

June 14, 2008

NEWS ANALYSIS

Justices Come Under Election-Year Spotlight

By [LINDA GREENHOUSE](#)

WASHINGTON — Thanks in no small part to Justice [Antonin Scalia](#)'s dire warning that granting [Guantánamo](#) detainees access to [habeas corpus](#) “will almost certainly cause more Americans to be killed,” the [Supreme Court](#) finds itself on the verge of becoming something that it has not been for many election cycles — a campaign issue.

Senator [John McCain](#), the presumed Republican presidential nominee, opened a town-hall-style meeting in New Jersey on Friday morning by telling the crowd of 1,500 people that the Supreme Court “rendered a decision yesterday that I think is one of the worst decisions in the history of this country.”

Mr. McCain's initial response to the court's 5-to-4 ruling in *Boumediene v. Bush* had been considerably milder. The decision “obviously concerns me,” he said on Thursday afternoon.

But overnight, the prospect of using the decision as a rallying point seemed to occur to many conservatives simultaneously. The ruling has “teed up the Supreme Court issue nicely for the [G.O.P.](#),” Curt Levey of the Committee for Justice, a group that advocates for Republican judicial nominees, wrote on his blog. The Wall Street Journal's editorial page quoted Justice Robert H. Jackson's famous observation that the Constitution is not a suicide pact and added, with reference to the author of Thursday's majority opinion, “About Anthony Kennedy's Constitution, we're not so sure.”

On the other end of the spectrum, liberals warned that the vision of civil liberties embraced by the court's narrow majority — security requires “fidelity to freedom's first principles,” Justice Kennedy wrote — was hanging by a thread. “One more Bush justice on the court and the decision would likely have gone the other way,” said Kathryn Kolbert, president of People for the American Way. Senator [Barack Obama](#), the presumed Democratic nominee, praised the decision as “an important step toward re-establishing our credibility as a nation committed to the rule of law.”

Although Mr. McCain has criticized the Bush administration for employing harsh interrogation

techniques, he has consistently supported barring the Guantánamo detainees from access to federal court. Justice Scalia's dissenting opinion, which called the decision "disastrous," "devastating" and tragic, was reminiscent of the tone of his dissenting opinion almost exactly five years ago, when the court overturned a Texas criminal sodomy law and set out a constitutional foundation for gay rights.

That decision, *Lawrence v. Texas*, portended a "massive disruption of the current social order," Justice Scalia wrote then. State laws "against bigamy, [same-sex marriage](#), adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" were all "called into question by today's decision," he warned.

While those comments helped fan the flames of the culture wars, as Justice Scalia may or may not have intended, they also may have had the effect of investing at least one item on his list with an aura of plausibility it had not previously enjoyed; barely five months later, the Massachusetts Supreme Judicial Court interpreted the state's Constitution as encompassing a right to same-sex marriage.

Justice Scalia's consistent behavior demonstrates his enjoyment of "the instant gratification of getting something off his chest," Professor [Laurence H. Tribe](#) of Harvard Law School said in an interview. "His tendency in case after case is to paint his dissenting view in the most inflammatory terms possible," Professor Tribe added, "giving red meat to those who want to make the Supreme Court their whipping boy."

In his dissent in the Guantánamo case, Justice Scalia accused the majority of harboring the "ultimate, unexpressed goal" of extending the ruling far beyond the United States naval base in Guantánamo Bay, Cuba, to give courts "the power to review the confinement of enemy prisoners held by the Executive anywhere in the world."

To the contrary, Justice Kennedy's analysis made clear that the decision was limited to Guantánamo by the special nature of the American installation there as well as by the remoteness of the base from any zone of hostilities. But critics of the decision quickly picked up on Justice Scalia's words, warning, as the editorial in *The Wall Street Journal* did, that prisoners at the [Bagram](#) Air Base in Afghanistan or in Iraq would soon have access to federal courts — a proposition that would be unlikely to get any votes, let alone five, from the current justices.

If a sustained election-year spotlight is to be trained on the Supreme Court, it would be a novelty in recent political history. In 1968, a time of great public concern about crime and violence, [Richard M. Nixon](#) ran for president as a critic of the Warren court's rulings in favor of

criminal defendants. (Nixon made it to the White House, but nearly all the decisions he ran against are still on the books; Friday was the Miranda ruling's 42nd anniversary.) But since then, even the superheated abortion issue has failed to resonate much beyond each party's base, notwithstanding frequent predictions to the contrary.

"Five hundred lawyers on my side and 500 on the other side care about the court, but I've never seen it go much beyond that," Richard Samp, chief counsel of the conservative **Washington Legal Foundation**, said in an interview. Nonetheless, Mr. Samp, who is strongly critical of the Guantánamo ruling, predicted that "as a political matter, it will help to rally those inclined to believe the Supreme Court is out of control."

Habeas corpus, as such, is an unlikely crowd-mover. But the decision clearly tapped into deep feelings about the entire course of the Bush administration's plan for the fight against terrorism. The debate among the justices was ostensibly over the fine points of constitutional history and interpretation. But what it revealed was a court as divided as the rest of the country, on the eve of a historic and perhaps close election, over the very nature of the post-Sept. 11 world.