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July 12, 2005

The Honorable Arlen Specter  
Chairman  
Senate Judiciary Committee  
SD-224 Dirksen Senate Office Building  
Washington, DC 20510-6275

The Honorable Patrick J. Leahy  
Ranking Minority Member  
Senate Judiciary Committee  
SD-224 Dirksen Senate Office Building  
Washington, DC 20510-6275

Dear Senators Specter and Leahy:

We are former judges who write to convey our grave concerns about S. 1088, which purports to “streamline” the federal habeas corpus system, but which would in reality dramatically diminish, if not entirely eliminate, the federal courts’ ability to consider habeas corpus petitions. Our concerns arise because this bill would prevent the federal courts from granting many petitions, even in cases of actual innocence. It would also create significant inconsistencies with current statutes and longstanding judicial decisions, thus slowing the litigation process to the detriment of crime victims and others who legitimately wish the process to proceed expeditiously.

Ordinarily, we are reluctant to take a public position on pending bills. However, judges have a duty to speak out about legislation that affects the administration of justice. Active judges may hesitate to respond, so we feel a responsibility to take the unusual step of making our position known.

S. 1088, and its companion House bill, H.R. 3035, would largely eliminate federal courts’ power to adjudicate critical federal issues in many habeas corpus cases involving state prisoners. It appears that the sponsors are chiefly concerned that habeas corpus petitions filed by prisoners under sentence of death may move too slowly through the system. In our experience, delay is not a serious problem in death penalty cases. If it ever was, the Anti-Terrorism and Effective Death Penalty Act, a comprehensive reform of habeas corpus enacted fewer than ten years ago, eliminated the problem. Most circuit courts routinely place capital cases on an expedited schedule. If there are instances in which death penalty cases have required years to resolve, they are exceptions to the rule and there are legitimate and important reasons for that delay.

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Importantly, whatever the concerns of the sponsors of the bill about capital cases, its impact is far more sweeping. The bill covers not only capital cases, but every state criminal conviction, capital and non-capital. Thus, it covers cases involving business, firearms, environmental, narcotics, and a vast array of other state offenses.

The bill professes to include an exception so that innocent people may still obtain relief. As we read it, however, the language of the exception is so narrow that it will cover virtually no one. There are now too many instances to ignore in which innocent people were sentenced to prison or even to death, and it took years for the evidence of their innocence to come to light. The limits on federal court review that S. 1088 proposes dramatically increase the risk that innocent people will languish in prison or even on death row, and that the true perpetrators of these crimes will remain free, perhaps to commit more crimes.

As we noted, the bill's effect would not be to streamline the process. Rather, it would delay it as courts will be forced to resolve inconsistencies between its language and the language in AEDPA and the Innocence Protection Act, the latter of which was enacted less than a year ago. It took almost 10 years for the courts to resolve questions about and challenges to AEDPA, and the constitutional questions and legal inconsistencies raised by S. 1088 are, in our view, much more serious and complicated. In addition, as we read the bill, it would overturn several recent Supreme Court decisions interpreting AEDPA as well as several other decisions of the Rehnquist Court, many of which have helped to further streamline the system and eliminate delays. It serves no one's interest to engender the kind of delays that this bill will create.

Moreover, this bill presents an extraordinary risk to the independence of the federal courts and to the separation of powers that underlies our democracy. Several provisions would flatly repeal federal court jurisdiction to entertain federal questions that are pertinent to the proper disposition of cases. These provisions are not modest adjustments to habeas procedure; they would foreclose federal judicial power to adjudicate federal question cases in the ordinary course. This would be a radical action, inconsistent with the long history of our American legal system.

Finally, we are constrained to say that this bill reflects distrust and, we think, disrespect for the federal judiciary. We frankly resent the implication that federal judges are not performing their constitutional functions in a proper and efficient manner. The truth is otherwise. Federal courts faithfully fulfill their responsibilities to the law and, as an independent branch of government, must be free to continue to do so.

It is difficult to see how legislation of this kind could improve the process and much easier to anticipate that it would complicate matters all the more. At the very least, Congress should not rush to judgment on this bill. There have been no studies on the impact of AEDPA on delays, and so the need for new legislation to decrease delays is significantly in doubt. We strongly support a study by the Judicial Conference of the United States or other independent body to determine whether there is any need for legislation to achieve the professed goals of S. 1088.

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All of us have devoted our careers to ensuring that our country's laws are upheld. We strongly believe that this bill is misguided and dangerous and that it should not receive favorable action. We would be happy to convey our views in person to you and your colleagues.

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Very truly yours,

Hon. Timothy K. Lewis	Former Judge, United States Court of Appeals for the 3 <sup>rd</sup> Circuit Former Judge, United States District Court for the Western District of Pennsylvania Former Federal Prosecutor
Hon. William H. Webster	Former Director, Federal Bureau of Investigation Former Director, Central Intelligence Agency Former Judge, United States Court of Appeals for the 8 <sup>th</sup> Circuit Former Judge, United District Court for the Eastern District of Missouri Former United States Attorney for the Eastern District of Missouri
Hon. William S. Sessions	Former Director, Federal Bureau of Investigation Former Chief United States District Judge for the Western District of Texas (1974-1987, Chief from 1980–1987)
Hon. Patricia Wald	Judge, United States Court of Appeals for D.C. Circuit (1977-1999) Chief Judge (1986–1991) Former Judge, International Criminal Tribunal for the Former Yugoslavia (1999-2001)
Hon. Robert J. Cindrich	Former United States Attorney for the Western District of Pennsylvania Former United States District Court Judge Western District of Pennsylvania
Hon. Stephen M. Orlofsky	Former United States Magistrate Judge for the District of New Jersey (1976-1980) Former United States District Judge for the District of New Jersey (1996-2003)
Hon. Bret H. Huggins	Former Judge, Arizona Superior Court (Navajo County, Arizona) (October 1992 to January 1997)
Hon. Charles Baird	Retired Justice, 5 <sup>th</sup> District Court of Appeals, Dallas, Texas

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Hon. Ron Chapman	Retired Justice, 5 <sup>th</sup> District Court of Appeals, Dallas, Texas
Hon. Harry Low	Presiding Justice, California Court of Appeals (1983-1992) Judge, San Francisco County Superior Court (1974-1983) Judge, San Francisco Municipal Court (1967-1974) Commissioner, Worker's Compensation Appeals Board (1966) Deputy Attorney General for California in the Civil and Tax Division (1956-1966)
Hon. Michael B. Bolan	Retired Judge of the Circuit Court of Cook County, Illinois Former Assistant States Attorney, Cook County, Illinois Former Assistant Attorney General, Illinois
Hon. Stanley G. Feldman	Retired Justice of the Arizona Supreme Court (1982-2002) Retired Chief Justice of the Arizona Supreme Court (1992-1996)
Hon. Joseph R. Grodin	Former Associate Justice, California Supreme Court
Hon. Charles B. Blackmar	Retired Judge and former Chief Justice, Supreme Court of Missouri Active Senior Judge
Hon. Sheila Murphy	Retired Presiding Judge of the 6 <sup>th</sup> District Court, Cook County, Illinois
Hon. Rudolf J. Gerber	Former Judge, Superior Court for the State of Arizona (1979-1988) Former Judge, Court of Appeals of Arizona (1988-2001)
Hon. H. Lee Sarokin	Retired Judge, United States Court of Appeals for the 3 <sup>rd</sup> Circuit
Hon. Daniel H. Weinstein	Retired Judge, California Superior Court
Hon. Edward Stern	Retired Presiding Judge, San Francisco Superior Court, State of California

(List as of July 27, 2005)