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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HABEAS CORPUS RESOURCE CENTER,

No. C 08-2649 CW

Plaintiff,

v.

ORDER GRANTING  
PLAINTIFF'S MOTION  
FOR A PRELIMINARY  
INJUNCTION

UNITED STATES DEPARTMENT OF JUSTICE  
and MICHAEL B. MUKASEY, in his  
official capacity as Attorney General  
of the United States,

Defendants.

\_\_\_\_\_/

Plaintiff Habeas Corpus Resource Center moves for a preliminary injunction barring Defendants U.S. Department of Justice (DOJ) and Michael Mukasey from making effective the regulation entitled "Certification Process for State Capital Counsel Systems," which is to be codified at 28 C.F.R. Part 26. Defendants oppose the motion.

BACKGROUND

Chapter 154 of Title 28 of the United States Code provides for expedited procedures in federal capital habeas corpus cases when a state is able to establish that it has provided qualified, competent, adequately resourced and adequately compensated counsel

1 in state post-conviction proceedings to inmates facing a capital  
2 sentence. Under the Antiterrorism and Effective Death Penalty Act  
3 of 1996, which added Chapter 154 to the Code, federal courts were  
4 responsible for determining whether states were eligible for the  
5 expedited federal procedures. The eligibility criteria were  
6 contained in § 2261(b), which provided:

7 (b) This chapter is applicable if a State establishes by  
8 statute, rule of its court of last resort, or by another  
9 agency authorized by State law, a mechanism for the  
10 appointment, compensation, and payment of reasonable  
11 litigation expenses of competent counsel in State  
12 post-conviction proceedings brought by indigent prisoners  
13 whose capital convictions and sentences have been upheld  
14 on direct appeal to the court of last resort in the State  
15 or have otherwise become final for State law purposes.  
16 The rule of court or statute must provide standards of  
17 competency for the appointment of such counsel.

18 28 U.S.C. § 2261(b) (2005).

19 The USA PATRIOT Improvement and Reauthorization Act of 2005  
20 (the Patriot Act), Pub. L. No. 109-174, 120 Stat. 192 (2005),  
21 amended Chapter 154 to shift the eligibility determination from the  
22 federal courts to the Attorney General. It replaced § 2261(b) with  
23 a new provision that states:

24 (b) Counsel.--This chapter is applicable if--

25 (1) the Attorney General of the United States  
26 certifies that a State has established a mechanism  
27 for providing counsel in postconviction proceedings  
28 as provided in section 2265; and

(2) counsel was appointed pursuant to that  
mechanism, petitioner validly waived counsel,  
petitioner retained counsel, or petitioner was found  
not to be indigent.

28 U.S.C. § 2261(b). Section 2265, which was also added by the  
Patriot Act amendments, provides:

(a) Certification.--

(1) In general.--If requested by an appropriate

1 State official, the Attorney General of the United  
2 States shall determine--

3 (A) whether the State has established a  
4 mechanism for the appointment, compensation,  
5 and payment of reasonable litigation expenses  
6 of competent counsel in State postconviction  
7 proceedings brought by indigent prisoners who  
8 have been sentenced to death;

9 (B) the date on which the mechanism described  
10 in subparagraph (A) was established; and

11 (C) whether the State provides standards of  
12 competency for the appointment of counsel in  
13 proceedings described in subparagraph (A).

14 (2) Effective date.--The date the mechanism  
15 described in paragraph (1)(A) was established shall  
16 be the effective date of the certification under  
17 this subsection.

18 (3) Only express requirements.--There are no  
19 requirements for certification or for application of  
20 this chapter other than those expressly stated in  
21 this chapter.

22 (b) Regulations.--The Attorney General shall promulgate  
23 regulations to implement the certification procedure  
24 under subsection (a).

25 (c) Review of certification.--

26 (1) In general.--The determination by the Attorney  
27 General regarding whether to certify a State under  
28 this section is subject to review exclusively as  
provided under chapter 158 of this title.

