ADVOCATE-GENERAL'S

BEYOND JUSTICE SCALIA

1st Edition By

MORTEN RAND

Advocate-General

Session of 2005-2006

Setting the Standards: Compliance with Professional Code of Conduct

Does Mr. Cohen engage in Legal Scholarship or in Issue Advocacy?

Adam Cohen, a lawyer and an author, is an Editorial Board Member at The New York Times. He has previously written on constitutional issues and the courts, including a 2003 article in which he expressed concern that judicial nominations by the Bush administration would lead to erosion of constitutional rights.

> "[The National Constitution Center] is, in the end, an inspiring place, because it tells a largely triumphal story of rights recognized and new groups woven into the fabric of the nation. But for anyone paying attention to the Bush administration's judicial nominations, this is a sobering time to visit. The White House seems intent on packing the courts with judges who want to reverse -- or at least retard -- many of the gains recorded here. The museum has a cafe with computers, and visitors are encouraged to e-mail their representatives in Congress. If museumgoers appreciate the constitutional rights they have gained over time, they should ask their senators to vote no on the worst of the Bush nominees."

In the same article, Mr. Cohen expressed strong reservations about US Supreme Court Justice Antonin Scalia:

> "President Bush has said he wants to appoint judges like Clarence Thomas and Justice Scalia, both embarked on campaigns to undo years of constitutional progress. Justice Scalia advocates tying Americans' rights today to the prevailing wisdom of the 18th century. In a petulant dissent in the recent sodomy decision, he argued that gay sex can be criminalized now because it was a crime in the 13 original states. Justice Thomas offered the dangerous argument in last year's school voucher case that states should be less bound by the Bill of Rights than the federal government.

> Mainstream conservatives approve of the onward march of the last two centuries of constitutional history. Anthony Kennedy, named to the Supreme Court by Ronald Reagan, eloquently observed in his majority decision in the sodomy case that ‘‘as the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.’’ But many Bush nominees are not conservatives but radicals. If they take over the federal courts -- and in a second Bush administration they might -- the scope of our constitutional rights could be very different. The National Constitution Center might be forced to reorganize its main hall in a ‘‘U’’ shape, so visitors can turn around and say goodbye to the rights that were taken away.”

Which leads us to conclude that Adam Cohen has an unsympathetic view upon Justice Scalia, whom he labels as a conservative “embarked upon a campaign to undo years of constitutional progress.”

Mr. Cohen’s article *Reining In Justice Scalia* was published on April 26, 2006, in the Opinion section of The New York Times. As the title hints, the article is sharply critical of Justice Scalia, whom Mr. Cohen views as being out of line due to his “Injudicious Public Statements,” “Refusing to Recuse,” and his being “Political Partisan.”

Mr. Cohen may reasonably be viewed as a legal scholar due to his professional background, his being a lawyer, and his extensive knowledge about the US constitution and various legal subjects with constitutional ramifications. Accordingly, I should like to consider whether his article ought to adhere to Section 6 of our Professional Code of Conduct, according to which: “Legal scholars and scholars in law-related fields should adhere to standards for objectivity, fairness, and truthfulness. Scholars who become aware of imperfections such as regulations of poor quality, bad governance, unprofessional behavior, or unethical conduct should express their concerns in an appropriate forum.”

Alternatively, Mr. Cohen may be viewed as someone who is engaged in issue advocacy due to his declared hostility towards the legal style and philosophy espoused by Justice Scalia. If so, the article ought to adhere to Section 7 of our Professional Code of Conduct, according to which: “Legal practitioners, lobbyists, scholars, and others who represent special interests should openly and voluntarily disclose that they are engaging in issue advocacy and on behalf of whom. These professionals should treat their opponents with respect, apply reasonable rationalization and argumentation methods, and refrain from slander or gossip, misrepresentation of facts, or other falsehoods of any kind.”

Mr. Cohen’s 2003 article was sharply criticized in an August 19, 2003, article entitled *Adam Cohen’s Constitutional Wrongs* by TimesWatch, which describes itself as “a project of the Media Research Center, dedicated to documenting and exposing the liberal political agenda of the *New York Times*.” Mr. Cohen is portrayed as a lawyer with a “liberal background” and one of several Times editors “with a liberal or Democratic background.” Accordingly, *The New York Times* is

viewed as a liberal news organization with a liberal political agenda, Mr. Cohen as one of its prominent liberal thinkers.

