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June 24, 2010

VIA ELECTRONIC DOCKET

Regulations Docket Clerk
Office of Legal Policy
Department of Justice
950 Pennsylvania Avenue, NW
Room 4234
Washington, DC 20530

RE: OAG Docket No. 1464

To Whom It May Concern:

I am writing to provide you with the views of the Constitution Project regarding the Department of Justice's (DOJ) proposal to remove the final rule to implement certification procedures for States seeking to qualify for the special Federal habeas corpus review procedures in capital cases afforded under chapter 154 of title 28 of the United States Code. *See* Certification Process for State Capital Counsel Systems; Removal of Final Rule, 75 Fed. Reg. 29,217 (May 25, 2010) ("Proposed Rule"); *see also* Certification Process for State Capital Counsel Systems, 73 Fed. Reg. 75,327 (Dec. 11, 2008) ("Final Rule").

The Constitution Project is a nonprofit organization in Washington, D.C., that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. The Constitution Project's Death Penalty Committee ("Committee") was created to address the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death. This bipartisan, blue-ribbon Committee comprises supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. Committee members are united in their profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been revealed to be deeply flawed. They also believe that no one should be denied basic constitutional protections, including, most importantly, competent counsel with appropriate and relevant experience who have adequate resources and are fairly compensated.

The Constitution Project favors the removal of the Final Rule and the undertaking of a new rulemaking process.

As a substantive matter, we believe that the Final Rule should be withdrawn because, among other things, (1) it inappropriately left the specification of any standards and definitions applicable to chapter 154 to the to the discretion of individual states rather than retaining discretion as to those specifications at the federal level; and (2) it failed to take account of federal court interpretations of chapter 154 that, among other things, promised a higher standard for the appointment of counsel than those adopted by the various states. To the extent the states are subject to regulation it should be appropriately strict, especially to assure adequate standards for selection of effective counsel.

In addition, we believe that there were deficiencies in the rulemaking process that led to the Final Rule not being adequate, deficiencies that the DOJ should take into account and avoid as it undertakes the rulemaking process for a new rule. Specifically, as a court that enjoined implementation of the Final Rule found, the DOJ did not give adequate notice of the proposed rulemaking. See *Habeas Corpus Res. Ctr. v. Dep't of Justice*, No. 08-2649, 2009 U.S. Dist. LEXIS 7562, at *17-23 (N.D. Cal. Jan. 20, 2009). Additionally, the original notice of proposed rulemaking (NPRM) issued by the Attorney General on June 6, 2007, was considered by the court and many outside observers to be deficient in that it did not adequately describe the proposed rule's expected effect. Among other deficiencies, the NPRM failed to disclose the Attorney General's view that amendments to the Patriot Act invalidated existing case law construing chapter 154, and the Attorney General's "intention to turn over responsibility for evaluating the adequacy of state-created standards to the very states that created them." *Id.* at *19. In addition, the DOJ did not appropriately supplement the notice in the Federal Register with other forms of notice designed to reach interested groups affected by the rulemaking. Nor did the NPRM provide adequate notice that decisions whether to certify individual states' procedures would be considered adjudications, rather than acts of rulemaking. Finally, the regulation itself was developed by too limited a working group with neither the necessary transparency as to the process nor the opportunity for appropriate public comment from those with diverse viewpoints.

To ensure that no similar deficiencies in process occur as the DOJ formulates a new rule for the certification process for state capital counsel systems, the Constitution Project urges the DOJ to implement a transparent and inclusive rulemaking process once the Final Rule is removed and a new rulemaking process is initiated. To accomplish this, the DOJ it should take the following steps.

First, the DOJ should solicit and record input from a wider range of relevant parties with diverse viewpoints, including state officials, the federal judiciary, and representatives of both prosecution interests and defense interests. This will increase the likelihood that the DOJ will develop a more comprehensive understanding of the issues and interests that impact the effectiveness of a states capital counsel system and allow the DOJ to develop a rule that addresses the practical operations of such systems.

Second, the DOJ's Office of Justice Programs (OJP) should consider undertaking a survey to collect information concerning existing state mechanisms for selecting,

compensating, and evaluating attorneys representing indigent capital defendants and the effectiveness and shortcoming of those systems. Such a survey will identify the components of state systems that best achieve the goals of providing independent, competent, and sufficiently resources counsel for capital defendants. This will allow the DOJ to develop a rule based on data-driven evidence.

Third, the DOJ should consider using a pre-notice period for drafted regulations as a means of obtaining additional information. This will allow the DOJ to solicit additional input from the various affected and interested parties prior to the notice and comment period. The result will be a better-tailored proposed rule and a more constructive notice and comment period.

Finally, the DOJ should supplement the notice in the Federal Register with other forms of notice targeted at interested groups, including state officials, death row inmates, the private bar, prosecution and defense organizations, and the state and federal judiciaries. Many of the parties most affected by any proposed rule might not be aware of such a proposal if notice is limited to the federal register. To achieve the primary goal of the notice requirement embodies in the Administrative Procedures Act, the DOJ should look beyond the Federal Register and employ a more expansive notice procedure than that employed for the original NPRM.

The Constitution Project believes that these suggestions, even if not mandated by law, constitute best practices in rulemaking, and will help ensure that the new rulemaking process will be fair, informed, and open.

We thank you for the opportunity to submit these comments. If you have any questions, please contact me at the address and/or phone number provided.

Sincerely,

Virginia E. Sloan
President
The Constitution Project
1200 18th Street, NW
Suite 1000
Washington, DC 20036
Telephone: 202-580-6920