(2) Venue.--The Court of Appeals for the District of  
Columbia Circuit shall have exclusive jurisdiction  
over matters under paragraph (1), subject to review  
by the Supreme Court under section 2350 of this  
title.

(3) Standard of review.--The determination by the  
Attorney General regarding whether to certify a  
State under this section shall be subject to de novo  
review.

28 U.S.C. § 2265.

On June 6, 2007, the Attorney General published a notice of  
proposed rulemaking (NPRM) that would implement a procedure by

1 which states could be certified under Chapter 154. The  
2 requirements for certification were contained in a single section,  
3 which the Attorney General proposed codifying as 28 C.F.R. § 26.22:

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

6 (a) The State has established a mechanism for the  
7 appointment of counsel for indigent prisoners under  
8 sentence of death in State postconviction  
9 proceedings. As provided in 28 U.S.C. 2261(c) and  
10 (d), the mechanism must offer to all such prisoners  
11 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--

12 (1) Appointing one or more attorneys as counsel  
13 to represent the prisoner upon a finding that  
14 the prisoner is indigent and accepted the offer  
or is unable competently to decide whether to  
accept or reject the offer;

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

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

19 . . . .

20 (b) The State has established a mechanism for  
21 compensation of appointed counsel in State postconviction  
22 proceedings.

23 . . . .

24 (c) The State has established a mechanism for the payment  
25 of reasonable litigation expenses.

26 . . . .

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

29 Certification Process for State Capital Counsel Systems, 72 Fed.  
30 Reg. 31217, 31219-20 (proposed June 6, 2007) (to be codified at 28

1 C.F.R. Part 26). The entirety of the stated rationale for this  
2 section was:

3 Section 26.22 sets out the requirements for certification  
4 that a State must meet to qualify for the application of  
5 chapter 154. These are the requirements expressly set  
6 forth in 28 U.S.C. 2261(c)-(d) and 2265(a)(1). With  
7 respect to each of the requirements, examples are  
8 provided in the text of mechanisms that would be deemed  
9 sufficient or, in some cases, insufficient to comply with  
10 the chapter. The examples given of qualifying mechanisms  
11 are illustrative and therefore do not preclude States  
12 with other mechanisms for providing counsel in  
13 postconviction proceedings from meeting the requirements  
14 for certification.

15 Id. at 31218.

16 The NPRM established a sixty-day period during which  
17 interested parties could submit their comments on the proposed rule  
18 to the Attorney General. The comment period was subsequently re-  
19 opened for an additional forty-five days. 72 Fed. Reg. 44816 (Aug.  
20 9, 2007).

21 According to the final rule, which was published on December  
22 11, 2008, the Attorney General received more than 32,000 comments  
23 in response to the NPRM. Certification Process for State Capital  
24 Counsel Systems, 73 Fed. Reg. 75327, 75327 (Dec. 11, 2008) (to be  
25 codified at 28 C.F.R. Part 26). A number of comments complained  
26 that the proposed rule was vague and urged the Attorney General to  
27 "provide further specification concerning the 'standards of  
28 competency,' 'competent counsel,' 'compensation' of appointed  
counsel, and 'reasonable litigation expenses' that a state's  
postconviction capital system must provide to qualify" for  
certification. Id. at 75330.

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

1 rule conflicted with a legislative intent to ensure  
2 competent counsel for state capital convicts in exchange  
3 for expedited federal habeas corpus review. They cited  
4 in support certain statements by the sponsors of the 2006  
5 amendments that they viewed as implying that the rule  
6 must require states to provide "adequate" or "quality"  
7 counsel for such convicts. According to these Senators,  
8 the rule should specify what would constitute adequate  
9 counsel and ensure that the states provide such counsel.

10 Similarly, the Judicial Conference of the United States  
11 in its comments urged elaboration or supplementation of  
12 the statutory requirements, to make clear what states  
13 must do for certification and to ensure that capital  
14 defendants receive adequate representation in state  
15 postconviction proceedings.

