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Right to Talk: Has Justice Antonin Scalia Compromised His Objectivity with a Public Remark?

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A Right to Talk

Has Justice Antonin Scalia compromised his objectivity with a public remark?

With two assisted suicide cases scheduled for argument before the Supreme Court this term, Justice Antonin Scalia already has publicly staked out his position on the issue.

While sentiments he expressed in 1990 in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, are well-known, Scalia told an audience at Catholic University late last year that it is "absolutely plain there is no [constitutional] right to die."

Is it proper for sitting judges to make such statements? While no one would deny Scalia his First

Amendment right to say what he pleases, that hardly quells concerns about the advisability of making such statements.

Vincent Martin Bonventre, a professor at Albany Law School in New York state, contends that Scalia crossed a line, robbing the public of its confidence in justices' open-mindedness and willingness to consider each case on its own merits.

For Lloyd B. Snyder, a professor at Cleveland-Marshall Law School, not only is Scalia well within the boundaries of propriety, but he has done lawyers and potential litigants a favor by speaking so openly.

Yes: Litigants deserve a justice with an open mind

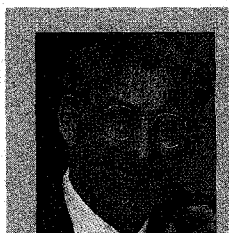
At best, Justice Scalia's remarks were imprudent. To be sure, few Court watchers were surprised to learn that Scalia finds the idea of a constitutionally based right to die unpersuasive. His previous expressions on the subject, on and off the bench, as well as his views about judicially cognizable liberties, have left little doubt about his beliefs on such questions.

But Scalia's unqualified declarations—"It's absolutely plain there is no right to die" and "It doesn't belong in the Supreme Court as a constitutional question"—evince a closed mind, an unconditional rejection and, indeed, a hostility about a specific issue being argued in pending appeals. As a sitting member of the Court, Scalia will be participating in the disposition of those appeals. As a judicial official, he has the responsibility to consider the issue as a neutral, unbiased magistrate. It is difficult to imagine how Scalia can function as such.

In many ways, Scalia is refreshing. He is outspoken and candid. He is a public official who shares his views with the public.

Anyone can learn his position on textualism, original intent, federalism, judicial usurpation and inappropriate resolution of complex social problems in the courts, to name a few. Whether he intends it or not, Scalia is a walking, talking rebuttal of the nonsensical notion of judges as detached intellects with no preconceptions, predispositions, personal convictions or philosophical outlooks that affect their decision-making.

But Scalia has gone beyond the bounds of candor. His categorical repudiation of a right to die crossed the line into the injudicious. It is not that judges should keep their opinions to themselves; they should keep their minds open. It is not that judges should feign neutrality;



BY VINCENT
MARTIN
BONVENTRE

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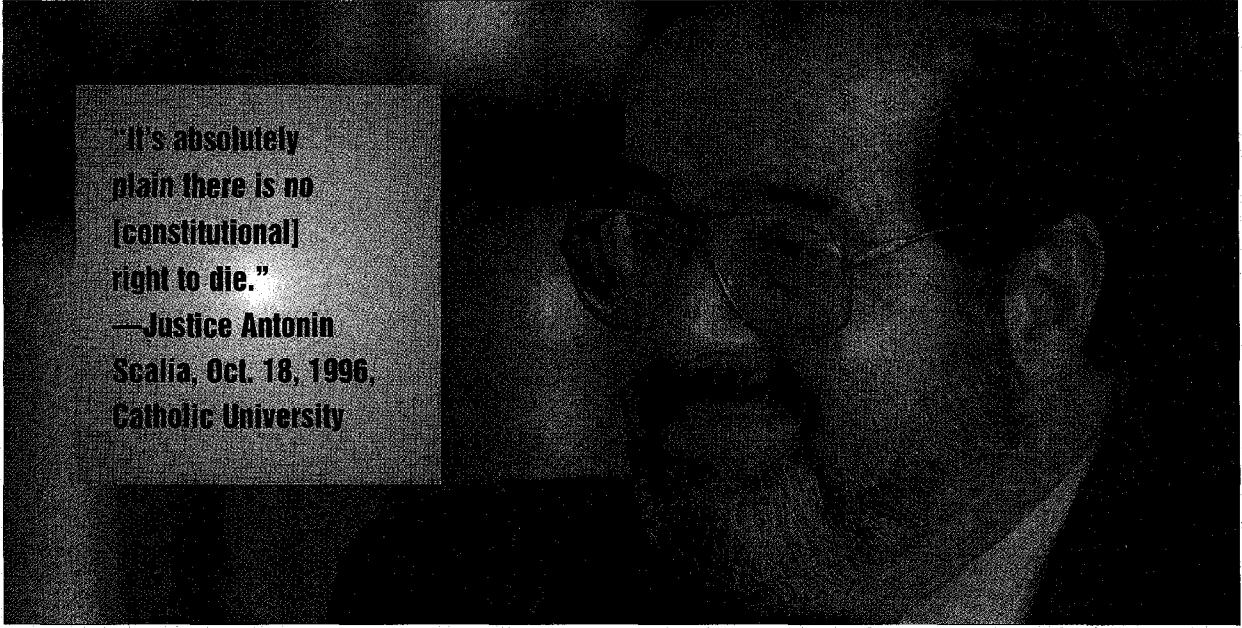
they should actually remain undecided. It is not that judges should give litigants a false sense of confidence; they should truly listen to and consider the arguments. A judge—like anyone—may be predisposed; but his or her decision ought not to be preordained.

