

Alito talks media with lawyers in St. Louis

Justice Samuel Alito didn't direct his remarks at the press when he spoke to a ballroom full of

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lawyers in St. Louis. But it was clearly the press he had in mind when he described the misconceptions that people have about the Supreme Court.

Alito even singled out for criticism the star Supreme Court reporter of the past generation, Linda Greenhouse, who writes a column about the court in her retirement from the New York Times. He noted that Greenhouse had wondered in her column about "topsy-turvy world" Supreme Court where business had not won as high a percentage of cases this term as in the past.

"Maybe the law has something to do with it," said Alito with some sarcasm. "Maybe the text has something to do with it. I know that is a radical thought."

Alito went on to tell the lawyers that much of what they hear and read about the Supreme Court is misleading or just plain wrong.

Speaking to a Law Day audience at the Bar Association of Metropolitan St. Louis, Alito gave what he likened to a late-night talk show host's Top 10 list of things misunderstood by the court. Among them:

- The justices aren't "at each others' throats" even if their opinions sometimes make it look as though they are.
- The Roberts Court is not pro-business. Alito said he almost fell off a tread mill when he heard a well-known

commentator state, falsely, that he had worked for the Chamber of Commerce.

- Justice Clarence Thomas' silence on the bench is no different than that of the greatest justice in history, Chief Justice John Marshall. Yet none of the reports on Thomas' silence made that historical reference, a fact that "displeased" Alito.
- The justices do their own work, are highly "independent" and are not manipulated by their clerks.
- Supreme Court oral arguments are "a relatively small and...unimportant" part of what the court does. Justices have spent hours or days reading briefs before hearing an argument on the bench.
- Only about one-fourth of the court's time is spent on constitutional issues, contrary to popular conception. The rest is spent interpreting federal laws or regulations.
- The court is a co-equal branch of government, neither more equal or less equal than the other two branches.
- Some of the court's opinions mean less than commentators say they do. Sometimes there is a five-justice majority only for applying a principle to the single set of facts.
- Precedent is more important than the particular constitutional theory that a justice applies.

Alito began on a humorous note, remarking on a poll that had shown that Americans could name more of Snow White's dwarfs than the Supreme Court's justices.

While the American people are accustomed to hearing about great constitutional cases such as Brown vs. Board of Education, he said, "most of our cases are not about great issues of constitutional law." Three-fourths of the cases the court hears each term involve arcane, often technical interpretations of federal law and regulations.

Much Supreme Court commentary features the ideological

divisions among the justices, Alito said. But those ideological divisions between originalists (who believe the Constitution means what it meant when it was written) and non-originalists (who take a more pragmatic, evolving view) are less important than meets the eye.

One case where the constitutional theory was important was the decision where the court found that the Second Amendment protected an individual's right to have a gun for self-defense. Justice Antonin Scalia wrote a "vigorously originalist" decision saying that is what the Founding Fathers meant. Justice Stephen Breyer's dissent was typically "pragmatic," he said.

Alito said he "bristles" when people ask him if he is working during the weeks when the court is not hearing oral arguments. "Hearing oral arguments is a relatively small and, truth be told, a relatively unimportant part of what we do," he said.

Partly for this reason, Alito said he was "struck and somewhat displeased" that none of the accounts he read about Justice Thomas' silence mentioned that this was the practice of the great Marshall court of the early 19th century.

Alito noted that justices are asking more and more questions during oral argument, now talking up more than 40 percent of the hour. If Thomas were to ask questions, Alito joked, the lawyers "could not get a word in edgewise."

One exaggeration, Alito said, is that some justices don't get along. He made reference to a dissent where one of his colleagues called his decision "meaningless, inconsistent with the rule of law and insane." Alito didn't say which justice had made the comment, but it was apparently a reference to a tart dissenting opinion that Scalia had written in 2007 in *Hein vs. Freedom of Religion Foundation*.

Alito had written the majority opinion finding that the foundation did not have the legal standing to file a church-

state challenge to the White House's creation of federal offices to encourage the involvement of faith-based groups in distribution of federal aid. Scalia was upset that Alito had not gone further and thrown out the precedent that groups use to file church-state challenges.

Scalia wrote that Alito's opinion was the "creation of utterly meaningless distinctions, which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently."

Alito said this kind of language did not anger him and noted that the justices always have a pleasant lunch after their private conferences to decide cases.

He said it was nothing like the court of the Roosevelt-Truman era when Chief Justice Fred Vinson apparently got out of his chair, his hand in a fist, and started toward Justice Felix Frankfurter. Frankfurter, the brilliant former Harvard law professor, made a practice of needling Vinson, whom he considered a lightweight.

Vinson reportedly yelled at Frankfurter, "No son of a bitch can ever say that to Fred Vinson!" Several justices interceded.

Alito didn't mention it but Frankfurter got the last word. Vinson, who apparently supported continued legal segregation, died just before *Brown vs. Board* was decided. Frankfurter reportedly quipped to a friend, "This is the first solid piece of evidence I've ever had that there really is a God."