16 Id. at 75330-31.

17 In the preamble to the final rule, the Attorney General  
18 rejected any suggestion that he had the authority to define the  
19 relevant terms. With respect to the term, "competent counsel" the  
20 preamble stated:

21 The commenters are correct that the text of chapter 154  
22 needs to be supplemented in defining competency standards  
23 for postconviction capital counsel, but mistaken as to  
24 who must effect that supplementation. Responsibility to  
25 set competency standards for postconviction capital  
26 counsel is assigned to the states that seek  
27 certification.

28 Id. at 75331. The Attorney General took the same approach with  
respect to his authority to establish standards for compensation of  
counsel and payment of reasonable litigation expenses, thereby  
leaving these matters to the discretion of the states seeking  
certification. Id. at 75332. In addition, the Attorney General  
expressed his view for the first time that existing case law  
interpreting the requirements of Chapter 154 was invalidated by the  
Patriot Act amendments' specification that there are "no  
requirements for certification or for application of this chapter  
other than those expressly stated in this chapter." See id.

1 The final rule is largely unchanged from the version contained  
2 in the NPRM. The primary substantive change to the rule was the  
3 deletion of a portion of proposed § 26.23(e) that had provided, "If  
4 a State with a certified mechanism amends governing State law to  
5 change its mechanism in a manner that may affect satisfaction of  
6 the requirements of § 26.22, the certification of the State's  
7 mechanism prior to the change does not apply to the changed  
8 mechanism, but the State may request a new certification by the  
9 Attorney General that the changed mechanism satisfies the  
10 requirements of § 26.22." 72 Fed. Reg. at 31220. The final  
11 version of the rule instead provides that, once a state is  
12 certified, it will remain certified even if it makes changes to its  
13 appointment mechanism. See 73 Fed. Reg. at 75339. Thus, under the  
14 final rule, a state could completely eliminate the right to counsel  
15 in capital post-conviction proceedings and continue to benefit from  
16 expedited review under Chapter 154.

17 Plaintiff is an agency of the State of California that  
18 provides legal representation to indigent defendants in state and  
19 federal post-conviction proceedings in California. Its amended  
20 complaint challenges the sufficiency of the notice provided in the  
21 NPRM. It claims that, although the final rule does not vary  
22 significantly from the proposed rule, the Attorney General's  
23 explanation of the rationale underlying the rule, made in response  
24 to comments and published for the first time in the preamble to the  
25 final rule, reveals an interpretation of the statute and the rule  
26 that has an impact beyond what interested parties could have  
27 foreseen based solely on the text of the rule itself. Plaintiff  
28 asserts that, in failing to provide notice of the scope of the

1 rule, Defendants deprived it of its right under the Administrative  
2 Procedures Act (APA) to comment meaningfully on the rule before it  
3 was promulgated. See 5 U.S.C. § 553(c).

4 On January 8, 2009, the Court issued a temporary restraining  
5 order and enjoined Defendants from making the final rule effective  
6 on January 12, 2009 as planned.

7 LEGAL STANDARD

8 "A plaintiff seeking a preliminary injunction must establish  
9 that he is likely to succeed on the merits, that he is likely to  
10 suffer irreparable harm in the absence of preliminary relief, that  
11 the balance of equities tips in his favor, and that an injunction  
12 is in the public interest." Winter v. Natural Res. Def. Council,  
13 Inc., \_\_\_ U.S. \_\_\_, 129 S. Ct. 365, 374 (2008). "[T]he required  
14 showing of harm varies inversely with the required showing of  
15 meritoriousness." Indep. Living Ctr. of S. Cal., Inc. v. Shewry,  
16 543 F.3d 1047, 1049 (9th Cir. 2008) (quoting Rodeo Collection, Ltd.  
17 v. W. Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987)). "When the  
18 balance of harm 'tips decidedly toward the plaintiff,' injunctive  
19 relief may be granted if the plaintiff raises questions 'serious  
20 enough to require litigation.'" Id. (quoting Benda v. Grand Lodge  
21 of the Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308,  
22 315 (9th Cir. 1978)).

