In Re Scalia the Outspoken v. Scalia the Reserved

By ADAM LIPTAK

PHILADELPHIA, April 29—About 20 minutes into stock remarks in praise of the Constitution, Justice Antonin Scalia paused. "Everything I've said up to now," he told a hotel ballroom full of lawyers here on Thursday, "has been uncontroversial."

What followed was not.

In emphatic phrases punctuated by operatic gesticulation, he then launched into an attack on a series of the most important Supreme Court decisions of the last 40 years. The court was wrong, he said, to say the Constitution requires that lawyers be provided to poor people accused of crimes. It was wrong, too, to find that the First Amendment imposes limits on libel lawsuits.

"We have now determined," he continued, "that liberties exist under the federal Constitution -- the right to abortion, the right to homosexual sodomy -- which were so little rooted in the traditions of the American people that they were criminal for 200 years."

He said his colleagues may soon discover a right to assisted suicide between the lines of the text of the Constitution.

"We're not ready to announce that right," he said, more than a little sarcastically. "Check back with us."

Citing long judicial tradition, Justice Scalia speaks eloquently about his desire to stay out of the public eye. But with his frequent and colorful public speeches, his 21-page defense in March of his duck-hunting trip with Vice President Dick Cheney, and his forceful, cutting and almost uniformly conservative opinions, Justice Scalia cannot help attracting attention.

His writing alone makes him stand out.

"He ranks with Holmes and Jackson as a writer," said Cass R. Sunstein, a law professor at the University of Chicago, referring to Justices Oliver Wendell Holmes Jr. and Robert H. Jackson.
But Stephen Gillers, who teaches judicial ethics at New York University, draws a different comparison: "Since World War II, I think it's fair to say, the extrajudicial conduct of only three justices have become significantly newsworthy in a harmful way: Fortas, Douglas, Scalia."

Justice Abe Fortas resigned in an ethics scandal in 1969, and Justice William O. Douglas's unorthodox private life and public statements led Gerald R. Ford, then the House minority leader, to call for his impeachment in 1970.

"Scalia is calling undue attention to himself, by mixing it up publicly in a way we associate with players, not referees, which is what a judge is supposed to be," Professor Gillers said.

Cited by George W. Bush during the 2000 presidential campaign as one of his two favorite justices, along with Clarence Thomas, Justice Scalia was not long ago widely mentioned as a possible successor to Chief Justice William H. Rehnquist.

These days, while he remains the great hope of many conservatives, even admirers say his public profile in a bitterly divided Washington has made such a move unlikely.

Television cameras were banned from Thursday's speech at the justice's direction, but reporters were allowed to make audio recordings of his remarks "for note-taking purposes but not for broadcast." That was a new accommodation, resulting from an incident in April in which a member of Justice Scalia's security detail ordered two reporters to erase recordings of his speech that day at a high school in Mississippi.

In other settings, the justice is less bashful.

He dominates oral arguments on the court with his active and sometimes withering questioning. His written opinions are pungent, trenchant and immensely readable. He is a hero to the American right.

Yet at the same time his opinions are sometimes so brash that they fail to attract the additional four votes needed to determine an outcome, some scholars say.

"His writing style is entertaining in the way that shouting matches on 'Hardball' are entertaining," said Mark Tushnet, a law professor at Georgetown. "Nobody persuades anyone by shouting on 'Hardball.'"

His jurisprudence -- with its emphasis on the original meaning of the Constitution, on the literal words of statutes and on categorical rules rather than ad hoc balancing -- is aimed, legal experts say, at the lower courts, at law schools and at posterity.

"He recognizes that his influence is largely in the strength of his own words and not in the number of votes he attracts to his opinions," said Douglas Kmiec, a law professor at Pepperdine.
In private, Justice Scalia is a gregarious man with many friends in the Washington elite, including people with whom he served in the Nixon and Ford administrations. But he is also on good terms with many of his ideological opposites, including lawyers for liberal advocacy groups like the American Civil Liberties Union and the Sierra Club.

