Justice Antonin Scalia

Oral History Project
The Historical Society of the District of Columbia Circuit
Justice Antonin Scalia

Interview conducted by Judith R. Hope, Esquire

December 5, 1992
NOTE

The following pages record interviews conducted on the dates indicated. The interviews were electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

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PREFACE

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Historical Society of the District of Columbia Circuit

Agreement Respecting Oral History of Antonin Scalia

1. In consideration of the recording and preservation of the oral history memoir of Antonin Scalia by the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter, "the Society"), I, Eugene Scalia, as representative of the estate of Antonin Scalia, do hereby grant and convey to the Society and its successors and assigns all of the rights, title, and interest in the voice recording and transcript of the interview as described in Schedule A hereto, including literary rights and copyrights. All copies of the voice recording and transcript are subject to the same restrictions herein provided.

2. I understand that the Society may duplicate, edit, or publish in any form or format, including publication on the Internet, and permit the use of said voice recording and transcript in any manner that the Society considers appropriate, and I waive any claims the estate may have or acquire to any royalties from such use, provided, however, that the estate will be provided a copy of the transcript and of the voice recording.

3. I reserve for the estate and anyone else whom I, acting as representative of the estate, may designate in writing the non-exclusive right to use the voice recording and transcript.

SWORN TO AND SUBSCRIBED before me this 11th day of August, 2018.

Eugene Scalia, Representative of the Estate of Antonin Scalia

My Commission expires: 1/31/21


Stephen J. Pollak

Notary Public

District of Columbia

Authority Nucedl.

2-31-21

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**Schedule A**

Voice recording and transcript resulting from one interview of Antonin Scalia conducted on the following date:

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The transcript of one interview is contained on one DVD.
The Historical Society of the District of Columbia Circuit

Oral History Agreement of Judith Richards Hope

1. Having agreed to conduct an oral history interview with Justice Antonin Scalia for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Judith Richards Hope do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the cassette tapes and transcripts of the interview conducted on December 15, 1992, including literary rights and copyrights.

2. I understand that the Society may duplicate, edit, or publish in any form or format, including publication on the Internet, and permit the use of said cassette tapes and transcripts in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the interview or the information contained therein until it is published, or until I receive permission from the Society.

Judith Richards Hope

October 17, 2017

SWORN TO AND SUBSCRIBED before me this 18th day of January, 2019.

A. Dawn Shavatt
Notary Public

My Commission expires: 4.30.22


Stephen J. Pollak
Schedule A

Tape recording(s) and transcript resulting from 1 interview of Justice Antonin Scalia on the following date:

December 5, 1992 1 tape 29 pages

The transcript of the interview is contained on one diskette.
Mrs. Hope: [The very beginning of the conversation was not taped.] Justice Scalia, it's
December the 5th, 1992. We are sitting in his Chambers; the fire is in the
fireplace and the purpose of this discussion is to give a little background
before the oral history of the D.C. Circuit. You know, quickly, can you
just tell us where you were born and what the first part of your life was
like, what your family background is.

Justice Scalia: Sure. I was born in Trenton, New Jersey. I lived there until I was about,
oh, I guess five; I went to kindergarten there. Then my family moved to
Elmhurst on Long Island, where I went back to kindergarten. I'm a two-
time loser in kindergarten. I guess the ages were ... the age of entry was
different. And I lived in Elmhurst until I went away to college.

Mrs. Hope: Public school? Catholic school?

Justice Scalia: PS 13, for grammar school. Xavier High School in Manhattan, which was
a Jesuit military school for high school and then in 1953, I went to
Georgetown to college and almost simultaneously, my parents moved
from Elmhurst, back to the Trenton area, because that's where my mother's
family was from and continue to live.

Mrs. Hope: Your father was Italian?

Justice Scalia: My father immigrated to this country when he was about 15 from Sicily
with his parents. My mother was born in this country in Little Italy in
New York City

Mrs. Hope: So, both of your parents are Italian?

Justice Scalia: Right. Well, my father was an Italian citizen, my mother was not an
Italian citizen; she was born in this country. Her parents were from - her
mother was from near Naples, her father was from [Bari].

Mrs. Hope: Do you have brothers and sisters?

Justice Scalia: Nope, I'm the only child.

Mrs. Hope: You're an only child.

Justice Scalia: Indeed.
Mrs. Hope: I'm an only child, too.

Justice Scalia: Really? It's great, isn't it?

Mrs. Hope: And your roommate in college, Dick Coleman was an only child. Yeah, there's something about it. Do you think that affected you in your growing up?

Justice Scalia: Well, I think so. I think it's probably a lot easier to raise an only child with high expectations. He always feels he's the center of the universe and has a good deal of security. I think it must be harder to be with brothers and sisters competing for parental attention. That was never an issue in my life. I was the apple of my parents' eye, as I assume you were, and, every only child is. Which is not to say I wouldn't have preferred to have brothers and sisters; I very much would have. I have no cousins. My mother was one of seven - five sisters and two brothers and I am the only grandchild from the whole family and my father was one of two children, he has a sister and I am the only offspring from that side too. So, I am really the last of the Mohicans.

Mrs. Hope: You really are the center.

Justice Scalia: But no cousins, that's…

Mrs. Hope: Was your home when you were growing up, was it a scholarly home? Was it a musical home? How did that work?

Justice Scalia: It was musical from my mother's side in that she played the piano. My father loved music. In fact, he had - he had had an interesting life. For a period, he was a newspaper editor. He bought an Italian newspaper somewhere in Pennsylvania, he was the editor of it - it eventually folded. He studied voice at the Eastman Conservatory in Rochester. And then eventually settled down as a teacher of romance languages at Brooklyn College, which is where he was from the time we moved to New York when I was five, until, gee, until I was in law school - until after I was in law school. Commuting to Brooklyn from Elmhurst on the New York subway at first, and then after they moved back to New Jersey, he commuted in from Trenton on the Pennsylvania Railroad and then the subway.

Mrs. Hope: No lawyers in the family?
Justice Scalia: My uncle was a lawyer. One of my mother's two brothers, Vincent, was a lawyer and I suppose to the extent I had any, you know, any inkling with what being a lawyer was like, it was from Vince.

Mrs. Hope: And when did that begin to be of real interest to you?

Justice Scalia: That's hard to say. I don't think it was ever a passion. I think in my last year of college I didn't know much what else I particularly wanted to do and it seemed to me I would like what law was about and so I went to law school. But I had not been dying to be a lawyer from an early age or anything like that.

Mrs. Hope: Were you scholarly?

Justice Scalia: I was a good scholar. Yeah. I think all my life I had been good in academics. You asked earlier was my family musical or scholarly and I said musical from my mother's side. She was, she played the piano; my father used to sing when he was younger. He had a nice tenor voice. But she always played the piano so there was always a lot of music in the home. He liked to listen to music, classical music, but anyway, the scholar part was my father, my father was a very, really scholarly fellow. You know, I am sometimes regarded as the son of an immigrant, you know, and made it to the Supreme Court, what a guy, but in fact, I'm, you know, I am not the member of my family who made the family fortune, so to speak. It was really my father who came from - his father was not illiterate, but not a scholarly person. He was an engineer, mechanical engineer at a sulphur mine in Italy; he kept the machines running. But essentially a blue collar worker and my father, just by dint of his own brains and effort became a doctor of philosophy and professor of romance languages. So, you know, I sort of riding on his accomplishment and what he wanted and obtained for his child - a good education and so forth. But he was the scholar in the family. He always had a book in front of his face: in French or Spanish, or Italian usually.

Mrs. Hope: And you did, too, when you were growing up.

Justice Scalia: Well, I studied a lot. I'm not sure I was a voracious extracurricular reader. I don't think I was then and I am not now. But I kept my nose to the grindstone and I really think that to try to identify what particular talent you have that helped you to advance in your profession, I think perhaps mine was that - the ability to interest myself in whatever problem happens to be the one that is set before me at the time. Whatever my - I think a lawyer has to do that because not everything that a lawyer does, in fact, relatively little of what a lawyer does is inherently exciting. You have to acquire to get your satisfaction out of figuring out problems, even
relatively dull and even relatively inconsequential problems. I have always had the ability to get enjoyment out of that.

Mrs. Hope: You went to Georgetown, which is a Jesuit school. Now, was Xavier Jesuit also?

Justice Scalia: Yes, it was.

Mrs. Hope: And Jesuits are supposed to be scholarly and analytical and picking apart the most minute arguments to see what the basis of them is. Is that - did that have any effect on the way you approach the law, or the fact that you thought law might be interesting?

Justice Scalia: Oh, I don't know whether it would have pushed me to law in particular. But you are quite right, but in those days at least, I'm not sure it's true anymore, but in those days Jesuits had a system of classical education which placed great stress upon languages (I had Greek and Latin in high school, as well as French), a great stress upon logic, courses in logic and philosophy, not in high school, but later at Georgetown. It was then known as a classical education. A lot of Cicero and the humanities. Not much science, especially laboratory science. Not much of that at all. But I never regretted that background. It's a superb background for law, among other things. It's probably a good background for many professions.

Mrs. Hope: Do you think you're known as a man who really believes in the plain meaning of a statute, for example? Do you think that the Jesuit training and the classical training had any impact on the way you approach statutory analysis and interpretation?

Justice Scalia: I don't know. I can't say that. Perhaps. I might have been the same without it. I have, perhaps I have more regard for language and what it says, what it suggests, what it connotes, simply because I have had so much exposure to language in my life, not just English but French, German and Latin, Greek. So I guess you get to feel comfortable with interpreting words and seeing their relationship with one another. I would not attribute it to the Jesuits in particular, but I think anyone who has had a lot of language probably feels more comfortable placing great stock in his ability to figure out the import of an English sentence from the text without running to extrinsic sources.

Mrs. Hope: I want to talk about your hobbies a little bit, when you were a young boy growing up in New Jersey and New York and then at Georgetown. I know that you are a fierce poker player; I know you're a good singer; I know you play a mean piano. And I want to know when all those things began and how they began and if there are other things. I guess you like baseball, too, as I recall?
Justice Scalia: Well, when I was a kid I played baseball, actually, played more stickball. Queens stickball, not Brooklyn stickball.

Mrs. Hope: What's the difference?

Justice Scalia: Brooklyn stickball is played in the street and on a bounce - the ball is pitched in on a bounce and you hit it with a stick, which is a broom stick or a mop handle or something like that. Queens stickball was always played against a wall, usually a wall in a schoolyard. Either the wall of the school building or wall of a handball court at the other end of the schoolyard. And, you would draw a box on the wall that was about the height and the width of the strike zone and the pitcher (it could be played with two people or with four), the pitcher would throw the person a little [fake?] ball called a "Spaldeen" and the batter, you know, if it went in the box it was a strike, if it was outside the box, it was a ball and the object was to hit it and if you hit it on the ground past the pitcher, it was a single; past another point, a double; if you hit the school building it was a triple; on the roof, a homerun. I used to play that morning to night on the weekends and I played a lot of basketball, you know, with two or three kids on a side with a single hoop. Generally, the hoop being attached to a backboard on a telephone pole down the street. I remember it was a good place to put up a basketball hoop because on the same telephone pole was the streetlight, so you could play at night. But mostly, that baseball, stickball, softball, not tennis which is what I play now or squash. I didn't take up tennis until, I guess I was in practice in law in Cleveland when I first began to play it. And squash I started playing at the University of Chicago when I was on the faculty.

Mrs. Hope: Do you still do that a lot?

Justice Scalia: I still do squash and tennis. Yes. I had a period when I did running, but I've sort of been off of that for a while.

Mrs. Hope: And you lift weights, I know.

Justice Scalia: Well, yeah, you make it sound like it's a competitive enterprise. Where I play squash, they have Nautilus machines I use to stay in shape. I do a round of those after playing squash.

Mrs. Hope: Now, where does the poker come from? Does that help you get through college?

Justice Scalia: No, I didn't play poker a lot. Actually, the first regular poker I ever played was in Cleveland at Jones, Day. After law school that was my first job and some of the younger partners and associates had a regular, once a
month poker game and it was very enjoyable. In fact, one of the regulars was Dick Pogue, who is now the sort of the managing partner of Jones, Day.

Mrs. Hope: And your music? I know you sing. I know you play the piano; I You must have started very young.

Justice Scalia: That started young. It was my father who insisted that I take piano lessons and not only take them, but take them from very good teachers, so that I used to go to a place called the Brooklyn School of Music, which, it was all the way down the other end of New York. I'd take the subway to get there – it would take me about 45 minutes, I think, on the subway to get to this place. I knew there were a lot of music teachers around Elmhurst, but my father wanted me to go to a good piano school and he had identified that one. It's right near - it was near, I think it was near Carnegie Hall. That could be right, I don't remember, but I know it was a long way. And until, at least until I was a junior or so in high school, I used to practice very faithfully and consistently at least an hour a day and got to be pretty good. Then as other demands crept in on my time, I got a little worse every year until I have fallen into the state of pianistic decrepitude that I am now in.

Mrs. Hope: Well, I know it's not too bad.

Justice Scalia: Well, it's pretty bad.

Mrs. Hope: I was going to ask you just one more question about growing up. Who was the person in your family, you think, if there was one, who was the most influence on you?

Justice Scalia: Oh my. That's a very hard question and I don't, I'm not sure that I'd be the one best able to answer it, to tell you the truth. I guess I used to think my father, not because he took me in hand that much, but simply because he was a constant role model of application. He was a very disciplined man. Energetic and believed that one should not waste time, squander one's money or one's talents, either one. So, he doubtless had a great influence on me. But, really the older I get in looking back and talking to some relatives about this or that and seeing how hard it is to raise my own children, I guess I have become more and more aware of how much influence my mother had upon me. Of the two of them, she was by far not the more scholarly. I mean, she was an intelligent woman. A great school teacher and from all I've heard a very good one. I've been reading some letters from parents of her students that she had saved, that were left in her papers after she died, and I think she was a very good teacher. But I am sure not the intellect that my father was, yet I am not sure that she didn't have more to do with how I turned out than my father did. She was very
careful about everything that touched my life. I mean, who my friends were, what organization. I was never aware of all of this as a kid, of course. I just went bouncing along. But in retrospect, I see that she very carefully plotted for me the course that she thought would be the most -- the safest and the most helpful. So, I mean, you know, it's surely either my mother or my father and I can't put either one of them first.