23 DISCUSSION

24 I. Standing

25 Defendants argue that Plaintiff lacks standing to pursue its  
26 claims and thus cannot satisfy Article III's "case or controversy"  
27 requirement. A plaintiff "has the burden of establishing the three  
28 elements of Article III standing: (1) he or she has suffered an



1 injury in fact that is concrete and particularized, and actual or  
2 imminent; (2) the injury is fairly traceable to the challenged  
3 conduct; and (3) the injury is likely to be redressed by a  
4 favorable court decision." Salmon Spawning & Recovery Alliance v.  
5 Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008). "Article III  
6 standing requires an injury that is actual or imminent, not  
7 conjectural or hypothetical." Cole v. Oroville Union High School  
8 Dist., 228 F.3d 1092, 1100 (9th Cir. 2000) (internal quotation  
9 marks omitted). "A plaintiff may allege a future injury in order  
10 to comply with this requirement, but only if he or she 'is  
11 immediately in danger of sustaining some direct injury as the  
12 result of the challenged official conduct and the injury or threat  
13 of injury is both real and immediate, not conjectural or  
14 hypothetical.'" Scott v. Pasadena Unified School Dist., 306 F.3d  
15 646, 656 (9th Cir. 2002) (quoting City of Los Angeles v. Lyons, 461  
16 U.S. 95, 102 (1983)).

17 Defendants assert that Plaintiff will not suffer any injury  
18 merely by the final rule entering into effect. Rather, they claim,  
19 Plaintiff will suffer an injury only after California applies for  
20 and receives certification from the DOJ. This argument, however,  
21 addresses the injury to Plaintiff flowing from the substance of the  
22 rule. Plaintiff's challenges are to procedural defects underlying  
23 the rule's promulgation -- in particular, Defendants' failure to  
24 afford Plaintiff an opportunity to participate meaningfully in the  
25 notice and comment process. Viewed in this light, Plaintiff has  
26 already been injured by the challenged conduct. Standing can be  
27 premised on this type of procedural injury, so long as the  
28 plaintiff can "show that the procedures in question are designed to

1 protect some threatened concrete interest of his" and that there is  
2 a "reasonable probability" that the challenged action threatens  
3 that interest. Citizens for Better Forestry v. U.S. Dep't of  
4 Agric., 341 F.3d 961, 970-71 (9th Cir. 2003). Because Plaintiff's  
5 ability to represent the interests of its clients in federal habeas  
6 proceedings is implicated by California's potential certification  
7 under the rule, Plaintiff has a concrete interest that is  
8 reasonably likely to be threatened by the rule. The notice-and-  
9 comment procedures of the APA are designed to afford parties an  
10 opportunity to present their views on rules that affect their  
11 interests. See Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227,  
12 236 (D.C. Cir. 2008). Plaintiff therefore has standing to pursue  
13 its claims of procedural injury for failure to observe those  
14 procedures.

15 II. Ripeness

16 Defendants also argue that Plaintiff's APA claims are not ripe  
17 for review. They note that the ripeness doctrine serves "to  
18 prevent courts, through avoidance of premature adjudication, from  
19 entangling themselves in abstract disagreements over administrative  
20 policies, and also to protect agencies from judicial interference  
21 until an administrative decision has been formalized and its  
22 effects felt in a concrete way by the challenging parties." Abbott  
23 Labs. v. Gardner, 387 U.S. 136, 148-49 (1967), superseded in non-  
24 relevant part by statute, Pub. L. 94-574, 90 Stat. 2721 (1976), as  
25 recognized in Califano v. Sanders, 430 U.S. 99, 105 (1977).