> Bill Keller, the Executive Editor of The New York Times, recently drew a sharp distinction between the Times' newsroom and its editorial page/columnists: "It would, indeed, be preposterous to argue that The Times does not have a liberal editorial page, or that a majority of the columnists (with a couple of outstanding exceptions) do not tend liberal. But it's just plain wrong to say that the newsroom is "liberal" -- in the sense that it toes a certain political or ideological line."

Based upon Mr. Cohen's previous categorical negative statements concerning Justice Scalia, his professional background as a lawyer representing special interest groups, and his present position with The New York Times' editorial board, I prefer to categorize him as someone who represents special interests. Accordingly, Section 6 of our Professional Code of Conduct does not apply, whereas Section 7 applies and shall form the basis upon which I will now review Mr. Cohen's 2006 article.

Did Mr. Cohen declare a special interest?

That Mr. Cohen does not refer to himself as an issue advocate does not raise any ethics concerns insofar as the article clearly indicates that it is an opinion article published by The New York Times and that he is a Board Member.

The average reader may know that The New York Times' editorial board tends to be critical of conservatives, but only a precious few will have any knowledge about Mr. Cohen's prior work concerning Justice Scalia. The average reader could easily be led astray. Whereas the 2003 article was a head-on collision with Justice Scalia's legal philosophy, which Mr. Cohen obviously views as reactionary, the 2006 opinion article takes a fundamentally different approach by criticizing Justice Scalia's obvious contempt for his opponents and arrogant refusal to engage in serious discussion concerning complex legal issues.

The New York Times has millions of readers, among them presumably thousands of foreigners who do not particularly care about US constitutional issues such as abortion rights, school prayers, or voting districts. These readers would not necessarily have had any reaction to Mr. Cohen's 2003 article, which many US conservatives presumably found disagreeable. However, intellectuals and other observers around the world will tend to agree with the basic point of view Mr. Cohen espouses in his 2006 opinion article. Any judge – a Supreme Court Justice in particular – has a deep moral obligation and fundamental professional responsibility to keep an open mind towards jurists of all persuasions and to show sincere respect for their points of view.

I consider Mr. Cohen's fundamental change between the two articles to be remarkable due to their distinctively different approach to substance and style. While the former article appears antagonistic and ideological, the more recent

opinion article appears rather shrewd and broadminded. However, the latter opinion article can only be analyzed correctly by someone who knows where Mr. Cohen "is coming from." Therefore, it would have been more appropriate if his recent opinion article had contained some reference to his prior criticism of Justice Scalia, such as the 2003 article discussed above.

Did Mr. Cohen Treat his opponent with respect?

Mr. Cohen's 2006 opinion article appears founded in genuine concern for the integrity and reputation of the US Supreme Court. While the article is highly critical of Justice Scalia's personal style and professional conduct, its objective does not appear to be a desire to embarrass Justice Scalia or tarnish his reputation, but rather to provide a coherent picture of the Justice in order to demonstrate how harmful his conduct has become to the Supreme Court. Neither the information which the article contains nor its language seem disrespectful of Justice Scalia.

However, respectful conduct towards Justice Scalia would necessarily entail the reader knowing that Mr. Cohen has in the past expressed that he views the Justice as an adversary on ideological and philosophical grounds. Any person who has only read Mr. Cohen's 2006 opinion article would have no clue about this existing adversarial relationship, wherefore I do find it objectionable that Mr. Cohen's opinion article contains no references to his 2003 article, in which he clearly revealed antagonism against Justice Scalia.

Did Mr. Cohen apply reasonable rationalization and argumentation methods?

The 2006 opinion article is rational, systematic, and wholesome as far as its argumentation. Each and every concern Mr. Cohen expresses about Justice Scalia's injudicious personal behavior and professional misconduct seems relevant to the overall concern about his ability to serve justice. Each and all of Mr. Cohen's postulates appear to be based upon specific, tangible, and – to a higher or lesser extent – verifiable facts. When combined, these postulates constitute a solid foundation for Mr. Cohen's ultimate postulate: That something serious has to be done. I find this to be a reasonable and persuasive approach.

Did Mr. Cohen refrain from slander or gossip?

> "He made national headlines recently for making a gesture that may or may not be obscene. If it wasn't obscene, it was certainly coarse and undignified."

The incident to which Mr. Cohen is referring caused a considerable amount of indignation, controversy, and negative publicity. It was widely viewed as inappropriate behavior by Justice Scalia, who found it necessary to write a letter in which he carefully explained that he did not view his gesture as obscene in any way. Whether or not the gesture was "coarse and undignified" may be a matter of opinion, especially considering that the press took some criticism for inappropriately confronting the Justice at church.

