RECENT DEVELOPMENT

A CASE FOR SPEEDIER EXECUTIONS: *Felker v. Turpin*, 116 S.Ct. 2333 (1996).

On the first anniversary of the bombing of the Federal Building in Oklahoma City, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (Act).[1] The Act's most significant provisions target more, however, than terrorists. In order to truncate the lengthy and costly federal appeals process for death-row inmates, the Act requires habeas corpus petitions to be filed within six months of the conclusion of direct review in state court;[2] it forces federal district courts to take action on the petition within another six months, and federal appeals courts to resolve any appeal within four months;[3] and it restricts the ability of inmates to file second or successive petitions.[4] With uncharacteristic haste, the Supreme Court granted certiorari nine days after the Act was signed into law,[5] agreeing to determine, among other issues, the constitutionality of a provision stripping the Court of jurisdiction to hear appeals from lower court denials of second or successive habeas petitions.[6] Last Term, in *Felker v. Turpin*,[7] the Supreme Court

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1. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

2. *See id.* § 107(a).

3. *See id.*

4. *See id.* § 106(b)(1)-(3). These habeas corpus reforms found their way into the antiterrorism bill in order to ensure swift justice for the Oklahoma City bombing suspects and to deter future terrorists. *See* Jonathan S. Landay, *Antiterrorism Bill Creates New Tools to Blot Out Crime: Will the Death Penalty Deter Future Bombers?*, CHRISTIAN SCI. MONITOR, Apr. 19, 1996, at 1. In fact, relatives of the bombing victims lobbied heavily for the reforms. *See, e.g.*, 141 CONG. REC. S7479-03, 7481-82 (letters of relatives reprinted).

For elaboration on the Act's provisions concerning second and successive habeas corpus petitions, see *infra* text accompanying notes 18-22. For more detailed treatment of the Act's other habeas reforms, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996). For a critical analysis of the Act's antiterrorist provisions, see Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074 (1996).

5. *See* Felker v. Turpin, 116 S. Ct. 2333, 2336-37 (1996).

6. *See* § 106(b)(3)(E), 110 Stat. at 1221. The Court specifically requested that the parties brief three issues: (1) the constitutionality of the provision described in the text; (2) whether the Act affected the Court's original habeas jurisdiction; and (3) whether the Act impermissibly "suspended" the writ of heabeas corpus. *See* 116 S. Ct. 1588 (1996). For a discussion of the Court's decision on these matters, see *infra* notes 24-36

unanimously upheld those provisions as a constitutional exercise of Congress's Exceptions Clause power under Article III.[8] Less than five months after the decision, the unsuccessful petitioner, Ellis Wayne Felker, was put to death, ending thirteen years of appeals on death row.[9]

This string of events may read like a death penalty proponent's fairy tale come true. However, the *Felker* Court also found that the Act does not repeal the Court's authority to entertain original habeas petitions,[10] which are filed directly with the Court. Moreover, although the Court decided upon the constitutionality of legislation facilitating "speedy executions,"[11] the opinion never explicitly acknowledged the Act's policy of expediting the capital appeals process. Understandably, Senator Orrin Hatch of Utah, Chairman of the Senate Judiciary Committee and a co-sponsor of the Act,[12] greeted the Court's holding on original habeas petitions with disappointment, and has threatened to "revisit this area" of the law if the Court appears too eager to entertain second or successive habeas petitions.[13] Though the decision on its face seems to warrant

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and accompanying text.

7. 116 S. Ct. 2333 (1996).

8. U.S. CONST. art. III, § 2, cl. 2 provides in pertinent part:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

9. Felker's death sentence was handed down on February 7, 1983. *See* Colin Bessonette, *Q & A on the News*, ATLANTA J. & CONST., Nov. 15, 1996, at A2. He was executed on November 16, 1996. *See Metro & Georgia in Brief*, ATLANTA J. & CONST., Nov. 17, 1996, at G2.

10. *See Felker*, 116 S. Ct. at 2338.

11. Or so the policy of the Act has been popularly characterized. *See, e.g., Impact of Speedy Execution Act Unclear*, COM. APPEAL (Tenn.), June 10, 1996, at B3; John Gonzalez, *Judge Rejects Claim Made by Euless Condemned Man*, FT. WORTH STAR-TELEGRAM, July 27, 1996, at 1.