26 According to Defendants, Plaintiff's claims will not be ripe until  
27 the Attorney General has applied the challenged regulation to an  
28 actual certification request. However, Defendants' position again

1 is based on characterizing Plaintiff's claims as pertaining to the  
2 substance of the rule. Plaintiff does not presently challenge the  
3 rule as contrary to Chapter 154; it challenges only Defendants'  
4 failure to afford it a meaningful opportunity to provide comments  
5 on the rule. Because the alleged procedural violations have  
6 already occurred, no additional facts remain to be developed and  
7 adjudicating Plaintiff's claim would not involve abstract  
8 disagreements. See Citizens for Better Forestry, 341 F.3d at 977.  
9 Plaintiff's claims are therefore ripe.

### 10 III. Likelihood of Success on the Merits

#### 11 A. Requirement of Notice-and-Comment Procedures

12 The APA requires an agency to publish notice of "either the  
13 terms or substance of [a] proposed rule or a description of the  
14 subjects and issues involved," in order to "give interested persons  
15 an opportunity to participate in the rule making through submission  
16 of written data, views, or arguments." 5 U.S.C. § 553(b)-(c).  
17 Defendants argue that they were not required to adhere to notice-  
18 and-comment rulemaking procedures, however, because theirs is an  
19 "interpretive rule," and the relevant provisions of the APA do not  
20 apply to "interpretative rules, general statements of policy, or  
21 rules of agency organization, procedure, or practice." 5 U.S.C.  
22 § 553(b)(3)(A).

23 "In general terms, interpretive rules merely explain, but do  
24 not add to, the substantive law that already exists in the form of  
25 a statute or legislative rule. Legislative rules, on the other  
26 hand, create rights, impose obligations, or effect a change in  
27 existing law pursuant to authority delegated by Congress." Hemp  
28 Indus. Ass'n v. Drug Enforcement Admin., 333 F.3d 1082, 1087 (9th

1 Cir. 2003). The distinction "turns on an agency's intention to  
2 bind itself" to a particular position. U.S. Tel. Ass'n v. FCC, 28  
3 F.3d 1232, 1234 (D.C. Cir. 1994).

4 The present rule was not an "interpretive" rule that was  
5 exempt from the APA's notice-and-comment requirements. It provided  
6 the "missing link" that was necessary to implement Chapter 154. If  
7 the rule goes into effect, states will be able to claim a right  
8 that they do not presently have. It is also clear that the DOJ  
9 intends to bind itself to the requirements set out in the rule; the  
10 preamble disavows any degree of discretion on the Attorney  
11 General's part. In addition, the DOJ's treatment of the rule to  
12 date belies its present assertion that the rule is simply  
13 interpretive. The DOJ classified the rule as a "major regulatory  
14 action" and purported to abide by the APA's notice-and-comment  
15 procedures.

16 For these reasons, Plaintiff has a high likelihood of success  
17 on the merits of this issue.

18 B. Adequacy of Notice

19 As noted above, the APA "requires an agency conducting  
20 notice-and-comment rulemaking to publish in its notice of proposed  
21 rulemaking 'either the terms or substance of the proposed rule or a  
22 description of the subjects and issues involved.'" Long Island  
23 Care at Home, Ltd. v. Coke, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2339, 2351  
24 (2007) (quoting 5 U.S.C. § 553(b)(3)). The test for sufficiency of  
25 notice under the APA "is whether the notice fairly apprises  
26 interested persons of the subjects and issues before the Agency."  
27 Louis v. U.S. Dep't of Labor, 419 F.3d 970, 975 (9th Cir. 2005)  
28 (internal quotation marks omitted). Plaintiff alleges that the

1 NPRM failed to provide adequate notice of the nature of Defendants'  
2 proposed rule because the "import and impact" of the rule was  
3 neither clear on its face nor disclosed in the preamble. See  
4 Natural Res. Def. Council, Inc. v. Hodel, 618 F. Supp. 848, 874-75  
5 (E.D. Cal. 1985).

