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The Attorney General's Power of Certification Regarding State Mechanisms to Opt-in to Streamlined Habeas Corpus Procedure

BY: JENNIFER PONDER

After concluding that habeas corpus “has been applied in a crazy-quilt manner with virtually endless appeals that deny justice to victims and defendants alike, making a mockery of the judicial system,”¹ Congress attempted to solve this problem by granting federal courts the power to approve individual state mechanisms designed to improve habeas corpus procedure. These state mechanisms would provide counsel to indigent capital prisoners in post-conviction proceedings in return for creating a faster federal habeas corpus procedure.² However, Congress determined that federal courts were not the appropriate body to certify these state mechanisms³ and instead granted that power to the Attorney General.⁴

This Comment discusses whether Congress correctly granted the power to certify state mechanisms for providing counsel to indigent capital offenders in post-conviction proceedings to the Attorney General. Critics contend that the Attorney General has a conflict of interest in granting state certification,⁵ and that the Certification Process for State Claims is too general and should be revised to include clarification of the specific criteria necessary for state certification.⁶ However, this Comment argues that the Attorney General is the legitimate authority to grant state certification. Furthermore, this Comment proposes several additions to the expected new regulations and addresses necessary concerns the Attorney General must resolve in order to ensure the Certification Process for State Claims is fair and legitimate.

In the 1980s, the Supreme Court recognized that capital habeas corpus proceedings had sunk into a quagmire, with several years passing between sentencing and final resolution of a case.⁷ In response to this considerable problem, Chief Justice Rehnquist formed the Ad Hoc Committee on Federal Habeas

Corpus in Capital Cases (“Powell Committee”) to determine whether it would be appropriate to speed up federal habeas corpus in circumstances where the petitioner had adequate counsel.⁸ The Powell Committee produced a report at the end of its investigation, finding it appropriate to speed up the habeas corpus process in certain circumstances. This report included a statutory proposal, suggesting a state opt-in procedure to streamline habeas corpus proceedings in return for the creation of a state mechanism to protect the indigent defendant.⁹ Eight years after the *Powell Committee Report*, Congress passed the Antiterrorism and Effective Death Penalty Act (“AEDPA”),

which streamlined capital federal habeas corpus claims in instances where a state created a mechanism that provided competent counsel for indigent defendants in post-conviction proceedings.¹⁰ Congress gave federal courts the power to determine whether state mechanisms met these required standards.¹¹

From 1996 to 2005, federal courts only approved one state mechanism under the requirements set forth in the AEDPA.¹² After this period of inaction, Congress removed the certification power from the judiciary and granted it to the Attorney General via the USA Patriot Improvement and Reauthorization Act of 2005.¹³ In December 2008, serving Attorney General Michael B. Mukasey¹⁴ published the final rule, Certification Process for State Capital Counsel Systems. Mukasey’s predecessor, Alberto Gonzalez, wrote the proposed rules, which were eventually incorporated into the final rule.¹⁵ The rule responded to public comments and created the requirements and procedures a state must undergo to achieve certification.¹⁶ Shortly after it went into effect on January 12, 2009, a district court in California granted a preliminary injunction enjoining the Attorney General



from implementing the regulations without at least an additional thirty-day comment period.¹⁷

After the 2008 Presidential election, the new Attorney General, Eric Holder, published a notice of request for comments to remain open from February 5, 2009 to April 6, 2009.¹⁸ After the conclusion of this comment period, the Attorney General did not propose a new final rule or even a new set of proposed requirements for the state mechanisms. In May 2010, the Attorney General proposed a rule to revoke the current Certification Process for State Capital Counsel Systems.¹⁹ The time is now ripe to prove that the Attorney General is the proper body to hold the certification power and to suggest what regulations he should write.

Part I of this Comment briefly discusses English habeas corpus, the history of American habeas corpus cases with a focus on capital punishment, and the myriad problems, which led to the Powell Committee Report. This Part also addresses that Report and the passage of the AEDPA. Part II critiques the provision of the AEDPA that gave the certification power to federal courts, examines the cases during this time, demonstrates why the Judicial Branch is an inappropriate choice to wield the certification power, and explains why Congress transferred the authority to grant certifications to the Attorney General via the Patriot Act.²⁰

Part III analyzes the Certification Process for State Capital Counsel Systems promulgated on December 11, 2009. Part IV asserts that the certification power properly rests with the Attorney General instead of the Judicial Branch. Part V discusses criticisms of the Certification Process for State Capital Counsel Systems and proposes recommendations for the development of revised regulations in order to appease critics, ensure that the states avail themselves of the opt-in process, and most importantly, provide competent counsel for offenders to ensure just results. Finally, Part VI argues that the Attorney General's regulations should be accorded *Chevron* deference so future changes will be accorded proper respect.

I. A BRIEF HISTORY OF HABEAS CORPUS

A. HABEAS CORPUS FROM ENGLAND TO THE 1980s

The writ of habeas corpus, sometimes referred to as the Great Writ,²¹ originated in England²² and was considered the “most celebrated writ of English law.”²³ English courts employed many different writs of habeas corpus for the swift administration of justice.²⁴ The writ of *habeas corpus ad subjiciendum* is most similar to what people think of as habeas corpus today.²⁵ This writ would command the person imprisoning the listed individual to produce him in court, and if the cause of the person's imprisonment was unlawful, then he would be re-

leased.²⁶ English colonists imported the writ of habeas corpus to the New World.²⁷ It was considered so integral to their legal system that the Founding Fathers included it in the Constitution.²⁸ The first Congress created the federal court system and granted the courts the power to issue writs of habeas corpus almost within the same breath, a move that illustrates just how vital the Founding Fathers considered the writ to the legal system.²⁹

Throughout the nineteenth and early twentieth centuries, legislation and judicial interpretation of the law expanded the writ of habeas corpus, as well as Supreme Court jurisdiction, from solely applying to federal law³⁰ to liberally allowing it in all criminal cases.³¹ In recent years, the Supreme Court found that the Constitution invites “a generous construction of the power of the federal courts to dispense with the writ conformably with common-law practice.”³²

B. THE POWELL COMMITTEE REPORT

In June 1988, Chief Justice William Rehnquist created the Powell Committee in response to the growing problems surrounding habeas corpus and the death penalty.³³ The Powell Committee was composed of attorneys with years of experience and expertise in capital cases and administrative law.³⁴ Chief Justice Rehnquist appointed former Supreme Court Justice Lewis F. Powell to chair the Committee.³⁵ Chief Justice Rehnquist also commissioned Chief Justice Roney of the Eleventh Circuit, District Judge Hodges of Florida, and District Judge Sanders of Texas to participate as members due to their familiarity with federal review of capital cases and because their circuits have the largest number of state death row prisoners.³⁶ In addition, Albert M. Pearson, a former defense attorney to capital defendants and professor at the University of Georgia School of Law, served as Reporter for the Committee.³⁷ Finally, William R. Burchill, Jr., General Counsel of the Administrative Office of the U.S. Courts, acted as Secretary.³⁸

