DEPARTMENT OF JUSTICE

28 CFR Part 26

[Docket No. OJP (DOJ)–1464; AG Order No. 3024–2008]

RIN 1121–AA74

Office of the Attorney General; Certification Process for State Capital Counsel Systems

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Final rule.

SUMMARY: The USA PATRIOT Improvement and Reauthorization Act of 2005 instructs the Attorney General to promulgate regulations to implement certification procedures for states seeking to qualify for the expedited federal habeas corpus review procedures in capital cases under chapter 154 of title 28, United States Code. The procedural benefits of chapter 154 are available to states that establish a mechanism for providing counsel to indigent capital defendants in state postconviction proceedings that satisfies certain statutory requirements. This rule carries out the Act's requirement of issuing regulations for the certification procedure.

DATES: *Effective Date:* This rule is effective January 12, 2009.

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SUPPLEMENTARY INFORMATION: Public Law 109–177, the USA PATRIOT Improvement and Reauthorization Act of 2005 (''the Act''), was signed into law on March 9, 2006. Section 507 of that Act amends chapter 154 of title 28 of the United States Code. Chapter 154 offers procedural benefits in federal habeas corpus review to states that go beyond the constitutional requirement of appointing counsel for indigents at trial and on appeal by providing counsel also to capital defendants in state postconviction proceedings. The chapter 154 procedures include special provisions relating to stays of execution (28 U.S.C. 2262), the time for filing federal habeas corpus applications (28 U.S.C. 2263), the scope of federal habeas corpus review (28 U.S.C. 2264), and time limits for federal district courts and courts of appeals to determine habeas corpus applications and related appeals (28 U.S.C. 2266). See 152 Cong. Rec. S1620, 1624–28 (daily ed. Mar. 2, 2006) (remarks of Sen. Kyl) (explanation of procedural benefits to states under chapter 154); 141 Cong. Rec. 9303–06 (Mar. 24, 1995) (remarks of Sen. Specter) (explaining the historical problem of capital habeas delay motivating the enactment of habeas reforms).

Although chapter 154 has been in place since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104–132), the determination that a state was eligible for the procedural benefits of chapter 154 had been left to the federal court of appeals for the circuit in which the state was located. The Act amended sections 2261(b) and 2265 of title 28 to assign responsibility for chapter 154 certification to the Attorney General of the United States, subject to review by the Court of Appeals for the District of Columbia Circuit. Section 2265 as amended makes clear that the only requirements that the Attorney General may impose for a state to receive certification are those expressly stated in chapter 154. See 28 U.S.C. 2265(a)(3) (''There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.''). It also provides that the date on which a state established the mechanism that qualifies it for certification is the effective date of the certification. See 28 U.S.C. 2265(a)(2).

In addition to the changes affecting certification, the Act amends section 2261(d) to permit the same counsel that has represented a prisoner on direct appeal to represent the prisoner in postconviction proceedings without limitation, and it amends section 2266(b)(1)(A) to extend the time for a district court to rule on a chapter 154 petition from 180 days to 450 days.

Section 2265(b) directs the Attorney General to promulgate regulations to implement the certification procedure. The Department of Justice published a proposed rule in the **Federal Register** on June 6, 2007, for this purpose, which would add a new subpart entitled ''Certification Process for State Capital Counsel Systems'' to 28 CFR part 26. See 72 FR 31217 (June 6, 2007). The original comment period ended on August 6, 2007. The Department published a notice reopening the comment period on August 9, 2007, and the reopened comment period ended on September 24, 2007. See 72 FR 44816 (Aug. 9, 2007).

A summary of the comments received on the proposed rule follows, including discussion of changes in the final rule based on the comments received, after which a section-by-section analysis for the final rule is provided.

Summary of Comments

Comments on the proposed rule were received from members of the public, professional groups of lawyers and judges, lawyers representing capital defendants, and advocacy groups. More than 32,000 separate comments were received, although the vast majority appeared to be a form e-mail message. Nevertheless, each comment was individually reviewed by the Department to ensure that all public input on the proposed rule was considered.

The Department made the following changes to the proposed rule based on the comments: (1) Modifying the definition of ''State postconviction proceedings'' in § 26.21 to clarify the range of covered proceedings; (2) modifying the initial sentences in § 26.22(b) and (c) to be more explicit about the scope of the chapter 154 requirements; (3) modifying § 26.23(b)(2) to reflect that in some states the highest court with jurisdiction over criminal matters is not the state supreme court; (4) adding an explicit statement in § 26.23(d) that the Attorney General will determine the date on which a qualifying state capital counsel mechanism was established, as required by 28 U.S.C. 2265(a)(1)(B); (5) modifying § 26.23(e), relating to the effect of changes in a state's capital counsel mechanism; and (6) correcting a citation error in the regulatory certification in the rule relating to federalism, which referenced Executive Order 12612 instead of Executive Order 13132. The details of these changes and the reasons they were made are discussed below in connection with the comments that suggested them.

Some of the commenters requested that additional time be provided for comment. This was done by publication of the notice reopening the comment period, appearing at 72 FR 44816 (Aug. 9, 2007).

Most of the critical comments received on the proposed rule reflected misunderstandings of the nature of the functions that chapter 154 requires the Attorney General to perform, and particularly, of the limited legal discretion that the Attorney General possesses under the statutory provisions. Chapter 154 provides expedited federal habeas corpus procedures in capital cases for states that establish a mechanism for providing counsel to indigent capital defendants in state postconviction proceedings that satisfies certain statutory requirements. The 2006 amendments to chapter 154 give the Attorney General the responsibility to

determine whether a states satisfies the requirements of chapter 154, subject to de novo review by the Court of Appeals for the District of Columbia Circuit. See 28 U.S.C. 2261(b), 2265. Section 2265 as amended makes clear that the only requirements that may be imposed for a state to receive certification are those expressly stated in chapter 154. See 28 U.S.C. 2265(a)(3) (''There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.'').

Because of this limitation, there is relatively little that the Attorney General has had to determine—or is free to determine—in the formulation of the rule. Hence, the rule in large measure simply recounts and provides illustration relating to the express statutory requirements for certification, addresses some limited interpretive questions, and outlines a procedure for states' requests for certification. The many ideas proposed in the comments for limiting chapter 154 certification to states that satisfy capital counsel standards that are not expressly stated in chapter 154 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.

With this background, specific comments are discussed under the following headings:

I. Responsibility for Certification

A. Role of the United States Attorney General

Some commenters argued that the Attorney General would have a conflict of interest in carrying out the certification function for state capital counsel mechanisms required by chapter 154. A comment from three U.S. Senators, for example, stated 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.

In other comments, an argument appeared that the discharge of these functions by the Attorney General would contravene Rule 1.7(a)(2) of the American Bar Association (ABA) Model Rules of Professional Conduct and comparable rules adopted by most state supreme courts. In relevant part, the cited rule provides that ''a lawyer shall not represent a client if * * * there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.'' (28 U.S.C. 530B provides that federal government attorneys are subject to state laws and rules and local federal court rules governing attorneys in the states where they engage in their duties to the same extent as other attorneys in those states.) For the most part, the commenters who made this argument seemed to be urging that the Attorney General should not carry out the functions required by chapter 154 at all, in order to avoid the alleged conflict of interest.

As to the specific nature of the alleged conflict of interest, the commenters' argument proceeded along the following lines: (1) The Attorney General may be asked to impose exacting requirements on the states—relating to such matters as provision of ''competent'' counsel and payment of ''reasonable litigation expenses'' in state postconviction proceedings in capital cases—as conditions for chapter 154 certification; (2) whatever requirements the Attorney General adopts under these headings in the context of chapter 154 may be cited as analogical or persuasive precedent for the judicial interpretation of the concept of constitutionally effective assistance in federal criminal proceedings in which there is a constitutional right to counsel; (3) hence, if the Attorney General adopts expansive requirements relating to state capital counsel under chapter 154, courts may interpret more expansively the requirements for constitutionally effective assistance of counsel in federal criminal proceedings; (4) such expansive interpretations of the requirements for constitutionally effective assistance of counsel in federal criminal proceedings would work against prosecutorial interests for which the Attorney General is responsible, as setting the bar higher for constitutionally effective assistance makes it more likely that the performance of defense counsel will be found to be constitutionally deficient, resulting in the overturning of criminal judgments that federal prosecutors have secured; (5) because of this potential spillover effect, the Attorney General has a conflict of interest in carrying out the chapter 154 functions.

