

What Chuck Grassley Said About Antonin Scalia May Offer a Hint as to What He Will Do

Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) offered his thoughts Monday on the passing of Supreme Court Associate Justice Antonin Scalia during a floor speech. The following speech could offer clues as to how the senator may proceed once President Obama makes his promised nomination of a replacement for Scalia.

Mr. President, we are all saddened by the recent death of Supreme Court Justice Antonin Scalia. I extend my sympathies to his family. His death is a great loss to the nation.

This is true for so many reasons. Justice Scalia changed legal discourse in this country. He focused legal argument on text and original understanding, rather than a judge's own views of changing times. He was a clear thinker. His judicial opinions and other writings were insightful, witty and unmistakably his own.

Even those who disagreed with him have acknowledged he was one of the greatest justices ever to serve on the Supreme Court.

Today I'd like to address a common misconception about Justice Scalia, one that couldn't be further from the truth. Some press stories have made the astounding claim that Justice Scalia interpreted individual liberties narrowly. This is absolutely untrue.

It's important to show how many times Justice Scalia was part of a 5 to 4 majority that upheld or even expanded individual rights.

If someone other than Justice Scalia had served on the court, individual liberty would have paid the price.

The first time Justice Scalia played such a pivotal role for liberty was in a Takings Clause case under the Fifth Amendment. He ruled that when a state imposes a condition on a land use permit, the government must show a close connection between the impact of the construction and the permit condition.

Even though I disagreed, he ruled that the First Amendment's Free Speech Clause prohibits the states or the federal government from criminalizing burning of the flag.

Congress cannot, he concluded, claim power under the Commerce Clause to criminalize an individual's ownership of a firearm in a gun-free school zone.

Justice Scalia was part of a five-member majority that held that under the Free Speech Clause, a public university cannot refuse to allocate a share of student activity funds to religious publications when it provides funds to secular publications.

He found the Tenth Amendment prohibits Congress from commandeering state and local officials to enforce federal laws.

The Court, in a 5-4 ruling including Justice Scalia, concluded that it didn't violate the First Amendment's Establishment of Religion Clause for public school teachers to teach secular subjects in parochial schools, as long as there is no excessive entanglement between the state and the religious institution.

Justice Scalia believed that the Sixth Amendment right to a jury trial requires certain sentencing factors be charged in the indictment and submitted to a jury for it to decide, rather than a judge.

He concluded with four other justices that the First Amendment's freedom of association allowed the Boy Scouts to exclude from its membership individuals who'd affect the ability of the group to advocate public or private views.

Showing that original intent can't be lampooned for failing to take technological changes into account, Justice Scalia wrote the Court's majority opinion holding that under the Fourth Amendment, police can't use thermal imaging technology or other technology not otherwise available to the general public for surveillance of a person's house, even without physical entry, without a warrant.

He decided that notwithstanding the Establishment Clause, a broad class of low-income parents may receive public school vouchers to defray the costs of their children's attendance at private schools of their choice, including religious schools.

He voted to strike down as a violation of the Sixth Amendment's right to a jury trial federal and state sentencing guidelines that permit judges rather than juries to determine the facts permitting a sentence to be lengthened beyond what is otherwise permissible.

Justice Scalia found placing the Ten Commandments on the Texas State House grounds doesn't violate the First Amendment's Establishment Clause when the monument was considered in context, and conveyed a historical and social message rather than a religious one.

He was part of a 5-4 Court that concluded the denial of a criminal defendant's Sixth Amendment right to his counsel of choice, not only denial of counsel generally, automatically requires reversal of his conviction.

He wrote for a 5-4 majority that the Second Amendment protects an individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within the home, in federal enclaves such as Washington, D.C. A later 5-4 decision

applies this individual Second Amendment right against state interference as well.

According to Justice Scalia and four other justices, a warrantless search of an automobile of a person who has been put under arrest is permissible under the Fourth Amendment only if there is a continuing threat to officer safety, or there is a need to preserve evidence.

Justice Scalia also voted that it is a violation of the Sixth Amendment right of the accused to confront the witnesses against him for the prosecution to use a drug test report without the live testimony of the particular person who performed the test.

He was part of a 5-4 majority that found that the First Amendment requires that corporations, including nonprofit corporations such as the Sierra Club and the National Rifle Association, are free to make unlimited independent campaign expenditures.

And under the Free Exercise of Religion Clause, according to Justice Scalia and four other justices, a closely held corporation is exempt from a law that its owners religiously object to, such as Obamacare's contraception mandate, if there is a less restrictive way to advance the law's interests.

Mr. President, think about the liberty lost, had Justice Scalia not served our nation. A different Justice might have ruled against individual liberty in each of these cases. It's a frightening prospect. But in each instance, that's what four of Justice Scalia's colleagues would've done.

Of course, these are only the 5-4 opinions. There were many others where Justice Scalia ruled in favor of constitutional liberty, and more than 4 other Justices joined him.

And then there were other decisions where Justice Scalia voted to accept the claim of individual liberty, but a majority of

the Court didn't. Some of those cases unquestionably should've come out the other way.

When considering Justice Scalia's contribution to individual liberty, it's vital to consider his great insight that the Bill of Rights are not the most important part of the Constitution in protecting freedom.

For him, as for the Framers of the Constitution, it's the structural provisions of the Constitution, the checks and balances and the separation of powers that are most protective of liberty.

These were made part of the Constitution not as ends unto themselves, or as the basis to bring lawsuits after rights were threatened, but as ways to prevent government from encroaching on individual freedom in the first place.

For instance, Justice Scalia protected the vertical separation of powers that is federalism. Federalism keeps decisions closer to the people but also ensures we have a unified nation.

And it prevents a federal government from overstepping its bounds in ways that threaten freedom.

He also maintained the horizontal separation of powers through strong support of the checks and balances in the Constitution. He defended the power of Congress against Executive encroachment, such as in the recess appointments case.

Justice Scalia protected the judiciary against legislative infringement of its powers. He defended the Executive against legislative usurpation as well.

The best example, and the one that most directly shows the connection between the separation of powers and individual freedom, was his solo dissent to the court's upholding of the Independent Counsel Act.

Contrary to the overwhelming views of the public, the media, and politicians at the time, Justice Scalia correctly viewed that statute not as a wolf in sheep's clothing, but as an actual wolf.

Dismissively rejected in 1988 by nearly all observers, his dissent understood that the creation of a prosecutor for the sole purpose of investigating individuals rather than crimes not only was a threat to the executive's power to prosecute, but was destined to produce unfair prosecutions.

It's now viewed as one of the most insightful, well-reasoned, farsighted, and greatest dissents in the court's history. But his powerful and true arguments didn't convince a single colleague to join him.

As important as his 5-4 rulings were, in so many ways, the difference between having Justice Scalia on the Court and not having him there, was what that meant for rigorous analysis of the law.

Justice Scalia's role as a textualist and an originalist was vital to his voting so frequently in favor of constitutional liberties. He reached conclusions supported by law whether they were popular or not, and often whether he agreed with them or not.

He opposed flag burning. And he didn't want to prevent the police from arresting dangerous criminals or make trials even more complicated and cumbersome.

He acted in the highest traditions of the Constitution and our judiciary.

We all owe him a debt of gratitude. And we all should give serious thought to the kind of judging that, like his, is necessary to preserve our freedoms and our constitutional order.