US Attorney General Gonzales to wield new death penalty authority

Kate Randall
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The US Justice Department is finalizing regulations that would give Attorney General Alberto Gonzales new authority in capital cases to shorten the time death row inmates have to appeal their convictions in federal court.

The new provisions, added to last year's reauthorization of the "anti-terror" USA Patriot Act, grant the attorney general the power to decide whether individual states are providing adequate legal counsel to capital defendants. Federal judges now hold that authority. The rules will be written into law after the September 23 deadline for "public comment" has passed.

In essence, the attorney general will be given the sole authority to "fast track" death penalty procedures, severely restricting the time condemned inmates have to appeal their convictions after their cases have been settled in state courts. Wrongfully convicted condemned inmates—and those who have received inadequate legal representation—face the prospect of being sent to their deaths with outstanding issues as to their innocence.

Kathryn Kase, a Houston lawyer and co-chair of the death penalty committee for the National Association of Criminal Defense Lawyers, commented to the *Los Angeles Times*, "This is the Bush administration throwing down the gauntlet and saying, 'We are going to speed up executions.'"

The new rules constitute a flagrant violation of constitutional protections of due process, particularly the right of habeas corpus to seek relief from unlawful detention. They place life-and-death decisions affecting condemned death penalty defendants in the hands of the government's top prosecutor.

Elisabeth Semel, director of the Death Penalty Clinic at the University of California law school in Berkeley, told BBC News, "It's like giving control of the hen house to the fox, because it's the attorney general in the state going to the attorney general of the US and getting permission to do something that kills the chicken."

The credentials of this particular attorney general, moreover, are a significant matter, when one takes a measure of his history in regard to capital punishment and democratic rights.

As general counsel to George W. Bush when he was Texas governor, Gonzales drafted execution memos in 57 cases. These memos, sent to the governor on the morning before a scheduled execution, would summarize complex issues in each case in several paragraphs, leaving a box at the bottom for the governor to decide on granting clemency by checking next to the word "grant" or "deny."

Bush almost without exception ticked the "deny" box. By the time Bush left the Texas governor's office and headed for the White House—and Gonzales had moved on to become the state's attorney general and serve on its Supreme Court—Bush had sent 152 people to their deaths, more than any other governor in US history. These condemned individuals included the mentally retarded, those convicted of crimes committed as juveniles, foreign nationals denied consular rights, and two women.

Following his close partnership with Bush in Texas, Gonzales served as White House counsel from 2001 to 2005. In that post, he crafted a now infamous memo to the president legitimizing torture in the "war on terror." He was appointed attorney general in February 2005, and is currently under scrutiny for his role in the US attorney firings, and for his visit to former attorney general John Ashcroft's hospital bedside to pressure him on implementing domestic spying operations.

Equally as sinister as the office and individual now being entrusted with making critical decisions on the death penalty is the substance of the new Justice Department procedures. These provisions were tucked away into the Patriot Act reauthorization bill signed into law by President Bush on March 9, 2006.

The measures deal with rules set down in the federal Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), enacted under the Democratic Clinton administration, which set up a system in which states could streamline death penalty appeals in federal court. The time allowed for a defendant to appeal in federal court after their case was resolved in state court was trimmed to a year, or to six months if states could prove that defendants had received adequate legal representation.

Beginning in the late 1990s, California and several other states sought authorization for the faster-paced, six-month limit, but were denied this designation in the federal court system, which was authorized under AEDPA to make the ruling. In fact, no state has ever been approved by the federal appeals court as meeting the requirements of providing adequate defense for death penalty defendants.

With the new regulations, the Bush administration is attempting to fashion an end-run around what they perceive to be obstacles to speeding up the machinery by which condemned prisoners are sent to their deaths. The attorney general from each state will now simply apply to the Justice Department to be included in the program. Upon approval by Gonzales that they are providing adequate counsel, any capital defendant in that state will be put on the legal "fast track" to execution.

In addition to the six-month limit on appeals, the new rules would also impose strict guidelines on federal judges in deciding these inmates' petitions. Federal district judges would be required to rule in 450 days; appeals courts judges would have only 120 days.

Representative Dan Lungren (Republican, California) and Senator

Jon Kyl (Republican, Arizona) campaigned for the new regulations to be inserted into the Patriot Act reauthorization bill last year. Death penalty proponents have been particularly frustrated with decisions by the 9th Circuit Court, based in San Francisco, which consistently has ruled against providing states with the "fast-track" designation, and has blocked many executions.