Addressing these comments requires explanation of the purpose of the amendments to chapter 154 that were enacted in 2006. According to their legislative history, the 2006 amendments were enacted by Congress in order to address a perceived existing conflict of interest. As originally enacted in 1996, chapter 154 did not state who would decide whether a state had satisfied its requirements. As a practical matter, this left the question to the various federal district courts and courts of appeals, as the issue arose in the litigation of capital cases. None of these courts found that the chapter 154 procedures were applicable in any case. Congress believed that a conflict of interest contributed to this result, in that the district and appellate courts would be subject to uncongenial requirements under chapter 154 if it were found to apply, including time limits on their review proceedings. See 152 Cong. Rec. S1620,1624–25 (daily ed. Mar. 2, 2006) (remarks of Sen. Kyl, sponsor of the 2006 amendments to chapter 154) (''[T]he 1996 * * * reforms * * * left the decision of whether a State qualified for the incentive to the same courts that were impacted by the time limits. This has proved to be a mistake. Chapter 154 has received an extremely cramped interpretation, denying the benefits of qualification to States that do provide qualified counsel and eliminating the incentive for other States to provide counsel * * * [T]his bill * * * removes the qualification decision to a neutral forum.''); 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake) (similar explanation by House sponsor).

The 2006 amendments sought to resolve this problem by assigning the decision concerning a state's satisfaction of the chapter 154 requirements to an official and a court that would have no comparable disincentive to certify compliance with the requirements. The Attorney General now makes this determination, subject to de novo review by the DC Circuit Court of Appeals. 28 U.S.C. 2265. The DC Circuit has no review jurisdiction over state capital cases and thus would not be affected by the application of the chapter 154 procedures in federal habeas corpus review of such cases. See 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (remarks of Sen. Kyl) (''Under new section 2265, the Attorney General of the United States will decide if a State has established a qualifying mechanism, and that decision will be reviewed by the DC Circuit, the only

Federal circuit that does not handle State-prisoner habeas cases and therefore is not impacted by the qualification decision.''); 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake) (similar explanation).

Against this background, the critical comments noted above essentially are complaining that, in seeking to correct one conflict of interest, Congress has created another. Even if this contention were valid, it could not support the suggestion that the Attorney General abrogate his certification responsibilities under chapter 154. Chapter 154 does not merely authorize or invite the Attorney General to carry out these functions, as some commenters apparently assumed; it requires him to do so. See 28 U.S.C. 2265(a)(1) (''If requested by an appropriate State official, the Attorney General of the United States shall determine'' whether the state has established a qualifying capital counsel mechanism); *Id.* at 2265(b) (''The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).'').

Alternatively, some commenters suggested that the Attorney General avoid the alleged conflict of interest by eschewing personal involvement in carrying out the chapter 154 functions and delegating them entirely to the Justice Department's Inspector General, who supposedly would be free of the alleged conflict. The rule has not been changed on this point because the underlying claim of a conflict of interest is not well-founded.

As noted, some commenters claimed that the Attorney General's involvement in the chapter 154 certification functions would violate ABA Model Rule 1.7 (and comparable state rules) that bar a lawyer from representing a client if there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer. In carrying out the chapter 154 certification function with which he is charged by the laws of the United States, the Attorney General's client is the United States. Hence, the question is whether the Attorney General's representation of the United States would be materially limited by the competing interests identified in the rule—responsibility to another client, a former client, or a third person, or a personal interest.

This question must be answered in the negative. The Attorney General has no responsibilities to any other client that would materially limit the discharge of the chapter 154 certification function. The Attorney General's only relevant current client is the United States, which has expressly directed the discharge of that function by law. There is also no reason to believe that the Attorney General has any responsibility to a ''former client'' or ''third person,'' or any ''personal interest,'' that would materially impair his representation of the United States in the discharge of that function. The Attorney General has a professional obligation to abide by the ''client's decisions concerning the objectives of representation,'' ABA Model Rule 1.2(a), and it is difficult to conceive how the Attorney General could have such a disqualifying conflict in representing the United States when it is the United States that has mandated through its laws that he carry out the chapter 154 certification function.

As noted above, some commenters argued further that there is a conflict between the Attorney General's prosecutorial responsibilities and his responsibilities under chapter 154, such as determining what constitutes ''competent counsel'' for purposes of the chapter. This argument misunderstands the nature of the Attorney General's functions under chapter 154. Chapter 154 does not involve the Attorney General in assessing or setting standards for the performance of defense counsel in state postconviction proceedings. Rather, the Attorney General's role is limited to determining whether the state has established a mechanism for providing representation to indigent capital defendants in state postconviction proceedings, and whether that mechanism satisfies certain criteria set out in chapter 154. See 28 U.S.C. 2261(b)(1), 2265. Moreover, the Attorney General has no discretion in defining the requirements that states must satisfy to achieve chapter 154 certification. Chapter 154 specifies those requirements and provides that ''[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.'' 28 U.S.C. 2265(a)(3).

The suggestion that the Attorney General delegate his functions under chapter 154 to the Department's Inspector General bears further discussion. This suggestion is apparently inspired by the assignment of certain functions to the Inspector General in a different set of capital counsel provisions that Congress enacted in 2004 as part of the Innocence Protection Act, Public Law 108–405, tit. IV, 118 Stat. 2278 (2004). The Innocence Protection Act authorized a grant program, to be administered by the Attorney General, to assist states in implementing certain federally prescribed capital counsel standards. *Id.* sections 421–26, codified at 42 U.S.C. 14163–63e.

The capital counsel provisions of the Innocence Protection Act differ from chapter 154 in that they provide for an ongoing federal oversight role with respect to state implementation of the capital counsel standards set forth in that Act. In connection with that oversight function, the Innocence Protection Act charges the Inspector General with evaluating whether the federal standards are being met in states that receive funding under the program. 42 U.S.C. 14163d(a). However, even in that context, the role contemplated for the Inspector General is only advisory. The ultimate determination concerning state compliance with the capital counsel standards, and concerning any remedial measures needed to achieve such compliance, is reserved to the Attorney General. *Id.* at 14163d(b)(2) (''If the Attorney General, after reviewing a[n Inspector General] report * * * determines that a State is not in compliance with the terms and conditions of the grant, the Attorney General shall consult with the appropriate State authorities to enter into a plan for corrective action. If the State does not agree to a plan for corrective action that has been approved by the Attorney General within 90 days * * * the Attorney General shall * * * issue guidance to the State regarding corrective action to bring the State into compliance.'')

Hence, the Innocence Protection Act, like chapter 154, is inconsistent with these commenters' theory that the Attorney General has an inherent conflict of interest in determining whether state capital counsel systems meet federal statutory standards.

B. Role of the State Attorneys General

Section 2265(a)(1) in chapter 154 requires the Attorney General to determine state compliance with the chapter 154 requirements ''[i]f requested by an appropriate State official.'' Section 26.21 in the rule says that ''*[a]ppropriate State official* means the State Attorney General, except that, in a state in which the State Attorney General does not have responsibility for Federal habeas corpus litigation, it means the Chief Executive thereof.''

Some commenters objected that the state attorney general is not an appropriate official to request chapter 154 certification, and that responsibility for doing so should instead be assigned to some ''neutral'' official, or

alternatively that it should be left to ''the state'' to decide what official may apply for certification. These commenters argued that the state attorney general should be disqualified from seeking chapter 154 certification because of a conflict of interest. The alleged conflict of interest would arise from the potential benefits to the state attorney general in capital cases if the chapter 154 procedures for federal habeas corpus review are made applicable in such cases.

The matter needs to be analyzed in terms of the dual objectives of chapter 154: improving the representation of capital defendants in state postconviction proceedings, and reducing unnecessarily protracted proceedings in federal habeas corpus review of state capital cases. With respect to the latter objective, the state attorney general's responsibility for defending state capital judgments and securing their execution without unnecessary delay may well be a positive incentive to seek chapter 154 certification. Hence, in relation to this legislative objective, the capital litigation responsibilities of state attorneys general are not disqualifying biases or conflicts, but rather a positive characteristic that makes these officials suitable to seek realization of the legislative objective by pursuing chapter 154 certification for their states. In contrast, reassigning responsibility for seeking chapter 154 certification to a ''neutral'' official could thwart realization of the legislative objective by giving that responsibility to someone who has less motivation or, indeed, no motivation, to do so.

