



# AMERICAN BAR ASSOCIATION

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## **STATEMENT OF**

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## **ON BEHALF OF THE**

**AMERICAN BAR ASSOCIATION**

**submitted to the**

**COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**on the subject of**

**S.1088, THE STREAMLINED PROCEDURES ACT OF 2005**

**OCTOBER 26, 2005**

Mr. Chairman and Members of the Committee:

I am Eric M. Freedman, the Maurice A. Deane Professor of Constitutional Law at the Hofstra Law School. I am submitting this statement on behalf of the American Bar Association (ABA) and its more than 400,000 members at the request of its President, Michael Greco, to express our views on the substitute version of S. 1088, the “Streamlined Procedures Act of 2005” introduced by Senator Specter on October 6, 2005.

On June 28, 2005 then-President Robert Gray wrote you to express our deep concerns with this legislation and urge that its consequences be fully considered. As the Reporter for the ABA’s *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2d ed., 2003) and a member of the Steering Committee of the ABA’s Death Penalty Representation Project, I submitted a statement in connection with the hearings that were held on July 13, 2005 detailing the ABA’s opposition to S. 1088 as then proposed. Following the Committee’s adoption of Senator Specter’s first substitute, Robert D. Evans, the Director of the ABA Governmental Affairs Office, wrote the Committee on September 27, 2005 to reiterate the Association’s opposition.

While some of the most recent changes have resulted in minor improvements to S.1088, the legislation nonetheless still represents a significant setback for justice. The section-by-section analysis appended to this statement details our objections to the bill.

In July we summarized our position by stating:

The ABA is not opposed to the death penalty, but it is in favor of justice in capital and non-capital cases alike. The bedrock definition of justice in this context is that the legal system function reliably to punish the guilty and acquit the innocent. In considering the role that federal habeas corpus should play within a structure designed to achieve these results, the ABA has long recognized two central facts:

A. The government must provide competent counsel to indigent defendants at each and every phase of the criminal process. If it did, both speed and justice would be immeasurably improved. For so long as it does not, both are in peril.

B. Federal habeas corpus proceedings should be structured in such a way as to insure that meritorious claims – be they claims of innocence or of violations of the procedures mandated by the Constitution to insure fairness and accuracy – are heard on the merits rather than disappearing in a thicket of legalisms [because] there is a chilling risk that the life of an innocent defendant may be lost in that thicket.

S. 1088 attacks both of these core principles. [Footnotes omitted]

As with regard to S.1088 as originally introduced, the fundamental orientation of this bill continues to be “antithetical to what real reform would require.” The proposed legislation remains certain to worsen “a system in which the federal habeas corpus courts spend an enormous percentage of the time dealing with such issues as exhaustion, procedural default, harmless error, retroactivity, and many others to the virtual exclusion of the question of whether in any particular case the state turned square constitutional corners in obtaining the conviction

and sentence under review.” Such a system is one “that exalts form over substance,” and that should be abolished rather than perpetuated. As we stated in July:

Speed and accuracy both will be impaired by the enactment of a bill that diverts the courts from the merits while inviting numerous challenges to the validity of its provisions, challenges that will have to be litigated just as the law under AEDPA is becoming relatively stable. Speed and accuracy both would be enhanced by reform proposals that center upon the provision of competent counsel and a judicial focus on the vindication of constitutional guarantees.

We urge that consideration of S. 1088 be dropped and that Congress instead devote its attention to resolution of the truly critical issues that are today undermining the efficacy of habeas corpus in performing its historic charge of insuring that every criminal sentence meets the requirements of basic fairness mandated by the Constitution.

At minimum, in view of the costs that even the proponents of S. 1088 concede the justice system will have to bear if the bill is enacted, before the Congress decides to proceed along the lines of the proposal it should have empirical evidence of the existence of the problems the legislation claims to solve. As explicated in the enclosed section-by-section analysis, we conclude, based on the experience of our most knowledgeable members – who include prosecutors and judges as well as defense counsel – that many of the provisions of S. 1088 are in fact “solutions” in search of problems, what we previously described as “issues that, although troublesome to prosecutors in particular cases that they may have lost, are not systemwide problems.” As you know this is also the unanimous view of the Chief Justices of the States, which are the purported beneficiaries of this legislation. But if proponents remain convinced there is controversy on this point, we would urge, as we did in our September 27 letter, that Congress authorize a study of the relevant issues by an appropriate independent body.

We thank you for your consideration of these views and reiterate our willingness to work with the Committee to assist it “in crafting legislation that its architects will be able to view with pride as a long-term improvement to our system of justice.”

### Section-by-Section Analysis

**Summary of concerns.** As with the prior versions, the substitute version of S. 1088 introduced on October 6, 2005 would virtually eliminate the ability of federal courts to determine federal issues in cases in which state prisoners (whether 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 challenges to its impairment of the independence of the federal courts.