12. Senator Robert Dole of Kansas was the other sponsor of the Act, which was introduced under the title of the Dole-Hatch Comprehensive Terrorism Prevention Act of 1995. *See* 141 CONG. REC. S7479-03, S7479 (statement of Sen. Hatch). The provisions dealing with habeas corpus reform were sponsored by Senators Dole, Hatch, and Arlen Specter of Pennsylvania. *See id.*

13. *See* Joan Biskupic, *Court Upholds Barrier to Death Row Appeals; But Direct Avenue to Justices is Left Open*, WASH. POST, June 29, 1996, at A11. In contrast, Boston University Professor Larry Yackle, who served as a consultant to the Felker legal team, characterized that part of the decision as "a significant victory." *See* George Rodrigue, *Decision May Speed Executions: Supreme Court Upholds Limits on Inmates' Appeals*, DALLAS MORNING NEWS, June 29, 1996, at 1A. Yackle reasoned: "On the one hand, it seems unlikely that the Supreme Court is going to exercise original jurisdiction in a lot of

Senator Hatch's concerns, an examination of the manner and underlying circumstances in which the justices crafted their opinions indicates that the present Court is unlikely to undercut Congress's policy of reducing habeas corpus appeals. Indeed, such an analysis reveals an implicit deference to legislative prerogative that makes *Felker* a good decision, not only as a significant victory for capital punishment champions, but also as an example of judicial restraint.

On November 23, 1981, Ellis Wayne Felker met Joy Ludlam at a lounge where she worked as a cocktail waitress. Learning that Ludlam was seeking a new job, Felker induced her to visit him the next day by offering her employment. After leaving to meet him the following evening, she was never seen alive again. Two weeks later, Ludlam's body was found in a creek, with forensic evidence revealing that she had been beaten, raped, sodomized, and strangled to death.[14] Further investigation linked Felker to the crimes.[15] Subsequently, a jury found Felker guilty of murder, rape, aggravated sodomy, and false imprisonment, and sentenced him to death for the murder.[16]

Felker's thirteen years of appeals can be divided into five stages. Four occurred before the recent Act. First, Felker appealed the conviction and sentence; the Georgia Supreme Court affirmed both; and the Supreme Court denied certiorari. Second, Felker sought collateral relief in a state trial court; the trial court denied collateral relief; the Georgia Supreme Court declined to hear an appeal of the denial; and the Supreme Court again denied certiorari. Third, Felker filed a habeas corpus petition in the United States District Court for the Middle District of Georgia; the court denied the petition; the Court of Appeals for the Eleventh Circuit affirmed; and the Supreme Court denied certiorari. Fourth, Felker filed a second petition for state collateral relief; the state trial court denied the

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death penalty cases. On the other hand, if they made the point of... saying habeas corpus jurisdiction still exists, it must mean something." *Id.* However, he and other legal analysts agree that the decision will significantly expedite executions. *See id.*

14. *See Felker*, 116 S. Ct. at 2336.

15. Chief Justice Rehnquist specifically relates:

> Investigators discovered hair resembling petitioner's on Joy's body and clothes, hair resembling Joy's in petitioner's bedroom, and clothing fibers like those in Joy's coat in the hatchback of petitioner's car. One of petitioner's neighbors reported seeing Joy's car at petitioner's house the day she disappeared.

Id.

16. *See id.*

petition; and the Georgia Supreme Court denied certiorari.[17]

Then, on April 24, 1996, the Antiterrorism and Effective Death Penalty Act was signed into law.[18] Its provisions concerning second and successive habeas corpus petitions by state prisoners directly governed Felker's fifth round of appeals. Subsections 106(b)(1)-(2) specify when such petitions must be dismissed,[19] and subsection 106(b)(3) requires prospective applicants to file a motion with the court of appeals for leave to file a second or successive habeas petition in district court.[20] Subsections 106(b)(3)(B)-(D) establish a three-judge panel to perform the "gatekeeping" function of vigilantly enforcing subsections 106(b)(1)-(2).[21] Finally, and most significantly, subsection 106(b)(3)(E) commands: "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."[22]

On May 2, 1996, the scheduled date of his execution, Felker filed in the Eleventh Circuit a motion for stay of execution and a motion for leave to file a second habeas petition in district court. The court of appeals denied both motions; Felker appealed; and the Supreme Court granted his stay application and petition for certiorari.[23]

Writing for a unanimous Court,[24] Chief Justice Rehnquist

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17. *See id.*

18. *See id.*

19. Pub. L. No. 104-132, § 106(b)(1)-(2) amends 28 U.S.C. § 2244(b) to read:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

110 Stat. at 1220-21.

20. *See* § 106(b)(3)(A), 110 Stat. at 1221.