With respect to the other legislative objective—improving capital case representation at the postconviction stage—the commenters argue that the state attorney general's interests may lead him to make unsound judgments whether the state has satisfied the capital counsel requirements of chapter 154. However, the state attorney general under the statutes and the rule is an applicant for certification, not the decisionmaker concerning the state's compliance with the chapter 154 standards. The U.S. Attorney General will make an independent determination of that question after considering the state attorney general's submission, as well as any supporting or contrary information or views that any interested entity chooses to submit through the public comment procedure provided in § 26.23(c)–(d). Hence, the objection concerning bias or conflict of interest on this point is without force as well.

Prior to the 2006 amendments, federal courts determined whether a state had satisfied the chapter 154 requirements in the course of adjudicating habeas corpus petitions brought by capital convicts from that state. Hence, in a state in which the state attorney general has responsibility for federal habeas corpus litigation in capital cases, the state attorney general was able to seek a determination that the state had satisfied the chapter 154 requirements as part of his or her litigation functions. There is no basis for interpreting the 2006 amendments as having divested state attorneys general of this authority. Doing so would thwart the objectives of the 2006 amendments by disabling the officials with the greatest incentive and capacity to seek chapter 154 certification in most states.

A further consideration is that the Attorney General's determination whether a state has satisfied the chapter 154 capital counsel requirements is not necessarily final. A state could seek de novo review of the Attorney General's determination by the DC Circuit Court of Appeals. 28 U.S.C. 2265(c). Seeking such review would commonly be within the litigation authority of the state attorney general, regardless of which official had sought the initial determination from the U.S. Attorney General. It would be odd to deem the state attorney general an ''[in]appropriate'' official to seek a determination concerning satisfaction of the chapter 154 requirements from the Attorney General in the first instance, where the statutes interpose no obstacle to state attorneys general seeking the same determination from the DC Circuit at a later stage.

Some commenters who sought to disqualify state attorneys general from seeking chapter 154 certification urged in the alternative that ''the state'' should decide which official may seek such certification. However, how ''the state'' makes such a decision requires further definition or explanation. Of course, many states deal with the Federal Government concerning satisfaction of federal law requirements through their attorneys general, but these commenters would reject that approach in this context. Alternatively, the suggestion may be that a state should not be permitted to seek chapter 154 certification unless it enacts legislation authorizing a particular official to seek the certification. Chapter 154, however, does not state that a legislative act by the state is a precondition for seeking chapter 154 certification. A further concern is that uncertainty whether ''the state'' has authorized a particular official to seek chapter 154 certification could lead to challenges to certification requests by such an official, or could deter officials from seeking certification, even if there were no question that the state had established a capital counsel mechanism satisfying chapter 154. Not specifying which state officials may apply for chapter 154 certification would thus create new impediments for the states in seeking such certification. For the foregoing reasons, the relevant definition in § 26.21 has not been changed in the final rule.

II. Requirements for Certification

Some commenters noted that the first sentence in § 26.22(b) did not expressly limit to capital cases the requirement that a state establish a mechanism for compensation of appointed counsel in state postconviction proceedings. While this limitation is clear from chapter 154 and from numerous statements in the proposed rule (including the examples in § 26.22(b)), these commenters are correct that the limitation was not set forth in the first sentence of § 26.22(b). The omission has been corrected in the final rule. Similarly, commenters noted that the first sentence in § 26.22(c) in the proposed rule did not expressly limit to postconviction proceedings in capital cases the requirement that the state establish a mechanism for the payment of reasonable litigation expenses. That omission has also been corrected in the final rule.

Comments of a more substantive nature on the requirements for certification were as follows:

A. In General

Some commenters urged that the rule be revised to provide further specification concerning the ''standards of competency,'' ''competent counsel,'' ''compensation'' of appointed counsel, and ''reasonable litigation expenses'' that a state's postconviction capital counsel system must provide to qualify for chapter 154 certification.

For example, three U.S. Senators submitted comments stating that the proposed rule failed to provide adequate guidance to states about meeting the requirements of chapter 154. These Senators argued that the proposed rule conflicted with a legislative intent to ensure competent counsel for state capital convicts in exchange for expedited federal habeas corpus review. They cited in support certain statements by the sponsors of the 2006 amendments that they viewed as implying that the rule must require states to provide ''adequate'' or ''quality'' counsel for such convicts. According to these Senators, the rule should specify what would constitute

adequate counsel and ensure that the states provide such counsel.

Similarly, the Judicial Conference of the United States in its comments urged elaboration or supplementation of the statutory requirements, to make clear what states must do for certification and to ensure that capital defendants receive adequate representation in state postconviction proceedings. The comments pointed in this connection to a resolution appearing in the Report of the Proceedings of the Judicial Conference of the United States (Mar. 13, 1990, pp. 8–9). In that resolution, the Judicial Conference endorsed the recommendations in the 1989 Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (commonly known as the ''Powell Committee'' report, see 135 Cong. Rec. 24694–98 (Oct. 16, 1989)), with the modification that ''[s]pecific mandatory standards similar to those set forth in the Anti-Drug Abuse Act of 1988 [Pub. L. 100–690, tit. VII, subtit. A, 102 Stat. 4181, 4393–94 (Nov. 18, 1988), now codified at 18 U.S.C. 3599] should be required with respect to the appointment and compensation of counsel for capital defendants at all stages of the state and federal capital punishment litigation.'' The capital counsel standards set forth in 18 U.S.C. 3599 generally require appointment for indigents of capital counsel having five years of bar admission and three years of felony litigation experience; compensation of such counsel at an hourly rate of not more than $125, but with authority for the Judicial Conference to increase the limit to reflect adjustments in general federal pay rates; and defrayal of reasonably necessary investigative, expert, or other services not exceeding $7,500, but with authority for the court to authorize higher amounts for services of an unusual character or duration with the approval of the chief judge or delegee.

These recommendations have not been adopted in the final rule because they misunderstand the Attorney General's authority under chapter 154. The commenters are correct that the text of chapter 154 needs to be supplemented in defining competency standards for postconviction capital counsel, but mistaken as to who must effect that supplementation. Responsibility to set competency standards for postconviction capital counsel is assigned to the states that seek certification. 28 U.S.C. 2265(a)(1)(C) (Attorney General to determine ''whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A) [*i.e.*, capital postconviction proceedings]'').

There is one other reference to counsel competency in 28 U.S.C. 2265(a)(1)(A), which says that the Attorney General is to determine ''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.'' (Emphasis added.) In context, the phrase ''competent counsel'' in section 2265(a)(1)(A) must be understood as a reference to the standards of counsel competency that the states are required to adopt by section 2265(a)(1)(C). Section 2265(a)(1)(A) requires the state to establish a mechanism for the appointment of postconviction capital counsel who meet the standards of competency provided by the state. If the reference to ''competent counsel'' in section 2265(a)(1)(A) were a directive to the Attorney General to set independently the counsel competency standards that states must meet for chapter 154 certification, then the section 2265(a)(1)(C) requirement that the states provide such standards would be superfluous, and section 2265 would be internally inconsistent as to the assignment of responsibility for setting counsel competency standards.

As the Judicial Conference noted in its comments, its March 1990 Report rejected an aspect of the Powell Committee's original proposal by urging that states be required to satisfy federally prescribed standards of counsel competency. But Congress did not accept the Conference's recommendation on this point, instead making the states responsible to provide the standards of competency. See 28 U.S.C. 2265(a)(1)(C). The Attorney General has no authority to overrule Congress and prescribe standards that others unsuccessfully urged Congress to impose.

With respect to compensation of counsel, various commenters urged that the rule be more prescriptive regarding the amount of required compensation, to ensure that state postconviction capital counsel are ''reasonably'' or ''adequately'' compensated or receive ''fair'' compensation. Again, such comments urge the regulatory adoption of measures that Congress declined to include in chapter 154. In contrast to the immediately succeeding phrase concerning litigation expenses in section 2265(a)(1)(A), which requires a mechanism for payment of ''reasonable'' litigation expenses, the language relating to ''compensation'' in the same provision comes with no qualifier. The statute requires only that the state have a mechanism for the ''compensation'' of postconviction capital counsel, leaving determination of the level of compensation to the states. Again, the Attorney General is prohibited from supplanting the states' discretion in this area, because ''[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.'' 28 U.S.C. 2265(a)(3).

