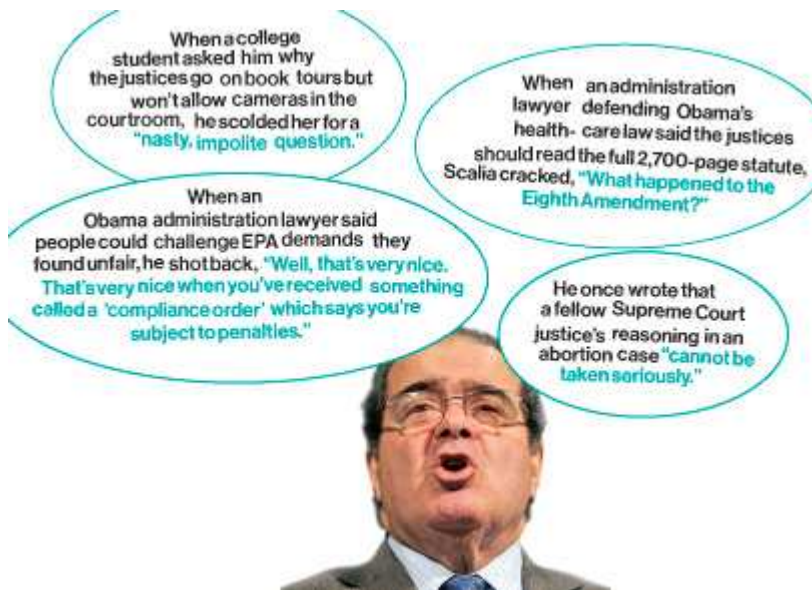


With a Sharp Tongue, Scalia Challenges the White House

By Greg Stohr on May 17, 2012

In January, U.S. Supreme Court Justice Antonin Scalia accused the U.S. Environmental Protection Agency of “high-handedness” during oral arguments in a property rights case. In March he mocked the administration’s legal reasoning in defending President Barack Obama’s health-care law, calling it “extraordinary.” In an April case challenging Arizona’s controversial immigration law, Scalia belittled the administration’s claim that the law might make Mexican leaders less willing to cooperate with the U.S. “So,” Scalia said, “we have to enforce our laws in a manner that will please Mexico?”

Scalia, a Ronald Reagan appointee now in his 26th year on the court, has never kept his thoughts to himself. Lawyers expect to be interrupted with queries and criticism from the other justices during oral arguments—but they gird themselves for the 76-year-old Scalia’s rapid-fire interrogations. His barbed commentary and putdowns rattle attorneys and often draw laughter from spectators in the gallery. In one case this year, he bombarded a government lawyer with 12 questions in 15 minutes.



Photograph by Jewel

Samad/AFP/Getty Images

Yet Scalia's exclamations from the bench have become more frequent and more opinionated, particularly in cases involving Obama administration policies. That has some lawyers who argue before the court, as well as academics, questioning whether the brilliant, temperamental justice sometimes crosses the line between skeptical scrutiny and advocacy. "His questions have been increasingly confrontational," says Charles Fried, a Harvard Law School professor who served as U.S. Solicitor General under Reagan. In the health-care case, "he came across much more like an advocate." (Scalia declined to be interviewed for this article.)

In the January EPA case, Scalia directed his fire at Justice Department lawyer Malcolm Stewart, who was defending the agency's use of administrative compliance orders to stop landowners from violating environmental laws. Some of the orders require property to be restored to its previous state. When Stewart argued that people and companies could seek to change any "infeasible" EPA requirements, Scalia made his contempt clear. "Well, that's very nice," he said. "That's very nice when you've received something called a 'compliance order' which says you're subject to penalties." The court unanimously ruled against the agency in March, giving property owners more power to challenge the compliance orders in court.

At one point during the three days of oral arguments in March over Obama's health-care law, Justice Dept. lawyer Edwin Kneedler said the justices should look at "the structure and the text" of the statute in considering whether the entire law must be struck down if the requirement to buy insurance was declared unconstitutional. Scalia pounced. Being forced to read the phone book-size law would be a violation of the Eighth Amendment's ban on cruel and unusual punishment, he cracked, "You really want us to go through these 2,700 pages?" Scalia all but declared he'd 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.

Scalia's admirers say he plays a critical role as one of the court's strongest defenders of individual liberties. He "goes right to the heart of the weakness of the advocate who's in front of him," says Ilya Shapiro, a senior fellow at the Cato Institute in Washington, which advocates smaller government. By staking out a forceful position on health care, Shapiro says, Scalia was trying to "express his exasperation with the government's assertion of power."

Doug Kendall, president of the liberal Constitutional Accountability Center in Washington, which supports the administration on health care and immigration, takes a less generous view. Scalia has become a "partisan cheerleader," he says. "I can't think of a serious question that he posed in either argument suggesting that he was open to have his mind changed."

***The bottom line:** Scalia's escalating attacks on Obama policies are raising questions about whether his political views are affecting his legal opinions.*

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