21. *See Felker*, 116 S. Ct. at 2337.

22. § 106(b)(3)(E), 110 Stat. at 1221.

23. *See Felker*, 116 S. Ct. at 2337.

24. Justice Stevens joined the Court's opinion and also filed a concurring opinion in

delivered three principal holdings. First, he held that subsection 106(b)(3)(E) of the Act, which strips the Court of jurisdiction to review appellate court denials of second or successive habeas petitions, does not disempower it to entertain habeas petitions in the first instance.[25] The Chief Justice followed *Ex parte Yerger*,[26] which ruled that Congress's 1868 repeal of an 1867 statute granting the Court appellate jurisdiction over habeas petitions did not implicitly revoke the Court's original habeas jurisdiction,[27] in similarly concluding that subsection 106(b)(3)(E) did not revoke the Court's original habeas jurisdiction.[28] And because the Act did not affect the Court's authority to adjudicate habeas petitions *per se*, but only its jurisdiction to revisit appellate denials of successive petitions, the Chief Justice found "no plausible" violation of the Exceptions Clause.[29]

Second, Chief Justice Rehnquist held that the "gatekeeping" requirements of subsection 106(b)(3) do not apply to the Court's consideration of habeas petitions, because subsection 106(b)(3)(A) specifies that the requirements pertain to applications "filed in the district court."[30] Nevertheless, the Chief Justice determined that subsection 106(b)(1)-(2)'s standards for dismissal of second or successive habeas applications[31] "certainly inform" the Court's consideration of original petitions.[32] The Chief Justice did not decide whether the Court is bound by

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which Justices Souter and Breyer joined. Justice Souter joined the Court's opinion and also filed a concurring opinion in which Justices Stevens and Breyer joined.

25. *See Felker*, 116 S. Ct. at 2337.

26. 75 U.S. (8 Wall.) 85 (1869).

27. *See id.* at 105. The *Yerger* Court reasoned: "Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy . . . ." *Id.*

For background on the 1867 and 1868 acts, and an overview of the history of the habeas corpus writ in the United States, see, for example, *Felker*, 116 S. Ct. at 2338; Christoper T. Handman, *The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying a New External Constraint to Congress's Exceptions Clause Power*, 106 YALE L. J. 197, 202-04 (1996).

28. *See Felker*, 116 S. Ct. at 2338-39 (citing *Yerger*, 75 U.S. (8 Wall.) at 85). The Court's original jurisdiction immediately derives from 28 U.S.C. § 2241(a) (1948), which provides in pertinent part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." This provision, in turn, directly descended from the Judiciary Act of 1789. *See Felker*, 116 S. Ct. at 2338 n.1.

29. *See Felker*, 116 S. Ct. at 2339. For the text of the Exceptions Clause, *see supra* note 8.

30. *Felker*, 116 S. Ct. at 2339.

31. For the text of § 106(b)(1)-(2), *see supra* note 19.

32. *See Felker*, 116 S. Ct. at 2339.

these restrictions.[33]

Third, Chief Justice Rehnquist held that the Act does not "suspend" the writ of habeas corpus in violation of the Suspension Clause.[34] He reasoned that the new restrictions "constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ,'"[35] and that, as such, "they do not amount to a 'suspension' of the writ contrary to [the Constitution]."[36]

Thereupon, the Chief Justice disposed of Felker's petition for an original writ of habeas corpus. Quoting the Court's Rule 20.4(a),[37] which states that "the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers," and that the writ is "rarely granted,"[38] the Chief Justice ruled that Felker failed to satisfy the Act's requirements for second or successive habeas petitions, "let alone" the exceptionality demanded by Rule 20.4(a).[39]

Writing in concurrence, Justice Stevens[40] stated that the Chief Justice's Exceptions Clause analysis was incomplete.[41] He contended that, in addition to original jurisdiction, the Court could review gatekeeping orders pursuant to the All Writs Act[42] and upon an appropriate circuit court interlocutory order.[43] Further, in exercising original habeas jurisdiction, the Court might consider earlier gatekeeping orders of the circuit court, "[providing] the parties with the functional equivalent of direct review."[44]

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33. *See id.*

34. The Suspension Clause reads: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

35. *Felker*, 116 S. Ct. at 2340. To support this proposition, the Chief Justice quoted *McCleskey v. Zant*, 499 U.S. 467, 489 (1991), stating: "[T]he doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Felker*, 116 S. Ct. at 2340.