Finally, with respect to litigation expenses, the statute requires only that the state establish a mechanism for payment of reasonable litigation expenses. 28 U.S.C. 2265(a)(1)(A). There is no basis for prescribing more specific requirements in the rule. For example, if a state statute or rule that applies to capital postconviction proceedings simply directs courts to reimburse counsel for reasonable litigation expenses, it would satisfy the requirement under chapter 154. See § 26.22(c), Ex. 1. Such a state provision would state the requirement in the same terms as chapter 154 itself, and there would be no basis for saying that the state had not satisfied the requirements ''expressly stated'' in the chapter with respect to payment of litigation expenses. 28 U.S.C. 2265(a)(1)(A), (3).

The foregoing should not be understood as disapproving of the more specific requirements that Congress has adopted for federal court proceedings in 18 U.S.C. 3599. Those requirements represent one approach to ensuring that defendants will be adequately represented, and states may look to them as a possible model for capital counsel standards in their own systems. The rule gives examples of measures that would qualify for chapter 154 certification that are similar to the standards of 18 U.S.C. 3599. See § 26.22(b), Ex. 1; § 26.22(c), Ex. 2; § 26.22(d), Ex.1. But these are not the only standards consistent with the statutory requirements for certification, and chapter 154 does not allow the Attorney General to supplant the states' discretion in further specifying such standards.

B. Definition of Requirements

The comments that urged further specification of the requirements for certification in the rule pointed to various possible models. As noted above, some cited the capital counsel requirements for federal proceedings that appear in 18 U.S.C. 3599. Others recommended incorporating specifications governing the design and operation of state capital counsel

systems based on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Where comments of this type acknowledged the existence of 28 U.S.C. 2265(a)(3) (''[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter''), they argued that it did not make any difference, on the ground that all of the proposed additions to the express statutory requirements can be regarded as mere definitions of terms appearing in the statute, such as those relating to standards of competency or payment of counsel for services or expenses. This theory may be most conveniently discussed in relation to particular key terms: ''Competent counsel,'' ''compensation,'' and ''reasonable litigation expenses.''

''Competent Counsel''

This term has already been discussed. It is correct that there is a need for additional articulation of counsel competency standards, but those standards are to be decided by the states. See 28 U.S.C. 2265(a)(1)(C). It makes no difference for this purpose whether the standards in question are characterized as supplementation or as definition of the term ''competent counsel.'' Regardless of labeling, the responsibility for further articulation of the counsel competency standards is assigned to the states, not to the Attorney General.

Some comments argued specifically that ''competent counsel'' must be defined in the rule to include timing requirements for appointment of postconviction capital counsel, citing *Spears* v. *Stewart*, 283 F.3d 992, 1019 (9th Cir. 2002). However, the 2006 amendments were enacted to overcome decisions like *Spears* and ensure that there would be no future impediments to the implementation of chapter 154 through the creation of extra-statutory requirements for certification: ''In *Spears* v. *Stewart*, 283 F.3d 992 * * * the Ninth Circuit held that even though Arizona had established a qualifying system and even though the State court had appointed counsel under that system, the Federal Court could still deny the State the benefit of qualification because of a delay in appointing counsel * * *. [T]his bill abrogates * * * th[is] holding and removes the qualification decision to a neutral forum * * *. Paragraph (a)(3) of new section 2265 forbids creation of additional requirements not expressly stated in the chapter, as was done in the *Spears* case.'' 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (remarks of Senator Kyl); see 151 Cong. Rec. E2639–40 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake) (critique of *Spears*).

''Compensation''

As discussed above, Chapter 154 simply requires that states provide ''compensation'' for postconviction capital counsel. The term ''compensation'' is not ambiguous and does not need further definition in the rule. Prescribing minimum amounts of compensation to ensure ''adequate'' or ''reasonable'' compensation, as some commenters have proposed, would not define any term in the statutes, but rather would add to the statutory requirements for certification, which 28 U.S.C. 2265(a)(3) does not allow.

''Reasonable Litigation Expenses''

Likewise, there is no need for further definition in the rule to resolve ambiguity in the meaning of ''reasonable litigation expenses,'' or in any other term in the statutes that might be seized as a peg on which to hang additional federal prescriptions. As discussed above, a state could, for example, formulate its capital counsel provisions in essentially the same terms as chapter 154 itself. If a state did so, it would have provided for all that chapter 154 requires, and there would be no basis for denying certification.

The capital counsel requirements in chapter 154 reflect Congress's judgment as to the proper balance in realizing the chapter's objectives, neither setting the bar too low to benefit indigent capital defendants in state postconviction proceedings, nor so high as to deter states from attempting to satisfy these requirements and seek certification. Prior to the 2006 amendments, the federal courts upset this balance, as Congress perceived the matter, by adding to the statutory requirements and refusing to find chapter 154 applicable in any case. Congress therefore transferred responsibility for chapter 154 certification to the Attorney General and the DC Circuit Court of Appeals and specified that ''[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.'' 28 U.S.C. 2265(a)(3); see 152 Cong. Rec. S1620, 1624–25 (daily ed. Mar. 2, 2006) (remarks of Senator Kyl). This balance would again be upset if requirements were prescribed for chapter 154 certification that do not appear in the statutes, either overtly or in the guise of ''defining'' statutory terms.

C. Timing of Collateral Review

Some comments addressed the eligibility for chapter 154 certification of states in which collateral review and direct review in capital cases take place concurrently. One of these comments noted that the definition of ''State postconviction proceedings'' in § 26.21 in the proposed rule retained some vestiges of a distinction between ''unitary review'' systems and other state review systems, which has no place in chapter 154 following the 2006 amendments. The point is well taken and the final rule has been changed to reflect it.

The original version of chapter 154 had separate provisions for (i) states following the common bifurcated approach in which collateral proceedings occur subsequent to the completion of direct review, governed by former section 2261(b)–(d), and (ii) states with ''unitary review'' procedures (defined as procedures authorizing a capital defendant ''to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack''), governed by former section 2265.

In *Ashmush* v. *Woodford*, 202 F.3d 1160 (9th Cir. 2000), the court assessed California's unitary review system for capital cases under former section 2265. The court found that the system did not qualify the state for the chapter 154 procedures, on the view that California's provisions relating to postconviction capital counsel were not a ''rule of its court of last resort or * * * statute,'' as former section 2265 required.

The 2006 amendments were intended to overturn this decision. See 152 Cong. Rec. S1624–25 (daily ed. Mar. 2, 2006) (remarks of Senator Kyl). They replaced the separate provisions for bifurcated review systems and ''unitary review'' systems with uniform standards in the current sections 2261(b) and 2265. The amendments eliminated the language in former section 2261(b) that confined its application to states that conduct postconviction review following direct review, and eliminated the language in former section 2265 that confined its application to states that conduct unitary review. The result is that the current versions of these provisions apply to all state systems. See 152 Cong. Rec. S1620 (remarks of Senator Kyl) (2006 amendments ''simplif[y] * * * the chapter 154 qualification standard, which obviates the need for separate standards for those States that make direct and collateral review into separate vehicles and those States with unitary procedures'').

Given this history and the current text of chapter 154, it is clear that certification is available to all states that satisfy the chapter's now-uniform requirements in relation to collateral proceedings in capital cases, without distinction between states in which such collateral proceedings occur following direct review and states in which such collateral proceedings occur concurrently with direct review. It is also clear that the rule need not refer to a distinction between states with ''unitary review'' systems and others. ''State postconviction proceedings'' have accordingly been defined in § 26.21 in the final rule as ''collateral proceedings in state court, regardless of whether the state conducts such proceedings after or concurrently with direct state review.''

III. Certification Procedure

A. Initial Certification

Some comments noted that the proposed rule did not refer to the requirement in 28 U.S.C. 2265(a)(1)(B) that the Attorney General determine the date on which a state established its qualifying capital counsel mechanism. Since section 2265(a)(2) makes the certification effective as of this date, the Attorney General's determination of this date affects the applicability of chapter 154 to cases in which state postconviction proceedings occurred before the certification but after the state established a qualifying capital counsel mechanism. Section 26.23(d) has accordingly been modified in the final rule to make clear that the Attorney General's certification will include a determination of the date on which the qualifying capital counsel mechanism was established.

The attorneys general of Texas and Oklahoma requested a change in § 26.23(b)(2), which concerns notice to the chief justice of the state's highest court that the state has requested chapter 154 certification. The highest court with jurisdiction over criminal matters in their states is not the state supreme court, but a separate court of criminal appeals, which would more appropriately receive notice concerning the request for chapter 154 certification. Section 26.23(b)(2) has been modified in the final rule to take account of this fact.

