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July 27, 2005

The Honorable Arlen Specter
Chairman
United States Senate Judiciary Committee
Washington, DC 20510

Dear Chairman Specter:

As president of The Rutherford Institute, I am writing to express my concerns about S. 1088, the "Streamlined Procedures Act of 2005," the major habeas legislation pending before both the Senate and House. A more detailed memorandum explaining my concerns is attached.

While I understand the desire to reduce delays in the federal courts' review of habeas corpus petitions filed by state prisoners, I do not believe that denying prisoners the right to petition the federal courts is a viable and constitutionally sound solution. Habeas corpus relief is based upon the simple premise that an individual should be protected from unlawful imprisonment. It is, thus, symbolic of our nation's commitment to constitutional values and to the idea that no person shall be convicted in violation of the fundamental law of the land.

As you prepare to mark-up this proposed piece of legislation, I urge you to carefully consider The Rutherford Institute's concerns about the Streamlined Procedures Act's impact on the constitutional rights of Americans.

Sincerely yours,

John W. Whitehead
President

Enclosures

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MEMORANDUM

TO: The Honorable Members of the Senate Judiciary Committee
FROM: John W. Whitehead, President
DATE: July 27, 2005
SUBJECT: Senate Bill 1088: "Streamlined Procedures Act of 2005"

Senator Jon Kyl (R- AZ) has introduced a bill in the Senate entitled the "Streamlined Procedures Act of 2005" (SPA), which is currently before the Senate's Judiciary Committee. Senator Kyl claims that this legislation is needed to reduce delays in the federal courts' review of habeas corpus petitions filed by state prisoners. However, as described in detail by University of Chicago Law Professor Bernard Harcourt in his testimony before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, the SPA raises serious constitutional questions.

The writ of habeas corpus has great importance in our constitutional system. It was regarded as so important to the Constitution's framers that they enshrined its protection in Article I, Section 9 several years before they detailed the more famous protections possessed by individuals in the Bill of Rights. Habeas corpus relief is based upon a simple idea: an individual should be protected from unlawful imprisonment.

The term “habeas corpus” refers to a collection of related but distinct remedies available to state and federal prisoners. A habeas corpus petition allows a person in custody, pursuant to the judgment of a state or federal court, to petition the federal courts for relief based on a claim that he or she is in custody in violation of the United States Constitution. Habeas corpus relief is thus symbolic of our nation’s commitment to constitutional values and to the idea that no person shall be convicted in violation of the fundamental law of the land.

When a state imposes criminal sanctions on an individual, it must take the utmost care to ensure that the process leading to the conviction is fair and that the punishment is just. For this reason, it is especially important that state prisoners be allowed to petition the federal courts for redress of claimed constitutional violations. State court judges—who are often elected—are susceptible to pressures that life-tenure federal judges may find less compelling. Further, the quality of state court judges may be uneven in many states with counties and cities of great diversity. These considerations argue in favor of not curtailing federal habeas corpus relief for state defendants. The SPA, however, will create new procedures that will vastly curtail the opportunities for state prisoners to obtain federal habeas corpus review.

Indeed, the SPA is radical legislation which would effectively gut federal habeas corpus review where states have imposed a death sentence, as well as in non-capital cases. The SPA will vastly modify the current standards for federal habeas review under the streamlined provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). It has taken almost ten years of litigation for AEDPA law to become functional, well-understood and well-applied by the federal courts. However, the SPA

would spawn a new round of unnecessary constitutional and statutory litigation, which would preoccupy the federal courts for the next decade.

The SPA proposes radical changes to our existing system of federal habeas corpus review under the AEDPA. These changes would likely result in the execution of citizens who have been wrongly convicted and sentenced to death. The SPA would overrule numerous Supreme Court cases, many of which are based upon constitutional principles of federalism and separation of powers. And the SPA, rather than streamlining habeas corpus, as the name suggests, would complicate litigation in all criminal cases, especially death penalty cases, by bogging down the federal courts with new challenges to these streamlined procedures.

The SPA does include an exemption for claims of actual innocence. However, this escape valve is far too narrow and limited to prevent innocent persons from being executed or sent to prison. A petitioner who claims actual innocence must demonstrate that: (1) his factual predicate “could not have been previously discovered through the exercise of due diligence”; (2) the underlying facts “would be sufficient to establish *by clear and convincing evidence* that but for constitutional error, no reasonable factfinder would have found the applicant guilty”; *and* (3) a denial of relief on the basis of the claim would be “contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.” Clearly, a genuinely innocent death row inmate could be foreclosed from raising actual innocence for a variety of reasons. For example, the new evidence could possibly have been discovered earlier, the evidence might not clearly and convincingly persuade every reasonable judge or jury or it might

not be unreasonable to reject the constitutional claim itself apart from any evidence of actual innocence.