Chief Justice Rehnquist charged the Powell Committee with scrutinizing “the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases in which the prisoner had or had been offered counsel.”³⁹ The Powell Committee met six times, assessed comments it received from interested parties and organizations, and published its report in September 1989.⁴⁰ Before reaching any conclusions, the Powell Committee evaluated responses from an assortment of commentators ranging from state and federal prosecutors, legislators, criminal defense attorneys and public defenders, and groups advocating an end to the death penalty.⁴¹ The Powell Committee concluded the “present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation” and created a lack of finality, virtually eliminating any deterrence the death penalty would have upon potential criminals.⁴²

The Powell Committee recognized three serious problems that needed to be rectified.⁴³ First, the Committee identified a great deal of unnecessary delay and repetition in federal habeas appeals cases, which it attributed to a lack of coordination between state and federal courts.⁴⁴ Prisoners had an incentive to draw out the legal proceedings with intermittent and repetitive claims, delaying their deaths for as long as possible.⁴⁵ Second, the Powell Committee reported a serious flaw in the existing system; most indigent capital defendants did not receive counsel for post-conviction proceedings until shortly before their execution date.⁴⁶ This delay often resulted in inefficiency, unfairness, and abrogation of their Constitutional rights.⁴⁷ Third, the Committee noted a flurry of last minute litigation beginning when the execution date was set and found these “eleventh hour petitions” were often meritless, resulting in needless expenditure of judicial resources.⁴⁸ In response to these findings, the Powell Committee drafted a set of statutory procedures to eliminate these problems.⁴⁹

C. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

Congress considered habeas corpus reform long before Chief Justice Rehnquist formed the Powell Committee.⁵⁰ However, despite the Powell Committee Report, the urging of the Chief Justice, and repeated attempts at reform by Senator Arlen Specter,⁵¹ it took a national tragedy to spur Congress to actually reform habeas corpus law.⁵² One year after the Oklahoma City bombing and seven years after the Powell Committee report,⁵³ Congress included habeas reform in the AEDPA.⁵⁴ The AEDPA included a provision focused on special habeas corpus procedures in capital cases.⁵⁵ This quid pro quo approach created an opt-in procedure whereby states could take advantage of faster federal habeas corpus proceedings with a limited scope of review in return for providing competent and adequately compensated attorneys to indigent petitioners in post-conviction proceedings.⁵⁶

The first section sets forth the requirements each state must meet in order to benefit from chapter 154.⁵⁷ It must establish “a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel” for indigent capital habeas corpus petitioners.⁵⁸ The state is required to

specify competency standards for that counsel,⁵⁹ and the counsel must not have represented the prisoner in trial or on direct appeal unless requested by both parties.⁶⁰ In addition, the state must request a court order when appointing counsel if the prisoner is indigent, finding that the prisoner rejected counsel with “an understanding of its legal consequences,” or refusing to appoint counsel because the prisoner is not indigent.⁶¹ Finally, the incompetence or ineffectiveness of this counsel during state or federal post-conviction proceedings shall not be grounds for further relief.⁶² Therefore, it does not matter whether the counsel in a specific trial was incompetent, so long as the state has set competency standards.⁶³

If the state opts in, the prisoner receives an automatic stay of execution unless he fails to file his federal habeas claim within the time limit, waives his right to file a writ of habeas corpus, or fails to “make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.”⁶⁴ Once the state has provided the appropriate mechanism, any application for habeas corpus relief must be filed within 180 days of the highest state court affirming the conviction and sentence on direct review.⁶⁵ The federal courts can only review claims that have been raised and addressed on the merits in state courts, unless the claim was not raised properly.⁶⁶

Congress severely limited the amount of time the federal courts had to evaluate these applications and motions for habeas corpus when compared with the previously nonexistent constraints.⁶⁷ A district court considering a habeas motion must enter a final judgment within 180 days after the application is submitted⁶⁸ and must give the parties at least 120 days to complete all actions before the case is submitted for a decision.⁶⁹ These limitations apply to the initial application for a writ of habeas corpus, any successive applications, and any redeterminations of an application if the decision is remanded.⁷⁰ A court of appeals that hears an appeal from a decision on a writ of habeas corpus shall file a decision no later than 120 days after the final brief is submitted.⁷¹ Congress also ensured that a petitioner could not use this appeal process solely to stave off his execution.⁷²

Therefore, it does not matter whether the counsel in a specific trial was incompetent, so long as the state has set competency standards.

II. CRITIQUING THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

A. JUDICIAL APPROVAL OF STATE OPT-IN MECHANISMS

During the nine years federal courts held the power to certify state mechanisms, Arizona was the only state to receive approval.⁷³ The Ninth Circuit Court of Appeals combined other federal court standards in order to test Arizona's appointment mechanism.⁷⁴ The Ninth Circuit found that Arizona's system for appointing post-conviction attorneys provided mandatory and binding competency standards, had a statute explicitly setting compensation for court-appointed lawyers, and provided for the payment of reasonable litigation expenses.⁷⁵ However, the court created what it considered to be a logical extension of the criteria that a state must implement to opt-in; not only must a state fulfill the stipulations of chapter 154, but it must also follow the requirements of its mechanism.⁷⁶ Because Arizona did not meet its timeliness standard, it could not avail itself of the benefits of chapter 154.⁷⁷

California's sole attempt at certification failed when the district court held its standards for competent counsel insufficient.⁷⁸ The district court found California's competency standards to be recommendations that did not require the Supreme Court to appoint competent counsel.⁷⁹ In addition, the district court determined that counsel must have post-conviction experience in order to be found competent – a requirement California's mechanism lacked.⁸⁰

Virginia's opt-in mechanism failed on several counts.⁸¹ The district court found Virginia's mechanism insufficient because its statute did not compel the appointment of counsel and made no mention of compensation for the appointed counsel.⁸² Nor did Virginia establish competency standards for the post-conviction counsel.⁸³

B. THE USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005

Members of Congress grew frustrated with the federal courts refusal to approve even a single state's opt-in mechanism.⁸⁴ Representative Jeff Flake proposed an amendment to remove the power to certify state mechanisms from the federal courts and grant it to the Attorney General in order to "give [s]tates a real incentive to provide quality counsel to death row prisoners in [s]tate habeas proceedings."⁸⁵ Representative Flake argued that because the states would be bound by the requirements of chapter 154, especially those relating to time limitations, the federal courts had a conflict of interest in approving state mechanisms.⁸⁶ In addition, he implied that some federal

judges refused to approve state mechanisms because of their personal animosity toward the death penalty.⁸⁷

Due to the federal courts refusal to approve mechanisms, the original habeas problems persisted throughout the nine years between the passage of the AEDPA and the Patriot Act.⁸⁸ Over a four-year span,⁸⁹ the number of state capital habeas corpus claims pending in federal district courts increased from 446 to 721 and the percentage of those cases pending for more than three years grew from 20.2 percent to 46.2 percent.⁹⁰

Ultimately, Congress determined that its decision to give federal courts the power to approve state mechanisms was a mistake,⁹¹ and it included an amendment within the Patriot Act to correct it.⁹² The most important change this amendment made was granting the Attorney General the power to certify that a state had established a mechanism providing counsel to indigent prisoners in post-conviction proceedings.⁹³ Although Congress assigned the Attorney General the task of writing regulations to implement the certification procedure,⁹⁴ it explicitly limited the Attorney General's power to create certification requirements.⁹⁵

In addition, Congress provided that the Attorney General's certification decision be subject to *de novo* review by the Court of Appeals for the District of Columbia Circuit.⁹⁶ Congress also shifted the chapter 154 requirements to section 2265, eliminating the unitary review procedure.⁹⁷ In effect, Congress virtually eliminated two of the state mechanism criteria: reasonable compensation and actual compliance.⁹⁸

III. THE ATTORNEY GENERAL IS THE APPROPRIATE AUTHORITY TO WIELD THE CERTIFICATION POWER

Congress properly reallocated the power to approve state mechanisms from the federal courts to the Attorney General. The Attorney General is the more suitable choice for this task because he does not benefit if a state mechanism is not approved. He is a single authority, so his decisions will promote consistency between state mechanisms. Further, the states are more likely to apply for certification, thereby securing indigent capital prisoners competent counsel and preventing them from living in a state of uncertainty with their lives hanging in the balance.