Other comments opined that the procedures in § 26.23 for the Attorney General to receive public input and make certification decisions are inadequate because they do not meet requirements for rulemaking or adjudication under the Administrative Procedure Act (''APA'') or the Constitution. Additional requirements suggested in these comments included (i) further specification of the information a state must submit or the showing a state must make to be eligible for certification; (ii) specification of the amount of time that will be allowed for public comment or input concerning a proposed certification; (iii) personal notice to potentially affected persons concerning a proposed certification; (iv) full disclosure of the information considered in reaching a certification decision and the reasons for the decision; (v) prohibition of ex parte contacts during the consideration of a state application; (vi) conduct of a hearing in the state for which certification has been requested; and (vii) adversarial presentation and testing of evidence or information offered in support of a certification decision.

Commenters making this argument generally assumed that a chapter 154 certification is a ''rule'' for APA purposes. Even if this assumption were correct, it would provide no support for many of the procedures proposed by these commenters, because the APA requires trial-like proceedings only for rulemaking that is ''required by statute to be made on the record after opportunity for an agency hearing.'' 5 U.S.C. 553(c), 556–57. Chapter 154 does not require that certifications be made on the record or after a hearing.

A more basic problem with these commenters' argument is that a chapter 154 certification is not a rule as defined in the APA. A certification is not a ''statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.'' 5 U.S.C. 551(4); see *Attorney General's Manual on the Administrative Procedure Act* 13–14 (1947) (Rules ''must be of *future effect*, implementing or prescribing future law * * *. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations.''). A chapter 154 certification does not regulate future conduct and it is not based on policy considerations; rather, it is a determination that a state has satisfied certain existing requirements of federal law. See 28 U.S.C. 2265(a)(3). Thus, it is comparable to other determinations that are characterized as ''orders'' under the APA, such as licensing decisions. See 5 U.S.C. 551(6) (defining ''order'' to mean ''the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing''), 551(8) (defining ''license'' to include ''the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission''). There are other contexts in which the Attorney General or other executive officials are called on to make determinations whether state laws and policies satisfy federal statutory standards. See, *e.g.*, 42 U.S.C. 1973c (Voting Rights Act preclearance by Attorney General upon application by chief legal officer or other appropriate official of state or subdivision). Determinations of this type are not generally deemed to be ''rules'' under the APA.

Although the rulemaking procedures of 5 U.S.C. 553 are not applicable, they can be useful and can be voluntarily adopted. Section 26.23(c)–(d) in the rule incorporates the principal elements of APA rulemaking procedure: Publishing notice of the state's request for certification in the **Federal Register** and receipt of public comment. The **Federal Register** notice will include any statutes, regulations, rules, policies, and other authorities identified by the state in support of the request. The provision for public notice and comment in the rule reflects the view that obtaining such public input may help to ensure a fully informed decision by the Attorney General, but it is not required by the APA.

Because a chapter 154 certification is an ''order'' rather than a ''rule,'' the process for making such a certification is an ''adjudication.'' 5 U.S.C. 551(7) (defining ''adjudication'' to mean ''agency process for the formulation of an order''); see also *Attorney General's Manual on the Administrative Procedure Act*, supra, at 14–15 (''adjudication * * * may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits''). The APA prescribes procedures for certain types of formal administrative adjudications, see 5 U.S.C. 554, which some commenters would apply to chapter 154 certification decisions. But these provisions apply only to ''adjudication required by statute to be determined on the record after opportunity for an agency hearing.'' 5 U.S.C. 554(a). Because chapter 154 does not require that certifications be determined on the record after opportunity for an agency hearing, these APA provisions are inapplicable. Also, these APA provisions do not apply to decisions subject to de novo review by a court, 5

U.S.C. 554(a)(1), such as a chapter 154 certification, see 28 U.S.C. 2265(c)(3).

Some commenters with capital defense responsibilities suggested that their clients would be deprived of life without due process of law if they were executed following habeas corpus review under chapter 154. This argument is not convincing. Cf. *Felker* v. *Turpin*, 518 U.S. 651, 663–64 (1996) (upholding legislative reform in habeas corpus procedure and recognizing that ''judgments about the proper scope of the writ are normally for Congress to make'' [citation and internal quotation marks omitted]). Some commenters appeared to suggest or assume that capital convicts have a constitutionally protected liberty interest in the application of the habeas corpus procedures of chapter 153 of title 28 rather than those of chapter 154, and that the certification procedures in § 26.23 are inadequate to protect this interest, even with de novo judicial review under 28 U.S.C. 2265(c). Again, the argument is not convincing. Chapter 154 certification decisions will not require complex and controvertible factual determinations relating to the practical operation of state postconviction review. Rather, they will be based on examination of state laws and policies to determine whether they provide for the measures the chapter describes. See Part II.A above and Part III.B below. The rule's procedures are adequate to provide the information the Attorney General will need in making chapter 154 certification decisions.

There is also no adequate basis for concluding, as some commenters argued, that capital defendants must have the full panoply of rights in relation to chapter 154 certifications that parties have in litigation. Not all governmental determinations must be made through quasi-litigative procedures, including determinations whether state laws and policies conform to federal statutory requirements. See, *e.g.*, 42 U.S.C. 16925 (Attorney General to determine whether states and other jurisdictions have substantially implemented the national standards for sex offender registration and notification); 5 U.S.C. 554 (requiring formal administrative adjudication only for matters required by statute to be determined on the record after opportunity for an agency hearing, and excluding matters subject to de novo judicial determination and other specified matters.) Rather, less formal procedures like those provided in § 26.23(c)–(d) are often more conducive to prompt and accurate decision-making. These procedures may include such measures as requesting additional information from the applicant state and advising the applicant concerning remedial measures that would facilitate compliance. *See, e.g.*, 73 FR 38029, 38047 (July 2, 2008) (procedure for determining state compliance in national guidelines for sex offender registration and notification); 64 FR 572, 586 (Jan. 5, 1999) (similar provisions in guidelines for predecessor sex offender registration and notification law). The commenters give no persuasive reason to depart from this approach in chapter 154 certification decisions.

A few procedural suggestions in the comments merit additional discussion:

One is that the rule further specify the showing a state must make to be eligible for certification. Comments of this type might be taken as proposing that the rule specify in greater detail the type or amount of supporting information that states must submit. But such specifications do not appear in chapter 154 itself and they are not necessary for the Attorney General to carry out his certification functions under the chapter. It is preferable to allow states to submit whatever information they wish in support of a certification request, just as all other persons will be permitted to submit whatever information they wish in support of or in opposition to a certification request. It is obviously in the interest of all concerned entities to submit whatever relevant information they can muster in support of the disposition they favor, and allowing them to do so will help to ensure that the Attorney General has the basis for a fully informed decision.

Alternatively, comments of this type may suggest that states should be required to establish that they have implemented qualifying capital counsel standards in a particular way, such as through statutory provisions or through procedural rules adopted by the state supreme court. But again, ''[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.'' 28 U.S.C. 2265(a)(3). There were originally provisions in chapter 154 describing in what form and by what entities qualifying capital counsel mechanisms and standards were to be adopted, but the 2006 amendments to chapter 154 eliminated these provisions. See 28 U.S.C. 2261, 2265; 152 Cong. Rec. S1624–25 (daily ed. Mar. 2, 2006) (remarks of Senator Kyl) (explaining problem under prior statutes illustrated by adverse decision concerning California's qualification and need for reform to afford states flexibility concerning establishment of capital counsel mechanisms). Hence, in making certification decisions under chapter 154, the Attorney General is not limited to examining particular types of rules or enactments, but rather may take into account all articulations of relevant state policy, regardless of form.

Finally, some comments proposed that the rule include a minimum period of time, such as at least 90 days, for comment on a requested chapter 154 certification. It is unnecessary to include such a specification in the rule. Section 26.23(c) provides for notice of a requested certification through **Federal Register** publication, and the time period for public comment will be included in such notices in the normal manner.

B. Continuing Oversight and Decertification

Some commenters maintained that the Attorney General must provide for ongoing monitoring or oversight of the postconviction capital counsel systems of states that have received chapter 154 certification, and must decertify states whose performance in this area is found to be wanting. Some argued that, in the absence of such oversight, states could simply ignore the requirements relating to postconviction capital counsel in their own laws and rules. No changes have been made in the rule based on these comments because they misunderstand chapter 154 and conflate the functions that chapter 154 assigns to the Attorney General with those it leaves to the courts.