6 To rebut Plaintiff's assertion, Defendants rely primarily on  
7 the fact that the final rule did not differ substantially from the  
8 proposed rule. They note that "a final regulation that varies from  
9 the proposal, even substantially, will be valid as long as it is in  
10 character with the original proposal and a logical outgrowth of the  
11 notice and comments." Env'tl. Def. Ctr., Inc. v. EPA, 344 F.3d 832,  
12 851 (9th Cir. 2003) (internal quotation marks omitted).

13 Nonetheless, even where the text of the rule itself does not  
14 change, notice may be insufficient if "the presentation of []  
15 information obscures the intent of the agency" and allows  
16 substantive rules to be enacted "through the back door." Louis,  
17 419 F.3d at 975. "An interested member of the public should be  
18 able to read the published notice . . . and understand the  
19 essential attributes" of the proposed action. Id. (internal  
20 quotation marks omitted).

21 Louis involved a rule that was introduced and described in a  
22 way that suggested it was nothing more than a description of  
23 records systems and their proposed routine uses. In reality,  
24 portions of the rule itself exempted certain records systems from  
25 disclosure requirements imposed by the Privacy Act. As a result,  
26 even though the exemptions were contained in the text of the  
27 proposed rule, "potentially controversial subject matter --  
28 exemption of entire systems of records from public disclosure laws"

1 was likely "to go unnoticed buried deep in a non-controversial  
2 publication generally describing existing systems and their  
3 contents." Louis, 419 F.3d at 976.

4 The present case is analogous to Louis. Although the final  
5 rule did not differ significantly from the proposed rule, Plaintiff  
6 has established that notice was inadequate because the NPRM did not  
7 reveal the Attorney General's view that the Patriot Act amendments  
8 invalidated existing case law interpreting the requirements of  
9 Chapter 154, nor his intention to turn over responsibility for  
10 evaluating the adequacy of state-created standards to the very  
11 states that created them.<sup>1</sup> The Ninth Circuit stressed in Louis  
12 "the importance of a notice's heading and summary in 'alerting a  
13 reader to the stakes'" involved in the rule's passage. Id. at 976  
14 (quoting McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317 (D.C.  
15 Cir. 1988)). Here, the summary of the rule in the NPRM did not  
16 convey the gravity of the Attorney General's action. Cf. Hodel,  
17 618 F. Supp. at 874-75 ("Given the actual impact of the new rule,  
18 the notice was patently misleading. A member of the public would  
19 be lulled into believing, by virtue of defendants'  
20 mischaracterization, that the change was designed only to  
21 'eliminate redundancy,' when, in fact, a basic policy readjustment  
22 was underway.")

23 The Patriot Act amendments did not alter the requirements of  
24 former § 2261(b) that states were eligible for certification only

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25  
26 <sup>1</sup>Plaintiff also claims that the NPRM did not give adequate  
27 notice: 1) that individual certification decisions would be  
28 considered adjudications, rather than rulemakings, under the APA;  
and 2) of the Department of Justice personnel who were responsible  
for drafting the rule. Because the Court finds that notice was  
inadequate for other reasons, it need not consider these arguments.

