

1. Do you agree that the proposed regulations are dangerous and deficient? If so, can you explain how they could exacerbate the problems with representation in capital cases identified in the hearing?

ANSWER: The ABA agrees that the proposed regulations are “deficient” because as currently drafted, they will not permit the Attorney General to determine if the state has established “a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel” in state post-conviction proceedings brought by indigent prisoners who have been sentenced to death as required by Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005. 28 U.S.C. § 2265(a)(1)

While the ABA has not taken a position on whether Section 507 is good policy, the approach taken by the Department of Justice fails to implement and otherwise ignores key aspects of the compromise inherent in the legislation.

First, the proposed regulations ignore significant aspects of the implementing legislation, as well as established legal benchmarks for how key terms in the legislation are to be understood and defined. These flaws include (a) the failure to consider whether the state has established a mechanism for the appointment of **competent** counsel, as opposed to any counsel, (b) the failure to limit the consideration of state mechanisms for the compensation of counsel to post-conviction capital cases, as opposed to all post-conviction representations, (c) the failure to implement the statutory requirement that the Attorney General determine the date on which the state’s mechanism was effective, and (d) the use of illustrative examples that suggest the Attorney General will certify programs that fall short of established minimum standards regarding the competence, compensation and expense reimbursement of counsel.

Second, the proposed regulations fail to establish uniform standards regarding the content of state applications, as well as the criteria the Attorney General is to utilize in evaluating applications. This *ad hoc* approach to the statutory task does nothing to prevent arbitrary and capricious evaluation of applications.

Third, while the proposed regulations adopt “notice” and “comment” procedures for review of applications, the process for the Attorney General’s review and consideration of applications falls well below the standards for agency rulemaking action under the Administrative Procedures Act, as well as the Due Process Clause. In particular, the process for the Attorney General’s review and consideration of applications (a) fails to ensure that interested parties have adequate notice of the application and a reasonable opportunity to be heard, (b) expressly contemplates *ex parte* communications between the Attorney General

and the state applicant, (c) fails to require that any determination is based on reasoned consideration of the evidence, and (d) fails to provide for a procedure by which interested persons can seek review or decertification of a state program once it has been certified, even if the operation of the program falls short of the statutory standard.

The proposed regulations, in short, are deeply and fundamentally flawed. For these reasons, the ABA also agrees that the proposed regulations are “dangerous” because implementation will necessarily affect the ability of death row prisoners to obtain the competent assistance of counsel, fair judicial review of their convictions and sentences, adequate due process, and justice.

2. *Attorney General Mukasey has not yet made any public statement on his intentions with respect to the regulations. Is there anything you believe he should keep in mind in deciding whether and how to implement them?*

ANSWER: Attorney General Mukasey should remember that he first and foremost has an obligation to ensure justice for all those who enter the criminal justice system. He should take careful note and understand the thousands of Comments -- including those authored by the ABA -- that expressed serious concerns with the proposed regulations. Attorney General Mukasey should utilize the ABA Guidelines for the Appointment and Performance of Defense Counsel when assessing whether a jurisdiction has met its statutory obligations to indigent death row prisoners in state post-conviction proceedings such that it would be entitled to receive the benefits identified in Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005.

3. *To be consistent with the goals of our criminal justice system and the Innocence Protection Act, how would you recommend revisiting the regulations or the statutory law on habeas review in capital cases?*

ANSWER: Attorney General Mukasey should not finalize the regulations as currently drafted and published without first making substantial modifications that meaningfully address the concerns of the Commentators. These changes should include but are not limited to incorporation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

The American Bar Association stands ready to assist the Attorney General and the Department of Justice with regard to improving the proposed regulations.