By closing the door to the underlying federal claims that support evidence of actual innocence, the SPA also effectively closes the door of habeas corpus to actually innocent prisoners and death row inmates. And as we have seen over the course of the past decade, tragically there are innocent inmates on death row in America's prisons.

An examination of some of the provisions of the SPA confirms these conclusions. Section 2, entitled "Mixed Petitions," deals with federal petitions that raise both claims that have been exhausted in state-post conviction proceedings and claims that have not been exhausted. Under this new provision, federal courts would be required to dismiss with prejudice unexhausted claims, regardless of the merits of the claim. This section effectively withdraws all judicial discretion from the federal courts. The only exceptions from this rule 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 was factually innocent, regardless of whether the prisoner's federal constitutional rights were violated.

Section 3, entitled "Amendments to Petitions," would limit a petitioner's ability to amend his federal habeas petition to only once and then only if he acts before the state files its answer. This provision applies regardless of whether the state has provided counsel at the state court proceedings.

Section 4, titled "Procedurally Defaulted Claims," effectively strips federal courts of jurisdiction to review claims that were procedurally defaulted in state court. In explicit language, this section also eliminates federal court jurisdiction to consider whether the

petitioner's alleged procedural default in state court was attributable to his lawyer's ineffective assistance of counsel. The only exceptions, again, would be for petitioners whose claims rest on "new rules" of law that have retroactive effect or on newly discovered evidence showing that the prisoner meets the SPA's "actual innocence" requirements. Consequently, under this section, federal constitutional claims would be barred from both state and federal court, irrespective of their merit.

Thus, Section 4 eviscerates the carefully crafted standard of "cause and prejudice" that Chief Justice William Rehnquist thoughtfully articulated in *Wainwright v. Sykes*, 433 U.S. 72 (1977). The *Wainwright* standard for procedural default has achieved a well-recognized and understood level of equilibrium in the federal courts and has been properly applied in the federal courts. Section 4 of the SPA effectively slashes this entire body of law.

Section 6, titled "Harmless Error in Sentencing," effectively eliminates federal review of any sentencing claim that a state court has found to be harmless or not prejudicial. This section would primarily affect death penalty cases where the question typically is whether effective assistance of counsel was rendered at the death sentencing phases. In a single stroke, Section 6 wipes out federal court jurisdiction to review most capital sentencing issues. Further, this section also applies to non-capital cases. The only exceptions would be for prisoners who can demonstrate that the violations they have suffered were "structural." By definition, structural claims cannot be "harmless." Very few errors are found to be structural, however, so this exception is inconsequential. Basically, since this section prohibits federal courts from examining whether a state court correctly determined that a trial error was "harmless," it requires federal courts to resolve

constitutional cases without the authority to determine independently the crucial federal issues. This invades the Article III independence of the federal courts.

Section 9, entitled “Capital Cases,” is perhaps the most radical section of the SPA. It effectively strips all federal courts of jurisdiction to consider most claims in state death penalty cases if the U. S. Attorney General certifies that the state from which the conviction emanated provides competent counsel to indigent capital defendants in state post-conviction proceedings. In other words, in those states in which the Attorney General certifies that counsel is provided in state post-conviction, there will likely be no more federal habeas corpus review in death penalty cases. By placing the authority to decide these matters with the Attorney General—a law enforcement official—the SPA disturbs the existing allocation of the separation of powers. The one narrow and limited exception for claims of actual innocence comes with conditions that scarcely anyone would be able to satisfy. This would virtually abolish federal habeas corpus review for state prisoners in death penalty cases.

Section 10, entitled “Clemency and Pardon Decisions,” would strip federal courts of jurisdiction to entertain federal claims arising in clemency and pardon cases. Its broad language would overrule *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), in which the Supreme Court held 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.

Finally, Section 13, entitled “Application to Pending Cases,” would make the SPA applicable to already pending federal habeas corpus cases, thus inviting litigation

over whether the U. S. Constitution allows Congress to attach legal consequences to past events.

In conclusion, the SPA is radical, jurisdiction-stripping legislation that will complicate what is becoming well-settled AEDPA jurisprudence. The SPA's constitutional difficulties are evident: it contemplates that federal courts would take jurisdiction of cases in order to decide whether previous state court judgments are valid, but it would then deny the federal courts jurisdiction to decide questions of federal law that are crucial to reaching proper results. This deprives the federal courts of their proper authority under Article III of the Constitution. Arguably, by effectively eviscerating habeas relief for all state prisoners—especially those on death row—the SPA suspends the writ of habeas corpus without a justifying national emergency.