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Supreme Court limits habeas corpus appeals

by Leo F. Scanlon

The conservative majority of the Supreme Court has often presented its approach to law as an antidote to the "judicial activism" of their liberal colleagues, who are accused of acting like legislators instead of judges. That argument stands eviscerated by the actions of the majority in the case of *McCleskey v. Zant,* in which the court overrode statutory language governing federal *habeas corpus* proceedings, and strove to implement the Bush administration Crime Bill by judicial fiat. *Habeas corpus* proceedings concern the release of a party from unlawful detention.

Attorney General Richard Thornburgh added to the Roman circus atmosphere being cultivated by this court when he took the unusual step of testifying as a friend of the court in a death penalty case. Thornburgh's action came as expectation mounted that he will be running for the Senate seat of the late Sen. John Heinz (R-Pa.). His choice of issues—allowing inflammatory ("victim-impact") testimony at trial in order to pressure juries to sentence murderers to death—underlines the fact that the Bushmen are preparing a flood of executions as a political spectacle during the upcoming elections.

Court sanctifies prosecutorial misconduct

As with other recent death penalty cases brought before the Court, the majority, led by Justice Anthony Kennedy, and including Chief Justice William Rehnquist, and Justices Sandra Day O'Connor, Antonin Scalia, Byron White, and Douglas Souter, aggressively attacked prevailing legal standards in order to guarantee the quickest possible execution of the defendant, Warren McCleskey. McCleskey was accused of shooting an off-duty police officer during a robbery staged by him and several accomplices. There was conflicting testimony as to who actually shot the guard, and one witness testified that it was another robber, not McCleskey, who did the shooting. The conviction of McCleskey rested on the dubious testimony of one of his accomplices, and was secured by the testimony of a prison informant who was placed in an adjacent cell by the prosecution in order to elicit incriminating testimony. A jailhouse boast that he "would have shot his way out even if there had been 12 cops" at the scene, earned McCleskey a death sentence.

The fact that the only significant witness against him was an informant was concealed from McCleskey and his attorney throughout the trial and during the course of two state and an initial federal *habeas corpus* proceeding. Two weeks before the filing of a second federal *habeas* petition, a prison official admitted the relationship of the prosecution to the witness. A lower court ruled that this merited a new trial, but the Supreme Court said no.

The majority ruled that McCleskey gave up his right to a hearing by not asserting it in his first federal *habeas* petition, even though the facts were deliberately concealed by the government. All such claims must be submitted at the first, and likely only petition a capital murder defendant is likely to receive, said the court.

The decision prompted Justice Thurgood Marshall to write: "The new rule announced and applied today was not even requested by respondent at any point in this litigation . . . rather than remand this case for reconsideration in light of its new standard, the majority performs an independent reconstruction of the record, disregarding the factual findings of the District Court and applying its new rule in a manner that encourages state officials to conceal evidence that would likely prompt a petitioner to raise a particular claim on *habeas*. Because I cannot acquiesce in this unjustifiable assault on the Great Writ, I dissent." He was joined by Justices Harry Blackmun and John Paul Stevens.

The draconian ruling is supposed to prevent criminals from delaying execution by filng multiple, frivolous, federal *habeas* petitions. But there is no bar to any lower court judge from recognizing and rejecting a truly specious motion. The Congress remains concerned that there are substantive issues involved in a majority of the *habeas* petitions which come to the federal courts from the states, and therefore explicitly rejected the majority's approach to dealing with that problem during the debate on the Crime Bill in 1990. Yet, as Blackmun observed, "the majority itself tosses aside established precedents without explanation, disregards the will of Congress, fashions rules that defy the reasonable expectations of the persons who must conform their conduct to the law's dictates, and applies those rules in a way that rewards state misconduct and deceit."

Statements by administration spokesmen make it clear that the use of executions as a device to shape public opinion is an end which overrides any constitutional bars to prosecutorial "misconduct and deceit." The "Victim and Witness Protection Act of 1982" encourages prosecutors to introduce emotionally charged testimony at sentencing hearings. In the case before the Supreme Court now, the State of Tennessee argued that "evidence of the effect of a murderer's act upon society is crucial to society's legitimate need to *exact retribution*" (emphasis added). Similarly, Thornburgh explained to the London *Economist* that retributive executions, which have no deterrent effect on crime, are necessary to "enhance the credibility of the criminal justice system."

As in the Roman circus, the awesome power of the state to arbitrarily take a life, is legitimized by the passion and emotions of the spectators.

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