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October 24, 2005

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

We are writing on behalf of the American Association of Jewish Lawyers and Jurists ("AAJLJ") to express our opposition to S. 1088, the so-called Streamlined Procedures Act. Our views as expressed herein are based on the most recent version of the bill, as set forth in an amended bill offered by you on October 19, 2005. If enacted, S. 1088 would remove, to a very substantial extent, the ability of federal courts to grant relief when presented with meritorious federal habeas corpus petitions. In our view it is unfortunate that Congress would consider stripping the federal courts of the ability to provide relief to prisoners whose constitutional rights have been prejudicially violated.

The AAJLJ is a membership association of lawyers and jurists open to all members of the professions regardless of religion. It is the U.S. affiliate of the International Association of Jewish Lawyers and Jurists, which was founded by the late Justice Arthur Goldberg of the United States Supreme Court and the late Justice Haim Cohen of the Supreme Court of Israel. The AAJLJ strongly believes that the principle of equal access to justice is an indispensable feature of a democratic society; in Jewish law the principle is expressed in the Torah: "Justice, justice shall you pursue", Deuteronomy 16:20. Members of the Association have litigated habeas cases and provided *pro bono* services in such cases around the country.

In our view, there is no need to rush to change the federal habeas laws in the drastic fashion proposed in the SPA. Nine years ago, 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").

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There have been no studies about the implementation of the AEDPA, or problems related thereto, that would justify making further, extreme, changes now. Testimony presented in favor of S. 1088 at Senate hearings strongly 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, the current version of S. 1088 would strip federal courts of the power to rule on meritorious constitutional claims whenever a state court purports to deny relief due to what it says is a procedural default. 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. 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 would be replaced by a "cause" and "innocence" standard that would demand a far higher threshold showing of innocence than the current law requires and penalize prisoners who did not have access to counsel or resources in state court. S. 1088, as written, would preclude relief for individuals who are in fact not guilty of the crime of which they were convicted. For example, if the reason that a prisoner did not raise a 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.

There are similar fairness problems with other aspects of S. 1088, including changes in "exhaustion" doctrine, limitations on amendments to habeas petitions, and the elimination of equitable tolling.

S. 1088 is 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.

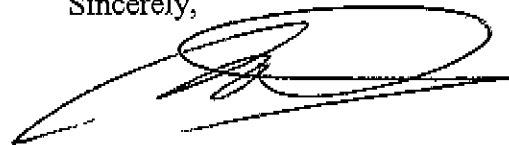
The Honorable Arlen Specter, p. 3

In sum, S. 1088 would strip federal courts of jurisdiction to determine many federal issues and undercut the Supreme Court's efforts to clear up uncertainties regarding AEDPA. The bill would significantly limit the ability of federal courts to determine federal constitutional issues in cases involving prisoners *either* facing death sentences *or* serving prison terms. It would overturn a whole series of Supreme Court decisions; 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.

Under these circumstances, the Senate Judiciary Committee should, at the very least, avoid a rush to "mark-up" and approval of this bill. 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, a member of the AAJLJ, 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 AAJLJ 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 black ink, appearing to read "Stephen R. Greenwald", written over a horizontal line.

Stephen R. Greenwald
Executive Vice President

cc: B Tolman