Justice Scalia: I remember a lot of teachers who had an enormous influence upon me. I think I was fortunate to grow up in the days - every cloud has a silver lining. The cloud of discrimination against women had the silver lining of some very good school teachers. I remember I had really wonderful, accomplished, disciplined women as grade teachers in PS 13. Perhaps, maybe the same women today would not be teaching grammar school, they would be on the board, something like that. That was what that particular evil produced. I remember a principal named Miss Lillian Eschenbecker. My mother remained friends with her for many years and she followed my later career I know. I remember Miss [Gowings] and several others at grammar school. I remember a lot of my teachers in high school. Frankly, if I had to pick an age of life where one is most influenced by teachers especially, I think the high school years are probably the most receptive. I remember Father Tom Matthews, who was one of the Jesuits at Xavier who was a wonderful man, of considerable influence on me. Father Morton Hill, who later was the director of the Yorktown project in New York, and several young Jesuits that the - in those days, maybe it's the same, I don't know, the Jesuits had a ten year stint before they were ordained and after studying theology for a couple of years, they would undergo what was called their "regency" and this was a period when they would teach, usually in high schools. And they were pretty young then at that time. I mean, they would have been maybe two years out of college, or something like that. But they were not that much older than the high school students they were teaching, so a real kind of a relationship could develop with them; the close, almost your own generation. I remember they were wonderful teachers and good companions. College. Yeah, I remember a lot of teachers that - I believe in teaching, you know I became a teacher later myself. My father was a teacher; my mother was a teacher. As I look through my life, teachers have had an enormous influence on me at every level. I guess they do on everyone. I don't know whether everyone is as quite aware of it as I am.

Mrs. Hope: Why did you pick Georgetown?

Justice Scalia: I had a scholarship. That helped. I had a full tuition scholarship there. Actually, my first choice was Princeton and I applied to Princeton, indeed
I had a Naval ROTC scholarship, which in those days was very unusual—it was very competitive. I took the...there was an exam, it was mostly, it wasn't an achievement exam, it was an intelligence exam: spatial relations, and that sort of stuff. I recall thinking it was the hardest exam I'd ever taken in my life and I had taken a lot of exams: entrance exams to high school, for example and ended up going to Xavier. I took entrance exams to go to private, mostly Catholic schools like Brooklyn Prep, Regis, they all had their own entrance exams. So I had a lot of exams. I remember never thinking I had taken an exam as hard as the Naval ROTC exam. Anyway, I was very pleased to win the Naval ROTC scholarship, but the hook was that you had to get admitted to a university that had a Naval ROTC. Princeton had it and I really wanted to go to Princeton because my, well because, as I told you, my mother's family was from New Jersey and from Trenton and, gee for Italian-Americans living in Trenton, Princetonians. God! That was really making it—to have one of your kids go to Princeton, so my parents would have wanted me to go there. Anyway, I didn't get admitted to Princeton and

Mrs. Hope: You're kidding.

Justice Scalia: No. And I always remembered thinking: that was the only instance where I thought my background, I wouldn't say it was discrimination against Italians in particular. But I remember having the interview with a Princeton alumnus and I sort of had the feeling I was just, or he thought I was just not the Princeton kind of a person.

Mrs. Hope: What does that mean?

Justice Scalia: And he was probably right. At least at that time. Not from the right school, the right family, good club, not WASPish enough. That may be unfair. It was a long time ago, but I did have that feeling and I must say that's the only time I have ever had the feeling that, you know, that being an Italian-American made any difference to my detriment in my life. Anyway, that's my ... I didn't get into Princeton and Georgetown offered me a full tuition scholarship

Mrs. Hope: You're Not ROTC?

Justice Scalia: No, not ROTC. I was in the ROTC there, but I was in the - they had Army ROTC. I was in that my first two years. Then my junior year I spent abroad at the University of Fribourg in Switzerland and, so I quit ROTC. When I came back, if I had continued ROTC, I would have had to take so many military science courses, that I would have had not much left for anything else. I didn't want to spend my whole senior year nothing but double-doses of military science. So, I just did not continue
Mrs. Hope: Do you have ... did you serve in the military?

Justice Scalia: No. No, I went from there to law school and never got drafted and never volunteered.

Mrs. Hope: Did you have a particular reason for choosing Harvard Law School?

Justice Scalia: Yeah. I thought it was the best. It had the reputation at that time as being number one. I got admitted there and I thought I ought to go there.

Mrs. Hope: You did well at Georgetown - were you, what, magna cum laude? Phi Beta Kappa?

Justice Scalia: No, I was summa. Georgetown didn't have Phi Beta Kappa in those days. It was not really that good a university by whatever standards Phi Beta Kappa evaluates. I don't think the library was big enough to qualify. So, no, I was not Phi Beta Kappa. I was ... I did as well there as anybody could to at Georgetown, I suppose, I was first in the class and valedictorian.

Mrs. Hope: What was your major field?

Justice Scalia: History. History major, philosophy minor. Again, I continued a lot of language studies. I had two years of Latin and Greek, I had two years each of those. And I studied German. I had French at Xavier. Again, it was mostly liberal arts that I studied. Philosophy.

Mrs. Hope: And how about law school? Your roommate from Georgetown was my friend and your still good friend, Dick Coleman.

Justice Scalia: Right.

Mrs. Hope: You both went to Harvard Law School

Justice Scalia: Right.

Mrs. Hope: Dick Coleman told me, "We thought about rooming together at Harvard, but I couldn't stand it because all he wanted to do was think about the law and talk about the law and I wanted to do some other things." You must have been quite a team at Georgetown, because you were first in your class and he was Student Body President.

Justice Scalia: Yeah, he was and very high up in his class, too. He was one of the best students, as well as being one of the most popular people there. We were an odd combination, in a way. He was a good influence - in most respects, he was a good influence on me. Maybe he was more balanced than I was.
He may have been right at Harvard not to get so involved in the law to the exclusion of everything else.

Mrs. Hope: Tell me about law school. You know, what you studied, and what the courses were that you took and why.

Justice Scalia: Well, Harvard in those days was a very serious place. Stories used to be told of competitiveness to such a degree that some students would leave their lights on all night, and go to sleep with their lights on just to panic their classmates into thinking they were studying late into the night. I guess I believed some of those stories.

Mrs. Hope: It happened when I was there, which was not too much later, and I know they were true.

Justice Scalia: Yeah. Anyway, I played the game. I mean not that way, but I entered into the total dedication aspect of it anyway. I cannot say that I look back with misty-eyed mellow reflection upon my years at Harvard Law School. They were years of really terribly hard work and I don't think I have ever studied harder, especially during the first year. It was just a constant round of studying. Second and third year, I spent much less time studying. In fact, I am sure I spent a smaller proportion of my time studying my courses, much smaller proportion of time studying courses, than I did on work for the Law Review. To some extent my grades reflected that. I still got good grades, but they weren't as good as they had been first year. But the Law Review in those days was a wonderful experience. I mean, it did demand that kind of total commitment from you and you gave it willingly because it just seemed the thing to do. I think it was a smaller staff than they have now. We had, for example, only two note editors who edited all the notes. My co-noter at Harvard was Frank Michelman, who is now on the faculty. As for the courses I took, they were pretty much bread and butter practice courses. There really wasn't a whole lot there in those days other than bread and butter practice - I mean there was a little else - international law. But, you know, there wasn't law and poverty, and ...  

Mrs. Hope: What do you think about those courses? There are so many of them now.

Justice Scalia: Not much.

Mrs. Hope: Particularly at Yale and what do you think?

Justice Scalia: I don't think much of them. I think, well I think the law schools have grown away from the bar. They were begotten by the bar, not by the University. Harvard Law School is, was started by the bar. Over the years, they have grown closer and closer to the university and further and
further from the practice and I think the courses that they offer very much reflect that nowadays. I think many of the professors at many of the institutions do not have the high regard for the practice that they did in the days when I studied. I remember some of my teachers were active practitioners: A. James Casner, for example, who taught property, had a substantial property law practice.

Mrs. Hope: Well, I guess Alan Dershowitz would say he had a substantial trial and appellate practice, too, which is a different kind of a thing.

Justice Scalia: I think it's a different kind of a thing and I'm not - you can name a few, but I don't think you can name as many. I also learned torts from a sitting federal judge, Calvert Magruder, who is a wonderful judge, was my torts teacher first year.

Mrs. Hope: Did you write a note? Did you write a particular article for the Law Review? If so, what was it about?

Justice Scalia: I was one of the team that did developments in the law during my second year. Every year, Harvard does (or did, I don't even know if they do it anymore) but they did a "developments" which would take a particular broad area of the law and do an intensive analysis of it. They would have five or six students dividing up the subject and that was a wonderful experience. I had never worked as closely with other bright lawyers as I did on that project. One of the other members, as I recall, was David Curry, we became good friends then and have remained so since. He is a … we later were colleagues together at the University of Chicago, where he still is. The developments subject we did was conspiracy. I also wrote a case note in my first year on the Law Review.

Mrs. Hope: You worked a lot, but somehow you managed to meet Maureen while you were at Harvard Law School and she was at Radcliffe, I guess.

Justice Scalia: That was a close call though, I almost didn't. I think I, we were introduced by mutual friends in December, something like that, and I liked her a lot, but I just immersed in Law Review stuff and I didn't ask her out again until, I think it was late January or something like that. But between then and March or April, we became engaged.

Mrs. Hope: This was your second year in law school?

Justice Scalia: No, this was my last year. That's why I say it was a close thing. I almost didn't meet Maureen, or didn't meet her soon enough, and that would have been a great tragedy.

Mrs. Hope: So, you knew her about two months and you were engaged?
Justice Scalia: Well, a little more, three or four. Something like that. Yeah. Which is extraordinary

Mrs. Hope: And now, it's what, nine children later?

Justice Scalia: Nine children later; nine children and, what, 32 years, something like that.

Mrs. Hope: Do you have grandchildren?

Justice Scalia: Two grandchildren, one on the way.

Mrs. Hope: Can't believe it. And your youngest child is still, what, 12?

Justice Scalia: Youngest is 12, yeah. We still have two at home. One is 12 and one is 17. But, you know, it's really a - it's not the same place it used to be when we had all of them around. It was a lot of fun. And I'm going to miss it. Well, I'm missing it already. You know, just having two doesn't really seem like - well, it's hardly worth the trouble.

Mrs. Hope: Let's see. A number of your children are lawyers.

Justice Scalia: Two lawyers, right.

Mrs. Hope: In thinking about how you grew up with your father, the scholar, and your mother, the teacher who was maybe the power behind the scenes guiding you even though you didn't know it, how would you compare the life in your own family, where instead of one child there are nine, and you were teaching and practicing law and judging and working in the government. How do you [garbled]?

Justice Scalia: No, no. It's about the same. I cannot claim that I had personally had a great, you know, a great hand in the raising of the children. Most of the decisions concerning the children have been made by Maureen. I mean, that is really her full-time job. We sort of joke about, especially since I've been on this Court, our family joke is that I take care of the Constitution and she takes care of everything else. It has been a little like that. But even before that, I must say, I have not been the, what should I say, hands-on kind of a father that some perhaps are. I've always been, in all the jobs I've had, whether it was in the federal government, or teaching, or in practice, I've always been home for dinner, family dinner every night so the kids always know that their father is there if they need anything and if they want to talk to me about anything, I'm there. But, basically, Maureen has shaped their lives much more than I have - looked out to see that they took the right courses at school, that their teachers were good ones and that they were getting the kind of attention they should from their teachers.
When it came time to go to college, figuring out what would be the best college that they were likely to get accepted to, she really became quite an expert on what colleges want what kind of qualifications. Oh, yes, if you have to do it nine times. That's right. Nine times. I told her she should write a book about it. It's a shame to let all that expertise that she's developed go to waste.

Mrs. Hope: Well, to go back to law school, you met her the last semester of your last year at law school. You were engaged in March and when were you married?

Justice Scalia: We were married in September.

Mrs. Hope: After law school, what did you do? Did you go straight to practice?

Justice Scalia: I had a - well - before, I had a Sheldon Fellowship from Harvard, which is a traveling fellowship -

Mrs. Hope: That's the one where you don't have to do anything. That you're not supposed to do anything.

Justice Scalia: It's the one where you can't do anything. Or at least you cannot study for a degree. There are three conditions--they just give you the money and say travel. Sort of an "honest" Fulbright. You do not have to devise some project that requires you to be in Florence, Italy. If you want to go to Florence, Italy, you go to Florence. The three conditions on it are that you cannot stay in any single location more than three months, you cannot enroll for a degree in any university (which I considered that one a laughable condition, it was the last thing I would have in mind after four years of college and three of law school), and finally, you had to write one letter, one letter to the Dean of the Law School saying, "Having a wonderful time, wish you were here!"

Mrs. Hope: What did you do on your Sheldon?

Justice Scalia: Well, I started to say, before I left on it, I took a job with a law firm, Jones, Day in Cleveland which, at that time, I understand it is now one of the largest firms in the country, in those days it was about 60 lawyers in Cleveland and I think three lawyers in Washington. And I worked there that summer to make a little money which would supplement the stipend from the Sheldon Fellowship. Then we got married in September and after a brief honeymoon on Cape Cod, went off to Europe on - - was it the Holland America lines? Was it the Italian lines? I don't know, but in those days, going by boat was much more common than going by plane and we spent close to three months in Frankfurt, because I had thought I wanted to study German law, I'd get a degree in it, but study... It was
probably a stupid thing to do. Frankfurt is certainly not the most [garbled] city in Germany, but I had, that had been recommended by some of my professors and by one in particular at Harvard and then after that we went north into Berlin, Eastern Germany, Poland, Czechoslovakia, Austria ... this was at the time...

Mrs. Hope: This was, what, at the time of Prague's freeing the (garbled]

Justice Scalia: It was the depth of the Cold War. The ... I guess, when did the Wall go up?

Mrs. Hope: Well, the Wall must have gone up in the early '60s.

Justice Scalia: That's right. The Wall went up, I guess, it must have been…

Mrs. Hope: 1961 or 62.

Justice Scalia: Well, I remember we were on that, it was during that year that we were on the Sheldon the missile crisis occurred and the Bay of Pigs invasion flopped. I remember we were in Venice at that time. I remember feeling so ashamed that our foreign policy had become such a cropper. But anyway, we traveled, the Eastern Europe part of it was particularly interesting. It was enough of the depth of the Cold War that I remember when we were in Warsaw we spoke to a student, a group of students from the University there and this whole large group of them just to talk to Americans, they were just so thrilled to have us there. I mean, we were treated almost like visiting royalty. It was absolutely incredible. They were so hungry for contacts with Westerners. I remember Maureen had lost one of the buttons on her coat; she had a blue cloth coat, with a sort of leather button on it and it was dangling, it was close to coming off when we arrived and when we left someone had taken the trouble to sew it on for her. Just one of the little incidents that I remember over there - their courtesy towards us. Then we headed from Warsaw south to Krakow, where from Professor King at Harvard we had an introduction to a professor there called Professor Ehrlich, a wonderful man, he had been the Polish representative on the Court of International Justice at The Hague and so was a very prominent man in Poland. He was not a Communist. In fact, he was a devout Catholic and had a daughter who was a nun, but he was so prominent, they dared not throw him off the faculty or anything. So he was still on the faculty at Krakow and his wife was a wonderful woman - an American from Newport. A blue-blooded Newport aristocrat. I don't know how they had gotten together, but the Communists tried to get her every year to go and vote so that she would lose her American citizenship, but she adamantly refused. Anyway, you don't want to hear about that whole year, but it was a wonderful year.
Mrs. Hope: Do you have a copy of the Sheldon letter that you wrote?

