state courts, lest they lose the opportunity to press others in federal court.

Finally, this section would forbid federal courts to relax the one-year filing period on equitable grounds—when there are extremely good reasons why a prisoner was unable to get to federal court within one year. All federal courts now allow for that possibility, though they rarely

actually give prisoners more time. This section would eliminate that authority. Here again, the proponents simply don't trust federal courts to act responsibly.

SEC. 6: This section would strip federal courts of jurisdiction to entertain most claims regarding a sentence if a state court found any constitutional error that occurred to be “harmless” or “not prejudicial.” The only exceptions would be for prisoners who demonstrate that the violations they suffered were “structural” (and thus cannot *be* “harmless”). Very few errors are “structural” in the necessary sense. So the exception for structural error cases is inconsequential.

The only argument proponents of the bill offer for this section is that claims going to sentences are typically not meritorious and only clog federal dockets. Far from it. The cases that would be affected are primarily death penalty cases in which the focus is usually on whether (1) a capital sentence violates the Eighth Amendment (for example because the sentencing factors are too vague, e.g. *Godfrey v. Georgia* or because the jury was erroneously permitted or not permitted to consider a particular factor e.g. *Simmons v. South Carolina* or because the jury was misled about the requirements for a valid sentencing decision e.g. *McCoy v. North Carolina*) or (2) counsel rendered ineffective assistance at the sentencing stage e.g. *Rompilla v. Beard*. This section would carve out an enormous share of the federal courts' jurisdiction to adjudicate capital cases. It would give state courts the perverse incentive to say that any federal constitutional errors affecting a death sentence weren't prejudicial, thus to insulate their decisions from the federal courts.

Nothing in this section would allow a federal court to examine whether a state court correctly determined that a trial error was “not prejudicial.” So the federal court would be expected to resolve a constitutional case without the authority to determine independently the crucial federal issue. That would obviously invite a constitutional challenge for invading federal court independence.

SEC 7. This section would make the provisions in AEDPA applicable to cases that were already pending on the date that Act became law. Thus it would overturn still another Supreme Court decision, *Lindh v. Murphy*, which construed AEDPA not to extend some of its key provisions to pending cases. The decision in *Lindh* not only respected Congress' wishes, but also eased the transition from prior law to the new AEDPA regime. Proponents of this bill argue that this section would only bring a few older cases into line with current law. Instead, it would stir up the very problems the Court defused. Extending AEDPA to those cases would invite arguments about whether Congress genuinely means to impose new legal consequences on events in the past and, if so, whether changing the rules of the game retroactively is constitutional. Both arguments would, of course, require yet more litigation to address.

SEC 8: This section would establish new timetables for federal courts to follow in processing appeals in habeas cases. AEDPA contains similar timetables—but only for death penalty cases and then only for cases arising from states that give something in return, i.e., counsel for indigents in state postconviction proceedings. This (long and complicated) section addresses no genuine problem. Proponents offer no evidence that federal appellate courts fail to handle habeas appeals expeditiously. The fact is that the circuit courts of appeals are swamped

with work, and appeals in ordinary civil and criminal cases – many of which also contain statutory deadlines – are piling up in a backlog. At best, establishing these timetables would force the courts to lay aside ordinary civil and criminal cases in order to rush habeas corpus cases to judgment; at worst, it would compromise the quality of the courts’ work—raising yet another basis for a constitutional challenge.

This section would also bar federal circuit courts from rehearing applications regarding second or successive habeas petitions. Under existing law, parties cannot petition circuit courts for rehearing, but courts can revisit applications on their own motion. The underlying problem is that courts have only thirty days to process applications of this kind. They can’t manage to do that (without neglecting all their other work), so they enter place-keeping orders and then return to applications after they have had time to reach a decision. Here again, the courts are already solving procedural problems, and this bill would only frustrate those efforts.

SEC. 9: This section would strip federal courts of jurisdiction to consider most claims (going either to a conviction or to a sentence) in death penalty cases arising from states that supply competent counsel to indigents in state postconviction proceedings. The jurisdictional prohibition would operate even with respect to claims the state courts failed to address. The only exceptions would be for prisoners who advance claims based on retroactive “new rules” (largely a null set) and those who offer newly discovered evidence clearly demonstrating their actual innocence. This is the most far-reaching attack on federal jurisdiction in habeas corpus since Senator Kyl proposed a substitute for AEDPA that would virtually have abolished habeas corpus for state prisoners. That substitute failed because senators insisted that their goal was not to eliminate federal court *jurisdiction*, but only its *inefficiencies*.

Under current law, a state can trigger a special set of procedural rules for federal habeas proceedings (rules that are advantageous to the state) if the state establishes an effective system for providing competent counsel to indigents in state postconviction proceedings. Federal courts determine whether a state’s scheme for supplying counsel meets the statutory criteria. This is the so-called “opt in” feature of AEDPA. A state *gets* something (advantageous procedural rules in federal court) in exchange for *doing* something (providing good lawyers to indigents in state proceedings). This section would change both ends of that *quid pro quo* equation. First, and most importantly, the state would no longer *need* favorable procedural rules in federal court, because they would get an absolute jurisdictional prohibition on federal court consideration of most federal claims. Second, states would no longer have to satisfy federal courts that their systems for providing counsel in state proceedings are adequate, because the authority to approve state schemes would be transferred to the Attorney General. The Court of Appeals for the District of Columbia would have exclusive jurisdiction to review his decisions, but only for an abuse of discretion.

Proponents of this bill argue that the Attorney General is a “neutral party” and thus an appropriate officer to decide whether a state has kept its part of the “opt in” bargain. Yet the Attorney General is the nation’s chief *prosecuting* officer and thus hardly neutral with respect to criminal cases. In any event, the implicit message, again, is that federal courts are not to be trusted.

SEC. 10: This section would strip federal courts of jurisdiction to entertain federal claims arising in clemency and pardon cases. Its extremely broad language would overrule *Ohio Adult Parole Authority v. Woodard*, in which the Supreme Court held in a case brought under Section 1983 that an inmate was entitled to assert the claim that the clemency procedures of a particular state violate minimal standards of due process under the federal constitution.

SEC. 11: This section would bar federal judges entertaining habeas petitions from handling requests for financial support from attorneys representing prisoners. It would shift that responsibility to other judges. It would also (usually) require the proceedings on such a request (as well as the amounts allowed) to be public. This is inconsistent with ABA Death Penalty Representation Guideline 4.1.B.2.

SEC 12: This section would extend the essentials of the Crime Victims' Rights Act (applicable to federal criminal proceedings) to habeas corpus cases. It would entitle victims to attend habeas hearings and to be notified of "developments" in habeas proceedings.

SEC. 13: This section would authorize district judges to allow prisoners to appeal in habeas corpus cases. It conforms to current practice and is not controversial.

SEC. 14: This section would make the provisions in this Act applicable to habeas corpus cases already pending. Like Section 7, this would provoke lawsuits over whether Congress genuinely intends to attach legal consequences to events in the past and, if so, whether the Constitution allows it.