Mr. Cohen refers to various other incidents in which Justice Scalia has made remarks many have viewed as highly provocative and undignified. One incident, in which the Justice argued during a debate forum for his belief in so-called "originalism" as far as interpretation of the US Constitution while stating that one "would have to be an idiot" to believe in a so-called "living constitution," may well be seen as offensive, especially to all the people who view the Constitution as an organic document subject to changing interpretation over time as society changes. Predictably, this statement caused an uproar, as did the Justice's subsequent remarks concerning the rights of detainees captured on the battlefield.

Justice Scalia may not have intended these statements for a wider audience, given his longstanding policy against allowing audio recordings of his speeches. No matter how embarrassing all the negative publicity may be to the Justice, I see nothing inappropriate about Mr. Cohen discussing these incidents.

Did Mr. Cohen refrain from misrepresentation of facts?

While I have found no misrepresentation of facts in Mr. Cohen's article, certain relevant facts have been omitted, which may give a somewhat distorted picture of events.

In the matter of the Sierra Club and Judicial Watch v. Vice President Dick Cheney, Mr. Cohen goes to great lengths to explain to the reader why Justice Scalia ought to have recused himself and why his failure to do so constituted an obvious and serious violation of the federal recusal statute.

What the opinion article neglects to mention, however, is that Chief Justice William Rehnquist wrote, in response to a letter by Senator Patrick Leahy and Joseph Lieberman:

> "While a member of the Court will often consult with colleagues as to whether to recuse in a case, there is no formal procedure for Court review of a Justice in an individual case….Insofar as your letter suggests reasons why Justice Scalia should have disqualified himself in the pending case of *Cheney v. U.S. District Court*, it has, as far as I know, no precedent… I think that any suggestion by you or Senator Lieberman as to why a Justice should recuse himself in a pending case is ill considered."

Mr. Cohen makes extensive references to a paper by Professor Friedman, who concluded that: "…the conclusion is inescapable that a reasonable person might question Scalia's impartiality in the case."

However, not all legal experts seemed in agreement that such a conclusion was inescapable: "Case law doesn't support recusal in this case. It doesn't raise alarm bells with me," said James Moliterno, a College of William and Mary law professor, and author of a book on judicial ethics. "There may be a political

appearance of impropriety, but it ought to take a lot for a Supreme Court justice to remove himself from a case. It would take an extraordinarily close relationship."

Did Mr. Cohen refrain from other falsehoods of any kind?

"The law of recusal is clear," writes Mr. Cohen, who then goes on to make a convincing argument for why Justice Scalia's failure to recuse himself from the case was unjust.

I am inclined to agree. The federal recusal statute obliges a judge to recuse himself if his impartiality can be reasonably questioned. This is an objective standard, which means that it is the appearance of impropriety that matters. The courts have interpreted this statute to mean that a judge must recuse himself if the circumstances may lead a reasonable person to doubt his impartiality. The overwhelming majority of major US editorials argued for recusal, none against, and such material has in past cases been considered relevant for measuring the public sentiment; this is ultimately decisive, as the statute aims to promote public confidence in the judiciary. A number of prior cases have stated that when in doubt, the judge should recuse himself.

However, I do find Mr. Cohen's analysis disturbingly simplistic. In March, 2004, The New York Times hosted a discussion of Justice Scalia's memorandum among six legal experts. Some of these experts took exception to several of the arguments in favor of recusal, including some prominently featured in Mr. Cohen's article.

> "White: Only the individual justice is capable of knowing if he or she is capable of rendering an impartial decision. On balance, I think that it was appropriate for Scalia to decide not to recuse himself."
>
> "Rotunda: What the recusal standard cannot mean is that if a lot of editorial writers make fun of you then you have to recuse yourself. We take somebody and make him a judge. We typically lower his salary. We flyspeck his career. We dig up dirt on him. If on top of this you have to say, ''You must divorce yourself from life,'' it's silly and it's not what's been done since the founding of the Republic."

By omitting any references to the views expressed by Chief Justice Rehnquist, Professor Moliterno, and others, Mr. Cohen's opinion article fails to make some important points: The recusal issue was a subject of debate, and not all legal experts considered Justice Scalia's obligation to recuse himself from the case a foregone conclusion.

Mr. Cohen proceeds to explain what he sees as Justice Scalia's repeated failure to recuse himself, including in the recent case of *Hamdan v. Rumsfeldt*, "in which many reasonable people questioned his impartiality – because of his own comments." However, the opinion article once again omits any reference to the important fact that the recusal issue has become a subject of lively debate, that various experts disagree about the reasonableness of the Justice's unwillingness to recuse himself from these cases. By omitting any reference to these mitigating

factors, Mr. Cohen has drawn a dark portrait of Justice Scalia as an irresponsible and somewhat irrational figure.