Justice Scalia: I do have a copy of it, because I never sent it. I wrote it when I got back and when we were waiting for our first child to arrive. When we returned, Maureen was I guess in her seventh month of pregnancy, or something like that, and she had the child, our eldest daughter, Anne, on Cape Cod where her mother was then living - at her mother's house. Actually at a hospital near there, Hyannis. But, while we were there, I wrote the letter to Dean [Ridgemont?]. As I say I have it because I said, this is so long after the Sheldon was used, so I never sent it. I always felt a little sheepish.

Mrs. Hope: Well, if you want to publish it for posterity, the D.C. Circuit Historical Society will be very pleased to have it.

Justice Scalia: Yeah, I wonder whether I could still find it again.

Mrs. Hope: You came back; you went to work practicing law? Did you go back to Jones, Day?

Justice Scalia: Went back to Jones, Day. Right.

Mrs. Hope: Took the Ohio Bar?

Justice Scalia: Took the Ohio Bar.

Mrs. Hope: I can't believe it. I'm a member of the Ohio Bar, too.

Justice Scalia: Is that right?

Mrs. Hope: But, I'll tell you, I tried to get a job at Jones, Day and I was a few years after you from Harvard, and they had no women and they weren't about to start with me.

Justice Scalia: That's right. They had one woman when I was there as I recall and she was brought on on some special basis to do Blue Sky work.

Mrs. Hope: That's exactly right.

Justice Scalia: She did nothing else.

Mrs. Hope: Well, they surely were not interested in a woman to be a trial lawyer.

Justice Scalia: That's quite so. They were different days, Judy, no doubt.

Mrs. Hope: I'm surprised they took in an Italian- American.
Justice Scalia: Oh, I wasn't the first. One of their - their chief litigator at the time was a fellow named Victor Marco, who had been, I think he'd been U.S. Attorney or Assistant U.S. Attorney in Cleveland and was a very good trial lawyer. You know, Cleveland was a pretty a - Jones, Day was never a "white shoe" firm. I mean, White & Case you might have trouble or some places like that, but no, not Cleveland. Cleveland was pretty much an ethnic town.

Mrs. Hope: What happened next? You didn't stay in Ohio, I think very long?

Justice Scalia: Oh, I did indeed. I stayed there, that was the job I had longest until I became a federal judge, to tell you the truth. I guess I've still had it longer than any other single job. I was there almost seven years, in Cleveland. Left in '67 to go teach at the University of Virginia. That was - that happened because I had always thought I probably wanted to go into teaching eventually, but I thought I'd practice for a few years anyway to get some experience. In those days, it was thought a lot more useful for teaching than it is nowadays. Another indication of how the academy has grown away from the - or the legal academy has grown away from the bar. But I enjoyed practicing so much that I just sort of forgot that I was going to go into teaching eventually and hung around probably longer than I should have.

Mrs. Hope: What was your specialty at Jones, Day?

Justice Scalia: I didn't have a specialty. One of the attractions of Jones, Day was that they had a system of work assignment that made it easy for a lawyer to do a lot of different things and they positively wanted their young lawyers to get a breadth of experience. So, I did virtually everything: I did some litigation; I did wills; I did real estate; I did financings; I did contracts; I did labor law; I did tax. It was wonderful. I got a really good look at the whole waterfront. One of the advantages of Cleveland was that the overhead was so much lower than in some of the other great legal cities, like New York, that you could afford a first-rate firm like Jones, Day, could have relatively small clients. Its rates could be low enough that a very small corporation could be a client. So after two years at the place, I had my own little corporation that was my client. Any problem they had, they would call me up and it was a really wonderful feeling. I liked it.

Mrs. Hope: When you left to go into teaching, what did you teach?

Justice Scalia: Private law subjects. I taught at Virginia: contracts, commercial law, conflicts, and comparative law.

Mrs. Hope: All at the same time?
Justice Scalia: No. No, that's over the four years that I was there. I only - only two of those subjects any year, I suppose. And not all of them. I taught contracts every year. I don't think any of the others I taught every year.

Mrs. Hope: Then what happened after Charlottesville? Where did you go? What did you do?

Justice Scalia: Well, I came up to Washington. I guess my first exposure to Washington was the summer of, and I cannot remember whether it was '68 or '69, but just principally to make some money over the summer, but also to get a look at the federal government, I suppose. I worked at what was then the Civil Service Commission, in the building that is still there down on Virginia Avenue. And, I worked in the - what was then the Office of Hearing Examiners. Wilson Matthews was the head of it at the time and that was really my first exposure to administrative law, I suppose, because, you know, Hearing Examiners were the, what are now called Administrative Law Judges. They are decision-makers under the Administrative Procedure Act. Anyway, then I came up to Washington on a permanent basis in 196-, no 1971. January of '71 - to be General Counsel of a new agency called the Office of Telecommunications Policy. The office had just been formed, it had not done anything. It had not even been fully staffed and its mission was to give the Executive, the President in particular, policy-making capability in the field of telecommunications. Prior to that the President had really no capacity in that area. The FCC was an independent agency, of course, so the President would not be privy to its policy thinking.

Mrs. Hope: And the President then was Nixon.

Justice Scalia: The President then was Nixon, that's right. And prior to the formation of OTP, he was getting his advice from - was it, I can't remember the man's name now. He was a public relations guy - Klein? I think his name was Klein in the White House. He was giving Nixon advice on broadcasting and what not and the man was not a policy maker; he was a public relations expert, that's all. Anyway, that job as General Counsel at OTP was probably the most fun I've had in government. It was exciting, it really was to be…

Mrs. Hope: Why was it exciting?

Justice Scalia: Well, because it was policy making. You were with a team of people, especially when you're with a team in a new agency, you have an objective you want to accomplish and you're doing it with friends that are in the trenches with you and you strive to achieve those objectives. It was really an exciting time.
Mrs. Hope: Who were the friends? Who were you working with? And how did you (garbled) there?

Justice Scalia: The Director of the office was Clay T. Whitehead, Tom Whitehead, a young man who had been working at the White House and had a particular interest in and capability for telecommunications. Other life-long friends that I made there were Brian Lamb, who is now the head of C-Span. He was the, whatever you call it, press relations officer at OTP. Henry Goldberg, who now has his own law firm here in Washington, was my Deputy General Counsel. I hired him from Covington & Burling. Bruce Owen, an economist. He was the chief economist for the office. He has remained here in Washington. It was, anyway, it was a wonderful team and we had wonderful ideas that were, for the most part, adopted. For example, Open Skies for satellites was the beginning of satellite communications and many people thought, indeed if past practice had been continued, what they thought would have come true, that there should be a monopoly on satellites. That ComBat should be the sole instrument of the United States for satellite communications. Our office opposed that and said it should be free competition for anyone who wants to put up a satellite and rent the transponders. And that's ultimately what happened. We proposed breaking up AT&T in the fashion it was ultimately broken up, although that was done by a court, not by legislation as I think it should have been. But we proposed separating the long lines from the - which is not a natural monopoly, from the local carriage, which was. We had proposals for cable television, which was in its infancy in those days. Anyway, we, you know, our job was to try to induce the FCC to go along with those proposals, and if that was unsuccessful, to support legislation. I stayed in that job for a couple of years, after which I was prepared to go back to Charlottesville. However, I was offered the chairmanship of the Administrative Conference of the United States. Roger Crampton, who was the chairman of it, was a friend of mine. He had been a professor at the University of Michigan, and he was moving on to the Justice Department to be head of the Office of Legal Counsel, to replace Bill Rehnquist, who had just gone on to the Supreme Court from that position.

Mrs. Hope: So, you saw a route?

Justice Scalia: I had no idea.

Mrs. Hope: You saw a pattern.

Justice Scalia: I had no idea it was to be a route, but I was nominated to replace Roger. The Administrative Conference, the Chairmanship of the Administrative Conference, it was very much an academic kind of a job. The Conference consists of a small council ...
Mrs. Hope: …about the Administrative Conference, Nino, you say it was sort of an academic pursuit. How did it work?

Justice Scalia: Well, as I say, it had a council and, I think it was called a general assembly. The general assembly was composed of, I think a bare majority were members from federal agencies, usually the general counsel. But in some cases, commissioners of independent regulatory agencies. I remember at the Nuclear Regulatory Commission, one of the Commissioners was a member and would come to all the meetings. The mission of the Administrative Conference was to study administrative procedures throughout the federal government and to make recommendations to the individual agencies and to the Congress and to the President for improving those procedures. In fact, the way the business was conducted was that the small staff of the Conference, and I mean it was a small staff, I think I had maybe four or five lawyers on the Conference staff under me, maybe six -- would, with the help of academic consultants, generally law professors in the field of administrative law from all around the country, study a particular area. The consultant would draw recommendations which would be presented to a committee of the general assembly. And then the committee would make a recommendation to the floor. It would be debated on the floor and the assembly would vote to adopt it or not. So, as you can gather from that description it is -- oh, the other members of the general assembly, besides the agency members who were a bare majority, were private practitioners who would be appointed by, I guess they were all, I'm trying to think who had the appointing power. I think they were all presidentially appointed. So, I did that job and became, I think pretty expert in the Administrative Procedure Act and in administrative law, and grew to love the subject, for a couple of years. I also got to know a large number of academics from all around the country who have, you know, remained good friends of mine in the field of administrative law; hired them as consultants on various projects. And then I was about ready to give it up and move back to Charlottesville, to back to teaching there. All this time, when I was at OTP, and also when I was at the Administrative Conference, I was on leave from the University of Virginia. By now, four years had gone by and I thought it was time to go back and I began moving my belongings back to Charlottesville into the house that we had rented out during that period. It had been inhabited by Attila the Hun in the interim (utterly destroyed it). Then, what should happen but that I should be offered yet another federal job. This time, the successor to Roger Crampton, Bob Dickson, whom I had known from the Administrative Conference, he had been a - one of - I think a consultant that had done some work for us. He was a professor at George Washington before that, then he had succeeded Roger Crampton
as the head of the Office of Legal Counsel. Well, he went back to teaching at St. Louis University, oh no, at Washington University in St. Louis, that's right. And there was a vacancy in that job and I was asked by President Nixon, well, by the then Attorney General, who was William Saxbe.

Mrs. Hope: Of Ohio?

Justice Scalia: Of Ohio, right. Former Senator. To take on that job. This was in the dying years of the Nixon administration, as you would gather from the fact that Saxbe was Attorney General. It was after John Mitchell had departed and practically the only person President Nixon could get appointed as Attorney General after Mitchell was a Senator. And Saxbe was known to be his own man, a fiercely independent sort. So he had become Attorney General. And his deputy was, of all people, Laurence Silberman. Now, the judge on the Court of Appeals and, I think Larry had a lot to do with picking me to be Head of the Office of Legal Counsel. So, anyway, I took that job and resigned from the University of Virginia because four years is enough, four years being on leave is enough.

Mrs. Hope: Let me ask you this. This was the Nixon administration. This was - the Justice Department was basically conservative. They weren't trying to reach out for new interpretations of things. Had you published or spoken or did they have a sense that you were conservative at that time; had your views crystallized, pretty much by then?

Justice Scalia: I'm trying to think. I had never been very politically active and I was certainly off-line in the Administrative Conference. I mean, the Administrative Conference is not a location - one meets a lot people from all around the government. That was the wonderful thing about it because so many of the members of the Conference were general counsels or agency heads from all around the government and when we did studies of various agencies, I'd often interview or speak with the agency heads. So I got to meet a lot of people. But I was not in a political job; it was very much an academic job. I think I acquired a reputation as very good lawyer. I don't - and, what should I say, conservative in my approach to the law.

Mrs. Hope: I can't, for example, see you as heading the Office of Legal Counsel if Bobby Kennedy were Attorney General. I don't think either one of you would have been comfortable with that.

Justice Scalia: I think that's probably right. I think it's important, but, maybe not for the reason you think. OLC, then as now, I think has to be the - it's too tendentious to call it the "conscience" of the Justice Department, but it has to call things straight. It cannot be so swept up in policy passion that it
gives bad legal advice. Its main function is to provide legal advice to the Attorney General and to all the other agencies of the government, most particularly the White House. If you have somebody there who is skewing legal advice because, you know, he wants to favor particular policy ends, you know, you have somebody who is useless. On the other hand, on the other hand, if the head of that office is to be effective, he has to be trusted by the people to whom he is saying "no." And, obviously, a conservative administration is more likely to accept a "no" from someone that it knows is basically himself a conservative sort and has that administration's interests at heart. And likewise, Bobby Kennedy is more likely to take a "no" from someone who is more liberally inclined, I suppose. So, yes, I think it probably an important qualification for the job, but not because it effects the product. Simply because it effects how the product will be received by those to whom it is given. But, you know, the job is a lawyer's job. The job is to say "this is what the law is, take it or leave it, like it or not." And very often you have to say no to a proposal that the administration wants to undertake or the Justice Department wants to undertake and, anyway, it was a very interesting run that I had at OLC. I don't know how long I was there, I guess you can look up somewhere what my dates were. Something like two or two and a half years. One of the first things that I had to confront is who owned the records and tapes of the Nixon Administration.

Mrs. Hope: Is that right?

Justice Scalia: That's right. This case that was just recently decided by a panel of the D.C. Circuit (speaking of the oral history of the D.C. Circuit), a panel consisting certainly not of Republican appointees, it was, as I recall Harry Edwards and Ruth? Was it Ruth Ginsburg? I think Ruth Ginsburg was on that panel, yes. And, I can't remember who the third one was, but in any case ...

Mrs. Hope: How did you call it?

Justice Scalia: I called it the way they did. There really seemed to me no other way to call it. I said, it was a fairly unpopular call at the time, and frankly I'm not sure that it was even a very welcome call to the Justice Department. I think they would have preferred to say the opposite because, you know, there was legislation taking over all of these documents. But any way, the call I gave was, no, they belonged to President Nixon because it had simply been the tradition of presidents, ever since George Washington that all of the papers of the president belonged to the president. They used to clear out the White House after their administration was over. George Washington took home, as I recall, they even had to go back to Mount Vernon to get a treaty that he had taken with him. It was the only copy. They didn't know what the treaty said. Anyway, that was really the one
opinion that I wrote when I was at OLC that I thought would stand a good chance of being reversed because, although I called it that way, it seemed to me such an unpopular political position that I feared that not every court would agree with it. But, so I was happy to see that upheld just recently.

Mrs. Hope: Fifteen years later; more than fifteen years later. Twenty years later.

Justice Scalia: As far as I know, none of the opinions I gave has been overturned in the courts. Another one I gave was, concerned the status of the American Bar Association Committee on Appointments. You know the Committee I mean? That makes recommendations -

Mrs. Hope: I've had some unforgettable experiences, yes, with that Committee.

