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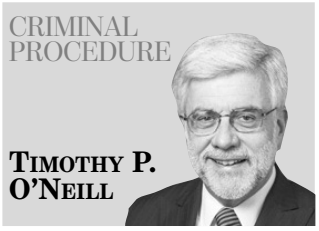
Most sacred right of habeas corpus slowly withering in Washington



Timothy P. O'Neill was the Edward T. and Noble W. Lee Chair in Constitutional Law for 2014-15 at The John Marshall Law School in Chicago. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

Erwin Chemerinsky is the dean of the University of California's Berkeley Law School. Jed Rakoff is a U.S. District Court judge for the Southern District of New York. Both are prolific writers concerned with the state of American law.

Recently, both have offered similar critiques of what they view as the refusal of the U.S. Supreme Court to carry out its constitutional duties of review.

Rakoff complains that for the last two centuries the court has abnegated its duty to properly restrain unconstitutional actions of the executive branch. He criticizes the court's use of judge-made doctrines such as "political questions" and "standing" as ways the court has avoided confronting issues ranging from Japanese internment to the government's treatment of aliens after 9/11. ("Don't Count on the Courts", New York Review of Books, April 5, 2018)

Chemerinsky makes similar claims in his book "Closing the Courthouse Door: How Your Constitutional Rights Became Unenforceable" (Yale, 2017). But the part of the book I found most interesting was his chapter on the evisceration of the writ of habeas corpus during the last 40 years. And the fault does not lie solely with the court, for in this area Congress is equally to blame.

The concept of habeas corpus has deep roots in English law and it is guaranteed by Article I, Section 9 of the Constitution. It is the primary vehicle by which a person convicted in state court is able to have a federal court decide whether his federal constitutional rights were violated.

Because the chances for U.S. Supreme Court review are so small, Chemerinsky says that in order to obtain federal relief it is realistically "habeas corpus or nothing." He then ruefully concludes that "The rules created by Congress and the Supreme Court almost always make it nothing."

Chemerinsky begins with the restrictions created by the court itself. Starting with the Burger Court in the 1970s, the court has worked to limit the availability of habeas relief.

For example, in 1976, the court categorically held that Fourth Amendment claims raised in state courts could not be brought for habeas review. (*Stone v. Powell*, 428 U.S. 465).

The next year the court reversed a defense-friendly Warren Court rule that allowed habeas review even if the defendant had not properly preserved the error in state court. In its place, the Burger Court instituted the much more stringent "cause and prejudice" standard that resulted in many more claims being barred by procedural default. (*Wainwright v Sykes*, 433 U.S. 72).

In 1993, the court held that a state defendant's claim of actual innocence is not a constitutional claim per se, but can only be used as a gateway to raise other claims. (*Herrera v Collins*, 506 U.S. 390.)

Perhaps the most dramatic change was the "new rule" policy the court established in *Teague v Lane*, 489 U.S. 288 (1989). Before *Teague*, the Supreme Court could use habeas as a vehicle for creating new constitutional rights. *Teague* drastically curtailed this by holding that a person requesting habeas relief had to show that the right he was denied had been clearly established by the time his conviction became final. The only exceptions of when "new rules" could apply were so narrow as to be useless.

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Congress picked up on this when it passed the Antiterrorism and Effective Death Penalty Act of 1996. It tweaked *Teague* by statutorily limiting habeas relief only to those cases in which a state court "decision ... was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court." 28 U.S.C. sec. 2254(d)(1).

This law provides two discrete ways to obtain relief. First, a state court's decision is "contrary to" clearly established federal law when it is "substantially different" from the relevant Supreme Court precedent.

Second, a decision is an "unreasonable application" of federal law only when the state court's application of the law was "objectively unreasonable." In interpreting this language, the Supreme Court has stressed that the mere fact the state court decision is "incorrect" is not sufficient. Establishing that a decision is an "unreasonable application" is a more difficult standard for a petitioner to meet than merely showing that the decision exhibits an "incorrect application."

The Supreme Court has narrowly described the only kind of error that can support relief under antiterrorism act as one that exists "beyond any possibility for fair-minded disagreement." It should not surprise you to learn that in noncapital habeas cases in 2007, the federal court granted relief in only 0.29 percent of the cases. That works out to fewer than 1 in 300.

Applying antiterrorism act, the Supreme Court has repeatedly and summarily reversed habeas grants made by the 9th U.S. Circuit Court of Appeals during the last 20 years. The court has chastised the 9th Circuit for not following antiterrorism act's standards to the letter.

The latest reversal came in a per curiam decision in *Kernan v Cuero*, No. 16-1468, decided Nov. 6. The Supreme Court criticized the 9th Circuit for supporting its habeas grant with sources other than U.S Supreme Court cases. It noted that "[c]ircuit precedent does not constitute 'clearly established [f]ederal law, as determined by the Supreme Court' ... nor, of course, do state court decisions, treatises or law review articles."

And this leads to a problem. Forty years ago, the Supreme Court was deciding around 150 cases per term. The court on its own has cut its caseload in half; it decided 66 cases in the 2014 term and only 63 in the 2015 term. Ironically, with antiterrorism act and the court itself demanding petitioners to specifically rely on U.S. Supreme Court precedent, the court is simply choosing not to resolve a growing number of new legal issues.

Arguably, this dearth of new Supreme Court precedent is partly to blame for the rejection of more than 299 of every 300 noncapital habeas petitions in 2007.

What is to be done?

Chemerinsky argues that antiterrorism act's restrictions constitute an unconstitutional suspension of the writ under Article I, Section 9. More realistically, perhaps, a future Congress could change the law. In the words of former judge Alex Kozinski, "AEDPA is a cruel, unjust and unnecessary law. It results in much human suffering. It should be repealed."