1 if they had established "a mechanism for the appointment,  
2 compensation, and payment of reasonable litigation expenses of  
3 competent counsel in State post-conviction proceedings." These  
4 requirements were simply moved to § 2265, and the determination of  
5 whether they had been satisfied was transferred from the courts to  
6 the Attorney General. While the text of the proposed rule did not  
7 specify how the Attorney General would determine the adequacy of a  
8 state's competency standards or the actual payment of reasonable  
9 litigation expenses and reasonable compensation, nothing in the  
10 proposed rule suggested that the Attorney General intended by the  
11 rule to abdicate all responsibility for ensuring that a state's  
12 standards were adequate in these respects. It was not until the  
13 final rule was published that the Attorney General explained his  
14 view that states seeking certification would determine for  
15 themselves whether their mechanisms were sufficient to ensure that  
16 competent, reasonably compensated counsel was actually appointed  
17 for defendants in capital cases, and to ensure that reasonable  
18 litigation expenses were actually paid. The Attorney General's  
19 approach is contrary to a long line of precedent interpreting the  
20 requirements of Chapter 154 -- requirements that were not  
21 eliminated by the Patriot Act amendments. See, e.g., Spears v.  
22 Stewart, 283 F.3d 992 (9th Cir. 2002) (holding that Chapter 154  
23 requires states to comply with their own systems for appointment of  
24 counsel); Baker v. Corcoran, 220 F.3d 276 (4th Cir. 2000) (holding  
25 that states do not qualify for expedited review under Chapter 154  
26 if they compensate appointed counsel at a rate that causes them to  
27 operate at a loss); Wright v. Angelone, 944 F. Supp. 460 (E.D. Va.  
28 1996) (holding that states cannot satisfy the requirements of

1 Chapter 154 unless they impose mandatory standards of competency  
2 that require appointed counsel to have "experience and demonstrated  
3 competence in bringing habeas petitions").

4 Defendants point to the comments submitted in response to the  
5 NPRM as proof that their notice was sufficient. However, although  
6 the comments address the rule's lack of precision in defining the  
7 relevant terms and urge the Attorney General to define the terms in  
8 a way that incorporates standards articulated in case law, they do  
9 not reflect an understanding of the Attorney General's view that  
10 such case law was invalidated by the Patriot Act amendments. Nor  
11 do they reflect an understanding of his view that he lacks  
12 authority to define the relevant statutory terms. If the NPRM had  
13 disclosed the Attorney General's controversial interpretation of  
14 Chapter 154, it is likely that many commenters would have disputed  
15 his view of the law. As it was, the Attorney General adopted his  
16 interpretation without the benefit of any such comments.

17 The Court concludes that the NPRM did not give adequate notice  
18 of the actual impact of the rule on state certification.  
19 Accordingly, Plaintiff has a high probability of success on the  
20 merits of this claim.

21 C. Bias

22 Plaintiff also claims that the rule is invalid because the DOJ  
23 officials who were involved in drafting it were biased toward  
24 prosecution interests. Plaintiff has submitted evidence supporting  
25 this conclusion. For example, the chief of the Capital Case Unit  
26 in the DOJ's Criminal Division (the agency's prosecutorial branch)  
27 was a member of the working group developing the regulation. This  
28 individual's professional background suggests that she may have had



1 a conflict of interest that rendered her involvement in drafting  
2 the rule inappropriate. There is also evidence that Senator Kyl of  
3 Arizona, who introduced the relevant portions of the Patriot Act  
4 amendments in the Senate, and Representative Lungren, the former  
5 Attorney General of California, exerted pressure on the DOJ as it  
6 drafted the rule. In addition, the evidence suggests that, even  
7 though the NPRM stated that working group members met with both  
8 prosecution and defense interests when creating the rule, the DOJ  
9 was never open to suggestions from members of the latter group.

10 An agency rule can be invalid if there is "a clear and  
11 convincing showing" that officials responsible for developing the  
12 rule had "an unalterably closed mind on matters critical to the  
13 [rule's] disposition." Alaska Factory Trawler Ass'n v. Baldrige,  
14 831 F.2d 1456, 1467 (9th Cir. 1987). This is because "[a]llowing  
15 the public to submit comments to an agency that has already made  
16 its decision is no different from prohibiting comments altogether."  
17 Nehemiah Corp. of Am. v. Jackson, 546 F. Supp. 2d 830, 847 (E.D.  
18 Cal. 2008). Although it would be premature to determine at this  
19 point whether the DOJ's rule was so tainted by bias that it was not  
20 a valid exercise of rulemaking authority, the evidence submitted by  
21 Plaintiff at least raises serious questions on the matter.