Justice Scalia: Yes, I know you have. Well, my predecessor, Bob Dickson, had given an opinion that that Committee was governed by the Federal Advisory Committee Act, which would mean that it has to be chaired by a federal official, subject to adjournment at his whim. All his proceedings would have to be public, etc., etc. And, of course, the American Bar Association Committee said, no thanks. If, you know, we're a private organization, if you're going to impose this on us, we just won't give you advice. We don't want all this to be public and we don't want to be governed by somebody else. So they were not going to give the Attorney General advice on judicial candidates. I mean, well, that was a matter of some concern. So, I was asked, or again, one of the first things I was asked to do when I came on board, to review the opinion of my predecessor to see whether, indeed, there was no alternative to what Dickson had advised. And I looked it over and, frankly, I think, as far as the statutory interpretation was concerned, there seemed to be no way out, but it really did seem to me that as a matter Constitutional law, if the statute mean that the president could not get advice concerning appointments from a private organization, without having that private organization subject to this kind of supervision, that the statute would, in all likelihood, be unconstitutional. So, I wrote an opinion saying that in light of the grave Constitutional issue presented, it should not be interpreted to apply to a committee advising the president on his appointments. And that also came before this Court, either last term or the term before, I didn't sit, of course, and that opinion was also upheld. So I consider myself, so far, with a pretty good batting average. I hope my judicial opinions have lasted as well.

Mrs. Hope: But that was a Supreme Court case, it wasn't in the Circuit.

Justice Scalia: No, that was a Supreme Court case, that's right.

Mrs. Hope: Well, that was a... that's batting a thousand. Maybe you should just quit right there.
Justice Scalia: Yeah, I should have.

Mrs. Hope: All right. I think - our time is running short here, but maybe we can just get you out of the Office of Legal Counsel for today and we're going to have to have one more session, Mr. Scalia.

Justice Scalia: Oh my. Okay.

Mrs. Hope: Alright. But, there you were, in the Office of Legal Counsel, and the hand of fate moved and tapped you on the shoulder. But somehow you were at the University of Chicago, too.

Justice Scalia: Oh yeah. I mean, I didn't come here from there. I mean Rehnquist came here from there, but I did not. No, as you may recall - well, that was not the only thing I did there. I did a lot of other things there. It was interesting, it was an interesting period. Although I had been selected for the job during the Nixon administration, I served in the job entirely under the Ford administration. By the time I had been confirmed, Nixon was no longer in office, so really President Ford.

Mrs. Hope: That's when I met you because I came to work for Ford and that's when we met.

Justice Scalia: That's right. Indeed, my commission as Assistant Attorney General is something of a collector's item. As you know, they all - there is a formula which they all follow. "I," whoever the President is, "Gerald R. Ford, President of the United States, reposing full faith and confidence in the integrity and ability of Antonin Scalia of the State of Virginia -- have nominated and by and with the advice and consent of the Senate, do hereby appoint the said Antonin Scalia to the position of," whatever it is. Well, Gerald Ford could not sign that kind of a commission because he had not nominated me. Richard Nixon had nominated me. So, I have a commission it was, it had to be re-written and it is, I am sure there cannot be many of others around which recite that formula, but they leave out the words "have nominated." They just say "I, Gerald Ford, by and with the advice and consent of the Senate, do hereby appoint the said Antonin Scalia."

Mrs. Hope: So, it didn't say Nixon nominates and Ford appoints.

Justice Scalia: No, no. No, I mean, it's an appointment commission, not a nomination document so it doesn't matter. Anyway, it was, as I say, it was ...

Mrs. Hope: It must have been a very difficult time because...
Justice Scalia: The executive branch was under siege. It was enfeebled, it had a head who had never run for national office and he had been a Congressman from Michigan. It had, you know, one scandal after another, scandal is the wrong word. Congressional investigations of various sorts. One Cointel program of the FBI, which had involved activities that should not have been conducted. CIA programs were under investigation. I recall during my tenure there— I would go to a... I believe it was a daily meeting at the situation room in the White House at which would be present... I'm trying to think of who all the personnel were. The head of the CIA, special advisor to the President, general counsel to the CIA, who had been appointed just to handle these investigations. And every morning we would decide how many of the executives most confidential documents about covert operations and all other matters would be turned over to the Pike Committee or to the, I forget who the House committee - the Church Committee in the Senate and the Pike Committee in the House were both conducting CIA investigations. But we would decide every day what we would do today about the latest requests for various documents. It was a constant exertion. Anyway, that ended on January 20 and we left quietly after the people threw us out, as the Constitution says, and I went. Now, I told you that I started that job under Billy Bart Saxbe, with Larry Silberman as Deputy Attorney General. Saxbe did not last very long in the job. After Ford came on board, he was replaced, he became Ambassador to India, and he was replaced by Edward Hirsch Levy.

Mrs. Hope: Of the University of Chicago.

Justice Scalia: Of the University of Chicago. President of the University of Chicago. Formerly, Dean of the Law School and so I was Ed Levy's legal advisor. There was probably no worse person in the world to be a legal advisor to Ed Levy. He being a very good, and very circumspect lawyer himself. I mean that facetiously, he was a wonderful man to work for

Mrs. Hope: I think he was one of the great Attorney Generals.

Justice Scalia: I think he was a terrific Attorney General. I was always very proud, because he really is a perfectionist in all things. He never changed one of my opinions. Most of ... in the old days, the Attorney General used to sign the opinions, they used to be opinions of the Attorney General and there's a whole series of volumes of opinions of ... OAG. They were cited Opinions of the Attorney General... There are not many of them in modern times because the function of giving the opinions has been almost entirely taken over by the Office of Legal Counsel, so that the opinions go out over the signature of the Assistant Attorney General instead of the AG himself. But on a few occasions, where a Cabinet Secretary requests an opinion of the Attorney General himself, the AG will do it. And I guess I did a few
for him. I don't know how many, but I don't think he ever changed any of them. I was really quite proud of that.

Mrs. Hope: Well, you were really in Constitutional crisis for a good part, then, of your term there.

Justice Scalia: Yeah, well, I wouldn't say Constitutional crisis, but we were certainly under siege. I mean, you know, you had a Congress in control of the opposition political party, an enfeebled executive, an executive in disgrace, and it was just one investigation after another. It was a hard time. It was a hard time for the Justice Department. The Justice Department especially. Because the Department itself had been so much involved in some of the abuses of the Nixon administration, so it was a long road back getting personnel of the Justice Department to be proud of themselves again. I think Ed Levy was just the man to achieve that, and I think he did achieve it. It was a good administration, though, I was proud to be a member of the Ford administration. I mean if you look at the Cabinet slots, it had good people.

Mrs. Hope: Well, yeah, I often think of that because that's the only time I served in government. And you look now at Dick Cheney, who is Chief of Staff and has done a brilliant job as Secretary of Defense, at Carla Hills, who is Housing Secretary and has done a brilliant job as Special Trade Representative.

Justice Scalia: Well, she started there in the Justice Department.

Mrs. Hope: Head of the Civil Division.

Justice Scalia: She was head of the Civil Division when I was head of OLC. That's right.

Mrs. Hope: So, I think in a way, it was a brief era in American history which really served the purpose that was needed, which was healing and a restoring of credibility, and I guess OLC would have a lot to do with that because you had to put the rule of law back in charge of a government that had gotten out of hand.

Justice Scalia: Yeah, well I won't ... I don't ... I think we tried. I don't know that OLC ... I wouldn't take any credit for OLC in particular, but I think that the Ford administration, generally, and the Ed Levy Justice Department, in particular, brought a feeling of integrity to the process that had been lost. But it was a hard time. I remember on one occasion I was nearly held in contempt of Congress, we had provided advice to Rogers Morton, who was head of the Interior Department, concerning the provision to a Congressional committee, headed by John Moss of California, he was a Congressman from Sacramento, of documents that had to be filed by
American exporters, under a statute which said that the contents of those documents would be kept confidential. The documents had to recite whether, among other things, whether the exporter had received any threats from countries regarding the Arab boycott of Israel, which was going on at that time. Arab countries would not deal with American companies that dealt with Israel. And, the Interior Department had to receive these filings. A Congressional committee wanted to get them to see, you know, what companies, in fact, said they had had such contacts and had complied with them, or whatever. We read the statute, OLC did, as saying confidential, and confidential means confidential from a committee of Congress as well. And there were good reasons to interpret it that way. The Congressional committee did not take this well. They discovered that before giving our opinion, we had requested the opinion of Interior itself as to what it thought the answer of the question it had asked us would be and, what they thought we had done was simply to take Interior's answer and make it our own and feed it back to them so that Well, in fact, OLC, for many years, it went back to, I think it might have been even before the time of Attorney General Jackson, for many years we had followed the policy of asking, of requiring that any agency who asks advice of OLC give its own estimate of what it thinks the answer is. To avoid being blind-sided by an agency when you give an answer and they, you know, pull up this piece of their intricate statute that, for some reason, we didn't consider. So, it was a long-standing practice. But, they wouldn't believe that and they demanded that Interior turn over those documents. They also sent investigators around to my office, who interviewed my lawyers. Just burst in upon them, without ever asking my permission; without ever coming to see me. And sought to interrogate them about how our opinion had been prepared. I, of course, told them not to talk to the investigators. I would not turn over, as the Committee demanded, the background documents of our opinion. The drafts and so forth and I would not testify as to the process of that opinion making because I considered all of that to be an attorney's confidential material in giving advice to the client, in this case the client being the Department of the Interior. Well, as I say, because of my refusal, I was scheduled to be considered for contempt of Congress, and I think I would have adhered to the refusal. The only thing that could have saved me, of course, would be the President declaring Executive Privilege, but he would not have done it for such a relatively minor matter. But the problem was solved in the way these problems are usually solved, Rogers Morton decided that the game wasn't worth the fight, so he turned over the, despite our advice that he didn't have to, he turned them over anyway.

Mrs. Hope: And saved your skin.

Justice Scalia: Saved my skin. Yes.
Mrs. Hope: Well, let's get you out of the Office of Legal Counsel and we'll conclude on another day.

Justice Scalia: Well, you have me out of there. I went back ... when the people threw us out, I went back with Ed Levy to Chicago. I'm sure it was largely through his urging that I interviewed at the Law School at the University of Chicago and I spent a half a year after leaving OLC here in Washington so that my children could finish their school year, and during that half a year, I taught at Georgetown, and I was a Resident Scholar, a scholar in residence at The American Enterprise Institute. Where I made friends with some other interesting people that have been my friends since. Such as Irving Crystal, who was also a Resident Scholar that year. Jeanne Kirkpatrick, Walter Burns, and then, the next summer, I guess July or August, I went to Chicago and began resuming my career as an academic. And …

[END OF TAPE]
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Biography of Former Associate Justice Antonin Scalia

Biographical Sketch

Judith Richards Hope, Esq.

Judith Richards Hope is a Washington lawyer who has practiced and taught law in the nation’s capital for more than fifty years. Her career as a trial lawyer began with the Washington, D.C. trial firm Williams & Connolly. Mrs. Hope eventually took a ten year break from private practice to raise two young children and serve in the government, first as Associate Director of the White House Domestic Council during the Ford Administration and later as Vice Chairman of the President’s Commission on Organized Crime during the Reagan Administration.

Mrs. Hope returned to private practice as a trial lawyer and member of the Executive Committee of Washington’s Wald, Harkrader & Ross. Subsequently, the international law firm Paul, Hastings, Janofsky & Walker recruited Ms. Hope to co-found its Washington Office and serve on the firm-wide executive committee. Mrs. Hope’s professional affiliations have included membership on the Boards of Directors of General Mills, Inc., IBM, Russell Reynolds Associates, Union Pacific Corporation, and Zurich Reinsurance, Inc. She was the first woman named as a Member of the Harvard Corporation, the University’s senior governing board, where she chaired the Inspection (Audit) and Honorary Degree Committees. Other past non-profit board affiliations have included the D.C. Circuit Historical Society, the Supreme Court Historical Society, and the Georgetown University Law Center Board of Visitors. In 2005 Georgetown University Law Center named Mrs. Hope a Distinguished Visitor from Practice. She currently sits on the Governing Council and Executive Committee of the Miller Center for the Study of the American Presidency at the University of Virginia. Ms. Hope is a graduate of Defiance (Ohio) High School, Wellesley College, and the Harvard Law School.
SUPREME COURT OF THE UNITED STATES
ASSOCIATE JUSTICE ANTONIN SCALIA MEMORIAL

SPECIAL SESSION OF THE SUPREME COURT

3:00 p.m.
Friday, November 4, 2016

Courtroom
Supreme Court of the United States
Washington, D.C.
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CHIEF JUSTICE ROBERTS: The Court is in Special Session this afternoon to receive the resolutions of the Bar of the Supreme Court in tribute to Associate Justice Antonin Scalia.

The Court recognizes the Acting Solicitor General of the United States.

GENERAL GERSHENGORN: Mr. Chief Justice, and may it please the Court:

At a meeting today of the Bar of this Court, resolutions memorializing our deep respect and affection for Justice Scalia were adopted unanimously.

Today, the Bar of this Court convenes to pay respect to a towering figure in American law, a Justice of conviction, character, and courage, a treasured colleague, an irreplaceable mentor, and a man devoted to his country, its Constitution, and this Court.

In his nearly 30-year tenure on this Court, Antonin Scalia displayed a forceful intellect, a remarkable wit, and an inimitable writing style. His ideas helped to shape the way we think about law. And for those blessed to know him, his compassion, humanity, and commitment to his family, friends, and faith will remain an inspiration.
Antonin Scalia was born on March 11th, 1936 in Trenton, New Jersey, and grew up in the Elmhurst neighborhood of Queens. After graduating from Xavier High School in Manhattan and Georgetown University, Justice Scalia attended Harvard Law School.

Although he relished the academic environment at Harvard, the signal event of his Harvard years occurred outside the classroom, when he met Maureen McCarthy. Their 55-year marriage produced nine children and dozens of grandchildren.

Following a stint in private practice, Justice Scalia accepted a post at the University of Virginia School of Law in 1967, and then held a series of government positions that culminated in his serving as Assistant Attorney General for the Office of Legal Counsel in the Department of Justice.

In 1977, Justice Scalia returned to academia, joining the University of Chicago faculty. In 1982, President Reagan nominated him to the U.S. Court of Appeals for the District of Columbia Circuit. And then, in 1986, President Reagan nominated Justice Scalia to this Court.

Over the next three decades, Justice Scalia left his mark on the law in numerous ways, too many to recount in full here. His steadfast commitment to the
idea that external legal principles, rather than internal policy preference, should govern judicial decision making made him deeply respectful of the Constitution's allocation of powers and vigilant in respecting legal texts.

That commitment showed up first and most often in his views on statutory interpretation. Justice Scalia pressed the proposition that, when interpreting a statutory text, judges must try to discern and enforce the meanings of words enacted by Congress to express its policies.

In his view, courts should never rewrite a discernible statutory text to conform it to a law's unenacted legislative purposes. This new textualism had an undeniable impact on the way the Court does business.

Just as Justice Scalia believed that courts should do their best to honor a statute's text, he thought the same should be true for the Constitution. As he saw it, the words of the Constitution bear the same meaning today as they did when adopted, neither diminished, nor augmented. He thus voted against recognition of new rights that he believed lacked a foundation in the Constitutional's -- Constitution's original meaning, resisting limitations on Democratic self-government that he believed the people did not vote
to impose. At the same time, he insisted on unyielding
enforcement of those restrictions that he believed the
people did vote to impose in the text of the
Constitution.

