

The legacy of Antonin Scalia

By Tom Carter
15 February 2016

On Saturday, United States Supreme Court Justice Antonin Scalia was found dead in his hotel room during a hunting trip in Texas, apparently of natural causes.

The figure of Scalia has personified the rightward march of the American political establishment over the past three decades, as it jettisoned what remained of its commitment to democratic institutions and erected the framework of a police state. From his pulpit on the Supreme Court, the arch-reactionary, a thug in black robes, preached relentlessly in his distinctively arrogant, cynical and belligerent tone.

The American political establishment has predictably and in nearly uniform language closed ranks to praise Scalia as a national treasure, worthy of universal mourning, whatever his political opinions may have been.

President Obama called Scalia “a towering legal figure.” The *New York Times*’ Ross Douthat praised Scalia’s “combination of brilliance, eloquence and good timing.” The *Washington Post* described him as “the intellectual cornerstone of the court’s modern conservative wing, whose elegant and acidic opinions inspired a movement of legal thinkers and ignited liberal critics.” In a statement, George H.W. Bush wrote, “Both his admirers and his detractors agreed that Justice Scalia was one of the sharpest constitutional intellects to ever serve on the bench.”

From Donald Trump to Bernie Sanders and Hillary Clinton, all of the establishment presidential candidates issued statements praising Scalia as a “great legal mind.” Trump referred to him as “a remarkable person and a brilliant Supreme Court Justice, one of the best of all time.”

Sanders, the nominal “socialist,” called Scalia a “brilliant, colorful and outspoken member of the Supreme Court.”

Utter nonsense. Throughout his time on the Supreme Court, Scalia had more in common with a medieval cleric at an *auto de fe* than a classical bourgeois jurist presiding over a court of law. Scalia determined the result first and then bludgeoned the law into the predetermined shape. Precedent, history and facts were ignored or falsified as necessary to produce the desired result.

Appointed by Ronald Reagan and confirmed almost unanimously in 1986 by Democrats and Republicans in the US Congress, Scalia’s career on the Supreme Court included some of the following highlights:

The stolen election of 2000. In December 2000, the Supreme Court intervened to halt the counting of votes in Florida and install George W. Bush in the White House. The 5-4 ruling in the case of *Bush v. Gore*, in which the justices cast their votes according to naked factional interests, was a milestone in the decay of American democracy. According to Scalia, “there is no universal

right of suffrage.” When later asked about the ruling, Scalia angrily replied, “Get over it.”

Dictatorship and the “war on terror.” Scalia was a major force behind the infiltration of fascistic doctrines into Supreme Court jurisprudence, under the guise of phrases such as the “unitary executive theory,” “executive privilege,” the “separation of powers,” the president’s role as “commander in chief” and “deference” to the executive. Under these doctrines, the president enjoys unchecked “wartime” powers to override democratic rights, and the courts and judges have no power to intervene. The essential content of these doctrines is indistinguishable from the “state of exception” theory of Nazi “crown jurist” Carl Schmitt (1888-1985).

During Scalia’s tenure on the Supreme Court, the court refused to disturb lower court decisions using “state secrets” doctrine to block challenges to torture, spying and assassination. The Bush and Obama administrations consistently invoked the “state secrets” doctrine to block court proceedings that sought to expose their crimes. For example, lower courts invoked “state secrets” to refuse to hear the case of *Mohamed v. Jeppesen Dataplan, Inc.* in 2010, and the Supreme Court declined to hear the case in 2011, leaving the lower court decision intact.

Arbitrary detention and torture. Scalia opposed the right of Guantanamo prisoners to *habeas corpus*, or the right to petition for judicial review of their detention. When the Supreme Court narrowly permitted some form of judicial review for Guantanamo cases, Scalia denounced the majority as traitors, whose decision “will almost certainly cause more Americans to be killed.”

“The Constitution says nothing whatever about torture,” Scalia said in an interview with Swiss radio network RTS in 2014. In fact, the Eighth Amendment, part of the Bill of Rights, prohibits “cruel and unusual punishment.” However, according to a legal theory invented by Scalia, “torture is not punishment.” In similar comments in 2008, Scalia argued that it would be permissible to torture suspected terrorists, that it would be “absurd to say that you can’t stick something under the fingernails, smack them in the face.”

In 2014, Scalia infamously shrugged his shoulders at a question about the mass internment of Japanese Americans during the Second World War. “[Y]ou are kidding yourself if you think the same thing will not happen again,” he said, invoking the Latin expression, “*Inter arma enim silent leges*” (roughly, in times of war the law is silent).

The death penalty, including for children and the mentally ill. Scalia emphatically favored the death penalty, which he supported with quotations from the Bible. According to Scalia, the

state “derives its moral authority from God ... to execute wrath, including even wrath by the sword, which is unmistakably a reference to the death penalty.” He infamously claimed that the death penalty was “no big deal” for Christians, since Christians believe in the afterlife.

