S. 1088, THE STREAMLINED PROCEDURES ACT
Comments for Judiciary Committee Hearing

1. Congress enacted the 1996 AEDPA in order to reduce delays on federal habeas. S. 1088 is designed to reduce delays in federal habeas review of state criminal convictions. When the 1996 habeas corpus reforms were enacted, President Clinton commented that "it should not take eight or nine years and three trips to the Supreme Court to finalize whether a person in fact was properly convicted or not." Unfortunately, this goal has not been achieved – federal-court appeals sometimes still last decades.

2. Unfortunately, the problem has not been fixed. Ten years later, it is apparent that gaps in the AEDPA have allowed federal habeas claims to continue to build up. The backlog of habeas claims has not been reduced – it has increased. According to the Administrative Office of the Courts, in fiscal year 1994, there were 13,359 federal habeas petition pending before the U.S. District Courts. By fiscal year 2003 – the last year for which data are available – that number had gone up by nearly 10,000 petitions, to 23,218 petitions pending. Similarly, in fiscal year 1994, 3,799 habeas petitions were pending before the U.S. Courts of Appeals. By 2003, that number had nearly doubled – to 7,025 petitions pending before the courts of appeals.

The continued delays and backlogs in federal habeas review are manifested in other ways as well. In a hearing on June 30 before the House Crime Subcommittee, Ronald Eisenberg, a deputy district attorney for Philadelphia, testified that "in the last decade, the number of lawyers employed exclusively on habeas work [in the Philadelphia DA's office] has increased 400%."

And of course, ongoing problems with federal habeas are evident from individual cases that remain in endless litigation before the courts. One infamous case that is very well known in my home state of Arizona involves the murder of Christy Ann Fornoff. On June 7 of this year, Carol Fornoff – Christy Ann's mother – testified in the House about the impact on her family of delays in reviewing the case of the man who raped and murdered her daughter in Tempe, Arizona in 1984. Christy Ann Fornoff, then 13 years old, was abducted while collecting newspaper subscriptions at an apartment complex near her home. Voluminous physical evidence linked her murder to a man in the apartment complex who later claimed to have discovered her body. The killer was convicted and sentenced in 1985, and the Arizona Supreme Court upheld the case in a lengthy opinion in 1988. The killer then filed a federal habeas petition in 1992. The federal district court alone then spent 7 years reviewing the case. After more appeals and remands, the case remains in federal habeas review today. The following passages from Mrs. Fornoff's testimony make a powerful case for why these types of delays are intolerable:

> It has now been over 21 years since Christy was murdered. By this fall, the case will have been in the federal courts for longer than Christy was ever alive.
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> I cannot describe to you how painful our experience with the court system has been. I cannot believe that just one court took over 7 years to decide our case.
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> Some might ask why we can't just move on, and forget about the killer's appeals. But it doesn't work that way. She was our daughter, our beautiful little girl, and

> he took her away. We want to know if he was properly convicted. We want to know, will his conviction be thrown out? Will there be another trial? I cannot imagine testifying at a trial again. And would they even be able to convict this man again? It has been 21 years. How many witnesses are still here, is all of the evidence even still available? Could this man one day be released? Could I run into him on the street, a free man – the man who assaulted and killed our little daughter? The courts have turned this case into an open wound for our family – a wound that has not been allowed to heal for 21 years.

The testimony before the House Crime Subcommittee on June 7 also described other examples of ongoing extreme delay in federal habeas cases:

- **Benjamin Brenneman – 15 years before one federal district court.** 12-year-old Benjamin Brenneman was kidnaped, sexually assaulted, and asphyxiated by a convicted sex offender in Orange County, California, in 1981. The evidence of guilt was overwhelming – the boy's special orthopedic shoes were found in the killer's apartment, and the killer even admitted to kidnaping and sexually assaulting the boy, although he claims that he did not intend to kill him. The jury found otherwise. But in 1990, the killer filed a federal habeas petition. Today, 15 years later, the case remains before that same federal district court.

- **Michelle and Melissa Davis – 13 years on federal habeas and counting.** Michelle and Melissa Davis, ages 7 and 2, were murdered by their aunt' ex-boyfriend in California in 1982. The killer began federal habeas appeals in 1992. The case remains before the federal courts today, with no end in sight. The girl's mother has now been waiting for a resolution of this case for 23 years.

- **Michelle Melander, 1981.** Michelle Melander – who was only a 5-month old baby – was kidnaped and sexually mutilated by a man in Parker, Arizona in 1981. Federal habeas review of the killer's conviction began in 1992. The case is still before the federal courts. Baby Michelle would be 24 years old today if she had lived.

3. Congress has the authority to address this problem by narrowing federal habeas review of state convictions to focus on priority issues. One thing that I think should be perfectly clear is that Congress has the authority to act in this area – to limit and tailor federal review of state convictions in order to streamline the process and prevent these kinds of delays. The writ of habeas corpus guaranteed against suspension by the U.S. Constitution is not a guarantee of absolutely unrestricted federal review of state convictions. In fact, it is not a guarantee of appellate or post-conviction review at all. It is a guarantee against being held without a trial – against executive detention. And it was always a sufficient return to a common-law habeas writ – the kind guaranteed by the Constitution – that the prisoner is being held because he was convicted after a criminal trial.