By the end of Justice Scalia's tenure, a
focus on the original public meaning of the
Constitution's text had become, if not orthodoxy, a
thoroughly respectable and commonplace approach to
constitutional interpretation. His approach was perhaps
best illustrated in two particularly noteworthy
opinions: District of Columbia v. Heller, holding that
the Second Amendment protects an individual right to
keep and bear arms for self-defense, and Crawford v.
Washington, interpreting the Sixth Amendment's
Confrontation Clause.

Although Justice Scalia may be best known
for his views on statutory and constitutional
interpretation, his first love was an area of
substantive law, constitutional structure, which shaped
his answers to the underlying questions that appear in
every case, who decides, and how.

Throughout his tenure, Justice Scalia sought
to honor the Constitution's structure, its distinct
horizontal and vertical lines of power. He appreciated
that men and women were not angels, and that electing or
appointing them to government posts did not make it otherwise.

Justice Scalia believed that by assigning three distinct kinds of government power to three distinct branches of government, the Constitution prevented the concentration of government power in the same hands.

Justice Scalia likewise regarded the Constitution's vertical separation of power, Federalism, as a core feature of the Constitution's structure that needed to be preserved. He joined the Court's decisions, recognizing limits on Congress's power to regulate interstate commerce, and upholding the State's sovereign immunity from suit. In these areas, as in so many others, Justice Scalia had a -- profound effect on the Court's jurisprudence.

Of course, no account of Justice Scalia's contribution to this Court would be complete without mentioning his remarkably clear and vivid writing, and the inventive, memorable images sprinkled throughout. The images were memorable precisely because they captured the substance of the legal point the Justice was making. Surely there was a separation of powers problem with the creation of what he called a sort of junior varsity Congress. And surely, there was a deep
flaw in a dormant Commerce Clause test that asked judges
to divine, as he put it, whether a particular line is
longer than a particular rock is heavy.

And while Justice Scalia's writing
frequently left -- leapt off the page, advocates before
the Court often confronted his tenacity and his wit long
before he unsheathed his pen. He peppered lawyers with
questions, sometimes posing 30 or 40 in a single
argument. And if he found an answer unsatisfactory, he
pursued the point through short, often flinty-minded,
follow-up inquiries.

Throughout his judicial career, Justice
Scalia maintained his collection -- connection with the
law schools by accepting countless invitations to speak
with students and professors.

And, in one sense, he never really left
teaching. His classroom just got bigger. He often
thought of the audience of his opinions as today's and
tomorrow's law students, and he relished opportunities
to talk to students about his theories of judging and
about the many useful ways to use a law degree.

Justice Scalia's productivity and many
contributions to the law could leave one with the
misimpression that he left little time for anything
else. And, of course, that was not so. This son of
Trenton and Queens became an avid hunter and fisherman. He relished meals with friends and colleagues and law clerks, often at the much-beloved A.V.'s, and usually with an anchovy pizza and an occasional glass of red wine.

He was an ever-present mentor to his many law clerks. And, of course, he was deeply devoted to his large and remarkably close family.

And through it all, the Justice did everything in his brim-filled -- brim-filled life with unstinting vigor, curiosity, engagement, and a twinkle in his eye.

Gathered here together, looking back at his life, the members of the Bar of the Supreme Court express our deepest respect for the late Justice Antonin Scalia, our loss at his passing from this life, and our enduring gratitude for the example he set in his life, both within and beyond the law.

On behalf of the Bar of the Supreme Court, it is my privilege to present the Court the resolutions adopted today, so that the Attorney General may move their inscription on the Court’s permanent record.

CHIEF JUSTICE ROBERTS: Thank you, General Gershengorn.

The Court recognizes the Attorney General of
the United States.

GENERAL LYNCH: Mr. Chief Justice, and may it please the Court:

The Bar of the Court met today to honor the memory of Antonin G. Scalia, Associate Justice of the Supreme Court from 1986 to 2016.

The passing of Justice Scalia has left an enormous void in this courtroom and in the life of the law throughout the United States. With his razor-sharp brilliance and unmatched eloquence, Justice Scalia transformed the way the jurists and lawyers approach the law. He strode like a colossus through some of the most important opinions, concurrences, and dissents of our time, and he had a singular presence both in the courtroom and on the page.

His penetrating questions at oral argument did not merely seek to clarify minor nuances; they cut to the heart of a position's flaws. And his writing did not merely state the law, it captivated all who treasure memorable and radiant prose.

And even those who disagreed with Justice Scalia could appreciate his inspired wordsmithing, like his assertion that Congress does not hide elephants in mouseholes or his contention that the rule of law requires a law of rules.
Justice Scalia's life was a quintessentially American story. His father was a Sicilian immigrant who
came through Ellis Island as a teenager, earned a
doctorate from Columbia, and became a professor. His
mother was an elementary schoolteacher, herself the
daughter of Italian immigrants.

By all accounts, Justice Scalia's talent was
obvious from a young age: From Xavier High School in
Manhattan to Georgetown, where he graduated first in his
class, to Harvard Law School, where he edited the
Harvard Law Review. He was a charismatic student who
loved to debate. That charisma and his love of the
clash of ideas would come to define him.

With these gifts, he could have gone
anywhere and done anything. He could have conquered the
worlds of commerce or found a home within the business
of the law. But rather than pursue material wealth in
the private sector, he chose the wealth of ideas to be
found in academia. And instead of seeking public
acclaim, he turned to public service.

Law students at the University of Virginia,
as well as the University of Chicago, Georgetown, and
Stanford, benefited from his rigorous intellectualism
and love of the law. And we at the Department of
Justice also benefited from his dedication to public
From 1974 to 1977, he served as the head of the Office of Legal Counsel at the Department of Justice. The traits that would come to define Justice Scalia's judicial presence were apparent in that role as he provided written opinions that showcased his intellectual rigor, his sharp pen, and his independent mind.

He was also known for his fierce support of the independence of the Office of Legal Counsel and of the Department, traditions we are proud to uphold.

Justice Scalia's contributions to the Supreme Court cannot be overstated. Countless pages have been written about the textualist approach to statutory interpretation he championed. In his three decades on the bench, he succeeded in changing the very way that lawyers and judges determine the meaning of congressional enactments, and he fundamentally transformed legal argument. As Justice Kagan noted in her Scalia lecture at Harvard Law School, we're all textualists now.

Justice Scalia will also be remembered for his robust interpretations of the protections that the Constitution affords those who come in contact with the criminal justice system. His Fourth Amendment and Sixth
Amendment decisions regarding searches, the right to a jury trial, and the Confrontation Clause fundamentally shaped the way law enforcement officers investigate potential wrongdoing, and the way prosecutors put on their cases.

The opinions are noteworthy for their reliance on Justice Scalia's originalist approach to interpreting the Constitution, a philosophy that looks backwards in order to look forward. It looks back to the founding of this great nation in an effort to understand the protections reserved in the Constitution, and it looks forward to demand that we uphold these protections despite changing times.

But Justice Scalia's greatest legacy may be that he brought unmatched conviction and enthusiasm to his jurisprudence. In doing so, he elevated our national legal discourse for all Americans. He challenged even those who agreed with him, and he earned the respect of those who did not.

Lawyers who appeared before Justice Scalia found themselves compelled to clarify their positions and to sharpen their arguments. Readers of Justice Scalia's opinions could not disregard the strength of his reasoning and were forced to re-examine their own convictions.
Justice Scalia knew that this was the point of debate, and he also knew that debate was the essence of democracy. For decades, he had an outsized role in the debates over the meaning of our most fundamental principles: principles of liberty, justice, and equality. And because of the brilliance, the eloquence, and the unique passion he brought to that debate, he guaranteed that he will continue to shape it for decades to come.

Mr. Chief Justice, on behalf of the lawyers of this nation, and in particular, the members of this Court's Bar, I respectfully request that the resolutions presented to you in honor of Antonin Scalia be accepted by the Court and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

CHIEF JUSTICE ROBERTS: Thank you, General Lynch. Your request that the Bar resolutions be made part of the permanent record of the Court is granted.

The Court extends to the members of the Resolutions Committee, to the members of the Arrangements Committee, and to the Chairman of today's meeting of the Bar our appreciation for the resolutions adopted today.

Antonin Scalia was nominated to the U.S.
Court of Appeals for the D.C. Circuit by President Reagan on July 15th, 1982. He joined that court on August 17 that same year. And just four years later, President Reagan nominated him to be our 103rd Supreme Court Justice.

At the time of the White House announcement, he was not well-known to the public. The press had to ask Justice Scalia how to pronounce both his first and last names.

(Laughter.)

CHIEF JUSTICE ROBERTS: Antonin Scalia was confirmed on Constitution Day in 1986 by a vote of 98-0. He took the oath of office as an Associate Justice of this Court on September 26th, 1986. Today, every lawyer and journalist in this country, and most other citizens as well know how to pronounce Justice Antonin Scalia.

In nearly three decades on this Court, Justice Scalia wrote, by our count, 282 opinions for the Court, beginning with O'Connor v. United States, which he announced exactly 30 years ago today, and ending with Kansas v. Carr, which he announced on January 20 of this year.

He was also known to write separately from time to time --

(Laughter.)
CHIEF JUSTICE ROBERTS: -- authoring more than 300 concurrences and nearly as many dissents. He served with 17 other Justices during his long tenure on this Court.

You have already heard of Justice Scalia's extraordinary legacy. On matters of constitutional interpretation, he championed the judicial philosophy of originalism, a view that the Constitution means today what it meant when it was adopted. He espoused this approach in opinions, both for the Court and in dissent, that are now a central feature of every law school's constitutional curriculum.

His opinions explaining our Constitution's structural constraints on governmental power are among the most important intellectual contributions to the study of liberty since The Federalist Papers.

Justice Scalia defended the president's power to appoint and remove executive officials, not to aggrandize presidential power, but to maintain the equilibrium between co-equal branches of government. He insisted that Congress perform the duties within its Constitutional charge and leave other matters alone, not to manage the legislative process, but to promote individual freedom through electoral accountability.

He approached the judicial branch with the
same rigor. Justice Scalia demanded that Federal courts stay within their constitutionally prescribed role of deciding only concrete cases and controversies. He did so not to avoid difficult issues, but to ensure that judges who are insulated from the political process resolve only those matters within Article III's grant of judicial power.

Justice Scalia applied originalist scrutiny to interpreting the Bill of Rights. His views were especially influential with respect to the First Amendment's religion clauses, the Second Amendment's right to bear arms, and the Sixth Amendment's Confrontation Clause. He persuasively explained how the guarantees set forth 225 years ago continue to provide vital protections in our own age. Writing for the Court in cases involving the Fourth Amendment, he demonstrated how the centuries-old protections against unreasonable searches and seizures reach contemporary police investigatory tools, ranging from thermal imaging to electronic tracking devices to drug-sniffing dogs. He once commented that his opinions on the scope of criminal law safeguards in the Bill of Rights should make him the favorite Justice among criminal defendants across the country.

(Laughter.)
CHIEF JUSTICE ROBERTS: Now, whether he wrote for the Court or in dissent, Justice Scalia's incisive analysis and unforgettable prose compelled jurists, lawyers, and citizens alike to think deeply about the meaning of the compact that binds us. Justice Scalia left an equally enduring mark on statutory construction. His insistence on the primacy of a statute's text has enforced greater discipline on the task of construction. As he explained, reliance on the statutory text restrains judicial discretion and thereby promotes democracy. Although Justice Scalia was a keen legal theorist, he was deeply concerned about the practical workings of government, and that intense focus is reflected in his contributions to administrative law. He made enduring contributions to that field as a teacher, scholar, and Chairman of the Administrative Conference of the United States, even before he became a judge. Whatever the discipline, whatever the role, Justice Scalia was committed to finding the right answer. And once he had settled upon what was right, he let the chips fall where they may, and cared not a whit what others thought about it. Justice Scalia's voice is perhaps most
deeply missed in this very chamber. From his first day on the bench, he was a vigorous participant in oral argument. His insightful inquiries enlivened debate and brought out the best in his colleagues and the attorneys who appeared before him, on many occasions also confirming that their best was not good enough.

(Laughter.)

CHIEF JUSTICE ROBERTS: Now, it would be a stretch to say that there was never a dull moment in this chamber --

(Laughter.)

CHIEF JUSTICE ROBERTS: -- but often, just when things were getting a bit soporific, counsel would make some assertion that would trigger a reaction from Justice Scalia, ranging from explosive to subtle, and the game would be on.

His comments in this room also included priceless sotto voce insights shared only with those fortunate enough to sit beside him on the bench.

(Laughter.)

CHIEF JUSTICE ROBERTS: Justice Scalia was not restrained in stating his views clearly and forcefully, but he never ceased being our dear friend and valued colleague. He wrestled with ideas, not people, and he knew the difference.
He made our days warmer, livelier, and happier. He sang loudest and best at our traditional birthday celebrations. He raised his glass highest to toast others' happy occasions, and his rich laughter filled our halls and our hearts.

Justice Scalia's life reached far beyond the law. He would never have said that the law was what was most important to him. He was steadfast in his Roman Catholic faith, and he was devoted beyond measure to his beloved wife, Maureen, and the nine children they raised.

On occasions such as this, speakers often employ so many laudatory adjectives that the effect can be to sow doubt rather than admiration. But no one who knew Justice Scalia, however they viewed his work, would dispute for a moment that he was patriotic, principled, loyal, courageous, engaging, and brilliant.

Those of us on the Court will miss Nino, but we will continue to feel his presence throughout this building. Our ears will hear his voice in this courtroom when advocates invoke his words searching for powerful authority. Our minds will move to the measure of his reason in our chambers when we study his opinions. And our hearts will smile, even as our eyes glisten, when we walk the halls and recall how happy we
were whenever we saw him rounding the corner.

(Whereupon, at 3:24 p.m., the Special Session was concluded.)
Introduction of Speakers

PAUL T. CAPPUCCIO

Thank you, Mr. Solicitor General.

And thank you Mr. Chief Justice, Associate Justices, Justice Stevens, Madam Attorney General, and each and every one of you who are here today to help us with what seems a nearly impossible task—to pay adequate tribute in a few brief speeches and Resolutions to the truly extraordinary life, career and impact of Justice Antonin Scalia.

Antonin Scalia was born March 11, 1936 in Trenton, New Jersey, and was raised in Queens, New York. He is the son of Salvatore Eugene Scalia, an immigrant from Sicily, and Catherine Louise Panaro Scalia, from Trenton, New Jersey. Both of his parents were teachers. While of relatively modest financial means, the household in which the future Justice was raised was by all accounts quite rich in faith, values and the love of and dedication to learning and teaching. Let us not forget today to remember, and to thank, Justice Scalia’s parents, who gave our country and the law such a tremendous gift in the person of their only child.