The essence of the constitutional difficulty with this bill is that it tells the federal courts to take jurisdiction of cases in order to decide whether previous state court judgments are valid, but then forbids those courts to decide questions of federal law that are crucial to reaching proper results. This combination denies the federal courts their Article III authority to decide cases within their jurisdiction in accordance with the Constitution (thus also violating the separation of powers), and may well constitute an unconstitutional suspension of the writ of habeas corpus

Even if not unconstitutional, the bill is unwise; by straitjacketing the traditional flexibility of the judicial branch to shape the habeas remedy in response to the circumstances of individual cases, the bill prevents judges from doing justice. At the same time, it would encourage the state courts to resolve cases on questionable grounds simply because the provisions of this bill would insulate such decisions from federal court review.

The legislation 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 question that would certainly generate 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.

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: (Exhaustion of Remedies)**

Existing law requires a prisoner to "exhaust" state court avenues for litigating a federal claim before he presents the claim to a federal court. The 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.

In its current form Section 2 provides two very narrow exceptions.

First, under subsection (B), to obtain merits review of an unexhausted claim, the prisoner must show not only “cause” for failing to exhaust state remedies, but also “a reasonable probability that, but for the alleged error, the fact finder would not have found that the applicant participated in the underlying offense” *and* that the denial of relief either would be “contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”, or that the denial of relief “would entail an unreasonable determination of a factual issue.”

As elsewhere in the legislation, the first part of this exception simply ignores the well-documented testimony of Barry Scheck, Seth Waxman and others to the effect that in most actual cases it is impossible to demonstrate innocence until the effects of the underlying procedural defect (e.g. ineffective assistance of counsel, prosecutorial misconduct) have first been removed. The second part borrows language from AEDPA that occurs there in a completely different context. There, it describes federal review of claims that the state courts have adjudicated on the merits; here, there has been no state court adjudication, but the federal courts are being restricted in their review as though there had been.

Second, under Subsection (C), to obtain merits review, a prisoner must show that “but for the alleged error, it is more likely than not that no reasonable fact finder would have found that the applicant participated in the underlying offense” *and* that the denial of relief either would be “contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or that the denial of relief “would entail an unreasonable determination of a factual issue.”

This second exception differs from the first in that it would suspend the general rule requiring dismissal with prejudice if the prisoner makes an even more powerful showing of actual innocence. It sets the bar so high that it would be practically impossible for anyone to clear it.

### **SEC. 3: (Amendments)**

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 standards that Section 2 employs to govern federal court consideration of “unexhausted” claims.

Under Rule 15 of the Federal Rules of Civil Procedure, an amendment “relates back” to the time of the original complaint. The drafters are intent upon preventing prisoners from extending the one-year filing period by adding new claims by amendment more than a year later and relying on Rule 15’s “relation back” feature to argue that the new claims are timely. In its recent decision in *Mayle v. Felix*, however, the Supreme Court held that amendments to habeas petitions usually do not “relate back.” Accordingly, the problem Section 3 is meant to address (if it ever existed at all) has already been fully remedied by the Supreme Court.

This section is premature at best and unfair at worst. First, without regard for any applicable filing deadline, it permits the government to cut off the ability to amend simply by filing an answer. Second, while this section allows certain exceptions from the general restrictions it would place on amendments, those exceptions are the same highly-restrictive standards used in Section 2 to govern the treatment of “unexhausted” claims rather than the nuanced ones that the Court has just adopted in *Felix*.

#### **SEC. 4: (Procedural Default)**

This section, whose impenetrable drafting is certain to spawn years of hyper-technical litigation having nothing in the least to do with the fairness of the underlying conviction, 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 two narrow exceptions that generally track the standards used in Section 2 regarding “unexhausted” claims, then adds two further possibilities: the state may waive reliance on Section 4 to foreclose federal adjudication of a claim, and a prisoner is forgiven for failing to comply with a state procedural rule that the Supreme Court has previously determined not to “afford a reasonable opportunity” to present a federal claim in state court. The latter provision is simply illusory. It is triggered only by an existing decision by the Supreme Court that a particular state procedural rule is inadequate to cut off federal review of a federal claim. That being so, it is of no use to anyone; any prisoner who seeks to invoke it will be frustrated for want of a *previous* Supreme Court decision.

Turning federalism upside-down, this section also requires a federal court to enforce state procedural rules even where the state court was willing to overlook violations in order to insure just results on the merits.

Finally, Section 4 would 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 AEDPA, 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. 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.

In a further strange inversion of federalism, this section would also order the federal courts to enforce state procedural rules where the state courts would not. A federal court would be required to ignore a state court's willingness to entertain the prisoner's application, 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 the time precisely as he should have: presenting the claim to a state court that had the ability to entertain it.

Proponents of this section have contended that it codifies *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: (Tolling)**

First, this section would mandate that if an application for relief in state court is to suspend the filing period for a federal habeas corpus petition, it must plead alleged violations of the prisoner's *federal* rights. Under existing law, such a petition might contain only claims based on state law. 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.

Second, this section would forbid federal courts to relax the one-year filing period on equitable grounds—even when there are extremely good explanations for prisoners' inability to get to federal court within one year. For example, a court might excuse prisoners in Louisiana from the deadline (for a reasonable period) on the obvious ground that in the aftermath of Hurricane Katrina there was no federal court where they could file their petitions. This section would needlessly eliminate the authority to do justice in an extremely narrow category of cases.

