

---

**June 28, 2007**

SUPREME COURT MEMO

**Even in Agreement, Scalia Puts Roberts to Lash**By **LINDA GREENHOUSE**

WASHINGTON, June 27 — It's not every day that one Supreme Court justice, even one as rhetorically unrestrained as Justice Antonin Scalia, characterizes another justice, let alone the chief justice of the United States, as a wimp and a hypocrite.

Yet Justice Scalia did something very close to that, not once but twice, in separate opinions on Monday. As a result, he has served to lift the curtain a bit on the differences within the powerful five-justice conservative bloc that has marched in lock step through much of the term, bent on reshaping the law and, in several important areas, well on the way toward doing so.

In the campaign finance case, he accused Chief Justice John G. Roberts Jr. of "faux judicial modesty" for writing an opinion that in Justice Scalia's view effectively overturned the court's 2003 campaign finance decision "without saying so." The clear implication was that the chief justice lacked the courage or honesty to overturn the precedent openly as Justice Scalia himself would have done.

"This faux judicial restraint is judicial obfuscation," he said.

And Justice Scalia was scathing in his criticism of an opinion signed by Chief Justice Roberts that limited, but did not completely abolish, the right of taxpayers to go to court to challenge government expenditures that promote religion. Justice Scalia would have gone on to shut the courthouse door completely, not simply limiting but overturning the precedent that the new ruling invoked.

"Minimalism is an admirable judicial trait," Justice Scalia said, "but not when it comes at the cost of meaningless and disingenuous distinctions."

It made no difference that Justice Samuel A. Alito Jr., another reliable member of the conservative bloc, was the author of that opinion that Chief Justice Roberts joined. Justice Scalia was clearly taking aim at the chief justice, openly mocking his much publicized goal of lowering the court's temperature through unanimous and jurisprudentially modest decisions.

Justice Scalia is, of course, well known for his verbal barbs. Few colleagues during his 21 years on the court have escaped his insults, not even Chief Justice William H. Rehnquist. He once accused Justice Sandra Day O'Connor of holding "irrational" views that "cannot be taken seriously." A book published in 2004 under the title "Scalia Dissents" celebrated what it called the justice's "unique communication skills."

But what was notable about his attacks on Chief Justice Roberts this week was that the two were on the same side. They were in dispute not over outcomes, but over how far and how fast to move the law. As Prof. Jack M. Balkin of Yale Law School wrote on his blog, Balkinization, "It is the difference between bomb throwing and dismantling."

Liberals are quick to point out that this may well prove to be a distinction without a difference, because throughout the term, these two justices have been arriving at the same bottom-line conclusions. Prof. Erwin Chemerinsky of Duke Law School observed that Chief Justice Roberts, who has taken the conservative position in every ideologically divided case this term, could hardly be described as less conservative than Justice Scalia.

Prof. Mark Tushnet of Harvard Law School, whose recent book, "A Court Divided," explored the differences among Republican-appointed members of the Rehnquist court, said that "a consolidated conservative majority, not a divided conservative majority," was now in charge.

But Justice Scalia has never been a particularly patient man, and at 71, with the conservative ascendancy at the court perhaps at its peak for the foreseeable future if [Republicans](#) lose the White House next year, he sees little to gain from incrementalism or its appearance. And even liberals who do not share his agenda concede his point that if a precedent is going to be overruled in all but name, it is better for all concerned to acknowledge the overruling as a fact.

"It's neither minimalist nor restrained to overrule cases while pretending you are not," Walter E. Dellinger III, who served as acting solicitor general in the Clinton administration, said in an online conversation on Slate. Mr. Dellinger's point was that "there can also be a significant cost to the coherence of the system" if lower courts are in the dark as to which precedents they must still rely on.

Chief Justice Roberts, operating on a long timeline at 52, may be responding to a different imperative. Openly overturning numerous precedents early in his tenure would invite criticism that the Roberts court has an agenda to "radically shift American law," said Thomas C. Goldstein, a student of the court who argues there often.

The conservative alliance at the court may be fractious but not fragile, strong enough to withstand Justice Scalia's "tweaking and needling," as Prof. Richard W. Garnett of Notre Dame Law School describes it.

"I look at it as a bit of a kabuki dance," said Professor Garnett, who clerked for Chief Justice Rehnquist and is close to the court's conservatives. He said he had no doubt that Justice Scalia had "huge respect for the new chief as a person and as a lawyer."

What is visible now, he said, is the latest iteration of the endless struggle between the need for stability in the law and the desire to correct previous mistakes.

"Different people who call themselves conservatives resolve that tension in different ways," Professor Garnett said, adding that Justice Scalia was "laying down markers, making sure the arguments are out there to be used in later cases."

[Copyright 2007 The New York Times Company](#)

[Privacy Policy](#) | [Search](#) | [Corrections](#) | [RSS](#) | [First Look](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#)

---