He is a man of varied tastes, with a fondness for poker, opera and, as all the world now knows, hunting. His friends call him Nino, and they say he enjoys nothing more than a good joke at his own expense.

The justice seems to enjoy informal exchanges and verbal jousting. Justice Scalia, a former law professor, would occasionally drop by to commandeer a constitutional law class at Catholic University, recalled Professor Kmiec, who was then the dean of the law school there.

"He'd go up to the lectern, ask the instructor what the topic of the day was, and literally take control of the class," Professor Kmiec said.

"He'd say, almost in so many words, 'If you think I'm wrong, then fight me about it.' "

Though he tries to keep most of his fights private, his efforts to stay out of the news have lately failed spectacularly.

In October, he recused himself from the case considering whether the words "under God" may be spoken in the Pledge of Allegiance in public schools. He gave no explanation, but his decision was almost certainly based on his having remarked on the case the previous January at a Religious Freedom Day ceremony sponsored by the Knights of Columbus in Fredericksburg, Va.

His decision not to withdraw from a case involving Mr. Cheney has been the subject of caustic commentary. The case was argued on Tuesday, and Justice Scalia was, as usual, an active questioner.

His combative tone in front of his audience on Thursday was mixed with a measure of defensiveness, perhaps prompted by these matters. Though he did not refer to them directly, he did reflect on the reputation he brought with him to the Supreme Court in 1986. He was seen, he said, as a good and honest lawyer.

"I'm not going to shade a decision," he said, "you know, make it come out the way I wanted it to come out."

And he was quick to assure his audience that he might not be prepared to follow all of his criticisms to their logical conclusion, which could entail rolling back half a century of constitutional law.

"I am a textualist," he said. "I am an originalist. I am not a nut."
Nadine Strossen, the president of the A.C.L.U. and a friend of the justice's, noted that his principles had led him to results that might not match his generally conservative policy preferences. She noted that he was in the majority in a 1989 decision that struck down a Texas law banning flag-burning. His dissents from the court's recent campaign finance decision and a 2000 decision limiting protests outside abortion clinics also showed, she said, great sensitivity to the First Amendment.

He also has many times ruled in favor of criminal defendants, particularly when their cases involved questionable searches.

Financial disclosure records, which report travel reimbursements, suggest that he makes more speeches than any other justice.

But the speeches are not publicized in advance and the texts are not made public. The Supreme Court's Web site contains 27 speeches by Chief Justice Rehnquist, 11 by Justice Stephen G. Breyer, 5 by Justice Ruth Bader Ginsburg and one each by Justices Sandra Day O'Connor and Anthony M. Kennedy. And none by Justice Scalia.

Justice Scalia, who is 68, joined the court in 1986, confirmed by a vote of 98 to 0. That, he suggested Thursday, would never happen today.

"Just between you and me," he said to the assembled lawyers, "I have always been a fairly conservative person. I think that was known 18 years ago."

Indeed, many experts say that the nation's polarized political environment and Justice Scalia's high profile would doom any chance he has of succeeding Chief Justice Rehnquist.

"I think he recognizes," Professor Kmiec said, "that the political reality is that in a closely divided Senate, where they have been filibustering far less well known figures, any proposed elevation to the ranks of chief justice would be vigorously opposed by those who have a different understanding of the Constitution than he has. I think that’s unfortunate."

Paul Weyrich, of the Free Congress Foundation, a conservative research group, said Justice Scalia remained the first choice of the American right.

"Sometimes White Houses are just afraid to buy into any controversy at all," Mr. Weyrich said. "That hasn't been the hallmark of this White House."

Before his nomination, by President Ronald Reagan, he had served for four years as a judge on the federal appeals court in Washington, and he held several posts in the Nixon and Ford administrations.

Before becoming a judge, he taught law at Georgetown, the University of Virginia and the University of Chicago, and an academic predisposition toward provocative debate informs and colors his judicial work.
His appetite for the sort of discussion and debate he enjoyed as a law professor has not been sated by the conferences the justices hold after oral arguments. Under Chief Justice Rehnquist, they are said to consist of little more than a tally of votes.