First, unlike the federal courts, the Attorney General does not have a vested interest in the outcome of a certification decision.⁹⁹ This new power affects only him by adding to his workload. On the other hand, the federal courts have a great deal invested in the approval of state mechanisms; if a state can receive the benefits of chapter 154, then the courts must dramatically increase the speed at which they evaluate state prisoners' federal habeas corpus claims.¹⁰⁰ Furthermore, the courts have to reorder their dockets to shift habeas claims to the forefront, as

well as make and write these decisions with uncommon speed.¹⁰¹ The Attorney General is more familiar with the realities of the state court system than the federal courts, which “have little responsibility because they are so far removed in time and space from the circumstances of the crime and the subtleties of the state proceedings. Accordingly, they have small motive to act expeditiously or efficiently”¹⁰²

Second, the Attorney General is a better authority to grant certification simply by virtue of being a single unit. When the courts held the certification power, federal habeas corpus proceedings took longer to litigate than before the AEDPA was passed.¹⁰³ When states must go to different courts and circuits for approval, it is quite possible, if not probable, that state mechanisms that were approved in one circuit would not be approved in another. The likelihood of a circuit split would create confusion among state officials and defendants alike, and the split would not only prolong federal habeas corpus while the Supreme Court addresses the issue, but it would also flout the purposes of federal habeas reform: to reduce delay, eliminate repetitive litigation,¹⁰⁴ and ensure finality.¹⁰⁵ Additionally, judicial approval of state mechanisms would vary not only between circuits but among district courts within the same state.¹⁰⁶

Third, states are more likely to create mechanisms that appoint counsel to indigent prisoners in post-conviction proceedings now that the Attorney General has the power to certify these mechanisms. When that power resided with the federal courts, of the thirty-eight death penalty states only one state’s mechanisms was approved,¹⁰⁷ and that state was still not allowed to take advantage of the benefits of chapter 154.¹⁰⁸ Congress members purposely shifted the certification responsibility to the Attorney General so states would have an incentive to provide counsel to indigent prisoners.¹⁰⁹ Some critics argue that the states have little motivation to opt-in to these benefits, regardless of who wields the certification power.¹¹⁰ However, the fact that states have generally retained their mechanisms, appointing counsel for post-conviction proceedings even though the courts refused to grant them the benefits of chapter 154,¹¹¹ suggests that if the likelihood of certification were to increase, states would continue to opt-in to speedier federal habeas corpus.

IV. THE CURRENT RULES REGULATING THE CERTIFICATION PROCESS

Two years after Congress passed the Patriot Act, Attorney General Michael Mukasey entered a final rule into the Federal Register, creating regulations for the certification process of state mechanisms to appoint counsel.¹¹² However, the Attorney

General responded to most of the critical comments by stating that the many ideas proposed “cannot be incorporated into the rule, because to do so would conflict with the statutory provision that there are no certification requirements beyond those that chapter 154 expressly states.”¹¹³

The Attorney General asserted that the dual objectives of chapter 154 are to improve “the representation of capital defendants in state post conviction proceedings” and reduce “unnecessarily protracted proceedings in federal habeas corpus review of state capital cases.”¹¹⁴ The Attorney General outlined the purpose of these regulations, essentially summarizing Congress’s delegation of the certification power to the Attorney General.¹¹⁵ Although many expected the Attorney General to clarify the new terms set forth in section 2265,¹¹⁶ he only defined two terms: “appropriate state official” and “state postconviction proceedings.”¹¹⁷

The following section explains the requirements a state must meet in order to earn the benefits of chapter 154.¹¹⁸ These criteria are almost exactly the same as listed in sections 2262(c) and (d) and 2265.¹¹⁹ The Attorney General then proffers a series of examples demonstrating how a state could meet or fall short of the certification requirements.¹²⁰ For instance, Example 2 illustrates an acceptable mechanism for the appointment of counsel: “[a] state provides that in any capital case in which a defendant is found to be indigent, the court shall appoint counsel for state postconviction proceedings from a list of attorneys available to represent defendants in a manner consistent with 28 U.S.C. 2261(c) and (d).”¹²¹

The last section describes the certification process in detail.¹²² An appropriate state official must ask for certification in a request that includes an attestation that the official is the “‘appropriate state official’ as defined in [section] 26.21” and an attestation stating that the state has notified the justice or judge of the state’s highest court of its request for certification.¹²³ Once the Attorney General has received the request for certification, he must publish a notice in the Federal Register to that effect, list the “statutes, regulations, rules, policies, and other authorities” the state is using in its mechanism, and ask for public comments on the request.¹²⁴ The Attorney General must review the state’s application, request additional information from the state, inform it of any problems that need to be resolved, and consider the public comments.¹²⁵ If the Attorney General approves a state’s efforts, he must publish the certification in the Federal Register along with the date the state mechanism went into effect.¹²⁶ Once the Attorney General has approved a state’s mechanism, that certification is final and will not be reconsidered or revoked.¹²⁷

V. CRITICISMS OF THE CURRENT REGULATIONS AND RECOMMENDATIONS FOR THE FUTURE

A. CRITICISMS OF THE CERTIFICATION PROCESS FOR STATE CAPITAL COUNSEL SYSTEMS

Critics have vehemently responded to the current regulations on certification of state mechanisms to appoint counsel for indigent capital prisoners¹²⁸ most likely because they fear that states will obtain the benefits of chapter 154 without fulfilling their obligations to provide competent counsel to indigent defendants.¹²⁹ One author categorized criticisms into eight groups.¹³⁰ The three most important criticisms of the final rule are: (1) the Attorney General did not define ambiguous terms and standards;¹³¹ (2) states can potentially renege on promises to provide benefits to indigent prisoners since a decertification method was not created;¹³² and (3) the Attorney General may be biased in favor of prosecutorial interests and will therefore approve inadequate mechanisms that do not sufficiently protect defendants.¹³³

It appears that the greatest concern is the Attorney General's refusal to clarify important terms and standards found in chapter 154.¹³⁴ In a comment upon the proposed rule, the Judicial Conference of the United States urged the Attorney General to define the following terms: "standards of competency," "competent counsel," "compensation of appointed counsel," and "reasonable litigation expenses."¹³⁵ Critics found these "fatally vague" terms¹³⁶ troubling because states could be granted certification even though the counsel provided is insufficient to meet the requirements of chapter 154.¹³⁷ This could create potentially inconsistent and arbitrary decisions,¹³⁸ and "inject even more confusion into the certification process."¹³⁹