The ABA Model Code of Judicial Conduct (1990) treats comments and behavior that raise questions about neutrality as unethical. Canon 3(B)(9) warns against "any public comment" by a judge that might "impair [the] fairness" of any pending or impending proceeding. Canon 4(A)(1) similarly admonishes judicial officers to avoid all "extra-judicial activities" that might "cast reasonable doubt on the judge's capacity to act impartially." And Canon 3(E)(1) prescribes disqualification of a judge whenever "impartiality might reasonably be questioned."

An argument could certainly be made that Scalia's remarks fall within the purview of those provisions. Surely, the parties urging the Court to give constitutional effect to their choice to die have every reason to believe that Scalia's mind is already fixed against their claims. They have every reason to believe that they begin with only eight, not nine, possible votes.

Scalia's remarks have variously been labeled indiscreet, injudicious, very poor form and an embarrassment to the Court. Legal commentators have largely refrained—openly, that is—to call them unethical. Suffice it to say that his remarks would seem to contravene the spirit of the judicial code to maintain impartiality and fairness, as well as the appearance thereof.

In that sense, his outright dismissal of any right to die was at least unfortunate and unwise. As he himself might well acknowledge, the advocacy of personal opinion does not mix easily with the role of neutral arbiter.



"It's absolutely plain there is no [constitutional] right to die."

—Justice Antonin Scalia, Oct. 18, 1996, Catholic University

No: Lawyers always want to know what a judge is thinking

In 1990 Justice Scalia wrote in the *Cruzan* case that there is no right to die. In 1996 he said the same thing in a speech at Catholic University. The first statement has raised nary an eyebrow. The remarks at Catholic University, however, have engendered much editorial comment suggesting that it was not proper for Scalia to say in public what he had previously written for publication.

The fact that two right-to-die cases are pending before the Supreme Court has energized the criticism about his remarks. I am at a loss to understand this misguided criticism.

Scalia's critics have not suggested that he has done anything illegal. The First Amendment to the U.S. Constitution would defeat any such argument. That amendment prohibits governmental laws or regulations that abridge freedom of speech.

Scalia has the same constitutional right to state his thoughts about the great issues of the day as you and I have. The Constitution of the United States does not contain an escape clause authorizing restrictions on the rights of attorneys, judges or Supreme Court justices.

The criticism of the justice is more subtle. Critics say that Scalia has exercised bad form; he has been indiscreet. What is the great evil behind this indiscretion?

It is that the parties involved in the cases now before the Court will lose faith in our justice system if they learn the justice's views prior to his decision in their case. The public at large will also, we are told, lose confidence in the impartiality of judges. Nonsense.

Competent lawyers always research the views of



BY LLOYD B. SNYDER

Most likely, attorneys in the upcoming cases would also like to hear other justices' viewpoints.

the judges before whom they appear, and they use this information in advising their clients. The lawyers asserting a right to die in the cases currently before the Supreme Court have read the *Cruzan* case. They know where Justice Scalia stands. And they have, most likely, advised their clients accordingly.

Both the lawyers and the clients knew after the Catholic University speech just what they knew before the speech: Justice Scalia is a lost cause on this issue. To win, the attorneys will have to pitch their arguments to the other justices.

In fact, I would bet that the lawyers would prefer to have had some of the other justices—those who have not expressed views in prior cases—speak about the right-to-die issue. Nothing is more frustrating for an attorney than appearing before a judge without having a handle on the questions that most concern the judge.

Nor is the public at large likely to gain or lose respect for our legal system based on the contents of Scalia's remarks. To the extent that they care about the issue at all, they are more likely to be concerned about whether Scalia is right than whether he has expressed his views in a concurring opinion or a speech.

I seriously doubt that the propriety of the forum for judicial comment is at the forefront of public concern about our legal system.

So if the public at large does not care, and if attorneys and clients want to know as much as they can about the views of judges they appear before, who is harmed by public statements of judges about important issues?

My point exactly. Let the man talk. ■