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Scalia Turns Advocate Against Obama

By Greg Stohr on May 15, 2012

In January, Supreme Court Justice Antonin Scalia accused the U.S. Environmental Protection Agency of “high-handedness.” He was just getting warmed up.

Over the next 3 1/2 months, Scalia asked whether federal immigration policy was designed to “please Mexico,” fired off 12 questions and comments in 15 minutes at a government lawyer in a case involving overtime pay, and dismissed part of Solicitor General Donald Verrilli’s defense of President Barack Obama’s health-care law as “extraordinary.”

Scalia’s tone this year, particularly in cases involving the Obama administration, is raising new criticism over the temperament of a justice who has always relished the give-and-take of the Supreme Court’s public sessions. Some lawyers say Scalia, a 1986 appointee of Republican President Ronald Reagan, is crossing the line that separates tough scrutiny from advocacy.

“His questions have been increasingly confrontational,” said Charles Fried, a Harvard Law School professor who served as Reagan’s top Supreme Court advocate. While the justice has always asked “pointed” questions, in the health-care case “he came across much more like an advocate.”

Scalia’s approach is fueling the perception that the biggest cases this term, including health care, may be influenced by politics, rather than the legal principles that he and other justices say should be their guide. A Bloomberg News poll in March showed

that 75 percent of Americans think the court's decision on the 2010 law will be based more on politics than on constitutional merit.

Campaign Issue

"Someone who had just tuned into the health-care argument might get the impression that the court is a much more partisan institution than it actually is," said David Strauss, a constitutional law professor at the University of Chicago Law School.

The week after the health-insurance argument, Obama showed a willingness to make the court an issue in his re-election campaign, saying a ruling striking down the law would be "judicial activism" by "an unelected group of people." The court will probably rule by the end of June.

Scalia, 76, declined to comment for this story, said Kathy Arberg, a Supreme Court spokeswoman.

The justice has never shied away from controversy. He once wrote that a colleague's reasoning in an abortion case "cannot be taken seriously." When the court expanded the rights of prisoners at the U.S. naval base in Guantanamo Bay, Cuba, he dissented by saying the ruling "will almost certainly cause more Americans to be killed."

'Nasty' Question

In 2009, he told a college student she had posed a "nasty, impolite question" when she asked whether book tours by the justices undermined their case for banning camera coverage of arguments. In 2006, he flicked his hand under his chin, using a dismissive gesture he said was Sicilian, to show his disdain for a reporter's question.

In the courtroom, he is quick with one-liners, drawing laughter more frequently than any other justice during the court's current

nine-month term, according to DC Dicta, a blog that tracks the court.

Of late, Scalia's most pointed remarks have come at the Obama administration's expense.

In January, he directed his fire at Malcolm Stewart, a Justice Department attorney. Stewart was defending the EPA's use of administrative compliance orders that demand an end to alleged environmental violations, in many cases insisting that recipients restore their land to its previous state.

'That's Very Nice'

Scalia made his contempt clear after Stewart said that people and companies could seek to change any "infeasible" requirements.

"Well, that's very nice," the justice said. "That's very nice when you've received something called a compliance order, which says you're subject to penalties" of \$32,500 per day.

When Stewart said the EPA had modified the order at issue, dropping a requirement that an Idaho couple replant vegetation on their property, Scalia scoffed again. "It shows the high-handedness of the agency, it seems to me, putting in there stuff that is simply not required," he said.

The court unanimously ruled against the EPA in March, giving landowners more power to challenge compliance orders in court.

Target: Verrilli

With health care, Scalia's primary target was Verrilli, the administration's top Supreme Court lawyer. Defending the law's requirement that Americans get insurance or pay a penalty, the solicitor general argued that uninsured people often receive care,

even if they can't pay for it, because of the "social norms to which we've obligated ourselves."

"Well, don't obligate yourself to that," Scalia said.

Later, Scalia called one strand of the government's defense -- its contention that Congress could legally enact the law as a tax -- "extraordinary."

The following day, he mocked an assertion by another Justice Department lawyer, Edwin Kneedler, as the court considered what would happen to the rest of the law should a key provision mandating that most Americans obtain insurance be declared unconstitutional. Kneedler said the court should look at "the structure and the text" of the 2,700-page statute.

"Mr. Kneedler, what happened to the Eighth Amendment?" Scalia asked, referring to the provision of the U.S. Constitution that bars cruel and unusual punishment. "You really want us to go through these 2,700 pages?"

'Statute's Gone'

At times during the health-care debate, Scalia took to stating his position, rather than asking questions. He all but declared that he would vote to invalidate the whole law, not just the insurance mandate. "My approach would say if you take the heart out of the statute, the statute's gone," he said.

In a Labor Department case that concerns claims for overtime pay by drug-industry salespeople, lawyer Stewart urged the court to side with the employees and defer to the department's interpretation of a federal wage-and-hour law.

Scalia, who directed a dozen questions and comments at Stewart, criticized the department for laying out that position in court filings, known as amicus briefs, rather than through formal rulemaking.

“This is part of a regular program that the agency has now instituted, to run around the country and file amicus briefs -- is that it?” Scalia asked -- again calling the approach “extraordinary.”

‘Please Mexico?’

Scalia described as “extraordinary” yet another administration position, this time when Verrilli urged the court to strike down Arizona’s illegal-immigration law. Scalia bristled when the solicitor general said “we have to have the cooperation of the Mexicans,” something Verrilli said the federal government could best secure without state interference.

“So we have to enforce our laws in a manner that will please Mexico?” Scalia said. “Is that what you’re saying?”

Not everyone thinks that Scalia has gone too far. Ilya Shapiro, an opponent of the health-care law who attends eight to 10 arguments each term, says he sees no change in Scalia’s approach.

“He’s sarcastic, and he goes right to the heart of the weakness of the advocate who’s in front of him,” said Shapiro, a senior fellow at Washington-based Cato Institute, which advocates for limited government.

On health care, Scalia was simply trying to “express his exasperation with the government’s assertion of power,” he said.

Troubling Pattern

To other Supreme Court lawyers, Scalia’s questions show a troubling pattern. Rather than merely probing legal arguments, he has served as a “partisan cheerleader,” said Doug Kendall,

president of the Constitutional Accountability Center in Washington, which supports the administration on health care and immigration.

“It’s disturbing to see a justice use oral argument as a platform for expressing the talking points that you hear each night on Fox News,” Kendall said. “I can’t think of a serious question that he posed in either argument suggesting that he was open to have his mind changed.”

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