"I don't like that," Justice Scalia said after a speech at George Washington University in 1988, two years after he joined the court. "Maybe it's just because I'm new. Maybe it's because I'm an ex-academic. Maybe it's because I'm right."

Professor Tushnet of Georgetown said he sensed that Justice Scalia's frustration with the atmosphere inside the court might have only grown in recent years.

Justice Scalia is the only child of Eugene and Catherine Scalia. His father, an immigrant from Italy, taught Romance languages at Brooklyn College. His mother was an elementary-school teacher. He was educated at Xavier High School, a Jesuit school in Manhattan, at Georgetown and at Harvard Law School.

He has nine children, a fact that influences his legal philosophy.

"Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions -- no television in the afternoon, or no television in the evening, or even no television at all," he said at a Harvard lecture in 1989. "But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed."

He is often in dissent. According to Thomas Goldstein, a Washington lawyer who follows the court, only Justice John Paul Stevens has dissented more often in recent years. In the last term, Mr. Goldstein said, Justice Thomas was the most frequent dissenter, followed by Justice Scalia.

The justice's style can verge on the insulting. Dissenting in a 2002 decision prohibiting the execution of the mentally retarded, he wrote, "seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members." An argument made by Justice O'Connor, he wrote in a 1989 abortion case, "cannot be taken seriously."

Opinions vary about whether other justices take offense.

Steven G. Calabresi, a law professor at Northwestern and a former Scalia clerk, said the other justices look the other way.

"His colleagues all recognize that he feels very strongly in some cases and that those temper tantrums blow over," Professor Calabresi said. "I watched him talk to Justice O'Connor and Justice Kennedy a lot, and my sense is that they got along very well."

Some scholars detect a rightward drift in Justice Scalia's recent decisions.
"When I worked for him, he had a set of principles, and those principles led to principled results, which were sometimes conservative and sometimes liberal," said Lawrence Lessig, a law professor at Stanford who was also a law clerk to Justice Scalia. "I don't understand anymore how his jurisprudence follows from his principles."

Sometimes he seems perplexed by the attention he receives.

After the stir in April at the Mississippi school over the recording of his speech, he sent a gracious and reflective apology to one of the reporters, Antoinette Konz.

"I abhor as much as any American the prospect of a law enforcement officer's seizing a reporter's notes or recording," he wrote. "It has been the tradition of the American judiciary not to thrust themselves into the public eye." He added, "It may be that my efforts to pursue it are doomed to failure."

Photos: Justice Antonin Scalia is not bashful in his speeches or opinions. (Photo by Tim Shaffer for The New York Times)(pg. 1); Antonin Scalia was part combative, part defensive in a speech Thursday. "I am a textualist," he said. "I am an originalist. I am not a nut." (Photo by Tim Shaffer for The New York Times)(pg. 34) Chart: "Scalia's Writings" Justice Antonin Scalia is known for writing opinions that are often forceful and entertaining. Excerpts from four of his dissents: Lawrence v. Texas 2003 Justice Scalia dissented from a 6-to-3 decision striking down a Texas law that made gay sex a crime. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. ... Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. ... That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining states that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. Hill v. Colorado 2000 Justice Scalia dissented from a 6-to-3 decision upholding a law limiting protests near abortion clinics. Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur. The Court tears away from the protesters the guarantees of the First Amendment when they most need it. So committed is the Court to its course that it denies these protesters, in the face of what they consider to be one of life's gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law. United States v. Virginia 1996 Justice Scalia dissented from a 7-to-1 decision requiring the Virginia Military Institute to admit women. Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education. ... The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. ... So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most
illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society's law-trained elite) into our Basic Law. Maryland v. Craig 1990 Justice Scalia dissented from a 5-to-4 decision that allowed children who were victims of sexual abuse to testify at trial by closed-circuit television. The following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the state's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I -- your father (or mother) whom you see before you -- did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution. (pg. 34)