The U.S. Court of Appeals for the Seventh Circuit elaborated on this point in *Lindh v. Murphy*, 96 F.3d 856 (*rev'd on other grounds*, 521 U.S. 320), explaining the nature of the constitutional habeas right:

> The writ known in 1789 was the pre-trial contest to the executive's power to hold a person captive, the device that prevents arbitrary detention without trial. The power thus enshrined did not include the ability to reexamine judgments rendered by courts possessing jurisdiction. Under the original practice, "a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal * * * [and] prevented issuance of a writ." The founding-era historical evidence suggests a prevailing view that state courts were adequate fora for protecting federal rights. Based on this assumption, there was (and is) no constitutionally enshrined right to mount a collateral attack on a state court's judgment in the inferior Article III courts and, *a fortiori*, no mandate that state court judgments embracing questionable (or even erroneous) interpretations of the federal Constitution be reviewed by the inferior Article III courts. (Citations omitted.)

The Seventh Circuit concluded: "Any suggestion that the [Constitution] forbids every contraction of the [federal habeas] power bestowed by Congress in 1885, and expanded by the 1948 and 1966 amendments, is untenable."

4. The importance of protecting actual innocence. Everyone agrees that it is important to allow actually innocent prisoners to prove their innocence at every point in the process. For this reason, at every point, this bill creates an exception for actual innocence claims to all procedural barriers, allowing these claims to go forward. We all want to make sure that an innocent person is not executed. I would note, also, that cases of actual innocence on death row are rare – and that innocence cases on death row that ever last as far as federal habeas review are extremely rare. In the March 30 hearing before the House Crime Subcommittee, Clatsop County, Oregon District Attorney Josh Marquis included in his testimony an analysis of the so-called DPIC list of allegedly innocent defendants who have been on death row. Marquis's testimony analyzes each case and identifies those that were *factually* innocent as opposed to *legally* innocent – *i.e.*, those who actually did not commit the crime. Marquis's analysis of the DPIC list identifies only 36 actual innocence cases on death row. My office has reviewed the legal history of each of these 36 cases. Of these 36 innocent inmates, 30 had their cases resolved in state proceedings. Only 6 cases ever reached federal habeas review. While it is important to keep federal habeas review open for claims of innocence on death row, it is also important to keep in mind the nature of the problem: of the approximately 7000 death sentences handed down in the post-*Furman* era, only 6 innocence cases have needed federal habeas review.

5. Examples of what the bill does: Streamlining Mixed Petitions and Applying a Unified Deference Standard.

I will briefly describes two sections of the bill and how they will reduce delays in federal habeas review.

Mixed Petitions. Section 2 of the bill eliminates the need to stay Federal proceedings and return to State court for further litigation when a defendant files a "mixed petition" that includes claims that were not exhausted in State court. Under this section, unexhausted claims that present meaningful evidence that the defendant did not commit the crime will remain in the

Federal petition and will be considered promptly by the Federal district court; other unexhausted claims will be dismissed. This provision prevents the delays created today by mixed petitions. There will be no need to stay the Federal proceedings and return to State court for another full round of State litigation – instead, all claims either will be considered immediately or dismissed.

It hardly needs mention that current practices makes the current statute's one-year deadline meaningless. If the petitioner can stay all Federal proceedings simply by adding a new, unexhausted claim to his first Federal petition, and have all Federal claims held in abeyance during the time that he exhausts another round of State review and appeals, the one-year limit on commencing Federal proceedings becomes little more than a formality. A petitioner need only file an incomplete petition in order to stop the clock for the length of time that it takes to again exhaust the entire State review procedure.

The Supreme Court partially restricted such stays – while creating new problems – in its recent decision in *Rhines v. Weber*, 125 S.Ct. 1528 (March 30, 2005). *Rhines* holds that it "likely would be an abuse of discretion for a district court to deny a stay and dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 1535. Not only does *Rhines* still allow petitioners to stay Federal proceedings for the entire length of time that it takes to exhaust another round of State appeals; it also creates a test for deciding which claims deserve a stay that inevitably will become its own source of litigation. *See id.* at 1536 (Souter, J., concurring) ("I fear that threshold inquiries into good cause will give the district court too much trouble to be worth the time.").

Section 2 will eliminate these delays and unnecessary litigation, adopting a simple, clear standard for allowing all claims to either go forward in federal court or be dismissed, without the need for additional years of litigation in State court.

Unified Review Standard. Another section of the bill that will streamline and simplify federal habeas procedures is section 7. This section makes the 1996 Antiterrorism and Effective Death Penalty Act applicable to all Federal habeas petitions. In *Lindh v. Murphy*, 521 U.S. 320 (1997), the U.S. Supreme Court decided that some of the changes made by the 1996 Act applied immediately, but others applied only to petitions filed after April 24, 1996. Because of that decision, a dual legal regime applies Federal habeas petitions. Old precedent and old law continue to govern some long-running petitions. Today, the number of petitions still subject to the prior habeas regime is small, but as that regime increasingly becomes a thing of the past, it becomes increasingly unfamiliar to litigants. This section would eliminate the need to apply the pre-1996 regime to any claims still pending today.

I look forward to the testimony from witnesses today regarding Congress's ongoing efforts to improve the federal habeas process.