

The political questions raised by Justice Scalia's attack on the media

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The latest scandal enveloping Associate Justice Antonin Scalia, the ideological leader of the US Supreme Court's right wing, has demonstrated once again his profound hostility to basic Constitutional norms.

The most recent incident occurred during Scalia's April 7 speech to an afternoon assembly at Presbyterian Christian High School in Hattiesburg, Mississippi. Some 35 minutes into his talk, a deputy marshal assigned to Scalia's security detail confronted two journalists—both sitting in the front row and taping openly—and told them Scalia forbade the recording of his speech. The marshal ordered them to erase their recordings. When Associated Press reporter Denise Grones balked, the marshal grabbed her recorder, a digital model, and demanded directions on how to erase its contents. The marshal also demanded that *Hattiesburg American* reporter Antoinette Konz hand over her cassette tape. It was returned, erased, after the speech.

The recordings were seized as Scalia was in the midst of remarks praising the Constitution as “extraordinary and amazing” and “a brilliant piece of work,” which he “thinks about all the time.”

The irony of Scalia's confiscation and eradication of the journalists' tapes during such a speech was not lost on the local media. “The illegal conduct is all the more outrageous, coming as it did while a Supreme Court Justice was speaking on the importance of the rights protected by the US Constitution,” said the press release of a consortium of Mississippi media outlets, including the Associated Press and the *Hattiesburg American*.

The Reporters Committee for Freedom of the Press filed a formal protest with US Attorney General John Ashcroft, denouncing the seizure and erasure of the tapes, and pointing out that it violated not just the First Amendment's guarantee of press freedom, but also the Privacy Protection Act of 1980, a federal law which makes it “unlawful for a government officer or employee ... to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast or other similar form of public

communication.”

On Monday, April 12, the Reporters Committee released a letter from Scalia in lieu of an apology to the reporters. Although the incident took place directly in front of the podium while he was speaking, Scalia claimed that “the action was not taken at my direction” and that “I was as upset as you were.”

This claim was directly contradicted by Konz, who said that when the deputy marshal “came up and demanded the tapes, she told us that Scalia did not want the speech to be tape-recorded.”

Obviously still smarting from the heavy criticism he recently received in the national media for going duck hunting with Dick Cheney while the vice president has a politically important case pending before the Supreme Court, Scalia indicated in his letter to the Reporters Committee that he would in the future modify his policy “to permit recording for use of the print media” to “promote accurate reporting,” but that he would continue to bar “the electronic media” from broadcasting his appearances because of “my First Amendment right not to speak on the radio or television when I do not wish to do so.”

Scalia's contention that the First Amendment protects his right to prohibit press coverage of his public appearances provides yet another example of his practice of turning the Constitution on its head to validate a predetermined conclusion. The First Amendment is a limitation on government action, not a limitation on press coverage. It does not protect high public officials such as Supreme Court justices from having their public appearances reported by the press; rather, it protects the right of the press to report on public officials like Scalia.

Scalia sits on the highest court of the most powerful nation on earth. April 20 the Supreme Court began hearing arguments on whether people imprisoned in the US-run concentration camp at Guantanamo Bay, Cuba, have any right to challenge their confinement in US courts. Next week arguments are scheduled in the two “enemy combatant” cases, where the Bush administration is seeking to establish

precedents allowing it to seize and imprison people indefinitely, without charges, access to courts, or legal counsel. Given the enormous influence he wields on the legal rights of hundreds of millions of people, it is absurd for Scalia to suggest that the First Amendment empowers him to limit or suppress media coverage of his public appearances.

The brazenness of Scalia's hypocrisy is breathtaking. While claiming that the First Amendment protects his privacy in relation to public speeches, he has for two decades spearheaded the Supreme Court's assault on constitutional safeguards of privacy for ordinary Americans, including the imposition of limitations on suits against the police for unconstitutional home searches, and the sanctioning of dragnet-style police stops of motorists. He is notorious for his hostility to *Roe v. Wade*, the landmark Supreme Court decision recognizing that the constitutional right of privacy extends to a woman's choice concerning the termination of pregnancy.

Scalia's efforts to muzzle the media and limit the public's "right to know" reflects the policy of the Bush administration, which does everything it can to hide its activities from public view. The public's right to know is the issue at the core of *Cheney v. District Court*, the case from which Scalia refuses to recuse himself despite the above-mentioned duck hunting vacation. [See "US Justice Scalia's memo on Cheney case: contempt for the law and democratic rights"]

Next Tuesday, the Supreme Court, including Scalia, will hear oral arguments in the case, and then decide before the end of June whether to uphold a lower court order compelling the vice president to turn over records of the Bush administration's energy task force meetings with former Enron CEO Kenneth Lay and other energy industry executives and lobbyists.

The seizure and erasure of the recordings during the high school speech was not Scalia's only attack on the media in Hattiesburg. At a reception following an earlier speech at William Carey College, a Baptist institution where a trustee, Louis Griffin, is one of Scalia's regular turkey hunting partners, Scalia demanded that television cameras and their crews be removed. Jeanna Graves, who arranged the event, sent the media an email stating she was "embarrassed and angry." Graves wrote, "I specifically asked for protocol and was told that the media would have access to Justice Scalia during the reception."

The Hattiesburg incidents hark back to a controversy last year when Scalia was given the Citadel of Free Speech award by the City Club of Cleveland in honor of his efforts on behalf of the "preservation of the First Amendment." Scalia barred the television media from covering his luncheon speech accepting the award.

Scalia's bullying of the media is of a piece with his bullying on the Supreme Court. He tends to dominate oral arguments by peppering counsel arguing the side he intends to vote against with aggressive and hostile questioning. When he fails to muster the five votes required for a majority opinion, he frequently pens bitter dissents, full of gratuitous insults and personal attacks on the justices in the majority. Several legal commentators noted the positive effect of Scalia's absence during recent oral arguments in the Pledge of Allegiance case, *Newdow v. Oak Grove School District*. (Scalia disqualified himself after a public speech slamming a lower court ruling upholding Newdow's claim that the words "under God" in the pledge violate the Constitutional separation of church and state.)

Scalia is notorious for disregarding conflicts of interests while pushing the Supreme Court toward a predetermined political conclusion. In the most notable of such instances, he refused to disqualify himself from the 2000 presidential election controversy, although his son was a member of the same law firm as Theodore Olsen, the attorney for George W. Bush. [See "Family ties, political bias linked US Supreme Court justices to Bush camp"]

Scalia then took the point position on hijacking the election by writing that the Supreme Court's 5-4 order halting the counting of Florida ballots was necessary to protect against "irreparable harm to petitioner [Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election."

No less significant than Scalia's disregard for judicial ethics and democratic rights is the cowardly silence of the liberal establishment and the Democratic Party on his conduct.

The Constitution provides that Congress can impeach and remove a Supreme Court justice who fails to meet the standard of "good behavior," a much lower standard than the "high crimes and misdemeanors" required for impeachment of the president. Yet there has been no suggestion from any prominent Democrat or media outlet that Scalia should be removed from the high court. The presumptive Democratic presidential candidate, John Kerry, has maintained a deafening silence on Scalia's behavior, a clear sign that the right wing will be free to continue dismantling democratic rights regardless of which major party's presidential candidate wins the November election.



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