Chapter 154 sets two requirements for its applicability. The first requirement is that the Attorney General certify that the state has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265. 28 U.S.C. 2261(b)(1). Section 2265 provides that the state must have ''established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel'' for indigents in state capital postconviction proceedings, and that the state must ''provide[] standards of competency for the appointment of counsel'' in such proceedings. A qualifying capital counsel mechanism also must provide for judicial orders appointing counsel or declining to do so based on waiver or non-indigency (section 2261(c)) and for replacement or continuation of counsel at different stages of a capital case in conformity with certain requirements (section 2261(d)). These provisions do not assign any function to the Attorney General beyond examining state laws and policies to determine whether they provide for these measures.

The second requirement for chapter 154's applicability is that ''counsel was

appointed pursuant to th[e] mechanism [certified by the Attorney General], petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.'' 28 U.S.C. 2261(b)(2). This paragraph differs from section 2261(b)(1) in that it does not assign any function to ''the Attorney General of the United States.'' Rather, it is addressed to the federal court to which a capital convict presents a habeas corpus petition. Hence, even if the Attorney General has certified a state, chapter 154 will not apply (absent waiver or a finding of non-indigency in the state proceedings) if the federal habeas court determines that counsel was not actually appointed for the convict pursuant to the certified mechanism.

Chapter 154 thus provides a tripartite division of responsibility: The Attorney General makes the general certification determination based on an examination of state laws and policies, but has no oversight role with respect to particular cases. Federal habeas courts verify that counsel was appointed pursuant to the state postconviction capital counsel mechanism in particular cases. Beyond that, administration of the state capital counsel system is left to the state. The legislative history confirms the division of responsibilities set forth in the statutes: ''Under new section 2265, the Attorney General of the United States will decide if a State has established a qualifying mechanism * * *. Once a State is certified as having a qualifying mechanism, chapter 154 applies to all cases in which counsel was appointed pursuant to that mechanism, and to cases where counsel was not appointed because the defendant waived counsel, retained his own, or had the means to retain his own. 'Pursuant' is intended to mean only that the State's qualifying mechanism was invoked to appoint counsel, not to empower the Federal courts to supervise the State courts' administration of their own appointment systems. Paragraph (a)(3) of new section 2265 forbids creation of additional requirements not expressly stated in the chapter * * *.'' 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (remarks of Senator Kyl).

Nothing in chapter 154 supports the view of some commenters that the Attorney General must examine the operation of the state capital counsel mechanism in particular cases, and there is much to the contrary. The statutes require certification by the Attorney General, but say nothing about decertification. If some type of continuing oversight and potential decertification were contemplated, many questions would need to be resolved, including (1) how the Attorney General would receive information concerning the ongoing operation of the certified state capital counsel mechanism; (2) whether departures in particular cases from the prescribed capital counsel mechanism would deprive the states of expedited habeas review in those cases only, or in all cases; (3) what quantum of violations would be necessary to warrant global decertification; (4) whether or how the Attorney General would communicate needed remedial measures to the state; and (5) whether and how certification could be restored if deficiencies in the operation of the capital counsel mechanism were corrected. There is nothing about any of these matters in chapter 154.

The commenters' theory also conflicts with features of chapter 154 that presuppose a one-time certification. For example, section 2265(a)(2) states that ''[t]he date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.'' If decertification were also contemplated, one would expect the provision to say as well when a certification terminates. Likewise, section 2265(b) states that ''the Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).'' Had decertification been contemplated, one would also expect the provision to direct the Attorney General to implement a decertification procedure.

In sum, the rule has not been changed to provide for continuing oversight of the operation of certified state capital counsel mechanisms by the Attorney General, or for potential decertification of state counsel mechanisms, because that would be contrary to the statutes. The legislative history confirms the obvious import of the statutory language on this point: ''When section 507 was being finalized, I and others were presented with arguments that some mechanism should be created for 'decertifying' a State that has opted in to chapter 154 but that allegedly has fallen out of compliance with its standards. I ultimately concluded that such a mechanism was unnecessary, and that it would likely impose substantial litigation burdens on the opt-in States that would outweigh any justification for the further review * * *. [I]f such a means of post-opt-in review were created, it inevitably would be overused and abused * * *. I thought it best to create a system of one-time certification, with no avenues to challenge or attempt to repeal the State's continuing chapter-154 eligibility. The consequences of opting in to chapter 154 should not be perpetual litigation over the State's continuing eligibility. * * * Therefore, under section 507, once a State is certified for chapter 154, that certification is final. There is no provision for 'decertification' or 'compliance review' after the State has been made subject to chapter 154.'' 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (remarks of Senator Kyl).

C. Effect of Changes in Capital Counsel Mechanisms

Some commenters criticized § 26.23(e) in the proposed rule, which provided in part that a certification would no longer apply if a state changed its capital counsel mechanism ''in a manner that may affect satisfaction of the requirements of § 26.22,'' but that ''the State may request a new certification by the Attorney General that the changed mechanism satisfies the requirements of § 26.22.'' Some comments argued that the certification should not cease to apply merely because the change might affect satisfaction of the chapter 154 requirements. Other comments noted potential problems resulting from the absence of any specification of who would determine whether a change in the capital counsel system might affect satisfaction of the requirements of § 26.22.

In response to these comments, § 26.23(e) has been changed in the final rule to delete the statement that certification will not apply to a changed capital counsel mechanism. As noted above, chapter 154 makes no provision for ''decertifying'' a state after it has received chapter 154 certification. See 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (remarks of Senator Kyl). This might in theory make it superfluous to permit the Attorney General to recertify a state after it has changed its counsel mechanism, on the ground that the original certification remains good no matter what happens subsequently. But capital defendants and their counsel may not accept such an understanding of chapter 154, and they may argue in litigation that the chapter 154 federal habeas corpus review procedures should not be deemed applicable in their cases in light of changes or alleged changes in a state's certified capital counsel mechanism. If a state had no means in such a case to seek re-certification by the Attorney General, then the problem that Congress sought to eliminate through the 2006 amendments could recur—litigation of the adequacy of state capital counsel mechanisms in the very federal courts that are affected by the applicability of the expedited habeas procedures in

chapter 154. The final rule, like the proposed rule, accordingly provides that the state may seek recertification by the Attorney General in such circumstances.

IV. Other Matters

A. Regulatory Certifications

Regulatory Flexibility Act

Some comments, including some from private lawyers who accept appointments to represent capital defendants in federal habeas corpus review proceedings, took issue with the Regulatory Flexibility Act certification in the proposed rule that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Their main argument on this point was that the applicability of the 180-day time limit for federal habeas filing under 28 U.S.C. 2263 in cases subject to chapter 154 would so burden them as to drive them out of capital federal habeas corpus work. No change has been made with respect to the Regulatory Flexibility Act certification in the final rule because the claim of a significant economic impact on a substantial number of small entities is unconvincing.

Independent of chapter 154, a convict must file a habeas corpus application within a one-year period, normally running from the date the judgment becomes final. 28 U.S.C. 2244(d). The basic 180-day limitation period under 28 U.S.C. 2263(a) is shorter, but it is extendable by 30 days for cause, *Id.* section 2263(b)(3), and it is tolled during the pendency of a petition for certiorari to the Supreme Court filed at the conclusion of direct review, *Id.* section 2263(b)(1). So these commenters overstate the practical difference between the habeas filing time limit under chapter 154 and the time limit that otherwise applies.

Chapter 154 also includes incentives for states to upgrade the representation of capital defendants in state postconviction proceedings, which should be of benefit to counsel who subsequently represent them in federal habeas corpus proceedings, by promoting the adequate development and presentation of claims in the state proceedings. In addition, the chapter 154 procedures eliminate a number of burdens that defense counsel would otherwise bear. Where chapter 154 applies, the automatic stay provisions of 28 U.S.C. 2262 are available, reducing the need to engage in litigation over stays of execution. Moreover, 28 U.S.C. 2264 provides clearer and tighter rules concerning the range of cognizable claims in federal habeas corpus review under chapter 154, in comparison with the general federal habeas review standards. This will relieve federal habeas counsel in chapter 154 proceedings of the need to develop and present claims that might be cognizable under the more porous general habeas rules, but are not cognizable under the chapter 154 standards. See 152 Cong. Rec. S1627–28 (daily ed. Mar. 2, 2006) (remarks of Senator Kyl) (explaining differences). Furthermore, under the chapter 154 procedures, federal habeas counsel will be relieved of the need to litigate questions concerning the exhaustion of state remedies, and of other litigative burdens incident to the movement of cases back and forth between the state courts and the federal courts that results from the exhaustion requirement of 28 U.S.C. 2254(b)–(c). This requirement does not apply to review under chapter 154. 28 U.S.C. 2264(b) (''Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.''); 152 Cong. Rec. S1626–27 (daily ed. Mar. 2, 2006) (remarks of Senator Kyl) (so explaining). In projecting a significant economic impact resulting from the application of certain features of the chapter 154 procedures, these commenters do not take account of offsetting reductions in the work required to prepare and litigate federal habeas petitions that would result from other features of these procedures.