36. *Felker*, 116 S. Ct. at 2340.

37. SUP. CT. R. 20.4(a).

38. *Felker*, 116 S. Ct. at 2340-41.

39. *See id.* at 2341.

40. As noted, Justice Stevens was joined by Justices Souter and Breyer.

41. *See Felker*, 116 S. Ct. at 2341 (Stevens, J., concurring).

42. 28 U.S.C. § 1651(a) ("The Supreme Court... may issue all writs necessary or appropriate in aid of [its] jurisdiction[] ... and agreeable to the usages and principles of law").

43. *See Felker*, 116 S. Ct. at 2341 (Stevens, J., concurring).

44. *Id.* (Stevens, J., concurring).

Justice Souter, in a separate concurrence,[45] noted three additional ways the Court could review gatekeeping orders: (1) certified questions from courts of appeals pursuant to 28 U.S.C. § 1254(2); (2) writs in aid of another exercise of appellate jurisdiction under 28 U.S.C. § 1651(a); and (3) extraordinary writs through the Court's own Rule 20.3.[46] He concluded by warning that "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."[47]

Justice Souter's closing warning sounds a note of uncertainty that reverberates back through the entire opinion. Will the Court use its original habeas jurisdiction, or the avenues of appellate review enumerated by Justices Stevens and Souter, to circumvent the Act, nullifying Congress's efforts to curtail the habeas appeals process?

An initial reading of Chief Justice Rehnquist's opinion may not give Senator Hatch and other death penalty proponents much assurance on this question. By holding that its original habeas jurisdiction remains intact, the Court retained a loophole permitting second or successive petitions. The Court's failure to comment on the Act's underlying objective of speedier appeals and executions generated additional uncertainty about how often the Court would exercise original jurisdiction to consider petitions otherwise barred from review by the Act. However, a more nuanced analysis of the opinion, considering its structure, tone, and context, reveals that the Court implicitly recognized Congress's policy of expediting habeas appeals—and executions.

First, the structure of the opinion is significant. Although the opinion is less than six full pages of text, the Chief Justice devoted nearly two pages to narrating the facts and procedural history of the case. In particular, he diligently detailed the long and winding road of Felker's thirteen years of appeals from death row.[48] It is axiomatic in brief-writing that a statement of facts should embody the argument of the case, because a skillful framing of the facts can determine the legal issues and

45. As noted, Justice Souter was joined by Justices Stevens and Breyer.

46. *See Felker*, 116 S. Ct. at 2341 (Souter, J., concurring).

47. *Id.* at 2342 (Souter, J., concurring).

48. *See Felker*, 116 S. Ct. at 2336-37.

outcomes.[49] Since opinion writing itself is a form of advocacy, one would expect the narration of facts in a carefully crafted opinion to follow a similar principle. The account of Felker's successive stages of appeals, as related by the Chief Justice, underscores the lengthy delays attending the capital appeals process. At its strongest, this narration functions as a factual poster-child for cutting that process short.

Second, the tone of the opinion indicates an impatience with challenges to the Act and, by implication, to the policy underlying it. Matter-of-factly, Chief Justice Rehnquist disposed of Felker's constitutional claims in quick succession.[50] Moreover, the Chief Justice pronounced his rulings as if they were inevitably compelled by the language of the Act and by relevant precedent.[51] While a certain amount of posturing is to be expected in any opinion, the Chief Justice's rhetorical strategy at least suggests that similar objections to the Act will not receive much more of the Court's attention in the near future.

Third, the context of the Court's opinion reinforces the inference that it deferred to, even adopted, Congress's policy of hastening executions by curtailing the number of avenues for habeas appeals. As previously noted, the Court granted certiorari only nine days after the Act became law.[52] The Court then made another rare move: it convened oral argument within weeks of granting certiorari.[53] Finally, in less than one month, it rendered a decision.[54] The Court's extraordinary dispatch in processing the case may stem from the Act's jurisdictional tinkering, which implicated the Court's day-to-day as well as constitutional functions. However, the inference is irresistible that the Court also handled the case in the spirit of the Act, setting itself up as a model of judicial efficiency.

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49. *See, e.g.*, Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 167 (1978) ("The consummate advocate will inspire his narrative with meaning so that only the legal doctrines that favor his client seem relevant and appropriate.").