#### 22 IV. Irreparable Harm, Balance of Equities and the Public Interest

23 Defendants argue that Plaintiff has not demonstrated a  
24 likelihood that it will face irreparable harm if a preliminary  
25 injunction does not issue, because Plaintiff does not stand to face  
26 any harm until the State of California applies for and obtains  
27 certification under the rule. The Court disagrees and finds that  
28 Plaintiff has demonstrated a likelihood of irreparable harm

1 sufficient, when considered together with the likelihood of success  
2 on the merits, to warrant granting a preliminary injunction.

3       If the rule goes into effect as planned, the mere possibility  
4 that California could apply for certification at any time will  
5 immediately thrust Plaintiff into uncertainty over the legal  
6 framework that applies to state and federal post-conviction  
7 remedies already being pursued on behalf of its clients. Plaintiff  
8 will have to decide how best to allocate its resources and to  
9 represent its clients' interests while allowing for the possibility  
10 that California may apply for and receive certification in the near  
11 future. If California is certified, the limitations period  
12 applicable to federal habeas petitions will be shortened from one  
13 year to six months. Given the uncertainty over the retroactive  
14 effect of the new limitations period, see 28 U.S.C. § 2265(a)(2)  
15 (providing that a state's certification is retroactive to the date  
16 on which its mechanism for appointing counsel was established), if  
17 this were to happen, Plaintiff would be forced to file on an  
18 expedited basis habeas petitions that were already due as of the  
19 date of the certification. Thus, if the rule goes into effect,  
20 Plaintiff must evaluate the possibility that it will have less than  
21 the expected one year to develop its clients' federal claims, and  
22 must decide whether to refrain from devoting resources to pursuing  
23 possibly meritorious claims that it might not be able to develop  
24 adequately if it is ultimately forced to file within the shorter  
25 period. Similarly, Plaintiff must immediately decide whether to  
26 expedite its pursuit of state post-conviction remedies, possibly at  
27 the expense of asserting meritorious claims; the limitations period  
28 for federal habeas claims begins to run on the date of final state

1 court affirmance of the conviction on direct review, and is not  
2 tolled until the petition for state post-conviction review is  
3 filed. Plaintiff faces these decisions even though it would take  
4 some amount of time for California to become certified; while  
5 Plaintiff could challenge any certification decision, at the time  
6 the regulation goes into effect it must account for the possibility  
7 that its challenge will not be successful.

8 Compared to the harm faced by Plaintiff, Defendants stand to  
9 face little, if any, harm if the rule does not enter into effect  
10 immediately. The Patriot Act amendments were passed in 2005.  
11 Defendants did not publish their proposed rule until mid-2007 and  
12 did not publish their final rule until the end of 2008. An  
13 additional delay pending resolution of this lawsuit will not  
14 prejudice them. In addition, the public interest favors  
15 maintaining the status quo while the legality of Defendants' rule  
16 is determined. Allowing the rule to go into effect for a time,  
17 only later to determine it invalid, would serve no purpose. It  
18 would waste the resources, not only of taxpayers paying counsel to  
19 represent indigent clients whose rights would become uncertain  
20 under the rule, but also of states that decide to seek  
21 certification before the rule's validity is established, and of  
22 courts that must determine whether they are bound by Chapter 154's  
23 requirements once states have been so certified.

24 CONCLUSION

25 For the foregoing reasons, Plaintiff's motion for a  
26 preliminary injunction is GRANTED. Defendants are enjoined during  
27 the pendency of these proceedings from putting into effect the rule  
28 entitled "Certification Process for State Capital Counsel Systems,"

1 published at 73 Fed. Reg. 75,327 (Dec. 11, 2008), without first  
2 providing an additional comment period of at least thirty days and  
3 publishing a response to any comments received during such period.

4 IT IS SO ORDERED.

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6 Dated: 1/20/09



7 CLAUDIA WILKEN  
United States District Judge

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United States District Court  
For the Northern District of California