Assessing the Quality: The Effectiveness of Mr. Cohen's Advocacy

The next question to be addressed is whether Mr. Cohen's approach is the right one for someone whose ultimate goal it is to preserve the integrity of the Supreme Court.

"Injudicious Public Statements"

Apparently, Mr. Cohen finds that justices – with the notable exception of Justice Scalia – are able to draw the appropriate balance between publicity and dignity:

> "There is a long tradition of Supreme Court justices speaking at law schools, and in other public forums. In general, this is a good thing. The American people should be able to see their justices up close, and learn their views about the law, and the justices should get out of the monastic world of the court and interact with real people.
>
> It is critical, though, that the justices uphold the court's integrity and independence. Alone among his Supreme Court colleagues, Justice Scalia seems indifferent to this basic point."

According to Section 5 of our Professional Code of Conduct, "Judges should not act in a manner which will cause reasonable doubt about their ability to function effectively as a judge or diminish the authority and integrity of the court."

It is only reasonable to expect that a judge will conduct himself in such a way that gives preeminence to his ability to function effectively as a judge compared with any other interest, no matter how legitimate. Furthermore, a Supreme Court Justice should display pragmatism, common sense, dignity, integrity – the kind of basic qualities that distinguish a leader from the pack. Justice Scalia is certainly a leader, someone whose words and actions hold sway over a great many people. The public does not want the best and brightest to write apologies, make strange gestures, write letters to newspaper editors explaining why their gestures are not obscene, do weird things, or make outrageous statements. A justice should not indulge in flamboyance, self-importance, grandstanding, or show disdain for those with a different legal philosophy.

The opinion article makes a convincing case as far as what Mr. Cohen refers to as Justice Scalia's "injudicious public statements." However, it does not have much to offer as far as possible solutions to this problem, except the hope that Justice Scalia will somehow come to his senses and start showing self-restraint.

There are no comprehensive guidelines about what Chief Justice Rehnquist referred to as "our off-the-bench conduct." The Ethics in Government Act does provide some guidance regarding activities of financial importance, but there are no clear rules as far as a justice's public statements. Mr. Cohen does not mention that there

may be a legal vacuum, which arguably leaves it for each individual justice to define for themselves what constitutes appropriate public conduct. Could be Justice Scalia has embarked upon a mission to exercise his right to freedom of speech, as a matter of principle. Could be his policy of not allowing audio recordings of his public speeches is an attempt to show restraint. Could be that Mr. Scalia thinks that he has gone out of his way to demonstrate that he is *not* indifferent to upholding the Supreme Court's integrity and independence.

Omitting these potentially mitigating factors add to Mr. Cohen's dark portrait of Justice Scalia as a reckless and irresponsible figure. The portrait is clear and rather convincing at first glance, but it may ultimately prove simplistic. If Justice Scalia is deliberately engaging in legal brinkmanship, then "reining him in" will prove an elusive goal without legal reform to clarify how justices ought to conduct themselves off-the-bench.

"Refusing to Recuse"

According to Section 5 of our Professional Code of Conduct, "Legislators, judges, and other public servants should abstain from any acts that may be indicative of corruption, make timely disclosure of any potential conflicts of interest, and avoid any acts of discrimination or nepotism."

Supreme Court Justices have tenure, they are appointed for life, not for their own benefit but to insulate them from undue political interference – i.e. to protect the Court's integrity and independence. However, this integrity and independence can be seriously undermined if a justice participates in a case despite a conflict of interest, whether real or perceived.

Some legal scholars seem to subscribe to the theory that a Supreme Court justice should only recuse himself under exceptional circumstances. A higher threshold for justices than for other judges seems without solid legal foundation, as the federal recusal statute makes no distinction between the two. However, one might well view Justice Scalia's refusal to recuse himself as symptomatic of the Supreme Court having become so polarized. Many important cases are decided 5-4 along predictable ideological lines, and a justice's decision to recuse himself from a case may well prove decisive to the outcome. Which, in turn, might tempt some influential people on each side to put pressure on that justice to either recuse or not recuse, all depending on their interest in the case.

Mr. Cohen does not mention that legal scholars disagree about when a Supreme Court justice should recuse, nor does he fully address the fundamental concerns that have lead Justice Scalia – supported by some scholars – to push the limits of the recusal statute. The opinion article does, however, ponder upon what mechanism could perhaps be designed to overcome the fundamental problem that the justices make the final decision concerning their recusal.