As you will hear presently, Justice Scalia has had a nearly unrivaled impact on the Courts, the law, legal education and the legal profession, as well as on generations of people in law and the academy. I like to think of Justice Scalia’s impact as “gravitational,” in the way that term is understood by modern science. He is like bright star, whose intellectual mass is so weighty, that it literally bends space in a manner that curves the path of any celestial body that comes anywhere near it. Some of us ended up in his orbit (and proudly so), and others simply had the trajectory of his or her thinking altered. But everyone—in the courts, the academy, and the legal profession—felt the pull of and was affected by the weight of his ideas and the force of his argument. Now, I should add that I once used this gravitational description of his legacy on a panel that he and I did together. When I finished, he looked at me, with that look of equal parts slyness, contempt, self-satisfaction and affection, and simply said: “You’re one to be describing me as a large mass.”

Justice Scalia was also a treasure in a way that has become all too uncommon today. When he believed he was right, he was uncompromising. And his pen, as we all know, often took no prisoners. But he was also uncompromising in his genuine affection for people who disagreed strongly with him. His deep friendship with, and great affection for, his colleagues is of course well known. But that is not an exception; with Justice Scalia, it was the rule. His life was rich with a seemingly ever expanding list of people with whom he disagreed in broad,
fundamental and even sometimes sharp ways, but whom he nevertheless respected and enjoyed. I never asked him about this, but I suspect if I had, he would have shot back with that signature grin of his and said something about hating the sin and loving the sinner. Of course, this quality—the ability to disagree strongly while maintaining genuine respect for and affection towards each other—is perhaps one of the greatest hallmarks of this Court, but it is nonetheless a great loss to witness the passing of one who possessed so thoroughly this balance of spirit that is so precious to our Republic.

This morning we are going to hear from four speakers, each a former law clerk of the Justice: one from private practice, one from academia, one from Supreme Court advocacy, and one from the bench—about how our great friend, colleague and mentor affected them, as well as their professions. After that, Rachel Barkow, also a former clerk of the Justice, will join us with a few words and to review and vote to recommend Resolutions to the Court.

Remarks
of
KRISTIN A. LINSLEY

Thank you, Paul. I will share some thoughts about what we learned from clerking for Justice Scalia and his influence on the legal profession, as well as a few reflections on his faith.

Justice Scalia had been on the Court only three years in 1989, when my co-clerks and I had the good fortune to work for him. He had just begun the process of trying to persuade his colleagues to rethink the way they approached the law, both statutory and constitutional. In discussing draft opinions from other chambers that Term, he would rail against the common phrase—“We begin, as always, with the text of the statute.” “What do you mean, we begin with the text?,” he would say. “Why not begin and end with the text?” That Term, he insisted on writing separately in cases where the main opinion relied on policy, fairness, or—worst of all—legislative history. He would refuse to join a lone paragraph, simply because the author cited a passage from a house report or a Senator’s statement on the floor. He would write that the only legitimate statutory law is that passed by Congress and signed by the President—not hidden meanings snuck in through such unpredictable and easily manipulated sources.

It soon became clear to us clerks that Justice Scalia’s adherence to the enacted text was not mere formalism but was, as he saw it, an approach compelled by our constitutional structure of government. When judges read statutes in light of purposes or policies not found in the text, they improperly alter the constitutional balance, and transfer legislative power away from Congress—either to the staffer who wrote the house report, or to the lone Senator, or to unelected judges. If that means we must give effect to awkward language that was the product of legislative compromises, so be it—it is not a judge’s job to gloss the language over and thereby change the enacted law.

Justice Scalia’s strong views on constitutional structure were not tentative, or still in formation, when we began our clerkship—or even when he became a Justice a few years earlier. Rather, they were already deeply ingrained, and affected every case he encountered, no matter
how mundane. We all had read his dissent in *Morrison v. Olson*—one of his most memorable writings to this day. It was filled with quotable maxims, including my own favorite—“He who lives by the *ipse dixit* dies by the *ipse dixit*.” But these pithy Scalia-isms mattered more because they captured a profoundly coherent vision of the constitutional balance of powers. And no one articulated that vision with more passion and lucidity, on cases large and small, than did Justice Scalia.

As clerks early in the Justice’s tenure, we saw his constitutional vision play out in many ways. He insisted that the constitutional words and structure must control—not the views of a majority of Justices—and that, if any further elucidation is needed, it should come from the historical context of the relevant phrases. This meant that if a right was *enumerated* in the Constitution, it should be given effect and not watered down, or ignored, because of new social mores or technology. Likewise, if a right was *not* enumerated, the Court should not bend the words of existing clauses to include it, no matter how desirable the claimed right might seem. This approach reflected Justice Scalia’s respect for the text, the limited role of federal judges, and the responsibility of the legislature to make the law.

After my clerkship, I entered the practice of law, with support from Justice Scalia. He had worked for several years at a well-regarded law firm and encouraged us, in his fatherly way, to spend time in the practice before going into teaching, government, or other pursuits. If nothing else, he said, you’ll gain a practical understanding of how law actually works, and you’ll have a professional home if academia and government don’t work out.

I decided to stay in the practice, and over the past 26 years, I’ve seen Justice Scalia’s strong influence on the profession. At a high level, the Court’s shift to a more textual approach has greatly simplified—and, I would say, improved—the practice of law, especially in statutory cases. Before Justice Scalia, lawyers would have to analyze volumes of legislative history in search of clues to Congress’s “purpose,” gathering passages from the Congressional Record to support their preferred reading. This was done at significant cost to the clients on both sides, and rarely with tangible, helpful results. Briefing and argument tended to focus on policy considerations and only secondarily on the text.

Now, lawyers focus much more on the text and structure of the relevant statutory scheme, contract, or constitutional provision. This shift can be traced to Justice Scalia, in several ways. The first is his influence on legal teaching—shaped by, among other things, the fact that law professors across the board now assign his opinions as important statements of the law, even if they disagree with his conclusions. And unlike when I was a law student, most law schools now teach statutory interpretation, and legal instruction follows a far more textual and structural approach. The result is that emerging young lawyers, whatever their political stripe, are more inclined to focus on legal text and the proper function of judges within our constitutional structure. And as more and more young lawyers are trained in this way, the profession naturally shifts as well.

This trend parallels changes in the judiciary. Good lawyers always shape their arguments to what judges find persuasive, and judges in the post-Scalia world are less likely to be influenced by policy considerations, general notions of Congressional purpose, or legislative

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history, and more likely to focus on the text of a given enactment, contract, or constitutional provision.

All of this has affected the profession, but with one caveat from Justice Scalia himself. As he was quick to tell us with a smile, not all judges share all of his views, and ultimately a lawyer’s duty is to his or her client, not to advance that lawyer’s view of what the law should be. So, he would bellow, even if he would not accept an outcome driven by a non-textual methodology, “You gotta make the argument!”

Justice Scalia also changed lawyering by pressing hard for clarification of the underlying law. Over the years, he left his mark on virtually every subject covered by federal law, including copyright, taxation, securities, class actions, civil and criminal procedure, and a litany of other areas that he tried, as he would say, to “clean up” by returning to their textual roots. I’ll offer one quick example—the field of bankruptcy. Before Justice Scalia, bankruptcy courts were seen as courts of equity, with broad powers to shape outcomes unbound by the operative statutes. Not surprisingly, the field was highly specialized, with only certain lawyers being seen as qualified to navigate the unique and often unwritten rules that governed in those courts. Justice Scalia resisted this view—thinking that, after all, bankruptcy laws are statutes like any other, and should be subject to the same methodology. Over the years, the influence of Justice Scalia’s textual approach has made the bankruptcy practice more predictable, evenhanded, and open to participation by non-specialists. The same is true in most other areas of federal law, as many practitioners in this room can attest.

I am deeply grateful to have had the chance not only to assist Justice Scalia and the Court professionally, but to become part of his extended family. Justice Scalia had scores of children and grandchildren to dote on, but somehow he found the time and energy to become a father figure to his 100-plus clerks, rejoicing at our successes; reaching out in times of difficulty; and generally relishing the company of what he affectionately called his “clerkerati.” And we all have been blessed over the years to know Mrs. Scalia, who likewise has welcomed, into the extended Scalia family, us clerks and our children—a group the Justice sometimes called the “grandclerks.” My three kids still talk about the day when we visited chambers, and Mrs. Scalia served them brownies she had made for them at home, and Justice Scalia let them sit at his huge desk and grilled them about their ambitions and interests.

One unexpected area in which the Justice influenced me was on matters of faith. During our clerkship, the issue of personal faith was rarely if ever discussed. It certainly never entered into our discussions of cases—even those, such as Employment Division v. Smith,2 that involved the religion clauses of the Constitution. Justice Scalia approached these cases as he did any others, by reference to the text and history of the relevant constitutional provisions.

But later, I came to appreciate the Justice’s faith through other means. My own spiritual path had led me to Catholicism, so this became yet another reason to engage with Justice Scalia. Having learned from him on matters of legal meaning, I began to understand the depth and breadth of his faith—and the fact that he brought the same intellectual passion and discipline to such matters as he did to legal issues. And although his faith never affected his judicial reasoning, there were certain parallels—most notably, the centrality of text within its appropriate hierarchy; a deep intellectual tradition; a belief in right and wrong, and the existence of objective

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truth; and the richness and relevance of historical tradition. The strength of Justice Scalia’s faith, like that of his intellect and legal vision, was profoundly humbling to me and to others who engaged him on that topic.

One aspect of Justice Scalia’s faith is relevant to his passing, so I want to share it with this group today. Justice Scalia always knew that his life on earth could end in an instant, without warning—“Poof,” it’s gone,” he would say. His faith taught him to be prepared for that moment. It was his job to be ready when the time came, and, if he was ready, he had no need to fear. For that reason, what he would ask from us is not to fight against his passing but to pray for him and take solace in his faith. That solace is welcome for the members of his clerk family, who have mourned his loss as we would that of a parent, as well as a beloved legal hero and mentor. Although we miss Justice Scalia greatly, we clerkerati are strengthened by his legacy, our memories and bonds with each other and the Scalia family, and the knowledge that his deep and abiding faith will guide him from here.

Remarks
of
BRADFORD R. CLARK

I clerked for Justice Scalia during the 1989 Term. I’m here to represent the Justice’s clerks who became law professors, of whom there are many. In fact, no fewer than 28 of the Justice’s former clerks now teach at law schools around the country, including Harvard, Yale, Columbia, NYU, Michigan, Virginia, Vanderbilt, Notre Dame, and many others. At first, I was surprised by how many of us chose that path. But, at the risk of scaring off hiring committees that might consider Scalia clerks in the future, I suspect our numbers reflect the Justice’s influence on us. Before becoming a judge, Justice Scalia was a tenured law professor at both the University of Virginia and the University of Chicago. He loved teaching law, perhaps because he loved ideas and understood their power. In fact, he once told me that law professors have their greatest impact through teaching rather than scholarship.

Justice Scalia never stopped teaching. Anyone who clerked for him knows this first-hand. Justice Scalia loved to argue about law, to mix it up in the way that good law professors do with their students. In every case, he’d meet with his clerks both before and after oral arguments to discuss the issues. He didn’t want us to come in there and just agree with him. That would have been neither fun, nor helpful. He valued analytical rigor and principled decision-making, and encouraged us to push back when we disagreed with him. Certainly, when he thought us wrong, he made it a teaching moment—showing us the error of our ways. Sometimes, he did it in Latin.

Occasionally, however, we actually managed to convince him that his initial take on a case was mistaken. In these cases, Justice Scalia didn’t mind being proven wrong. He wanted us to push him, to test his views, and to help him get it right. In the process, Justice Scalia taught us something else—that this was not personal, that it was not about his ego or ours, that we should be open-minded, and that we should always go where principle—rather than expediency—took us.
Justice Scalia’s influence went far beyond what he taught his law clerks. He also taught generations of law students through his opinions. My students always find his clear, vivid, and direct writing style to be both gripping and accessible. This is true whether or not they were inclined to agree with him to begin with. Perhaps because students are usually primed to disagree with Justice Scalia, his opinions routinely beat their expectations. They wow students with their common sense, their entertaining prose, and their commitment to principle. This is true not only in the blockbusters, but also in relatively mundane cases. How could someone ignore an opinion explaining that a loose judicial balancing test is like asking “whether a particular line is longer than a particular rock is heavy.” . . . Students got his point.

Justice Scalia’s textualism and originalism reshaped legal conversations in the classroom and in the courtroom. When Congress selects words to express its policies, he thought judges should follow those words. Certainly, that was better than judges and their law clerks trying to imagine how 535 legislators and the President would have decided a case they never contemplated. In constitutional cases, unless the text precluded the political branches from acting, he saw no basis for the Court to prefer its moral judgments over those of the people’s elected representatives. The year I clerked for the Justice—in a case seeking to establish a right to die—he wrote that the answers to questions of life and death are not “known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.”

Justice Scalia changed the way we approach constitutional and statutory interpretation. And law professors—who by and large did not like it—could not ignore it. They had to discuss Justice Scalia’s views in class, and they wrote countless articles analyzing and critiquing his opinions. Academic criticism didn’t faze Justice Scalia. It only reinforced his resolve to strengthen, to refine and, when appropriate, to reconsider his ideas.

That is not to say that Justice Scalia saw no role for legal scholarship. He encouraged us to do the kind of scholarship that might actually help lawyers and judges in their work. Law has meaning only in context, and he knew that the law’s background principles and assumptions are easily lost or forgotten over time. In his view, law professors could provide a valuable service to the Court and to the profession by recovering lost context and meaning. Many of his clerks have taken this advice to heart.

Justice Scalia also published lots of articles and books. And he loved to visit law schools. I think he saw these visits as an opportunity to bypass normal channels and speak directly with law students. These visits had an impact. When I started teaching at George Washington University, I learned that—in 1990—the Justice had allowed us to record a lecture he gave on statutory interpretation. Every year, that lecture is still shown to students taking Legislation. And, every year, it provokes our students to rethink their long-held assumptions.

When Justice Scalia visited law schools, he not only gave lectures and judged moot court competitions, he also made a point to visit ordinary classes. In these exchanges, Justice Scalia relished the opportunity to mix it up with law students. He approached them with openness, honesty, and respect. Students always found his visits stimulating, educational, and fun. And, after those visits, professors couldn’t stop students from talking about his ideas . . . no matter how hard they tried.

I can’t believe he’s gone. But I know that his ideas will long outlast his days on earth. In part, that’s because he was such a powerful thinker. But it’s also because he was such a great
teacher. His firm belief that we shouldn’t be ruled by judges, and his simple idea that the best way to interpret a text is to read it, will continue to shape the way students, lawyers, and judges think about law well into the future. Not all of his clerks who teach law are of one mind. We don’t all share a common legal philosophy or agree with everything Justice Scalia believed. But we all take with us his commitment to openness, to the power of ideas, to the value of debate and disagreement, to cherishing friends with whom we disagree, and to the idea that law—done right—is a matter of principle rather than expediency. It falls to all of us, then, to keep that spirit—Justice Scalia’s spirit—alive.

Remarks
of
Paul D. Clement

I had my first oral argument before Justice Scalia almost 25 years ago, and it did not go well. He summoned me down from law school to interview for a law clerk position and, after brief exchange of pleasantries, he began to pepper me with questions. My answers needed a lot of work, with “I don’t know, I had not thought of that” being among the most concise and truthful, but somehow the Justice hired me.