50. *See Felker*, 116 S. Ct. at 2338-40.

51. *See, e.g., id.* at 2339 ("[T]here can be *no plausible argument* that the Act has deprived this Court of appellate jurisdiction....") (emphasis added); *id.* ("[These restrictions on repetitive claims] *certainly* inform our consideration of original habeas petitions....") (emphasis added); *id.* at 2340 ("[T]his requirement *simply* transfers from the district court to the court of appeals a screening function....") (emphasis added).

52. *See supra* note 5 and accompanying text.

53. *See Felker*, 116 S. Ct. at 2333, 2337. *Cf.* Ted Gest, *A House Without a Blueprint: After 20 Years, the Death Penalty is Still Being Meted Out Unevenly*, U.S. NEWS & WORLD REP., July 8, 1996, at 41, 42.

54. *See Felker*, 116 S. Ct. at 2333.

If the structure, tone, and context of *Felker* imply that the Court will not undermine Congress's reform of the habeas appeals process, then two of the more puzzling aspects of the opinion—namely, its silence regarding the policy of speedy appeals and executions, and its reservation of indirect methods for reviewing second and successive habeas petitions—must still be interpreted.

The Court's failure to express an explicit opinion about the Act's underlying purpose suggests that it either deferred to congressional policymaking or deferred judgment on that policy for another time. The assured manner in which the Chief Justice upheld the Act against constitutional challenge more likely denotes respect for legislative prerogative in this area. Indeed, there is concrete evidence of such deference. The Chief Justice wrote: "We have [long] recognized that judgments about the proper scope of the [habeas] writ are 'normally for Congress to make.'"[55]

The Court's reservation of original habeas jurisdiction as an alternative pathway for reviewing second or successive habeas petitions is not inconsistent with this interpretation. This reservation may indicate the Court's recognition of its own limited role as a constitutional safety net for providing individualized justice. By concluding his opinion with the admonition that original writs are "rarely granted" because the Court will issue them only in "exceptional circumstances,"[56] the Chief Justice signaled that the Court would not employ its original habeas jurisdiction to deprive the Act of effectiveness.

The concurrences, in contrast, display more reservation of judgment than deference to legislative policymaking. The facility with which Justices Stevens, Souter, and Breyer[57] conceive ways that the Act's jurisdictional boundaries may be circumvented indicates that they may tolerate it only tentatively, and only insofar as the Court can, in practice, exercise the authority that Congress has withdrawn.

Where does this analysis of *Felker* leave us? As a practical matter, it suggests that the Court, at least as it is presently composed, will effectuate rather than undercut the Act's policy

55. *Id.* at 2340 (quoting *Loucher v. Thomas*, 116 S. Ct. 1293, 1298 (1996)).

56. *Id.* at 2341.

57. Justice Breyer joined both concurrences. *See supra* note 24.

of limiting habeas corpus appeals and expediting executions.[58] More subtly, this analysis reveals a gap between the language on the face of the opinion—the language of legal reasoning—and the policy outcome the Court accepts.[59] Such a gap may make the Court appear disingenuous, hiding its hand of policy behind a curtain of statutory construction and precedent. Alternatively, the gap may signify not disingenuousness, but distance from the general public, in that the Court wrote for a lawyer class capable of interpreting the subtext of its opinion. Finally, the gap may manifest a *judicial* policy of the Court to refrain from second-guessing the merits of *legislative* policy, and instead to decide the case upon the rule of law. If the gap between the text of the opinion and the policy it effectuates is indeed a manifestation of the Court's use of rule-based rather than result-based reasoning,[60] then *Felker* will not only succeed in curtailing habeas corpus petitions and death-row appeals, but will also influence judicial decisionmaking generally as an uncommon example of the Court's exercise of restraint.

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58. This policy has subsequently received Chief Justice Rehnquist's public support. In his year-end message on the state of the federal courts, the Chief Justice praised Congress for the Act's restrictions of death-row appeals. *See* WALL ST. J., Jan. 2, 1997, at 1. *See also Judges Need Raise, Rehnquist Says*, LOS ANGELES TIMES, Jan. 2, 1997, at A9.

59. In other words, although the decision reasoned by analogy from applicable law and did not explicitly endorse speedier executions, the Court surreptitiously acceded to that policy result.

60. For a critical discussion of these two modes of judicial decisionmaking, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).