Scalia favored the death penalty for children aged 15 at the time of the offense in the early case of *Thompson v. Oklahoma* (1988). In *Miller v. Alabama* (2014) he favored the death penalty for 14-year-olds. He also favored the death penalty for the mentally ill, angrily dissenting throughout his career from Supreme Court opinions limiting the use of capital punishment.

Scalia’s last action as a Supreme Court justice was to deny a stay of execution. “This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent,” he wrote in a 2009 dissent of a Supreme Court decision to order a federal trial court to consider the case of Troy Davis, who was later executed in 2011.

Repudiating the separation of church and state. The democratic principle of the separation of church and state, according to Scalia, was the result of words “spoken by a serpent, addressing a woman named Eve.” The principle is embodied in the first phrase of the First Amendment to the US constitution, part of the Bill of Rights. Scalia supported prayer in public institutions as well as the display of the Ten Commandments and crosses in public places, on the grounds that “monotheism is shared by the vast majority of the American people.” When he was asked, after a special Catholic mass for lawyers and politicians at the Cathedral of the Holy Cross, whether he could be impartial on this question, he responded with an obscene under-the-chin Italian hand gesture.

Political corruption and bribery. In the infamous case of *Citizens United* (2010), the Supreme Court found that corporations have a constitutional “right” to spend unlimited sums on elections, which resulted in an explosion of big business spending. Scalia joined the majority opinion and also filed a separate concurring opinion to attempt to establish that corporate political influence is rooted in American history.

While a case involving then Vice President Dick Cheney was pending before the Supreme Court, Scalia joined Cheney for a private duck-hunting trip. Scalia contemptuously rejected calls that he should recuse himself from the case, in flagrant violation of judicial ethics.

Defending big business and attacking workers’ rights. Scalia consistently upheld the interests of corporate and financial interests, abrogating the rights of consumers and employees. In the case of *Wal-Mart v. Dukes* (2011) , the Supreme Court significantly undermined the procedure of a class action lawsuit, a major legal vehicle for challenging corporate misconduct. More recently, Scalia voted to block environmental regulations that sought to address climate change.

In a 2014 case, Scalia voted to deny back pay to steelworkers who had not been paid for a lengthy period of time spent “donning and doffing” their safety equipment. Scalia consulted the dictionary and determined that the workers were merely “changing clothes,” even though the equipment included “a flame-retardant jacket, pair of pants, and hood; a hardhat; a snood [headgear];

wristlets; work gloves; leggings; metatarsal boots; safety glasses; earplugs; and a respirator.”

Attacks on civil rights and bigotry. In 2013, Scalia voted with the Supreme Court majority to gut the enforcement provisions of the Voting Rights Act, a major piece of reform legislation that emerged from the Civil Rights movement. Scalia spoke for a section of the American political establishment that never fully accepted the civil rights reforms.

As recently as December 2015, Scalia ranted that black students would be better off in “less-advanced” and “slower-track” schools. “There are those who contend that it does not benefit African Americans to get into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a slower-track school, where they do well,” Scalia said. Scalia claimed that “most of the black scientists in this country” come from “lesser schools” where they were not “pushed ahead in classes that are too fast for them.” This argument, the clear implication of which is that blacks are racially inferior, would justify a return to segregated schools.

When the Supreme Court struck down Texas laws prohibiting homosexuality in *Lawrence v. Texas* (2003), Scalia raved that the decision created “a massive disruption of the current social order,” and denounced the majority for having “signed on to the so-called homosexual agenda.” Scalia also dissented from the 2015 decision upholding marriage equality.

Immunity for killer cops. Scalia was a major exponent of the authoritarian doctrine of “qualified immunity,” which shields police officers from lawsuits arising from their misconduct. In another example of the “brilliant” Scalia’s legal method, he claimed last year that a Texas cop did not use “deadly force” when he shot and killed a man in a moving car, since the officer was shooting at a car, not a person.

The key role played by Scalia in the American political establishment over three decades is reflected by the acrimonious political crisis that emerged within hours of his death. Prominent Republican senators Ted Cruz, Mitch McConnell and Marco Rubio preemptively announced that no successor would be confirmed before the November 2016 presidential elections. President Obama, meanwhile, declared that a successor would be nominated within weeks, a position supported by Sanders and Clinton.

However, the unanimous deference to Scalia’s “brilliant legal mind” from the entire political and media establishment is significant in itself. It expresses the collapse of any significant constituency for democracy or democratic rights in American ruling circles, which despite bitter internal divisions is united behind three decades of social and political reaction, the latter half of which were spent in a state of permanent war.

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