Some critics want the Attorney General to "provide for ongoing monitoring or oversight of the post-conviction capital counsel systems of" states that have received certifications and decertify states if they no longer meet the necessary requirements.¹⁴⁰ Critics argue that the lack of supervision or ability to withdraw certification makes it possible for states to reap the benefits of chapter 154 without actually funding or administering the mandatory mechanism.¹⁴¹ The public comments expressed a fear, and in one case, a certainty, that the Attorney General would have a conflict of interest in favor of certifying state mechanisms.¹⁴² Critics drew attention to the fact that the

Attorney General is a prosecutor and therefore would be unable to separate this role from his task to certify state mechanisms.¹⁴³

B. RECOMMENDATIONS FOR FUTURE REGULATIONS

Within the last year, the Attorney General proposed removing the existing rules regulating the certification process for state capital counsel systems.¹⁴⁴ However, these regulations must be rewritten due to Congress's charge to the Attorney General in the Patriot Act.¹⁴⁵ The Attorney General must address the above criticisms thoughtfully to assure both actual fairness and the appearance of it.

First, the Attorney General should clarify or provide more examples of vital terms found in chapter 154, namely "mechanism," "standards of competency," "competent counsel," "reasonable compensation," and "reasonable litigation expenses." The Attorney General should focus a great amount of time and effort on the term "mechanism" to specify whether the mechanism must be mandatory, whether it can be promulgated by the

state's legislature or court system, and to establish who will enforce the mechanism. Second, the Attorney General must create some means to monitor and decertify states that are not maintaining and enforcing their post-conviction counsel mechanisms. Unfortunately, the critics fear that states will not follow through with their guarantees to indigent defendants is a real possibility, even if the failure is unintentional.

Third, the Attorney General must acknowledge the potential for bias within the final rule and establish strong ethical standards to adhere to in order to ensure that his decisions are impartial. Otherwise, he will give credence to claims of bias due to the nature of his role as a prosecutor. Finally, the Attorney General should include an explanation of his decision to either grant or deny state certification so that the state can improve its mechanisms and other states can benefit from understanding the Attorney General's reasoning.

However, these regulations must be rewritten due to Congress's charge to the Attorney General in the Patriot Act.

VI. THE ATTORNEY GENERAL, CHEVRON DEFERENCE & CONCLUSION

A. CHEVRON, U.S.A. v. NATURAL RESOURCES DEFENSE COUNCIL

Due to prior criticism of a system enabling speedier habeas corpus and the idea of giving the power of certification to the Attorney General, it is almost guaranteed that the new

regulations will be challenged in court. The traditional test to determine how much deference an agency regulation deserves can be found in *Chevron, U.S.A. v. Natural Resources Defense Council*.¹⁴⁶ In *Chevron*, the Supreme Court considered whether an agency had the power to interpret a term found in a statute which delegated to that agency the authority to enforce that statute.¹⁴⁷ The Court created a two-part test that courts must use to evaluate an agency's interpretation of the statute it is enforcing.¹⁴⁸ First, a court must determine whether Congress has already answered the question at issue.¹⁴⁹ However, if the statute does not address the issue or is ambiguous, the court must rule upon whether the agency's interpretation "is based upon a permissible construction of the statute."¹⁵⁰ A court cannot simply enforce its own interpretation of the statute; it must look to Congressional intent.¹⁵¹

If Congress purposely left room for agency interpretation, then the court shall view it as "an express delegation of authority to the agency," and the court cannot replace its own construction for a "reasonable interpretation made by the administrator of an agency."¹⁵² At this point in its analysis, the court must ask whether the administrator's interpretation of the statute is reasonable in the context of the program it is implementing.¹⁵³ If an "agency construction of a statutory provision [is] fairly conceptualized, [then the challenge] centers on the wisdom of the agency's policy."¹⁵⁴ In analyzing an agency's policy, the question becomes a political issue instead of a judicial task.¹⁵⁵ Because this is an issue of administrative and interpretive policy, the determination belongs with a political body, and the Court has found that the Attorney General is politically accountable for his actions.¹⁵⁶ In *Christensen v. Harris County*,¹⁵⁷ the Supreme Court clarified what types of agency decisions deserve *Chevron* deference. The Court found that "notice-and-comment rulemaking" and the agency interpretation found in the regulation deserve *Chevron* deference.¹⁵⁸

B. THE ATTORNEY GENERAL'S REGULATIONS SHOULD BE ACCORDED CHEVRON DEFERENCE

Before *Chevron* deference can be applied to the Attorney General's regulations, the Attorney General must qualify as an agency.¹⁵⁹ The Attorney General is the head of the Department of Justice. Within the part of the United States Code that describes the organization of agencies, the Department of Justice is listed as an executive department,¹⁶⁰ which in turn, fulfills the definition of "executive agency."¹⁶¹ Therefore, the Attorney General is part of an agency. In addition, the portion covering administrative procedure defines agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."¹⁶² The Attorney General falls within this broad definition and is not excluded by further clarification within the statute.¹⁶³ Therefore, the Attor-

ney General, himself and as part of the Department of Justice, is an agency.

The Supreme Court essentially ruled that *Chevron* deference is only applicable to formal rulemaking.¹⁶⁴ In *Chevron*, it analyzed an agency interpretation derived from the establishment of a formal rule but did not mention other agency constructions of statutes.¹⁶⁵ Later, in *Christensen v. Harris County*, the Supreme Court determined that only agency regulations deserve *Chevron* deference.¹⁶⁶ In the only case to address the regulation made by the Attorney General, the United States District Court for the Northern District of California reviewed the rulemaking process behind these habeas corpus regulations and determined the process was formal.¹⁶⁷ Furthermore, the Department of Justice complied with and did not protest the court's ruling,¹⁶⁸ thereby acknowledging that the rulemaking process was formal.

However, even if the rulemaking process were informal, the Attorney General's regulations would receive *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority."¹⁶⁹ The Patriot Act clearly delegated power to the Attorney General,¹⁷⁰ and he made the regulations using this power.¹⁷¹ Therefore, regardless of whether the regulations were created by a formal or informal rulemaking process, they deserve *Chevron* deference.

C. CONCLUSION

Now that Congress has granted the Attorney General the power to certify state mechanisms that provide counsel to indigent capital defendants in post-conviction proceedings, these prisoners will be assured a better chance at fair results, and the federal courts will no longer be bogged down by federal habeas proceedings. These benefits are the perfect illustration of why the Attorney General is the appropriate body to certify these state mechanisms and the recommendations contained within this article would move states toward the creation of fair systems of indigent capital defense.

¹ 141 CONG. REC. S4590-96 (daily ed. Mar. 24, 1995) (statement of Sen. Specter).

² Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2261-2265, 2261(c)(1) (1996) [hereinafter *AEDPA*], proscribing special habeas corpus procedures in capital cases when a prisoner is in state custody and describing how the procedure includes "appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer".