Finally, the lawyers complaining of an adverse economic impact do not claim or show that other litigation or legal work they would engage in instead would be less lucrative, even if it were true that the implementation of chapter 154 would deter them from accepting capital habeas appointments. Considering all of the above, no substantial reason has been given for revisiting the Regulatory Flexibility Act certification and it is unchanged in the final rule.

Executive Order 13132—Federalism

Some commenters took issue with the certification in the proposed rule that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment, pursuant to Executive Order 13132. (The proposed rule included in this certification a mistaken reference to the predecessor Executive Order 12612, but current Executive Order 13132 was accurately referenced in the caption for the certification, and the certification was premised on the current version of that order.) The specific claim of these commenters is that the proposed rule did not include federalism assessment statements sufficient under section 6(b) and (c) of Executive Order 13132.

The requirements of section 6(b) and (c) of the Executive Order are limited to rules with ''federalism implications.'' This phrase means ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Exec. Order 13132 at § 1(a). But the certification in the proposed rule properly stated that the rule does not have such effects, noting that the rule only provides a framework for states that wish to qualify for the benefits of the expedited habeas corpus procedures of chapter 154.

Hence, the objection that the proposed rule did not include assessments sufficient to comply with section 6(b) and (c) of the Executive Order is not well founded. The certification accordingly has not been changed in the final rule, except for correcting the mistaken citation to Executive Order 12612.

Executive Order 12988—Civil Justice Reform

Some commenters objected to the certification that the proposed regulation met the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988, including the requirements that proposed regulations ''provide a clear legal standard for affected conduct rather than a general standard,'' *Id.* section 3(a)(3), and that proposed regulations, as appropriate, ''define[ ] key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items,'' *Id.* section 3(b)(2)(F).

The comments urging specificity in the rule, as directed by Executive Order 12988, are at odds with objections by the same commenters that the rule should not specify which state officials are appropriate state officials for seeking chapter 154 certification, an issue discussed in Part I.B of this summary above. In relation to other terms and concepts in chapter 154, the objection relating to clear legal standards and definitional specificity is merely a variation of the claim that the Attorney General should usurp definitional functions that chapter 154 reserves to the states (regarding counsel competency standards), or should violate the prohibition of 28 U.S.C. 2265(a)(3) against adding to the chapter's express requirements for certification in the guise of ''definition.'' These matters are fully discussed in Part II.A–B of this summary above.

Hence, the comments received provided no substantial reason to reconsider the certification relating to Executive Order 12988 and this certification has not been changed in the final rule.

B. Additional Comments

Other comments were received on the proposed rule, which variously expressed support for the rule and did not propose any changes; stated general opposition to the rule or chapter 154; or submitted comments proposing changes in the rule that were similar in character or purpose to the comments discussed above. No additional changes were made in the rule on the basis of these comments because they either proposed no changes or provided no persuasive reasons for the changes they proposed.

Section-by-Section Analysis

Section 26.20

Section 26.20 explains the rule's purpose to implement the certification procedure for chapter 154.

Section 26.21

Section 26.21 provides definitions for certain terms used in chapter 154 and the regulations. Under 28 U.S.C. 2265(a), a certification request must be made by ''an appropriate State official.'' Pursuant to the definition of this term in the rule, in most cases, that official will be the state attorney general. In those few states, however, where the state attorney general does not have responsibilities relating to federal habeas corpus litigation, the chief executive of the state will be considered the appropriate state official to make a submission on behalf of the state.

Section 26.21 defines ''State postconviction proceedings'' as ''collateral proceedings in state court, regardless of whether the state conducts such proceedings after or concurrently with direct state review.'' Collateral review normally takes place following the completion of direct review of the judgment, but some states have special procedures for capital cases in which collateral proceedings and direct review may take place concurrently. Formerly separate provisions for the application of chapter 154 in states with ''unitary review'' procedures (involving concurrent collateral and direct review) were replaced by the recent amendments with provisions that are worded broadly enough to permit chapter 154 certification for all states under uniform standards, regardless of their timing of collateral review vis-a-vis direct review. Compare current 28 U.S.C. 2261(b) and 2265, as amended by Public Law 109–177, section 507, 120 Stat. 250–51 (Mar. 9, 2006), with former 28 U.S.C. 2261(b) and 2265 (2000); see 152 Cong. Rec. S1620 (daily ed. Mar. 2, 2006) (remarks of Sen. Kyl) (explaining that the current provisions simplify the chapter 154 qualification standards, ''which obviates the need for separate standards for those States that make direct and collateral review into separate vehicles and those States with unitary procedures'').

The definition of ''State postconviction proceedings'' in the rule reflects the underlying objective of chapter 154 to provide expedited federal habeas corpus review in capital cases arising in states that have gone beyond the constitutional requirement of appointing counsel for indigents at trial and on appeal by extending the appointment of counsel to indigent capital defendants in state collateral proceedings. The provisions of chapter 154, as well as the relevant legislative history, reflect the understanding of ''postconviction proceedings'' as not encompassing all proceedings that occur after conviction (*e.g.*, sentencing proceedings, direct review), but rather as referring to collateral proceedings. See 28 U.S.C. 2261(e) (providing that ineffectiveness or incompetence of counsel during postconviction proceedings in a capital case cannot be a ground for relief in a federal habeas corpus proceeding); 28 U.S.C. 2263(a), (b)(2) (180-day time limit for Federal habeas filing under chapter 154 starts to run ''after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review'' subject to tolling ''from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition''); 152 Cong. Rec. S1620, 1624–25 (daily ed. Mar. 2, 2006) (remarks of Sen. Kyl) (explaining that chapter 154 provides incentives for States to provide counsel in State postconviction proceedings, equated to collateral proceedings); 151 Cong. Rec. E2639–40 (daily ed. Dec. 14, 2005) (extension of remarks of Rep. Flake) (same understanding); see also, *e.g.*, *Murray* v. *Giarratano,* 492 U.S. 1 (1989) (equating postconviction and collateral proceedings).

Section 26.22

Section 26.22 sets out the requirements for certification that a state must meet to qualify for the application of chapter 154. These are the requirements in 28 U.S.C. 2261(c)–(d) and 2265(a)(1). With respect to each of the requirements, examples are provided in the text of mechanisms that would be deemed sufficient or, in some cases, insufficient to comply with the chapter. The examples given of qualifying mechanisms are illustrative and therefore do not preclude states with other mechanisms from meeting the requirements for certification.

Section 26.23

Section 26.23 sets out the mechanics of the certification process for states seeking to opt in to chapter 154.

Regulatory Certifications

Executive Order 12866—Regulatory Planning and Review

This action has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and, accordingly, this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. It provides only a framework for those states that wish to qualify for the benefits of the expedited habeas procedures of chapter 154 of title 28 of the U.S. Code. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule provides only a framework for those states that wish to qualify for the benefits of the expedited habeas procedures of chapter 154 of title 28 of the United States Code.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under section 202 of the Unfunded Mandates Reform Act (2 U.S.C. 1532).

List of Subjects in 28 CFR Part 26

Law enforcement officers, Prisoners.

■ Accordingly, for the reasons set forth in the preamble, part 26 of chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 26—DEATH SENTENCES PROCEDURES

■ 1. The authority citation for part 26 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 4001(b), 4002; 28 U.S.C. 509, 510, 2261, 2265.

■ 2. The heading for part 26 is revised as set forth above.

■ 3. Sections 26.1 through 26.5 are designated as Subpart A and a new subpart heading is added to read as follows:

Subpart A—Implementation of Death Sentences in Federal Cases

■ 4. Part 26 is amended by adding at the end thereof the following new Subpart B to read as follows:

Subpart B—Certification Process for State Capital Counsel Systems

Sec.

§ 26.20 Purpose.

Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a state has a mechanism for providing legal representation to indigent prisoners in state postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. If certification is granted, sections 2262, 2263, 2264, and 2266 of chapter 154 of title 28 apply in relation to federal habeas corpus review of capital cases from the state. Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.