Third, 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.

The current version of Section 5 apparently attempts to overrule *Saffold* only in cases arising from states that process applications for postconviction relief by means of a series of independent applications for an "original writ," like California. But it is far from clear that its reference to "original-writ" systems is sufficiently clear to achieve this result. For example, the Florida Supreme Court considers attacks on state court convictions by simultaneously adjudicating (a) an appeal from the result of a post-conviction attack filed pursuant to Fl. R. Cr. Pr. 3.850 and (b) an application for an

original writ of habeas corpus filed directly with that court.

**Sec. 6: (Application to pre-AEDPA cases)**

This section carries forward a section in the original bill that would make the provisions in AEDPA applicable to cases that were already pending on the date that Act became law. It would thereby 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. 7: (Appellate Time Limits)**

This section carries forward a provision in the original bill that 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 and is in any event unenforceable as a practical matter.

Section 7 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. Since they cannot do so without neglecting all their other work 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 section of the bill would only frustrate those efforts.

**Sec. 8: (Opt-in)**

This section would carry forward provisions in the original bill that make dramatic changes to the so-called “opt-in” feature of AEDPA. These alterations are

badly conceived and worse drafted.

Under current law, a state can trigger a special set of procedural rules for death penalty cases (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. The idea is that a state *gets* something (advantageous procedural rules in federal court) in exchange for *doing* something (providing good lawyers to indigents in state proceedings). But, as we noted in our testimony of July 2005, "The sad truth is that the states have found it more to their interests to retain their current inadequate systems for the provision of counsel than to obtain the benefits of [opt-in]." Rather than responding by fixing the systems, S. 1088 responds by rewarding the states' intransigence.

First, states would no longer have to satisfy federal courts that their systems for providing counsel in state proceedings are adequate. 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 extreme abuse of discretion. The Attorney General is the nation's chief *prosecutor* and thus is hardly an appropriate officer to decide whether a state has kept its part of the "opt in" bargain.

Second, Section 8 reproduces in opt-in cases many of the provisions that the original bill used in other sections. Those earlier provisions typically borrowed standards from yet another feature of existing law, § 2254(e)(2), which governs the availability of evidentiary hearings in federal court. The resulting standards are not only unjustifiably restrictive as a substantive matter but also extraordinarily confusing and certain to spawn interminable litigation over their meaning.

Third, this section makes additional changes in cases in which federal courts stay executions pending federal habeas proceedings. Under the 1994 decision in *McFarland v. Scott*, a district court need not wait until a death row prisoner actually files a formal habeas petition to stay his execution but can issue a stay at the time the prisoner files an application for appointed counsel. This section would terminate such stays automatically 60 days after the appointment of counsel. Thus, counsel would be diverted into litigating a further stay application rather than working on the merits of the case.

Fourth, this section establishes a priority for death penalty cases in which a stay has been issued (but only as against non-capital habeas cases) and directs every federal

court entertaining capital habeas cases to adopt a plan “to ensure that such cases are completed in the minimum amount of time that is consistent with due process.” This is an example of a provision that is unnecessary at best and ill-conceived at worst. Until Congress has established the existence and cause of a problem, legislating to solve it hardly makes sense.

The section also contains provisions respecting DNA testing which, as Barry Scheck and his colleagues plan to advise the Committee in greater detail, are inconsistent with existing legislation and insufficient to vindicate meritorious claims of innocence. Section 13 is in the same category and we therefore do not comment on it separately.

#### **SEC. 9: (Clemency)**

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. The only exception is that the Supreme Court may hear such cases on review from the highest courts of states – thereby reproducing the precise inefficiencies that led to the modern regime of federal habeas corpus in the first place. See Eric M. Freedman, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 138-39 (NYU Press paperback 2003).

#### **SEC. 10: (Funding Requests)**

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, an inefficiency that has led the Judicial Conference to oppose it. The section 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 and constitutes unjustifiable discrimination against prisoners who happen to be indigent.

#### **SEC 11: (Victims’ Rights)**

This section would extend the essentials of the Crime Victims’ Rights Act, applicable to federal criminal proceedings, to the entirely different context of habeas corpus cases. Whatever the merits of the underlying policy, the section attempts to

implement it by driving a square peg into a round hole and is therefore likely to satisfy no one.

**SEC. 12: (Certificates of Appealability)**

This technical correction made by 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: (Effective Date)**

This section of the bill would make its provisions applicable to habeas corpus cases already pending. Like Section 6, 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. Section 14 recognizes the problems that would be created by making everything in the bill immediately applicable to pending cases and thus allows for exceptions that may be set out in the provisions to which they apply. The result is only more confusion. Since the default position is that everything applies to all cases, and since it is untenable to take that position with respect to many provisions, the drafters have necessarily had to write special “applicability” rules for various provisions scattered throughout the bill. Those special rules, in turn, only invite litigation over their meaning as well as raising the serious risk that the drafters may have forgotten to include one where they should have.

It would make far more sense to adopt just the opposite general default position in this section and then establish exceptions from that where desired. That method would at least have the benefit of making Congressional intent clear.