³ 152 CONG. REC. S1620-28 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl) (focusing on how section 507 expands and improves the expedited habeas corpus procedures authorized under chapter 154).

- ⁴ USA Patriot Improvement and Reauthorization Act of 2005, 28 U.S.C. § 2261(b) (2006) [hereinafter *Patriot Act*] (stating that “the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in post-conviction proceedings”).
- ⁵ See Certification Process for State Capital Counsel Systems, 73 Fed. Reg. 75,327, 75,328 (Dec. 11, 2008) (to be codified at 28 C.F.R. pt. 26) (stating that three senators were of the opinion that the proposed rule would permit the “potential structural bias” of the Attorney General in favor of certification to override the requirements of the law); see also Casey C. Kannenberg, *Wading Through the Morass of Modern Federal Habeas Review of State Capital Prisoners’ Claims*, 28 QUINNIPIAC L. REV. 107, 157 (2009) (citing possible bias and political influence in addition to conflict of interest as “inhibiting the ability of the Attorney General to fairly and impartially implement the certification process”).
- ⁶ Certification Process for State Capital Counsel Systems, 73 Fed. Reg. at 75,330-32; see also Kannenberg, *supra* note 5, at 156 (explaining that tens of thousands of commentators provided reactions to the proposed legislation, which centered on the need for clarification of both the substance and the implementation of the rule).
- ⁷ 135 CONG. REC. S24,694-98 (daily ed. Oct. 16, 1989) (Report of the Powell Committee’s findings provided to Congress by Chief Justice Rehnquist).
- ⁸ See *id.* at S24,694 (asserting that much of the problem is caused by lack of competent counsel until shortly before execution leading to a drain on judicial resources).
- ⁹ See *id.* (including a statutory proposal outlining a quid pro quo arrangement between the states and the federal justice system).
- ¹⁰ AEDPA, 28 U.S.C. §§ 2261-2266.
- ¹¹ *Id.* § 2261.
- ¹² See *Spears v. Stewart*, 267 F.3d 1026, 1041-42 (9th Cir. 2001) (approving Arizona’s mechanism as meeting the required standards, but rejecting the state’s claim to the benefits of the streamlined process because the appointment of counsel did not comply with the timeliness requirement of the mechanism).
- ¹³ Patriot Act, 28 U.S.C. §§ 2261, 2265 (2006) (“If requested by an appropriate State official, the Attorney General of the United States shall determine— (A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death; (B) the date on which the mechanism described in subparagraph (A) was established; and (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).”).
- ¹⁴ Certification Process for State Capital Counsel Systems, 73 Fed. Reg. 75,327, 75,339 (Dec. 11, 2008) (to be codified at 28 C.F.R. pt. 26).
- ¹⁵ Certification Process for State Capital Counsel Systems, 72 Fed. Reg. 31,217-02, 31,220 (Jun. 6, 2007) (to be codified at 28 C.F.R. pt. 26).
- ¹⁶ Certification Process for State Capital Counsel Systems, 73 Fed. Reg. at 75,327-01.
- ¹⁷ *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, No. C 08-2649 CW, 2009 WL 185423, at *10 (N.D. Cal. Jan. 20, 2009); *id.*
- ¹⁸ Certification Process for State Capital Counsel Systems, 74 Fed. Reg. 6131 (Feb. 5, 2009) (to be codified at 28 C.F.R. pt. 26).
- ¹⁹ Certification Process for State Capital Counsel Systems; Removal of Final Rule, 75 Fed. Reg. 29,217 (proposed May 25, 2010) (to be codified at 28 C.F.R. pt. 28).
- ²⁰ See generally Patriot Act, 28 U.S.C. §§ 2261, 2265 (2006).
- ²¹ See *Fay v. Noia*, 372 U.S. 391, 399-400 (1963) (calling habeas corpus the “Great Writ” of Anglo-American jurisprudence).
- ²² 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (Univ. of Chicago Press 1979) (1765) (“[I]f any person be restrained of his liberty by order of decree or any illegal court . . . he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king’s bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as justice shall appertain.”).
- ²³ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (Univ. of Chicago Press 1979) (1768).
- ²⁴ See generally *id.* at 130-31 (explaining the different writs of habeas corpus, such as *habeas corpus ad respondendum*, *ad satisfaciendum*, *ad prosequendum*, *ad testificandum*, *ad deliberandum*, and common writ *ad faciendum et recipiendum*, which is “when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court”).
- ²⁵ See *Fay*, 372 U.S. at 399-400 (addressing habeas corpus as *habeas corpus ad subjiciendum*, which was used to question the lawfulness of the detention or imprisonment of another in custody).
- ²⁶ 3 BLACKSTONE, *supra* note 23, at 131.
- ²⁷ CHARLES S. DOYLE, CONG. RESEARCH SERV., R41011, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 3 (2006).
- ²⁸ See U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.”); see also *Fay*, 372 U.S. 391, 405 (stating that when the Suspension Clause was written, common-law authority demonstrated that citizens could turn to habeas corpus to protect their fundamental liberties from the government).
- ²⁹ See An Act to Establish the Judicial Courts of the United States, ch. 20, §§ 1-3, 14, 1 Stat. 73, 73-74, 81 (1789) (granting the Supreme Court Justices and federal judges the power to grant writs of habeas corpus to determine the reason for their imprisonment, however they would not extend to non-federal prisoners).
- ³⁰ See *Ex parte Dorr*, 44 U.S. (1 How.) 103, 105 (1845) (asserting that the Supreme Court could use the writ only to summon state prisoners as witnesses).
- ³¹ See *Frank v. Mangum*, 237 U.S. 309, 331 (1915) (stating that Congress recognized the need to protect the freedoms of American citizens against Constitutional violations by the state and federal governments); see also *Fay*, 372 U.S. at 412-13 (finding that the increase in the Supreme Court’s ability to review habeas cases stemmed from its opportunity to review state criminal judgments).
- ³² *Fay*, 372 U.S. at 406.
- ³³ 135 CONG. REC. S24,694.
- ³⁴ *Id.*
- ³⁵ *Id.*; see also Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES, Aug. 26, 1998, <http://www.nytimes.com/1998/08/26/us/lewis-powell-crucial-centrist-justice-dies-at-90.html> (discussing Justice Powell’s changed stance on the death penalty from voting to uphold the death penalty earlier in his career to advocating for its abolishment post-retirement). Powell voted with the conservatives in support of the death penalty while on the court but later encouraged its eradication, not for moral or legal reasons, but because lingering doubts in the validity of the sentence would tarnish the judicial system. *Id.*
- ³⁶ 135 CONG. REC. S24,694.
- ³⁷ *Id.*
- ³⁸ *Id.*
- ³⁹ *Id.* (quoting Chief Justice Rehnquist).
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² 135 CONG. REC. S24,694.
- ⁴³ *Id.* at S24,694-95 (listing sections on erroneous delay and repetition, the need for representation, and last minute court proceedings).
- ⁴⁴ See *id.* at S24,694 (stating that prisoners would frequently move between the federal and state courts in an attempt to exhaust state remedies).
- ⁴⁵ *Id.*

⁴⁶ *Id.* at S24,695 (suggesting that justice may be ill-served when petitions are filed solely because of a pending execution).

⁴⁷ 135 CONG. REC. S24,695.

