TROY DAVIS GETS A NEW HEARING

A few days ago I wrote about how bad legislation in the form of the Antiterrorism and Effective Death Penalty Act of 1996 has turned federal juries and appellate courts into "death panels" by limiting and accelerating the appeal process, and thus the execution, of defendants in capital cases. The upshot of that post is Federal judges are starting to speak out vociferously in dissent to the law.

One of the matters with notoriety in the media that has been impacted by the evisceration of Habeas occasioned by the Antiterrorism and Effective Death Penalty Act of 1996 is the death penalty case of Troy Davis. Today, the Supreme Court took the somewhat unexpected and extremely rare step of ordering a new hearing in a District trial level court into new evidence and the guilt or innocence of Davis:

> The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently "exceptional" to warrant utilization of this Court's Rule 20.4(a), 28 U. S. C. §2241(b), and our original habeas jurisdiction. See Byrnes v. Walker, 371 U. S. 937 (1962); Chaapel v. Cochran, 369 U. S. 869 (1962).
> …
> The District Court may conclude that §2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this. See Felker v. Turpin, 518 U. S. 651, 663 (1996) (expressly leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions). The court may also find it relevant to the AEDPA analysis

> that Davis is bringing an “actual innocence” claim.
> …
> JUSTICE SCALIA would pretermit all of these unresolved legal questions on the theory that we must treat even the most robust showing of actual innocence identically on habeas review to an accusation of minor procedural error. Without briefing or argument, he concludes that Congress chose to foreclose relief and that the Constitution permits this. But imagine a petitioner in Davis’s situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent’s reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning.

In a short, by SCOTUS standards ruling (3 pages), the majority not only granted Davis a rehearing of his Habeas claims on new evidence, they framed the concurrence to the majority decision as a slap at Justice Scalia. Ouch.

Scalia, shrinking violet he is, fired right back in a sharp dissent:

> Today this Court takes the extraordinary step—one not taken in nearly 50 years—of instructing a district court to adjudicate a state prisoner’s petition for an original writ of habeas corpus. The Court proceeds down this path even though every judicial and executive body that has examined petitioner’s stale claim of innocence has been unpersuaded, and (to make matters worst) even though it would be impossible for the District Court to grant any relief. Far from demonstrating, as this Court’s Rule 20.4(a) requires, “exceptional circumstances” that “warrant the

> exercise of the Court's discretionary powers," petitioner's claim is a sure loser. Transferring his petition to the District Court is a confusing exercise that can serve no purpose except to delay the State's execution of its lawful criminal judgment. I respectfully dissent.

Scalia is right, this particular form of relief is exceedingly rare (that is the only thing he is right about here). What is even more shocking is that it got done in this case, with this court, at this time. While Davis' family and attorneys maintained their optimism relief would be granted, scant few other folks experienced in these things did including, quite frankly, me. Sonia Sotomayor did not participate, so the majority had to find five votes somewhere, and this is a real head scratcher. The majority opinion was unsigned, but an attached concurring opinion was noted as "Justice Stevens, with whom Justice Ginsburg and Justice Breyer join, concurring". Thomas, predictably, tagged along with Nino on the dissent. That would appear to mean the majority found two more votes for Davis among Kennedy, Alito and Roberts. Now *that* is shocking.

In the prior post, I quoted a NYT article discussing Judge Rosemary Barkett of the 11th Circuit in Atlanta, who was one of the many judges coming out with dissenting opinions blistering the egregious Antiterrorism and Effective Death Penalty Act of 1996:

> In April, Judge Rosemary Barkett of the United States Court of Appeals for the 11th Circuit, in Atlanta, complained of the law's "thicket of procedural brambles." Dissenting from a decision by her colleagues, Judge Barkett noted that seven of the nine witnesses in the murder trial of Troy Davis, a death row inmate in Georgia, had recanted their testimony. To execute Mr. Davis without fully considering that evidence would be

> “unconscionable and unconstitutional,” wrote Judge Barkett, who has voted in more than 200 other cases to uphold the death penalty.

The voices are now more than mere dissents. While not directly overruling or attacking the Antiterrorism and Effective Death Penalty Act of 1996, the majority in Davis sure indicated problems with it. Good. I have always felt Sonia Sotomayor was very pro law and order, and correspondingly weak on cases like this; that was my main objection to her nomination. It will be interesting to see how she votes when this issue next gets in front of The Supremes, and that is likely to be soon giving the contentiousness of Scalia’s dissent and the unusual majority in Davis.