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TRIBUTE

Remembering Justice Scalia

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While Justice Scalia would have been grateful for the many warm tributes written about him over the last year, I wonder whether he would have noted, with his wry smile, one potentially awkward feature of them. Is not what we are doing uncomfortably close to one of his favorite targets in life: after-the-fact legislative history?[1] Might he not have accused us of trying to introduce a friendly set of submissions in order to varnish this or that part of his life—to make it look like something it was not?

No risk there. If there is one point on which all can agree, it is that Justice Scalia led an unambiguous life. There is so much evidence, so much clear-eyed text if you will, about where he stood—on just about everything. Want to know what he thought about constitutional and statutory interpretation? Check out *A Matter of Interpretation*.[2] Want to know his views about the canons of construction? Read *Reading Law*.[3] Want to know his views about the interaction of faith and law? Try his many speeches on the topic.[4] And then of

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1. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) ("Permitting the legislative history of subsequent . . . legislation to alter the meaning of a statute would set a dangerous precedent."); Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252, 332 (2012).

2. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23-25, 37-38 (1997).

3. SCALIA & GARNER, *supra* note 1, at 59-340.

4. *See, e.g.*, Ed Whelan, *Antonin Scalia, Disciple of the Word*, NAT'L REV. (Oct. 27, 2016, 4:00 AM), http://www.nationalreview.com/article/441459/antonin-scalia-faith-law-always-loyal-truth (discussing Justice Scalia's "The Two Thomases" speech).

course there are his 870 opinions on the Court. For Pete's sake, there has even been an opera written about him and Justice Ginsburg.[5]

So there is little room for lawyerly construction or deconstruction or even an original song. But there is plenty of room for gratitude and admiration.

Start with personal gratitude. Luckily for me, few lawyers knew me before I worked for Justice Scalia. Let us just say I was not a promising candidate for arguing cases before the Supreme Court or deciding cases in the court of appeals, as (at least) one incident from my clerkship year confirms. Sophisticated law clerk that I thought I was, I wrote a draft dissent for the Justice that at one point compared the majority opinion to the Know-Nothing Party of the nineteenth century. I was crestfallen when the Justice removed the line, and I had the audacity to ask him why he had taken it out. "Well, Jeff," he said, "the first reason is that you spelled it 'No-nothingism.'" I could not bring myself to ask him for the second reason. Know nothing, indeed.

I am indebted to Justice Scalia for giving me the legal skills and inspiration to reach for what should have been unreachable jobs. But I am most grateful to him for something else—that I have enjoyed every job I have had in the legal profession. How life changing, how much fun, to come across someone with such a spirit of curiosity, such a remarkable wit, and such a fearless character. Once you had a drink at that well, there was no turning back. If anyone knew how to inspire a young person to turn law into a calling, it was Justice Scalia.

Let me turn to admiration. As the last 228 years confirm, it is a tricky business to aspire to "a government of laws, and not of men"[6] and yet permit a small group of men and women to have the final say over cases that decide the meaning of the Constitution and the rest of federal law. Augmenting that challenge is the ever-present risk that judicial interpretation will say more about the interpreter than the document being interpreted. Justice Scalia approached these dilemmas head on and devoted a career to addressing them. The longer I have been on the bench, the more I have come to admire his efforts to resolve these vexing questions.

If there is one aspect of Justice Scalia seared into my mind, it is the value he placed on ideas. The proper currency of law in his world was reasoned interpretation, not adding-up-to-five power. It followed that good ideas, not the station of the judge or the advocate who came up with them, drove his

5. Derrick Wang, Scalia/Ginsburg*: A (Gentle) Parody of Operatic Proportions*, 38 COLUM. J.L. & ARTS 239 (2015); *Scalia/Ginsburg*, DW: COMPOSER & LYRICIST, http://www.derrickwang.com/scalia-ginsburg (last visited June 6, 2017); *see also* RUTH BADER GINSBURG WITH MARY HARTNETT & WENDY W. WILLIAMS, MY OWN WORDS 43 (2016).

6. JOHN ADAMS, *Novanglus Essay No. VII*, *in* THE NOVANGLUS ESSAYS 66, 70 (n.d.) (emphasis omitted), http://thefederalistpapers.integratedmarket.netdna-cdn.com/wp-content/uploads/2012/12/The-Novanglus-Essays-by-John-Adams.pdf.

approach to the Court's work. That is not a bad thing for a lower court judge or for a legal system. It means that everyone has a chance to influence the process. And it means that a legal culture that must be hierarchical in one way need not be hierarchical in all ways—a feature of our judiciary that is not only healthy but also quintessentially American.

All lower court judges, no matter their perspective, appreciate the oh-so-clear quality of a Justice Scalia opinion. There are 851 authorized federal judgeships, and it is a truth not often advertised that 842 of those judges do a good part of the work. How helpful it is to have a Scalia opinion in hand in addressing our caseload. You know where the law stands when you read a majority opinion by Justice Scalia.

