US Supreme Court Justice Scalia defends torture

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In a radio interview broadcast last week in Great Britain, United States Supreme Court Associate Justice Antonin Scalia claimed that nothing in the Constitution protects foreigners outside US territory or prohibits federal agents from using torture while questioning their captives.

The story was buried in the mainstream media and received no comment from any of the leading presidential candidates, despite recent revelations of CIA waterboarding.

Appearing on the BBC Radio 4 program, "The Law in Action," Scalia told interviewer Clive Coleman, "The United States Constitution gives rights to Americans wherever they are and to foreigners who are in America, who are in the United States. It doesn't give rights to everybody in the world." Scalia was responding to a question from Coleman on the Justice's views on Guantánamo Bay.

"I don't have a warrant to go investigating the actions of my country throughout the world to see whose rights they've violated," he said. "I mean there may be some natural law up there in the sky but the American Constitution doesn't give rights to these people...[T]he text of the Constitution does not confer rights on people of the world."

In other words, the US Constitution allows its government agents to go anywhere outside the United States and do whatever they want to non-US citizens, who have absolutely no remedy whatsoever for their mistreatment in any US court. This view comes from a justice generally considered the leader of a four-vote Supreme Court bloc—one short of an outright majority.

Coleman, obviously somewhat flabbergasted by Scalia's brazenness, then asked his opinion on torture, saying that the Eighth Amendment's prohibition of "cruel and unusual punishment" would seem to make the issue "a no-brainer."

Scalia disagreed. Referring to "so-called torture," he said, "Smacking someone in the face to find out where he has hidden the bomb that is about to blow up Los Angeles" is not prohibited by the Constitution. In arguing that the Constitution allowed for torture, Scalia was making clear that he considered the practice acceptable for all prisoners, whether or not they are US citizens.

Coleman pointed out that Scalia's premise—that government agents would just happen to be holding captive someone with exactly the information needed to defuse a ticking bomb—was unlikely. Referring to "sticking needles under his fingernails" to get information, Coleman asked Scalia, "You think that should be allowed?"

"It would be absurd to say that you cannot use something under the fingernails, smack him in the face, it would be absurd to say you couldn't do that," Scalia responded. He added, "I certainly know you can't come in smugly and with great self-satisfaction and say 'Oh, it's torture and therefore it's no good.'"

Scalia then broadened the hypothetical scenario he thinks would justify torture. "It may not be a ticking bomb in Los Angeles but it may be, 'Where is this group we know is plotting some very painful action against the United States? Where are they and what are they currently planning?'" Scalia did not indicate who he thought should have the power to decide what information was necessary or who might potentially have it. Such decisions would evidently be made by the president, without any judicial proceedings.

Scalia's use of extreme rhetorical fantasies to set up arguments of "necessity" and "public good" to gut democratic rights is the stock in trade of every despot in history. The scenarios constructed by Scalia arise

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more from an episode of Fox Television's reactionary show "24" than from any real event. Scalia's views are thoroughly antagonistic to the most basic democratic principles on which the United States was established.

The policy of torture that has been developed by the US government is aimed not at deterring terrorist attacks, but at intimidating and repressing any opposition to the policy of the American ruling class. Scalia is one of the court's most consistent advocates of the unrestrained power of corporations and the wealthy.

It is not just the Eighth Amendment prohibition against "cruel and unusual punishment" that condemns torture, but also the Fifth Amendment provision barring self-incrimination. These two clauses of the Bill of Rights, taken together, were clearly intended to bar the government from wanton infliction of pain for any purpose.

Patrick Henry—a leading orator among the founders—once said that if the Constitution were to be ratified without the Bill of Rights, the new government "may introduce the practice of...torturing, to extort a confession of the crime. They will...tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone."

The Supreme Court made this same point more than seventy years ago in *Brown v. Mississippi* (1936). Chief Justice Hughes wrote, "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country."

That a sitting justice of the United States Supreme Court would intervene publicly to repudiate such principles and overtly defend the use of torture speaks volumes about the decayed state of democratic rights in the United States today.

There has been no significant reaction to Scalia's statements in any of the principal organs of the bourgeois media. The evening newscasts and cable networks did not report them. Aside from burying dispatches from Associated Press and Reuters in inside pages last week, none of the major US newspapers had anything to say about Scalia's comments. No editorials appeared in *The New York Times*, *The Wall Street Journal* or any other major press outlet.

None of the three leading presidential contenders has commented on Scalia's defense of torture, despite the high likelihood that the next president will have appointment opportunities that could significantly affect the future trajectory of the Supreme Court. Instead, the day after Scalia's interview was broadcast, the presumptive Republican nominee, John McCain voted against a Senate measure to outlaw waterboarding. Both leading Democratic contenders, Senators Hillary Clinton and Barack Obama, did not vote.

This state of affairs did not happen overnight. For more than six years the population has been subjected to a relentless media barrage juxtaposing protection from terrorist attacks against the maintenance of democratic rights. People are constantly being told that the so-called "war on terror" cannot be waged successfully within the confines of constitutional protections from unreasonable searches, coerced confessions and cruel punishments.

The end result has been the immense degradation of political consciousness necessary for Scalia to make such provocative statements without generating immediate calls for his resignation or impeachment.

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