That power will now be given to the attorney general. Only the United States Court of Appeals for the Federal Circuit in Washington, whose 12 judges are appointed by the president, has the authority to overrule Gonzales. This provision was obviously designed as a purely cosmetic check on the attorney general's decision-making powers.

Opponents of the new regulations have also criticized the standards by which states will be approved for the expedited appeals process in the federal court system. In order to qualify, states would only be required to demonstrate that they have a "mechanism" for supplying lawyers to death row inmates. They would not have to show that the lawyers representing capital defendants were competent, or that they received adequate funding from the state.

In Arizona and California, for example, there are state-sponsored programs that support defense counsel in capital cases, but there are too few attorneys for the defendants who need representation. Lawyers representing death row inmates in these states also say that they receive insufficient funding from the state to mount adequate defenses for their clients.

Numerous studies have shown that capital defendants—who are overwhelmingly working class and poor—receive substandard and in many cases abysmal legal representation. A study released in 2000 examining every capital conviction and appeal between 1973 and 1995—nearly 5,500 judicial decisions—showed that courts found reversible error in nearly seven out of ten capital cases during this period. The study—"A Broken System: Error Rates in Capital Cases," by James S. Liebman and Jeffrey Fagan—showed that factors leading to overturning capital sentences were not mere technicalities, but serious legal errors.

The most common reasons for overturning death sentences were: egregiously incompetent legal representation; prosecutorial misconduct, often including suppression of evidence of innocence; and faulty instructions to jurors.

The study also found that 7 percent of those whose convictions were overturned were also found to be not guilty of the capital crime. The average amount of time taken for these cases to make their way through the appeals process was nine years. Under the new regulations, the portion of time allowed for appeal in the federal courts would be severely restricted, with the effect that defendants might not be able to present DNA and other evidence to prove their innocence or demonstrate that their legal rights had been violated.

Death penalty supporters object to the amount of time spent on death penalty appeals. While in the early 1980s, the average time between sentencing and execution was four years, it now averages 11 years. They want to speed this process up, which would inevitably result in the execution of those who are innocent of the capital crime, and/or whose legal and constitutional rights have been violated during prosecutions.

Ninety-eight people were sent to their deaths in 1999, the highest number since the US Supreme Court reinstated the death penalty in 1976. That figure has steadily declined, with 53 executed in 2006, and 33 executed so far this year. The drop has been fueled in part by declining public support for the death penalty.

According to the Death Penalty Information Center (DPIC), since 1973, 124 people in 25 states have been released from death row with evidence of their innocence, including 22 in Florida and 18 in Illinois. The latest case documented by DPIC is that of Curtis Edward McCarty, the 201st person in the US exonerated through DNA evidence, and the 15th of those who has served time on death row. His case puts a human face on the appeals process disparaged by the Bush Justice Department as inefficient and frivolous.

Curtis McCarty spent 21 years in prison for a crime he did not commit, and was sentenced to die three different times for the 1982 rape and murder in Oklahoma of teenager Pamela Kaye Willis. DNA evidence in recent years has shown that another person raped the victim.

On May 11, 2007, District Court Judge Twyla Mason Grey ordered that the charges against McCarty be dismissed, ruling that the case against him was tainted by the questionable testimony on semen and hair evidence by former police chemist Joyce Gilchrist.

Judge Grey said that Gilchrist had acted in "bad faith" and "most likely did destroy or intentionally lose" hair evidence that was crucial to McCarty's conviction. Joyce Gilchrist was the lead forensic analyst in 23 cases that ended in death sentences. Eleven of these defendants have been executed.

District Attorney Robert H. Macy prosecuted McCarty at both of his trials. In his 21 years as Oklahoma County DA, Macy sent 73 people to death row—more than any other prosecutor in the nation. Twenty of these individuals have been executed. He has stated publicly that executing an innocent person is a sacrifice worth making to maintain capital punishment in the US.

Since the US Supreme Court reinstated capital punishment in 1976, 1,090 people have been executed in the United States. Eleven of these have been woman; 22 were executed for crimes committed when they were juveniles. Thirty-eight of the 50 US states, as well as the federal government, still sanction the death penalty, a barbaric practice that has been outlawed by the vast majority of industrialized countries, including all of Western Europe.

The move by the Bush administration to grant the attorney general these new, thoroughly undemocratic powers in relation to the death penalty exposes a regime increasingly at odds with civilized, humanitarian norms.