The next oral arguments with the Justice came in chambers in what he called the clerk conferences, during which the law clerks and the Justice would debate the upcoming week’s cases, often loudly, always passionately, and usually punctuated by the Justice’s infectious laugh. Those clerk conferences were among the highlights of the clerkship, and why not? The Justice took our views seriously, expected us to speak up when we disagreed with him, and taught us a great deal about advocacy, law, and civil discourse. The results were career-altering for the clerks. Once you have had the opportunity to tangle with Justice Scalia mano-a-mano over difficult legal issues, very few subsequent experiences in the law rank as particularly intimidating. It is perhaps no surprise then that so many of the Justice’s law clerks have returned to the Court to present oral argument. In last Term alone, eleven of the Justice’s former law clerks presented argument in 22 different cases, meaning that at least one of the Justice’s former clerks argued in nearly a third of the Court’s cases.

As law clerks, we also had the incomparable experience of watching that amazing wordsmith take our drafts and work his magic. He routinely was handed a stone and returned a sculpture. Indeed, the transformation was generally so complete that I often wondered why he asked for drafts at all. I strongly suspect it was because he had no idea how to format a new document on the computer.

The Justice’s great gift as a writer was that his memorable turns of phrase so perfectly captured the essence of the legal point he wanted to make. A central point of his Morrison dissent was that the independent counsel statute was no wolf in sheep’s clothing but a frontal assault on the separation of powers: “this wolf comes as a wolf.” And this was a gift he always had. I recently came across an article he wrote as a young associate professor on the subject of sovereign immunity and nonstatutory review of federal administrative action—a dry topic in the wrong hands. But not in his. In making the point that two phenomena, superficially at odds, were actually mutually reinforcing he evoked “a child's astonishment at watching a tight-robe
walker for the first time—how marvelous that he should not only walk along such a narrow wire, but carry and balance a long stick at the same time!"

The Justice worked hard in chambers, but he made plenty of time for other pursuits. His appetite for travel was legendary—one of my first calls from him as a law clerk came in from India—and he would occasionally emerge from his office in black tie ready for an evening of socializing. While I was privileged to be the Justice’s elbow clerk, I was also his designated racquet clerk. As such, he would frequently drop by my desk in the afternoon, racquet in hand. We occasionally played squash a few blocks from the Court, but his favored game was tennis and his favored venue were clay courts near his home, which were particularly conducive to his “Sicilian drop shot.” Since the courts were near his home, we would often drive separately, and although we left the building at the same time, he invariably arrived there first. When it came to the posted speed limits, he was no strict textualist.

We happy few who were privileged to clerk for the Justice were transformed by the experience. But his influence went far beyond the clerkkerati. The Justice had a transformative effect on the Supreme Court and the way it decides cases. His impact on statutory construction, which is the bread and butter of what the Court does, was nothing short of Copernican, with the center of attention returned to the text. He likewise championed a focus on the text and original public meaning of the Constitution. And he strove mightily to ensure that his methodology for interpreting both statutes and the Constitution produced predictable legal results, even when they did not comport with his policy preferences. His votes to vindicate the First Amendment rights of flag burners are famous examples.

But perhaps no area of Justice Scalia’s jurisprudence gave rise to this phenomenon—a phenomenon near and dear to him—more often than criminal law. On a personal level, Antonin Scalia, an appointee of Presidents Nixon, Ford and Reagan, was a law and order kind of guy. And sometimes that description fit his constitutional decisions. For example, he had no love for the exclusionary rule. But very often, Justice Scalia’s commitment to textualism put him in the criminal defendant’s camp. His opinion in Crawford revitalized the Confrontation Clause. Fueled by Fifth Amendment due process concerns, he led the Court’s charge to eliminate the amorphous concept of “honest services” fraud. And Justice Scalia’s belief in the Sixth Amendment’s jury-trial guarantee led him to join a host of opinions revolutionizing criminal sentencing.

One such case involved a government effort to overturn a reduced sentence. The lower courts had substantially reduced the defendant’s sentence, and so he was able to attend the Supreme Court argument in the gallery. At one point, when Justice Scalia was peppering the government’s lawyer with questions, the defendant tugged on his lawyer’s sleeve, pointed to Justice Scalia, and whispered, “He so gets me.” Indeed. While Antonin Scalia—a law and order guy—might not have “got” the defendant; Justice Scalia, interpreting the text of the Sixth Amendment, most certainly did.

Justice Scalia had a profound impact not only on the Court’s decisions, but on the way it conducts oral argument. In the 1970’s and early 1980’s, it was common for Supreme Court advocates to be asked only a handful of questions during oral argument. That changed when Justice Scalia joined the Court. Indeed, it changed on day one. The Justice had obviously been told that there was something of a tradition that a new, junior Justice would allow more senior colleagues to lead off the questioning. And while I am sure it took enormous self-discipline, he
waited a good 15 minutes into the argument before asking his first question. He then asked the next ten, and a total of 28 in that first argument as a Justice. Other Justices eventually followed suit, lest the new guy have all the fun.

Things have never been the same, for the Court or for the advocates. Argument before the Supreme Court is now the art of answering questions. Moot courts are no longer optional. It is no accident that the Solicitor General’s office formalized its moot court process, and the Georgetown Supreme Court moot court program was founded, after Justice Scalia joined the Court.

Justice Scalia’s questions were pointed and asked in his inimitable style. And the combined effect of his forceful presence and distinct jurisprudence created unique challenges for the oral advocate. If the legislative history favored a client’s case, the advocate could not simply omit any discussion of the favorable committee report or floor statement. But arrive prepared, for the onslaught was coming. Did the President sign the committee report? How many members of Congress actually heard that floor statement? You could not predict the precise form of the question, but you knew the question was coming.

Justice Scalia’s distinct jurisprudence meant that having the Justice on your side in a case did not necessarily mean that you would be spared tough questioning, especially if you were urging an alternative means to the same end. In a case where the government urged the Court to deny taxpayer standing without squarely overruling *Flast v. Cohen*, Justice Scalia, the Court’s foremost opponent of taxpayer standing, asked the government no less than 20 questions because he found the government’s middle ground position incoherent. The Justices who actually disagreed with the government’s bottom line had to work hard to get a word in edgewise.

At the same time that he made oral argument a lively affair, he made clear it need not be dour. Justice Scalia injected humor into his colloquies with counsel and asked many questions with a twinkle in his eye. He was routinely ranked the Court’s funniest Justice as judged by the court reporter’s need to note “[laughter]” in the oral argument transcript.

In the months that followed his passing, I made my first arguments to a Supreme Court that did not include Justice Scalia; he had been on the Court for each of my previous arguments. His absence from the bench was palpable. As I prepared answers that he would not hear and wrote briefs he would not read, I was struck by how much over the years that I and other lawyers were writing and preparing for him. And that will not stop. Just as his opinions will continue to shape the way the law is taught and understood, he will continue to shape the ways briefs are written and the way advocates prepare for oral argument.

Let me close with my favorite exchange with Justice Scalia at oral argument. The case involved whether the Court should extend an implied cause of action. The Justice was not a fan of implied causes of action—or implied anything for that matter—and had criticized the Court’s practice, in what he called the “bad old days,” of inferring causes of action that appeared nowhere in the enacted text. There was some confusion at argument about whether a particular Court precedent was a product of those “bad old days,” and Justice Scalia asked me when I thought “the bad old days ended?” My answer, then as now, was of course: “The bad old days ended when you got on the Court, Mr. Justice Scalia.” The Justice’s nearly 30 years of service were good days indeed for this Court and everyone privileged enough to interact with Justice Antonin Scalia.
While Justice Scalia would have been grateful for today’s ceremony, I wonder if he would have noted, with his wry smile, one potentially awkward feature of it. Isn’t what we are doing—with these remarks, this Resolution, and this meeting of the Bar—uncomfortably close to one of his favorite targets in life: after-the-fact legislative history? Might he not accuse us of trying to smuggle a friendly set of submissions into the U.S. Reports in order to varnish this or that part of his life—to make it look like something it was not?

Happily for us, there is no such risk here. If there is one point on which we can all agree, it’s that Justice Scalia led an unambiguous life. There’s 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*. Want to know his views about the canons of construction? Read *Reading Law*. Want to know his views about the interaction of faith and law? Try his many speeches on the topic. And then of course there are his 870 opinions on this Court. For Pete’s sake, there has even been an opera written about him and Justice Ginsburg.

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

Start with the gratitude. Lucky for me, no one in this Hall knew me before I worked for Justice Scalia. Let’s just say I was not a promising candidate for arguing cases in this Court or deciding cases in the court of appeals. 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 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 the admiration. As the last 227 years confirm, it’s a tricky business to aspire to “a government of laws and not of men” 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. Justice Scalia took that dilemma head on and devoted a career to trying to reconcile the competing considerations. The longer I have been on the bench, the more I have admired 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 approach to the Court’s work. That’s 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 quintessentially American.
All lower court judges, no matter their perspective, appreciated the oh-so-clear quality of a Justice Scalia opinion. There are 851 authorized federal judgeships, and it’s a truth not often uttered in this building that 842 of those judges do a good part of the work. How helpful it was to have a Scalia opinion in hand in addressing our case load. You knew where the law stood when you read a majority opinion by Justice Scalia.

With his clarity of thought and facility with language came transparency of method. To his everlasting credit, Justice Scalia’s opinions let the world know how he should be judged. The 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’s one thing to say that justice is blind. It’s quite another to prove it by treating seen and unseen cases alike.

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. There’s plenty of repetition, and every time you do something interesting it’s subjected to review here. 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.

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 10 other chess players willing to take him on. Even his first book, *A Matter of Interpretation*, is done—most revealingly—in a debate format. He chose not to write a book about his views alone. He presented a theory of judging, then asked several prominent professors to challenge him—signaling confidence, humility, and transparency all at once.

Justice Scalia set another valuable example. He invested time in friendships with colleagues, including those with whom he sometimes disagreed, even vigorously. It makes me happy 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 me, I am not sure which was the greater example of good-faith collegiality: Enduring 35 years’ worth of long, difficult-to-follow operas or teaching a potential adversary how to use a gun?

I have said some nice things about Justice Scalia. And I can add a few more—that he wrote like Jackson and Holmes, thought like 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’s 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. That was never going to be an easy road to travel—and not just because the Justice 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. 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.

It’s easy to miss something else about the Justice: 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.

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 can’t 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?

So I give thanks that Justice Scalia served his country faithfully and well, taught us never to lose sight of these essential questions, and offered us a most admirable way of answering them.

Motion to Adopt Committee Resolutions
Rachel E. Barkow

When someone passes away, Jewish people often say to those who are grieving, “may his memory be a blessing.”

I know I speak for everyone on the Resolutions Committee when I say that working on the resolutions was a labor of love and admiration—indeed, a blessing.
I have always loved reading Justice Scalia’s opinions, but even more so since he passed away.

Because you can feel his energy in every word he wrote and hear his voice come off the page as if he’s right there beside you.

I still laugh at his best lines, and the days in my class when we discuss an opinion by Justice Scalia are the most energizing.

The students are at their best as they wrestle with the power of his arguments, and I see his legacy play out in real time. His memory is with us all and what a blessing it is.

You have before you the product of the Committee on Resolutions. On behalf of the committee, I have the honor to move their adoption.

Call for Second and Closing Remarks
PAUL T. CAPPUCCIO

Thank you, Rachel. The Resolutions are before us for adoption. If adopted, they will be presented to the Court by the Solicitor General. Is there a second?

Thank you, I now put the Resolutions to a vote. All in favor of adopting the Resolutions, please signify by saying “Aye.” … Any opposed? Good.

Hearing no opposition, I declare the Resolutions adopted.

This completes our work here, and we will now be adjourning to the courtroom. You should have a card that indicates your seating, and you will assisted in that by the Court staff. Before we do, I would like to thank everyone at the Court, including Jeff Minear, Sheldon Snook and Angela Frank, and others, who helped us with this memorial.

Given the Justice’s love of language, particularly Latin, it is fitting that we close this meeting with the customary declaration: I declare this memorial meeting of the Bar of the Supreme Court to be adjourned sine die.

Thank you.
Today the bar of this Court convenes to pay respect to a towering figure in American law—a Justice of conviction, character, and courage; a treasured colleague; an irreplaceable mentor; and a man devoted to his country, its Constitution, and this Court. In his nearly 30-year tenure on this Court, Antonin Scalia displayed a forceful intellect, a remarkable wit, and an inimitable writing style. His ideas helped to shape the way we think about law. And for those blessed to know him, his compassion, humanity, and commitment to his family, friends, and faith will remain an inspiration.

On March 11, 1936, five months after this Court heard its first case in this building, Antonin Scalia was born in Trenton, New Jersey. His mother, Catherine Panaro, was the oldest of seven and born to parents who immigrated to the United States from Italy in 1904. His father, Salvatore Eugene Scalia, came to this country from Sicily in 1920 at age 17. Both became teachers—S. Eugene a professor of Romance Languages at Brooklyn College and Catherine an elementary school teacher.

Antonin—Nino to family and friends—was his parents’ only child and the only child of his generation on either side of the large family. He grew up in Trenton and later in the diverse Elmhurst neighborhood of Queens in New York City, where his parents made “an education project” out of him. Antonin’s curiosity and love of argument surfaced early. One aunt recalled that, “[w]hen [Antonin] wanted to do something” an adult had put off-limits, “you had to give him a very, very good argument about why he could not do it.”

Through their example and, one suspects, occasional direction, Scalia’s parents fostered his religious faith and character. He also inherited from them a lifelong love of music—especially opera—and the ability to play the piano, which he learned from his father.

After an uncharacteristically subpar showing on an entrance examination for his preferred high school—missing a grammar question of all things—Scalia attended Xavier High School in Manhattan.

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“One door closes, another door opens,” as he would say. Faith was foremost at the Jesuit school at that point and military discipline a close second. Scalia graduated first in his class, collecting an array of awards along the way. He was a stand-out debater—even appearing on local television—and played the French horn for the marching band and starred in several school plays, including the title role in Macbeth. From a teacher at Xavier, Scalia learned what he often referred to as the “Shakespeare Principle”: “When you read Shakespeare, Shakespeare’s not on trial. You are.”

Scalia continued the pursuit of a Jesuit education by attending Georgetown University, where he studied history and government and once again graduated first in his class. He and a teammate rose to national prominence in competitive debate, and he continued to perform on stage. Georgetown also made a mark on the Justice’s faith. The “last lesson” he learned in college, imparted by a professor during his oral examinations, was “not to separate your religious life from your intellectual life.” Scalia took that lesson to heart. In his commencement speech, he challenged his classmates to be courageous and to “carry and advance into all sections of our society this distinctively human life, of reason learned and faith believed.” “If we will not lead,” Scalia asked, “who will?”