⁴⁸ *Id.*

⁴⁹ *See id.* at 24,695-98 (creating an opt-in system where states can avail themselves of faster federal habeas corpus in return for providing counsel for indigent defendants).

⁵⁰ *Compare* 141 CONG. REC. S4591 (attesting that the Senate passed habeas reform in 1984), *with* 135 CONG. REC. S24,694 (stating the Powell Committee was formed in June of 1988).

⁵¹ *See* 141 CONG. REC. S4591 (asserting that Senator Specter tried to pass reform in the 100th through the 103rd Congresses).

⁵² Jake Sussman, Note, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 345-47 (2001) (stating that Congress finally responded to criticisms of federal habeas corpus after the Oklahoma City Bombing "by sharply curtailing the availability of the writ in several ways, including establishing a strict one-year limitations period for filing habeas corpus petitions").

⁵³ *See* Christopher S. Wren, *McVeigh is Executed for Oklahoma City Bombing*, N.Y. TIMES, Jun. 11, 2001, <http://www.nytimes.com/2001/06/11/national/11CND-EXECUTE.html> (describing that Timothy McVeigh detonated a bomb that destroyed a federal building in Oklahoma City on April 19, 1995); *see also* 141 CONG. REC. S7479-83 (daily ed. May 25, 1995) (statement of Sen. Hatch); *see also* 141 CONG. REC. S7660-63 (daily ed. Jun. 5, 1995) (statement of Sen. Feinstein) (showing how Congress members used the publicity from the Oklahoma City Bombing to argue in favor of habeas corpus reform).

⁵⁴ AEDPA, Pub. L. No. 104-132, 110 Stat. 1214, 1221-26 (1996).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See* AEDPA, 28 U.S.C. §§ 2261, 2263 (establishing standards for relief in capital cases with a limitation period of six months).

⁵⁸ § 2261(b).

⁵⁹ *Id.*

⁶⁰ *Id.* § 2261(d).

⁶¹ *Id.* § 2261(c)(1)-(3).

⁶² *Id.* § 2261(e).

⁶³ *See id.* ("The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254.").

⁶⁴ *Id.* § 2262.

⁶⁵ *Id.* § 2263(a)-(b) (stating that the timing requirements shall be tolled from the date a petition of certiorari is filed in the Supreme Court until the date of its disposition, from the date the first petition for post-conviction review is filed, or during an additional period of up to thirty days if an extension is requested containing good cause).

⁶⁶ AEDPA § 2264(a)(1)-(3) (declaring that federal courts can consider additional claims if "the failure to raise the claim[s] properly [are]—(1) the result of State action in violation of the Constitution or laws of the United States; (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review").

⁶⁷ *Id.* § 2266.

⁶⁸ *Id.* §§ 2263(a), 2266(b)(1)(A), 2266(b)(1)(C)(i) (stating that a court may delay its decision for one thirty-day period if it issues a written order finding that the nation's interest in justice outweighs the public's and the petitioner's interest in a speedy resolution of the application).

⁶⁹ *Id.* § 2266(b)(1)(B).

⁷⁰ *Id.* § 2266(b)(2).

⁷¹ *Id.* § 2266(c)(1)(A).

⁷² AEDPA § 2266(b)(3)-(4).

⁷³ *See* *Spears v. Stewart*, 267 F.3d 1026, 1029 (9th Cir. 2001) (holding that Arizona's mechanism met the requirements of chapter 154, but the state was not entitled to the benefits because Arizona did not comply with its timeliness requirement).

⁷⁴ *See id.* at 1035 (quoting the *Ashmus* requirement that state standards for attorney competency must be binding and mandatory).

⁷⁵ *Id.* at 1037-38.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Ashmus v. Calderon*, 935 F. Supp. 1048, 1073 (N.D. Cal. 1997), *rev'd*, 523 U.S. 740 (1998) (finding that although the case was reversed on standing grounds, the district court's holding regarding California's opt-in mechanisms remained untouched).

⁷⁹ *Id.* at 1072-74.

⁸⁰ *Id.*

⁸¹ *See* *Satcher v. Netherland*, 944 F. Supp. 1222, 1245 (E.D. Va. 1996) (approving Virginia's opt-in mechanism a few days prior to *Wright v. Angelone* but rejecting it because "Virginia's mechanism for the appointment of post-conviction counsel fails to meet three out of the four 'opt-in' requirements under the Act"); *see also* *Wright v. Angelone*, 944 F. Supp. 460, 464 (E.D. Va. 1996) (holding that Virginia did not have a mechanism for appointment, compensation, or reimbursement of counsel).

⁸² *Wright*, 944 F. Supp. at 465 (recognizing the inadequacy of the Virginia law because it did not have any mechanism requiring the payment of counsel or reasonable litigation expenses).

⁸³ *Id.* at 465-66.

⁸⁴ *See* 151 CONG. REC. E2639-40 (daily ed. Dec. 22, 2005) (statement of Rep. Flake) (discussing how the Ninth Circuit mistreated his home state of Arizona by denying the state's petition to receive the benefits of chapter 154).

⁸⁵ *Id.*

⁸⁶ *Id.* at E2640.

⁸⁷ *Id.*

⁸⁸ 152 CONG. REC. S1620.

⁸⁹ The data was taken from 1998 to 2002. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at S1624.

⁹² Patriot Act, 28 U.S.C. § 2261 (2006).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* (providing that "[t]here are no requirements for certification or application of this chapter other than those expressly stated in this chapter").

⁹⁶ AEDPA, 28 U.S.C. § 2265(c).

⁹⁷ *Id.*

⁹⁸ *Kannenberg*, *supra* note 5, at 152-53 (2009) (citing 152 CONG. REC. S1620-28, 1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl)) (commenting that the "[p]aragraph (a)(3) of new section 2365 forbids the creation of additional requirements not expressly stated in the chapter, as was done in the *Spears* case").

⁹⁹ *See* 151 CONG. REC. E2640 (stating "the Attorney General receives no benefits from chapter 154"). *But see* Lawrence J. Fox, *Comments of Legal Ethics Professors and Professional Responsibility Lawyers on the Office of Justice Programs Docket No. 1464, Certification Process for State Capital Counsel Systems*, Aug. 2, 2007, available at <http://capitaldefense-weekly.com/library/optin/DOJ-2007-0110-0042.1.pdf> (asserting that the Attorney General has substantial interest involving issues regarding the competency of defense counsel).

¹⁰⁰ See 28 U.S.C. § 2263; see also 151 CONG. REC. E2640 (arguing that the problem with chapter 154 is that it binds the same courts who decided its applicability); see also Letter from James C. Duff, Sec’y, Judicial Conference of the U.S., to Kim Ball Norris, Senior Policy Advisor for Adjudication, U.S. Dep’t of Justice (Aug. 1, 2007), available at <http://capitaldefenseweekly.com/library/optin/DOJ-2007-0110-0040judconf.pdf> (referring to the Powell Committee report, which addressed the issue of reducing the time and resources required by federal capital habeas litigation by recommending giving states expedited review of state death sentences in federal court if they first established a system for providing “competent counsel for inmates on state collateral review”).

