BRYAN A. STEVENSON
RESPONSES ON DOJ “OPT-IN” REGULATIONS
(Senator Kennedy)

1. Yes, I agree that the proposed regulations are dangerous and deficient. I think the structure of this mechanism itself is problematic because the Attorney General, as the nation’s top prosecutor, should not have a controlling role in determining how the defense function is implemented or measured as these regulations now permit. I think the structure and the role of the Attorney General in enforcing capital punishment creates an inherent problem with any regulatory scheme. To address this, proposed regulations would have to be very sensitive and attentive to the defense function in capital cases in every state and give a great deal of consideration to the historic problems of counsel in death penalty cases. The proposed regulations identified so far do not do this at all. The lack of definitions, standards, or requirements make compliance with the regulations arbitrary and meaningless.

The certification process that has been proposed has no independence or autonomy from political or prosecutorial forces. These forces simply want faster executions with inadequate regard for the longstanding problems of adequate legal assistance to defendants, which is critical to reliable and fair verdicts. Not only are the proposed regulations unworkable and poorly conceived and drafted, they do not provide a realistic or effective framework for judicial interpretation or implementation.

The DOJ should withdraw their proposed regulations and begin a process that involves experienced capital defense litigators to shape meaningful and informed requirements that could improve representation of death row prisoners and capital defendants.

With regard to the issues identified at the hearing, there are hundreds and hundreds of cases that were adjudicated in clearly deficient systems. Collateral review of these cases is the only effective mechanism for providing remedies to innocent people on death row and people wrongly convicted or sentenced to death. There is no question that implementation of the proposed regulations would seriously undermine crucial review of death penalty cases by terminating appeals and eliminating safeguards. This will certainly result in wrongful executions and a capital punishment process that is even less credible and reliable than the very flawed system currently in place.

2. I would urge Attorney General Mukasey to keep in mind that the integrity of the Justice Department is very much implicated when it weighs in on something as serious and important as capital punishment. He risks a great deal if he endorses or attempts to implement rules that make executions in this country even more unreliable and carefully evaluated than they are presently. I think the Justice Department is strongest when it is

scrupulous in its commitment to rulemaking and conduct that upholds the highest standards of integrity and fairness. These proposed regulations for death penalty defense in no way satisfy those standards, and the character of the Justice Department under his leadership will absolutely be undermined if the regulations are not reconsidered and rewritten.

3. At a minimum, there needs to be definitions in the regulations with regard to competency and compensation. Instead of simply requiring compensation or competency, there should be explicit, detailed definitions so states know what is required of them. Requiring a state to have a compensation mechanism and competency standards is too broad and general. There should be specific guidelines regarding these requirements for certification. The examples in the proposed regulations are not sufficient. They only outline sample cases that would be adequate. However, a state is not required to follow any one particular example.

With regard to the statutory law on habeas review, there are several solutions I think would advance a desperately needed discussion and effort to restore fairness and reliability to the administration of criminal justice. **The first solution I would propose is to mandate the appointment of skilled counsel to every condemned prisoner under sentence of death who seeks collateral review of his conviction or sentence.** Many states do not provide counsel for condemned prisoners, and all prisoners are subject to stringent filing requirements, statutes of limitations, and other procedural restrictions. Since the United States Supreme Court has not recognized a right to counsel in postconviction proceedings,[1] it is up to any state that seeks to execute people to ensure that all death-sentenced prisoners have skilled, adequately trained counsel. Through the AEDPA, Congress has recognized the legitimacy of this basic requirement by enticing states with heightened restrictions in federal habeas corpus review if they provide collateral postconviction counsel.[2]

Second, we should repeal the AEDPA or suspend it in states that fail to meet basic requirements with regard to the quality of counsel. Under the AEDPA, the consequence of inadequate legal representation in capital cases is not only unfair and unreliable convictions and death sentences, but also insulation of these problems and errors from review because counsel fails to preserve issues or comply with the procedural requirements that must be satisfied for postconviction remedies. It makes no sense to make procedural requirements more demanding and harsh as the AEDPA does, especially in jurisdictions where there are deficiencies in the defense counsel function. Many states have opted to continue administering criminal justice with grossly underfunded and inadequate indigent defense systems, a choice that increases the number of federal habeas corpus filings necessary to enforce constitutional protections. Additionally, in some states, judges are elected on campaigns that promise to resist protecting the rights of criminal defendants and prisoners. Some judges may also feel political pressure to be harsh on capital defendants to ensure promotions. Additionally, some state court judges summarily adopt findings and legal rulings prepared by state prosecutors in state postconviction. All of this casts doubt on fairness, independence, and reliability of postconviction appeals.

Also, if states have unreasonable statutes of limitations that do not address whether prisoners have counsel, or fail to provide some form of legal assistance, prisoners should not be precluded from federal review. Many states have opted not to provide the kind of review the AEDPA assumes when it requires federal judges to defer to state court rulings and findings.[3] Only by allowing the petitioner to show that deficiencies in the state court review process warrant no such deference can any meaningful hope of reform be created.[4] Asking that federal judges first determine if constitutional rights have been violated in a particular case and then evaluate whether a remedy for that violation is warranted would simplify the process of habeas corpus review.

Finally, we should suspend procedural defaults and preclusion where critical constitutional interests are in question. The appeal and postconviction review process should be a mechanism for ensuring that police, prosecutors, and other criminal justice players with great power and discretion act legally. Abuse of power by judges, lawyers, and law enforcement officials is not easily identified internally. Many of the constitutional violations implicated by this abuse cannot be brought to light without meaningful postconviction review. Ensuring that these claims are reviewed on the merits in state and federal habeas corpus proceedings is important not only to innocent and wrongly-sentenced prisoners, but also to the larger society, which relies on those with power to exercise it lawfully and responsibly. States frequently attempt, and often succeed in their efforts, to shield illegal conduct by state officials in criminal cases from scrutiny because indigent prisoners cannot get around procedural or other preclusion rules.

The importance of maintaining a just system requires review on the merits of some constitutional claims unless a prisoner has inexcusably failed to prosecute the claim or has knowingly violated important procedural rules. Racial bias claims constitute an important example of such an issue. Habeas corpus litigation has been the mechanism by which the United States Supreme Court has done important work to allow racial minorities to participate in grand juries, in trial juries, and as grand jury forepersons.[5] The perception of unfairness is exacerbated by the lack of racial diversity among judges and prosecutors. Failing to address clear evidence of racial bias in criminal cases by invoking procedural defaults or preclusion facilitates racially discriminatory conduct and does great harm to the integrity of criminal justice review. Where claims presented in individual cases threaten the integrity of the criminal justice system as a whole, such as claims of racial bias, and also claims of innocence and inadequate legal representation, there should be a fundamental commitment to ensure that the laws of the Constitution have been upheld without regard for procedural technicalities that only insulate unconstitutional conduct by judges or prosecutors from remedy.

ENDNOTES

1. *See Barbour v. Haley*, 417 F.3d 1222 (11th Cir. 2006).

2. 28 U.S.C. § 2265 (1996); *see also* USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th Cong. § 507 (2006).

3. 28 U.S.C. § 2254(d)–(e) (1996).

4. This was the practice prior to the enactment of the AEDPA. *See, e.g.*, *Townsend v. Sain*, 372 U.S. 293 (1963).

5. *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Rose v. Mitchell*, 443 U.S. 545 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977).