§ 26.21 Definitions.

For purposes of this part, the term—

Appropriate state official means the State Attorney General, except that, in a state in which the State Attorney General does not have responsibility for federal habeas corpus litigation, it means the Chief Executive thereof.

State postconviction proceedings means collateral proceedings in state court, regardless of whether the state conducts such proceedings after or concurrently with direct state review.

§ 26.22 Requirements.

A state meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines each of the following to be satisfied:

(a) The state has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in state postconviction proceedings. As provided in 28 U.S.C. 2261(c) and (d), the mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly request continued representation, and the mechanism must provide for the entry of an order by a court of record—

(1) Appointing one or more attorneys as counsel 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;

(2) Finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

Example 1. A state provides that attorneys in a public defender's office are to be appointed to represent indigent capital defendants in state postconviction proceedings in capital cases. The counsel appointment mechanism otherwise satisfies the requirements of 28 U.S.C. 2261(c) and (d). Such a mechanism would satisfy the chapter 154 requirement relating to appointment of counsel.

Example 2. 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). Such a mechanism would satisfy the chapter 154 requirement relating to appointment of counsel.

Example 3. State law provides that local jurisdictions are to determine whether counsel is appointed for indigents in state postconviction proceedings in capital cases and not all jurisdictions provide for the appointment of such counsel. This mechanism would not satisfy the chapter 154 requirement relating to appointment of counsel.

(b) The state has established a mechanism for compensation of appointed counsel in state postconviction proceedings in capital cases.

Example 1. A state sets hourly rates and allowances for compensation of capital counsel, with judicial discretion to authorize additional compensation if necessary in particular cases. For example, state law may provide that capital counsel in state postconviction proceedings will be paid an hourly rate not to exceed $100 for up to 200 hours of work, and that these caps can be judicially waived if compensation would otherwise be unreasonable. Such a system would meet this requirement, as the state has established a mechanism to compensate counsel in state postconviction proceedings.

Example 2. A state provides that attorneys in a public defender's office are to be appointed to serve as counsel for indigent defendants in capital postconviction proceedings. The attorney's compensation is his or her regular salary provided by the public defender's office. Such a system would meet the requirement of establishing a mechanism to compensate counsel in state postconviction proceedings.

Example 3. A state appoints attorneys who serve on a volunteer basis as counsel for indigent defendants in all capital postconviction proceedings. There is no provision for compensation of appointed counsel by the state. Such a system would not meet the requirement regarding compensation of counsel.

(c) The state has established a mechanism for the payment of reasonable litigation expenses of appointed counsel in state postconviction proceedings in capital cases.

Example 1. A state may simply authorize the court to approve payment of reasonable litigation expenses. For example, state law may provide that the court shall order reimbursement of counsel for expenses if the expenses are reasonably necessary and reasonably incurred. Such a system would meet the requirement of establishing a mechanism for payment of reasonable litigation expenses.

Example 2. A state authorizes reimbursement of counsel for litigation expenses up to a set cap, but with allowance for judicial authorization to reimburse expenses above that level if necessary. This system would parallel the approach in postconviction proceedings in federal capital cases and in federal habeas corpus review of state capital cases under 18 U.S.C. 3599(a)(2), (f), (g)(2), which sets a presumptive cap of $7,500 but provides a procedure for judicial authorization of greater amounts. Such a system would meet the requirement of establishing a mechanism for payment of reasonable litigation expenses as required for certification under chapter 154.

Example 3. State law authorizes reimbursement of counsel for litigation expenses in capital postconviction proceedings up to $1000. There is no authorization for payment of litigation expenses above that set cap, even if the expenses are determined by the court to be reasonably necessary and reasonably

incurred. This mechanism would not satisfy the chapter 154 requirement regarding payment of reasonable litigation expenses.

(d) The state provides competency standards for the appointment of counsel representing indigent prisoners in capital cases in state postconviction proceedings.

Example 1. A state requires that postconviction counsel must have been a member of the state bar for at least five years and have at least three years of felony litigation experience. This standard is similar to that set by federal law for appointed counsel for indigent defendants in postconviction proceedings in federal capital cases, and in federal habeas corpus review of state capital cases, under 18 U.S.C. 3599(a)(2), (c). Because this state has adopted standards of competency, it meets this requirement.

Example 2. A state appoints counsel for indigent capital defendants in postconviction proceedings from a public defender's office. The appointed defender must be an attorney admitted to practice law in the state and must possess demonstrated experience in the litigation of capital cases. This state would meet the requirement of having established standards of competency for postconviction capital counsel.

Example 3. A state law requires some combination of training and litigation experience. For example, state law might provide that in order to represent an indigent defendant in state postconviction proceedings in a capital case an attorney must—(1) Have attended at least twelve hours of training or educational programs on postconviction criminal litigation and the defense of capital cases; (2) have substantial felony trial experience; and (3) have participated as counsel or co-counsel in at least five appeals or postconviction review proceedings relating to violent felony convictions. This State would meet the requirement of having established standards of competency for postconviction capital counsel.

Example 4. State law allows any attorney licensed by the state bar to practice law to represent indigent capital defendants in postconviction proceedings. No effort is made to set further standards or guidelines for such representation. Such a mechanism would not meet the requirement of having established standards of competency for postconviction capital counsel.

§ 26.23 Certification process.

(a) An appropriate state official may request that the Attorney General determine whether the state meets the requirements for certification under § 26.22.

(b) The request shall include:

(1) An attestation by the submitting state official that he or she is the ''appropriate state official'' as defined in § 26.21; and

(2) An affirmation by the state that it has provided notice of its request for certification to the chief or presiding justice or judge of the state's highest court with jurisdiction over criminal matters.

(c) Upon receipt of a state's request for certification, the Attorney General will publish a notice in the **Federal Register**—

(1) Indicating that the state has requested certification;

(2) Listing any statutes, regulations, rules, policies, and other authorities identified by the state in support of the request; and

(3) Soliciting public comment on the request.

(d) The state's request will be reviewed by the Attorney General, who may, at any time, request supplementary information from the state or advise the state of any deficiencies that would need to be remedied in order to obtain certification. The review will include consideration of timely public comments received in response to the **Federal Register** notice under paragraph (c) of this section. The certification will be published in the **Federal Register** if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the state for certification was established.

(e) Upon certification by the Attorney General that a state meets the requirements of § 26.22, such certification is final and will not be reopened. Subsequent changes in a state's mechanism for providing legal representation to indigent prisoners in state postconviction proceedings in capital cases do not affect the validity of a prior certification or the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed during state postconviction proceedings in the case. However, 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.

Dated: December 5, 2008.

Michael B. Mukasey,

Attorney General.

[FR Doc. E8–29328 Filed 12–10–08; 8:45 am]

BILLING CODE 4410–18–P

POSTAL SERVICE

39 CFR Part 912

Procedures To Adjudicate Claims for Personal Injury or Property Damage Arising Out of the Operation of the U.S. Postal Service

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This rule amends the Postal Service's regulations concerning tort claims to clarify the procedure for amending claims, and to update mailing addresses.

DATES: *Effective Date:* December 11, 2008.

FOR FURTHER INFORMATION CONTACT: Ruth A. Przybeck, Chief Counsel, National Tort Center, P.O. Box 66640, St. Louis, MO 63141–0640; telephone (314) 872–5120.

SUPPLEMENTARY INFORMATION: Amendment of part 912 is necessary to clarify the procedure in § 912.5 for amending claims, and to update mailing addresses. This rule is a change in agency rules of procedure that does not substantially affect any rights or obligations of private parties. Therefore, it is appropriate for its adoption by the Postal Service to become effective immediately.

List of Subjects in 39 CFR Part 912

Administrative practice and procedure; Claims.

■ For the reasons set forth above, the Postal Service amends 39 CFR part 912 as follows:

PART 912—[AMENDED]

■ 1. The authority citation for part 912 continues to read as follows:

Authority: 28 U.S.C. 2671–2680; 28 CFR 14.1 through 14.11; 39 U.S.C. 409.

§ 912.4 [Amended]

■ 2. In § 912.4, remove the address ''P.O. Box 66640, St. Louis, MO 63166–6640'' and add ''P.O. Box 66640, St. Louis, MO 63141–0640'' in its place.

■ 3. In § 912.5, add paragraph (c) to read as follows:

§ 912.5 Administrative claim; when presented.

* * * * *

(c) Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the Postal Service shall have six months in which to make final disposition of the claim as amended, and the claimant's