¹⁰¹ 151 CONG. REC. E2640; see also Letter from James C. Duff to Kim Ball Norris, *supra* note 100, at 2 (stating that federal courts would have to rearrange both civil and criminal dockets); 152 CONG. REC. S1606 (pointing out that the same courts who would be bound to and suffer the detriment of the deadlines were also deciding whether to grant the benefits of those deadlines).

¹⁰² *Terrorist Death Penalty Enhancement Act of 2005, and the Streamlined Procedures Act of 2005: Hearing on H.R. 3060 and H.R. 3035 Before the H. Comm. on the Judiciary*, 109th Cong. 90 (2005) (statement of Ron Eisenberg, Deputy District Attorney of Philadelphia, Pennsylvania).

¹⁰³ See Jon B. Gould, *Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus*, 29 JUST. SYS. J. 273, 278 (2008) (describing two empirical studies conducted in 2007, wherein one study concerned the processing of capital cases in California, and the second study examined federal habeas corpus processing nationwide and the handling of these cases in the thirteen circuits, attesting to the fact that habeas-corpus cases took longer to litigate than they did at the time the AEDPA was passed).

¹⁰⁴ Once the Supreme Court selected one Circuit’s interpretation over another, defendants in the losing circuit would inevitably challenge the rulings they received, forcing their cases to be reassessed all over again.

¹⁰⁵ See 135 CONG. REC. S24,684-87 (asserting delay and lack of finality as the impetus behind the creation of the Powell Committee and finding that repetition is one of the major causes of delay).

¹⁰⁶ See, e.g., *Spears v. Stewart*, 267 F.3d 1026, 1041-42 (9th Cir. 2001) (explaining that while “Arizona had established a mechanism for the timely appointment and compensation of post-conviction counsel in all capital cases, which facially complied with Chapter 154 of AEDPA . . . the appointment of counsel for Petitioner did not comply substantially with the timeliness requirement of that mechanism [and] Arizona is not entitled to benefit from the expedited procedures in this case”).

¹⁰⁷ *Id.* at 276.

¹⁰⁸ *Spears*, 267 F.3d at 1041-42 (approving Arizona’s mechanism as meeting the required standards, yet rejecting the state’s claim to the benefits of the streamlined process).

¹⁰⁹ See 151 CONG. REC. E2640 (statement of Rep. Flake) (“My amendment is designed to give States a real incentive to provide quality counsel to death row prisoners in State habeas proceedings.”).

¹¹⁰ See Jordan M. Steiker, *Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform Within States*, 34 AM. J. CRIM. L. 293, 301-03 (2007) (arguing that the incentives offered in chapter 154 are insufficient to entice states to overlook the hassles of creating the necessary mechanism because high-executing states already implemented some form of the opt-in, while low-executing states often are not pushing for an expedited death penalty process).

¹¹¹ Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 16 (2002) (listing the thirty states who have tried to opt-in and failed but noting that they still maintained their post-conviction counsel law on the books).

¹¹² Certification Process for State Capital Counsel Systems, 73 Fed. Reg. at 75,327.

¹¹³ *Id.* at 75,328.

¹¹⁴ *Id.* at 75,330.

¹¹⁵ Death Sentences Procedures, 28 C.F.R. § 26.2 (2009).

¹¹⁶ See Kannenberg, *supra* note 5, at 153-54 (explaining the need for clarification of the terms used in section 2265 given that litigation over states’ opt-in mechanisms reflected a lack of understanding of the key terms).

¹¹⁷ 28 C.F.R. § 26.21 (defining the two terms “appropriate state official” and “state postconviction proceedings”). Appropriate state official refers to the state’s Attorney General or the Chief Executive responsible for dealing with federal habeas corpus litigation. State post-conviction proceedings means “collateral proceedings in state court, regardless of whether the state conducts such proceeding after or concurrently with direct state review.” *Id.*

¹¹⁸ 28 C.F.R. § 26.22 (outlining the four requirements a state must meet in order to earn benefits of chapter 154; a) establishing a mechanism for the appointment of counsel for indigent prisoners under sentence of death in state post-conviction proceedings; b) establishing a mechanism for compensation of appointed counsel; c) establishing a mechanism for payment of reasonable litigation expenses of appointed counsel; and d) establishing a mechanism for providing competency standards for the appointment of counsel).

¹¹⁹ See Kannenberg, *supra* note 5, at 154 (explaining that the proposed section 26.22 “sets out verbatim, the requirements stated in sections 2261 (c) and (d), and 2265 . . .”). Compare 28 U.S.C. § 2261 (c)-(d), 2265 (Any mechanism used to appoint, compensate, and reimburse counsel must offer counsel to all State prisoners under capital sentence, and provide for the entry of order by a court of record after finding that the prisoner is indigent. In addition, ensure that no counsel will have previously represented the client at trial in the case unless both client and counsel expressly request “continued representation”), with 28 C.F.R. § 26.22 (stating that a state must provide for the appointment of counsel, offer said counsel, prepare an entry of an order from a court of record, set standard for attorney competency, and include a mechanism to compensate the counsel and for reasonable litigation expenses).

¹²⁰ 28 C.F.R. § 26.22.

¹²¹ 28 C.F.R. § 26.22(a) Example 2.

¹²² 28 C.F.R. § 22.23.

¹²³ 28 C.F.R. § 22.23(a)-(b)(1)-(2).

¹²⁴ 28 C.F.R. § 22.23(c)(1)-(3).

¹²⁵ 28 C.F.R. § 22.23(d).

¹²⁶ *Id.*

¹²⁷ But see 28 C.F.R. § 22.23(e) (declaring that “a state may request a new certification by the Attorney General to resolve uncertainties concerning or meet challenges to the applicability of chapter 154 in relation to federal habeas corpus review of capital cases from the state based on changes or alleged changes in the state’s capital counsel mechanism”).

¹²⁸ See Certification Process for State Capital Counsel Systems, 73 Fed. Reg. at 75,327 (describing that there were over 32,000 public comments posted in response to the proposed regulations, in which most of the comments reflected the misunderstandings of the nature of the functions that chapter 154 requires the Attorney General to perform, in addition to the limited legal discretion possessed under the statutory provisions).

¹²⁹ See Sara Rodriguez & Scott J. Atlas, *Habeas Corpus: The Dilemma of Actual Innocence*, 34 LITIG. 35, 40 (2007) (commenting that the regulations do not define “standards of competency,” do not set parameters for how much lawyers should be paid, and do not explain the definition of “reasonable litigation expenses”).

¹³⁰ Kannenberg, *supra* note 5, at 156-57 (listing “(1) concern over the lack of definitions and substantive criteria; (2) concern over the lack of a compliance or decertification mechanism; (3) concern over the possible conflict of interest, bias, and political influence [affecting the Attorney General] . . . (4) concern over the proposed regulations’ failure to establish a burden of proof; (5) concern over the use of ‘examples’ . . . (6) concern over the failure . . . to provide adequate notice regarding the proposed rules; (7) concern over the failure . . . to provide adequate notice concerning the state certification process; and (8) concern over the proposed regulations’ impact on small entities”).

¹³¹ *Id.* at 157-62.

¹³² *Id.* at 163.

¹³³ *Id.* at 164.

¹³⁴ *Id.* at 157.