While Justice Scalia was no-nonsense about doing his best to decide cases impartially, he proved that the task need not be dull. Try being a court of appeals judge—what the Constitution might have called the "superior inferior" judges.[7] There is plenty of repetition, and every time you do something interesting it is potentially subject to review at the Supreme Court. How refreshing to have a Scalia opinion to comfort and startle you. Say what you will about the Justice, his opinions never put anyone to sleep.

Some of his most engaging opinions, some of his best lines, came in the most run-of-the-mine cases. What a powerful example. Instead of wondering what I had done to deserve the fate of deciding a dry-as-dust case, a Scalia opinion on the topic reminded me that there was nothing of the sort. No matter the stakes, he prized coherence—always—and his mind never seemed to come to rest until each string of thought had come into tune. His commitment to the technical controversies showed that all cases, great and small, deserve the same rigor and care.

Kyles v. Whitley puts an exclamation mark on the point. What might have been a humdrum habeas case—about whether the State had violated the defendant's *Brady* rights[8]—became anything but once Justice Scalia unsheathed his pen. Justice Scalia thought the evidence of guilt from four eyewitnesses, what he called a "quadruple coincidence," was overwhelming, making the *Brady* evidence immaterial.[9] But the Court thought this evidence was suspect because the eyewitnesses could see only the defendant's face. Here is Justice Scalia's response:

> Facial features are *the primary means* by which human beings recognize one another. That is why police departments distribute "mug" shots of wanted felons,

7. *See* U.S. CONST. art. III, § 1.

8. Kyles v. Whitley, 514 U.S. 419, 421-22 (1995); *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that a prosecutor must, upon request, turn over favorable, material evidence to a defendant).

9. *Kyles*, 514 U.S. at 462 (Scalia, J., dissenting).

> rather than Ivy-League-type posture pictures; it is why bank robbers wear stockings over their faces instead of floor-length capes over their shoulders; it is why the Lone Ranger wears a mask instead of a poncho; and it is why a criminal defense lawyer who seeks to destroy an identifying witness by asking "You admit that you saw only the killer's face?" will be laughed out of the courtroom.[10]

As *Kyles* confirms, *all* cases engaged Justice Scalia's talents. Notice, by the way, that he did not write imaginative lines for their own sake. They had a broader point. "Ivy-League-type posture pictures," the Lone Ranger, and ponchos directly furthered the opinion's reasoning.[11]

All of this came easily to him, I suppose, because competitions of the mind came naturally to him. I like to think of him as the chess master who comes to the park on a Saturday morning and is disappointed to see just ten other chess players willing to take him on. Even his first book, *A Matter of Interpretation*, is written, most revealingly, in debate format. He chose not to write a book about his views alone. He presented a theory of judging, then allowed several prominent professors to challenge him[12]—signaling confidence, humility, and transparency all at once.

I have said some nice things about Justice Scalia. And I can add a few more—that he wrote like Justices Jackson and Holmes, thought like Justices Frankfurter and Story, and saw the long-term stakes like Chief Justice Marshall. But all of these talents would have been worthless—truth be told, potentially dangerous—if that were all there was to the Justice. The indispensable thing to say about Justice Scalia is that he passed the bedrock test of judicial character: he respected the line between law and personal opinion.

Writing and thinking like the judicial titans create more risks than rewards for the judge who sees law and personal belief as one. Take *Buck v. Bell*.[13] Justice Holmes's brilliance and sparkling prose did not save him from the

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10. *Id.* at 466-67.

11. An anecdote from Justice White targets a different tendency. During the 1971 Term, the Justice told one of his clerks that he wrote very well. But before the clerk could fully appreciate the apparent compliment, the Justice added that "Justice Jackson had that problem, too." *See* DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 363 (1998); James E. Scarboro, *Good Judgment as a Manifestation of Character in the Opinions of Justice Byron R. White*, 71 U. COLO. L. REV. 1427, 1436-37 (2000); *see also* John Q. Barrett, Judge Gorsuch's Admiration for Justice Jackson's Writing . . . and Justice White, Dubitante 3 n.2 (2017), http://thejacksonlist.com/wp-content/uploads/2017/03/20170320-Jackson-List-Gorsuch-White-on-Jackson-Writing.pdf. While Justice Jackson may be an unfair foil, the point is powerful, the risk ever-present. In *Kyles* and elsewhere, Justice Scalia resisted the temptation of writing clever lines in the standalone service of writing clever lines.

12. *See* SCALIA, *supra* note 2, at 49-127 (collecting responses from Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin).