> "If Justice Scalia keeps flouting basic recusal principles, the court should consider changing its rules. Currently, justices are the only federal judges who are allowed to decide on their own whether to recuse themselves. There is an inherent illogic in allowing a judge to be the final word on his own impartiality — if they are so biased that they cannot hear a case, they may well be too biased to decide if they are too biased. But it is a system that works only if justices do their utmost to be fair to the arguments for recusal.
>
> The court could decide to allow the justices as a whole, or an alternating panel of three justices, to rule on recusal motions aimed at their colleagues. Such an approach would have its own problems — conceivably, justices in one ideological camp could vote to recuse their ideological opposites to affect the outcome of a case. But if individual justices abuse their right to decide their own motions, such a change would be an improvement."

These constructive proposals point in the right direction. None of them are likely to become law, however, given the fact that the Supreme Court has become subdivided into "ideological camps," which reflect the partisan political landscape outside the Court. One could consider creating an independent panel with a mix of jurists and non-jurists to make these decisions, or one could consider allowing substitutes for justices who have to recuse themselves.

"Political Partisan"

Mr. Cohen focuses upon Justice Scalia as *the problem*. I am not entirely convinced. Instead, I cannot help but speculate whether the Supreme Court is losing much of its credibility due to it having become so politicized. If this is the case, then the article does not adequately reflect the fundamental underlying problem – that is, the poisonous political culture that has penetrated the justice system, culminating with the Supreme Court's controversial 5-4 decision to intervene in the 2000 Presidential elections. Justice Scalia's controversial behavior and provocative statements may actually be a constant reminder of a systemic problem much larger than himself.

Conclusions

Compliance with our Professional Code of Conduct

Adam Cohen of the New York Times editorial board has written a persuasive article about Justice Antonin Scalia of the US Supreme Court. Our detailed examination has shown that his depiction of Justice Scalia's conduct is, by and large, a concise, relevant, and fair representation of facts.

Mr. Cohen's concise analysis, professional background as an attorney, and grasp of constitutional issues initially led us to consider him a legal scholar. However, our further research revealed the existence of prior works in which the author described Justice Scalia as someone "embarked on campaigns to undo years of constitutional progress." Henceforth, we view the op-ed article being discussed here as a form of issue advocacy, not a manifestation of legal scholarship.

Pursuant to Article 7 of our Professional Code of Conduct, an issue advocate should declare any special interest. Mr. Cohen did not do so expressly, nor did he in my judgment do so implicitly, insofar as his article contains no reference whatsoever to his prior criticism of Justice Scalia.

An issue advocate should also treat his opponent with respect. However, by omitting any reference to the fact that he has for years been opposed to Justice Scalia on ideological grounds, Mr. Cohen disrespectfully failed to identify the Justice as his opponent.

We found that Mr. Cohen applied reasonable rationalization and argumentation methods, and that he refrained from slander or gossip. While we found no misrepresentation of facts, we did detect that certain facts had been omitted, which might give a somewhat distorted picture of events. Similarly, while we found no falsehoods of any kind, we did find Mr. Cohen's analysis disturbingly simplistic in some important respects.

The Effectiveness of Mr. Cohen's Advocacy

The author has managed to convey convincingly the message that Justice Scalia's misbehavior constitutes a problem that urgently needs to be addressed lest the US Supreme Court suffers serious harm upon its credibility, integrity, and reputation.

Unfortunately, Mr. Cohen's article merely scratches the surface. His account for the problems concerning Justice Scalia's repeated refusal to recuse himself from cases in which he appears to have a conflict of interest is somewhat sketchy and simplistic, his suggestions for possible solutions rather vague and lacking in confidence. Furthermore, the article does not even come close to offering remedies

to the other parts of the problem: Justice Scalia's injudicious public statements and political partisanship.

Mr. Cohen's analysis seems inadequate in one critically important respect. By focusing all of his attention on how and why Justice Scalia is out of line, the author overlooks a more fundamental and ultimately far more serious problem: The US Supreme Court is intrinsically vulnerable to abuse, the lives of its Justices becoming increasingly politicized and polemic.

As a consequence of this omission, inevitably, Mr. Cohen's attempt to suggest remedies becomes shaky and is ultimately doomed to fail. Merely "reining in Justice Scalia" will not fix the underlying problem. Were Justice Scalia to improve as a result of quiet pressure from friends and colleagues, this would not restore public confidence in the integrity of the US Supreme Court, merely offer a temporary reprieve from further damage to its reputation. Conversely, any attempts to censure or impeach Justice Scalia, as some observers have been suggesting, would only highlight the partisanship and political controversy surrounding the Court. ■