¹³⁵ Letter from James C. Duff to Kim Ball Norris, *supra* note 100, at 1.

¹³⁶ Letter from Elizabeth Semel, Dir. of the Death Penalty Clinic, Berkeley School of Law, to Kim Ball Norris, Senior Policy Advisor for Adjudication, Dep’t of Justice (Aug. 6, 2007), available at <http://www.capitaldefenseweekly.com/library/optin/DOJ-2007-0110-0049.1.pdf>.

¹³⁷ See Letter from James C. Duff to Kim Ball Norris, *supra* note 100, at 2-3 (expressing concern that the lack of competency standards would lead to unfair litigation in the federal courts, especially given the time constraints).

¹³⁸ See Letter from Andrea Keilen, Exec. Dir., Tex. Defender Service, to Danica Szarvas-Kidd, Policy Advisor for Adjudication, Dep’t of Justice (Sept. 24, 2007), available at <http://capitaldefenseweekly.com/library/optin/DOJ-2007-0010-0155.1.pdf> (noting that the terms which will form the basis for the Department of Justice’s standards for state certification should be clearly and sufficiently defined and detailed to ensure that the decision making is clear and not arbitrary); see also Letter from Elizabeth Semel to Kim Ball Norris, *supra* note 138, at 2 (stating that even with the examples, the lack of guidance could lead to “arbitrary and capricious agency action”).

¹³⁹ Letter from Elizabeth Semel to Kim Ball Norris, *supra* note 138, at 2.

¹⁴⁰ Certification Process for State Capital Counsel Systems, 73 Fed. Reg. at 75,334; see also Kannenberg, *supra* note 5, at 163 (stating a significant concern about the regulations is the lack of an enforcement or decertification mechanism); see also Letter from Elizabeth Semel to Kim Ball Norris, *supra* note 138, at 4 (noting the lack of any supervision or means with which to withdraw certification due to the failure to establish a review committee to oversee such decertification).

¹⁴¹ See, e.g., Letter from Elizabeth Semel to Kim Ball Norris, *supra* note 138, at 1-5 (reiterating the lack of any review mechanism to guarantee oversight of the process to withdraw certification).

¹⁴² See Fox, *supra* note 99, at 1 (concluding “to a reasonable degree of professional certainty that the Attorney General has an impossible conflict of interest in undertaking this assignment”); see also Kannenberg, *supra* note 5, at 164 (arguing that even if the Attorney General’s integrity was not compromised, his relationships with the states’ Attorneys General create the impression of bias); see also Certification Process for State Capital Counsel Systems, 73 Fed. Reg. at 75,328 (referring to comments that argue that the role of the Attorney General would have a conflict of interest in carrying out “the certification function for state capital counsel mechanisms required by chapter 154”).

¹⁴³ See Fox, *supra* note 99, at 2 (reasoning that because the Attorney General is a prosecutor, he is incapable of determining the competency of defense counsel and their reasonable litigation expenses).

¹⁴⁴ See Certification Process for State Capital Counsel Systems; Removal of Final Rule, 75 Fed. Reg. at 29,217 (proposing to remove the December 11, 2008 regulations pending the completion of a “new rule making process,” during which time the Department will consider which certification procedures are appropriate).

¹⁴⁵ Patriot Act, 28 U.S.C. §§ 2261, 2265.

¹⁴⁶ See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (considering the issue of how much deference agency interpretation of a statute deserves).

¹⁴⁷ *Id.* at 840 (describing that the plaintiffs challenged the Environmental Protection Agency’s interpretation of the term “stationary source”).

¹⁴⁸ See *id.* at 842-43 (creating this test to ultimately determine whether the previous court’s error had resulted in an erroneous judgment).

¹⁴⁹ *Id.* (asserting that if Congress has already made its intent clear, then both the court and the agency must defer to its judgment).

¹⁵⁰ *Id.* at 843.

¹⁵¹ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (explaining where the intent of Congress is clear the court will defer to that intent but where the court has determined that Congress has not addressed the question at issue, the court will not impose its own construction on the statute).

¹⁵² *Id.* at 843-44.

¹⁵³ *Id.* at 845.

¹⁵⁴ *Id.* at 866.

¹⁵⁵ See *id.* (emphasizing that the role of judges is to interpret the law, not get involved in politics or policy and explaining that it is best left to the legislators and administrators to determine “the wisdom of policy choices.”)

¹⁵⁶ *Id.* at 865 (stating that although the Attorney General is not an elected official, he is directly accountable to the President who must cater to voters and can easily replace the Attorney General).

¹⁵⁷ 529 U.S. 576 (2000).

¹⁵⁸ *Id.* at 587 (noting that on the other hand, interpretations found in opinion letters, agency manuals, enforcement guidelines, and policy statements are not accorded *Chevron* deference).

¹⁵⁹ *Id.*

¹⁶⁰ 5 U.S.C. § 101 (2006).

¹⁶¹ 5 U.S.C. § 105 (defining “executive agency” as an “Executive department, a Government corporation, and an independent establishment”).

¹⁶² 5 U.S.C. § 551(1).

¹⁶³ § 551(1)(A)-(G) (excluding explicitly various government entities from the definition of agency: Congress, the United States courts, “the governments of the territories or possessions of the United States,” “the government of the District of Columbia,” agencies composed by representatives of parties or organizations, and military authorities such as courts martial or authority in occupied territory or in the field during a war).

¹⁶⁴ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 855 (1984) (examining 46 Fed. Reg. 50,766 (Oct. 14, 1981) and distinguishing between a formal rulemaking comment and a clarification-type comment).

¹⁶⁵ See 5 U.S.C. § 553(b)-(d) (explaining that formal rulemaking requires the agency to include a proposal of the rule in the Federal Register so interested parties can comment, and once the agency receives these comments, it must consider them and write a concise general statement of the rule’s basis and purpose in relation to the comments when it publishes the final rule in the Federal Register).

¹⁶⁶ But see *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (noting that because agency interpretations such as those found in “policy statements, agency manuals, and enforcement guidelines” lack the force of law, they will not be given *Chevron* deference).

¹⁶⁷ *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, No. C 08-2649 CW, 2009 WL 185423, at *2-3, *6 (N.D. Cal. Jan. 20, 2009) (holding that the Department of Justice’s argument that the rule was “interpretive” was unpersuasive because it was intended to be binding upon the agency, it did not the Attorney General discretion, and it “provide[s] the ‘missing link’ that was necessary to implement chapter 154”).

¹⁶⁸ See *id.* at *10 (holding that the Department of Justice must provide an additional length of time for parties and organizations to post comments and that the Department of Justice must respond to these comments); see also Certification Process for State Capital Counsel Systems, 74 Fed. Reg. 6131 (Feb. 5, 2009) (to be codified at 28 C.F.R. pt. 26) (reopening the comment period until April 6, 2009).

¹⁶⁹ *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

¹⁷⁰ See Patriot Act, 28 U.S.C. § 2265(b) (stating that the “Attorney General shall promulgate regulations” to establish the procedure for certification, as amended by the Patriot Act).

¹⁷¹ Certification Process for State Capital Systems, 73 Fed. Reg. at 75,327 (acknowledging that this final rule is derived from the Patriot Act).

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