13. 274 U.S. 200 (1927).

decision. They made it worse. And it is hard to deny that his policy preferences got the best of him, as his private correspondence confirms.[14]

Many of the great Justices have acknowledged the danger and done their best to resist it. Justice Story: "The truth is, that, even with the most secure tenure of office, during good behaviour, the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but, that they will be ready to yield themselves to the passions, and politics, and prejudices of the day."[15] Justice Frankfurter: "For the highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law of which we are all guardians—those impersonal convictions that make a society a civilized community, and not the victims of personal rule."[16] Perhaps Justice Scalia put it best: "[B]rains and learning, like muscle and physical skill, are articles of commerce. They are bought and sold. . . . The only thing in the world not for sale is character."[17]

Separating the meaning of law from personal belief is never an easy road for a judge to travel. And it was never going to be easy for Justice Scalia—and not just because he had a few ideas about how the world should work. Surely someone as smart as Justice Scalia knew how helpful it would have been to his legacy to bend his views now and then to accommodate public opinion or to be the go-along-to-get-along judge that he most assuredly was not.[18] Surely he knew how difficult it would be to persuade the public that there is a difference between what a previously enacted text requires and what today's public prefers. The judge who travels that road, as he well learned, will be misunderstood and will suffer a double dose of misapprehension: praise he does not want from some quarters and criticism he does not deserve from others.

With Justice Scalia's clarity of thought, facility with language, *and* judicial character came perhaps his most important attribute: transparency of method. To his everlasting credit, Justice Scalia's opinions let the world know how *he* should be judged and whether *he* was separating law from personal belief. The

14. "One decision that I wrote gave me pleasure," Justice Holmes told a friend, "establishing the constitutionality of a law permitting the sterilization of imbeciles." Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (May 19, 1927), *in* THE HOLMES-EINSTEIN LETTERS 266, 267 (James Bishop Peabody ed., 1964).

15. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1613, at 476 (Boston, Hilliard, Gray & Co. 1833).

16. Tom C. Clark, *Mr. Justice Frankfurter: "A Heritage for All Who Love the Law,"* 51 A.B.A. J. 330, 332 (1965).

17. *In Season of Commencements, Words of Wisdom Heard Anew*, N.Y. TIMES (May 27, 1996), https://nyti.ms/2quSTlD (quoting Justice Antonin Scalia, Commencement Address at the College of William & Mary (May 12, 1996)).

18. *See* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10 ("I have never been custodian of my legacy.").

Justice left little doubt about how the Scalia scorecard worked—what the benchmarks were for a fair decision in the case at hand and for equal treatment between that case and the next one down the road. It is one thing to say that justice is blind. It is quite another to prove it by treating seen and unseen cases alike over the span of a judicial career. In revealing how his opinions should be judged, Justice Scalia devoted a career to crafting principles of judging meant to confine the natural temptation of any judge to prefer outcomes consistent with his or her personal beliefs.

In holding steadfast to these principles, it is well to remember that he did not work alone. There is no Justice Scalia without Mrs. Scalia. And when you add to that his devoted family and his abiding faith, it becomes clear why he was able to retain the courage of his convictions and the conscience to know when they were at risk.

Justice Scalia set another valuable example from the perspective of a lower court judge. He invested time in friendships with colleagues, including those with whom he sometimes disagreed, even vigorously. It makes me smile that most lawyers in this country, and nearly all judges, know that Justice Scalia attended one opera after another with Justice Ginsburg and taught Justice Kagan how to hunt. Speaking strictly for myself, I am not sure which was the greater example of good-faith collegiality: enduring thirty-five years' worth of long, difficult-to-follow operas or teaching a potential adversary how to use a gun.

Several years ago, Justice Scalia gave a eulogy in which he said that a mentor of his had run a "good race." In applying that idea to the Justice, I must concur in the judgment but not all of the reasoning. Oh sure, the Justice ran a great race—covering a lot of ground with pace, character, and flair. But instead of thinking of his life as a completed race, I much prefer to think of it as a critical leg of a relay.

It warms my heart to think of the many people who have been, and will be, inspired by Justice Scalia, and who will pick up where he left off in ways large and small.

It warms my heart to think of an argument at the Court decades from now when Justices will be asking questions, and advocates will be answering them, in ways influenced by things Justice Scalia did that seeped into the deepest fabrics of American law—so deep that no one that day will know why they are doing what they are doing.

And it warms my heart to think of perhaps his most lasting legacy. We Americans tend to be obsessed with winning and losing, making it tempting to measure a judicial career solely by how often a Justice won or lost the fights of the day. I cannot deny the importance of wins and losses or that the winners sometimes try to write the history. But I can say that questions can be just as important as answers over the long term—and the questions Justice Scalia relentlessly posed will be with us for a long time. Those questions, framed by a

confident man, reduce to the most humble a judge can ask: Did the People empower us to resolve this dispute? If so, on what grounds is it permissible to do so?

In doing his best to answer these questions throughout his career, Justice Scalia showed that he possessed all, not just some, of the essential attributes of a good judge: flinty-minded thinking, a way with words, and character.