After Georgetown, Scalia attended Harvard Law School, where he relished debating cases with professors in the classroom and with classmates through his work as an editor of the Law Review. But however rich the academic environment, the signal event of his Harvard years occurred outside the classroom, when he met Maureen McCarthy, an undergraduate student from Radcliffe College, on a blind date. The two had much in common—sharp intellects and quick wits. Perhaps most importantly, Maureen recalled, they had shared convictions on “all the important things,” including their Catholic faith. In Antonin’s telling, Maureen was drawn by the Sheldon Fellowship he had won at Harvard to travel around Europe after graduation. Whatever the proximate cause, the marriage took

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place in September 1960 and was a blessing and a source of strength to both. Their 55-year union produced nine children and dozens of grandchildren. Antonin joked that the “secret” to their marriage’s longevity was that “Maureen made it very clear early on that if we split up, [he] would get the children.”3 For her part, Maureen explained that she “would have been bored” with someone “wissy washy.”4

Upon returning from their European travels, the Scalias moved to Cleveland, Ohio, where Antonin joined Jones, Day, Cockley & Reavis. During his six years there, his work covered a range of fields, from antitrust and real estate to labor law, contracts, and tax. Although Scalia enjoyed the practice of law and was well regarded at the firm, he had long aimed to follow his parents’ path by becoming a teacher.

In 1967, Scalia accepted a post at the University of Virginia School of Law, where he taught contracts and comparative law. The focus of his scholarship, if not always his teaching, would become administrative law.5 In the classroom he was energetic and engaging, posing inventive and often entertaining hypotheticals. He enjoyed encouraging students to consider legal problems from the standpoint of a layperson, asking classes, “What would Joe Sixpack say about this?” He often concluded the semester by quoting a line from Robert Bolt’s A Man for All Seasons, which to Scalia was a “beautiful expression of the importance of the law.” In the passage,

Sir Thomas More boldly declares: “Whoever hunts for me, Roper, God or Devil, will find me hiding in the thickets of the law! And I’ll hide my daughter with me! Not hoist her up to the mainmast of your seagoing principles! They put about too nimbly!”

Several years into teaching, Scalia was appointed to the first of several Executive Branch positions. In 1971, he became the general counsel of the newly created Office of Telecommunications Policy, where he addressed legal and policy issues arising in the still-nascent cable industry. The following year, Scalia was asked to chair the Administrative Conference of the United States, a body composed of officials from various agencies, academics, and other experts in the field to study problems of administrative law and procedure and to recommend solutions to Congress or agencies. Scalia enjoyed the Conference’s work, and was gratified when the Conference was revived in 2010 after a multi-year hiatus.

In 1974, Scalia became the Assistant Attorney General for the Office of Legal Counsel in the Department of Justice. Then-Deputy Attorney General Laurence Silberman explained that, in choosing a new head of OLC in the aftermath of Watergate, the Ford Administration “wanted a brilliant lawyer with steel nerves.” Scalia fit the bill. Confirmed just weeks after President Ford took office, Scalia confronted a litany of difficult constitutional and other issues, starting with the legal ownership of President Nixon’s papers. The work entailed long hours. As Maureen recounted, Scalia “slept in the White House, and I don’t mean the Lincoln bedroom.” But even through those trying and exhilarating professional days, family and faith remained priorities.

In 1977, Scalia returned to academia, joining the University of Chicago faculty, where he remained, aside from a visit to Stanford, until 1982. In Chicago, Scalia continued to focus on administrative law and became head of the American Bar Association’s Section of

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6 BISKUPIC, supra note 1, at 66–67, 76.
8 BISKUPIC, supra note 1, at 53.
Administrative Law in 1981. He was particularly pleased with the amicus brief he wrote for the ABA in *INS v. Chadha*, the landmark separation-of-powers case striking down a one-house legislative veto.

When President Reagan took office in 1981, he looked for a new Solicitor General, and before long Scalia and Rex Lee emerged as finalists. Scalia was crestfallen when he did not receive the appointment. The President had other ideas, however, nominating him to the U.S. Court of Appeals for the D.C. Circuit in 1982. In his four years on that court, Scalia encountered a range of constitutional and statutory questions. While there, he wrote what he considered one of the best openings in all of his opinions: “This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck’s aphorism that ‘No man should see how laws or sausages are made.’”

When Chief Justice Burger announced his retirement in 1986, President Reagan nominated Justice Rehnquist to fill Burger’s seat and tapped Scalia to fill Rehnquist’s seat. At his confirmation hearing, Scalia was asked to explain the “success of the Constitution.” While the Bill of Rights is “very important,” he responded, its provisions standing alone “do not do anything.” Other countries, even those with authoritarian regimes, have “at least as good guarantees of personal freedom.” Instead, Scalia explained, “[w]hat makes it work, what assures that those words are not just hollow promises, is the structure of government that the original Constitution established, the checks and balances among the three branches.”

When Senator Metzenbaum in jest criticized Scalia’s “bad judgment in whipping” the Senator on the tennis court, Scalia confessed that “[i]t was a case of [his] integrity overcoming [his] judgment.”

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12 *Id.* at 13.
was confirmed 98-0 on September 17, 1986, the 199th anniversary of the Constitution’s signing in Philadelphia.

Over the next three decades, Justice Scalia left his mark on the law in numerous ways, too many to recount in full here. His steadfast commitment to the idea that external legal principles rather than internal policy preferences should govern judicial decisionmaking made him deeply respectful of the Constitution’s allocation of powers and vigilant in respecting legal texts. That commitment showed up first, and most often, in his views on statutory interpretation. Justice Scalia pressed the elementary proposition that, when interpreting a statutory text, judges must try to discern and enforce the meaning of words enacted by Congress to express its policies. In his view, courts should never rewrite a discernible statutory text to conform to a law’s unenacted legislative purposes. This position challenged the practice of first divining and then enforcing the “spirit” rather than the “letter” of a law, an approach embodied by the Holy Trinity decision.13 With characteristic energy, Justice Scalia contested that practice. The legislative process is opaque, path-dependent, and prone to “backroom deals” that do not make their way into the public eye. An awkwardly worded statute that falls short of its apparent policy aspirations thus might not be the product of legislative misstatement, but might instead be “the result of compromise among various interest groups, resulting in a decision to go so far and no farther.”14 Hence, when judges rewrote a clear statute to conform its terms to what they perceived to be the law’s underlying purposes, they risked upsetting whatever “legislative compromise [may have] enabled the law to be enacted” in the first place.15 Holy Trinity was never the same after Justice Scalia joined the Court.

During his career, the Court moved a good way (though not as far as he would have liked) toward his rigorous emphasis on the en-

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13 Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).
acted text.\textsuperscript{16} The Court’s citation of dictionaries has risen to levels previously unseen in the U.S. Reports.\textsuperscript{17} After a post-New Deal judicial trend away from the use of semantic canons, they now play a visible, sometimes pivotal, role in the Court’s determinations of statutory meaning.\textsuperscript{18} And the Court became skeptical of implied statutory rights of action.\textsuperscript{19} This new textualism\textsuperscript{20} had an undeniable impact on the way the Court does business.

Perhaps most pronounced has been the Court’s embrace of the idea, championed by Justice Scalia, that extrinsic indicia of statutory intention, such as legislative reports or floor statements, may not override a clear statutory text. In an opinion for the Court early in his tenure, Justice Scalia wrote that “[t]he best evidence of [a statute’s] purpose is the statutory text adopted by both Houses of Congress and submitted to the President.”\textsuperscript{21} He added that where such a text is “unambiguous,” the Court “do[es] not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.”\textsuperscript{22}

Before 1986, the Court frequently used legislative history in an effort to discern legislative intent. Often, the Court would treat the views of a statute’s sponsor or a drafting committee as if they represented the intentions of Congress as a whole.\textsuperscript{23} So strong was the

\textsuperscript{17} See, e.g., Jeffrey L. Kirchmeier & Samuel A. Thumma, Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century, 94 MARQ. L. REV. 77, 86 (2010).
\textsuperscript{22} Id. at 98–99.
acceptance of legislative history that a Burger Court opinion, in an
unguarded moment, declared that because “[t]he legislative history
. . . is ambiguous[,] . . . we must look primarily to the statutes them-
selves to find the legislative intent.”

Justice Scalia criticized the use of legislative history as a tool of
construction every chance he got, all but affixing a badge of shame
on it. In vivid prose informed by practical experience in govern-
ment, he questioned whether rank-and-file legislators necessarily
read, much less agreed with, floor statements or even the committee
reports that had become a staple of interpretive practice. When the
Court interpreted the Civil Rights Attorney’s Fees Award Act by
parsing lower court cases that the committee reports had cited, Jus-
tice Scalia wrote: “As anyone familiar with modern-day drafting of
congressional committee reports is well aware, the references to the
cases were inserted, at best by a committee staff member on his or
her own initiative, and at worst by a committee staff member at the
suggestion of a lawyer-lobbyist; and the purpose of those references
was not primarily to inform the Members of Congress what the bill
meant . . . , but rather to influence judicial construction.”

Ultimately, Justice Scalia’s principal concern was less the accu-
cracy of legislative reports than their legitimacy. The Constitution
conditions Congress’s power to legislate on a bill’s passage by two
Houses and either the assent of the President or the override of a
presidential veto by two-thirds of each house. According to Justice
Scalia, even if most Members of Congress would want and expect
the courts to treat legislative history as an authoritative indication of
a statute’s intended meaning, “the very first provision of the Consti-
tution” precludes that arrangement by vesting “[a]ll legislative
Powers” in Congress itself. If legislative committees or bill spon-

part and concurring in the judgment).
(Scalia, J., concurring in part and concurring in the judgment) (quoting U.S.
CONST. art. I, § 1).
sors could make pronouncements that specified the entire body’s intended policies, then Members of Congress could make an end-run around the bicameralism and presentment requirements themselves. In Justice Scalia’s words: “We are governed by laws, not by the intentions of legislators. . . . ‘The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.’”28

It is fair to say that the connection between statutory text and judicial interpretations of it has tightened substantially since Justice Scalia joined the Court. The Court has restored the primacy of statutory text and routinely declines to “resort to legislative history to cloud a statutory text that is clear,” as Justice Ginsburg wrote for the Court.29 Today, the Court instead “presume[s] that a legislature says in a statute what it means and means in a statute what it says there.”30 That is no small legacy.

Just as Justice Scalia believed that courts should do their best to honor a statute’s text, he thought the same should be true for the Constitution. And if it was essential to respect the language of the Constitution, it followed that its meaning should be fixed unless and until the People followed the process for ratifying amendments to the charter. As he saw it, the words of the Constitution, like all legal texts and documents, bear the same meaning today as they did when adopted, neither diminished nor augmented—though of course capable of application to new technologies and other features of modern society.31

He grounded this principle of interpretation in part in respect for democracy. To recognize constitutional rights that he could not locate in the Constitution, he believed, “prohibit[s] . . . acts of self-

governance that ‘We the people’ never, ever, voted to outlaw.”

“This practice of constitutional revision by an unelected committee of nine,” he argued, “robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.” He thus voted against recognition of new rights that he believed lacked a foundation in the Constitution’s original meaning—in areas ranging from abortion and same-sex marriage to punitive-damage caps and retroactive taxation.

Any other approach, he worried, placed at risk the guarantees of liberty actually enshrined in the Constitution. Just as he resisted imposing new restrictions on democratic self-government that the People did not vote to impose, he insisted on unyielding enforcement of those restrictions that the People did vote to impose. An essential responsibility of the Court, he thought, was “to preserve our society’s values” and “to prevent backsliding” from the limits prescribed by the Constitution. That approach prompted him to dissent from decisions that he believed cut back on the original meaning of constitutional guarantees such as the Elections Clause, the Ex Post Facto Clause, the Fourth Amendment, the Jury Clause, and the

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35 Obergefell, 135 S. Ct. at 2626 (Scalia, J., dissenting).
Seventh Amendment. His judicial philosophy also led him to recognize constitutional limitations upon the Government’s use of new technology where necessary to “assure[] preservation” of the same “degree” of liberty “that existed when the [Bill of Rights] was adopted.” That imperative prompted his opinions for the Court holding that the Fourth Amendment restricts the Government’s power to use thermal scanners to inspect houses, and that the Confrontation Clause protects a criminal defendant’s right to confront forensic analysts.

Where the constitutional text did not answer the question at hand, history came to the fore, not for its own sake, but to shed light on the original public meaning of the text. It is doubtful that any justice has done more for the cause of legal history or placed more light on once-obscure legal texts. His opinions are replete with references to Coke’s Institutes and Blackstone’s Commentaries, to Johnson’s Dictionary and Publius’ Federalist, and to statutes enacted by early Congresses and constitutions adopted by the original States. His lead opinion in Harmelin v. Michigan canvassed everything from Lord Chief Justice Jeffreys’ remarks during the Bloody Assizes to Patrick Henry’s remarks during the Virginia ratification convention before concluding that disproportionality alone does not render a punishment cruel and unusual under the Eighth Amendment. And in Hamdi v. Rumsfeld, he concluded in dissent that, in the absence of a suspension of the privilege of the writ of habeas corpus, the President lacked power to detain American citizens without charge as enemy combatants—though only after a reconnaissance of the Habeas Corpus Act of 1679, English treason prosecutions, and previous English and American statutes suspending the privilege.

He summed up his approach to text and tradition this way:

46 Id.
“[A] venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle . . . devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court’s principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices are to be figured out. When it appears that the latest ‘rule,’ or ‘three-part test,’ or ‘balancing test’ devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens.”

That meant that in Establishment Clause cases, to use one example, he voted to uphold prayer at public-school graduations, accommodation of religious beliefs, and public displays of religious monuments because they enjoyed the validation of tradition—regardless of whether they comported with judge-devised metrics such as the Lemon test.

By the end of Justice Scalia’s tenure, a focus on the original public meaning of the Constitution’s text had become, if not orthodoxy, a thoroughly respectable and commonplace approach to constitutional interpretation. Two decisions—District of Columbia v. Heller and Crawford v. Washington—illustrate the point. In Heller, the Court held that the Second Amendment protects an individual right to keep and bear arms for self-defense. Justice Scalia’s opinion for the Court showcases his meticulous approach to uncovering how the Constitution was understood by “ordinary citizens in the

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founding generation”—starting with an analysis of the words of the Second Amendment, continuing with an examination of analogous provisions in early state constitutions, and turning to an analysis of how the Second Amendment was interpreted through the eighteenth and nineteenth centuries. This focus on text and history was hardly limited to the Justice’s opinion for the Court. Justice Stevens’ dissent emphasized the debates surrounding the ratification of the Constitution and the drafting history of the Second Amendment, while Justice Breyer’s dissent stressed the prevalence of gun laws in colonial towns.

Crawford is of a piece. His 7-2 decision for the Court interpreted the Sixth Amendment’s Confrontation Clause and turned on the public understanding of the guarantee at the time of ratification rather than on the Framers’ broader interest in promoting the reliability of evidence in a criminal case. In a series of cases exemplified by Ohio v. Roberts, the Court had employed a balancing test designed to identify reliable evidence. Crawford memorably dispatched the Roberts balancing test and the elevation of the Framers’ broader interest in reliable evidence over the textual guarantee of confrontation. “By replacing categorical constitutional guarantees with open-ended balancing tests,” Justice Scalia reasoned, “we do violence to [the Framers’] design.” And while Justice Scalia happily conceded that “the Clause’s ultimate goal is reliable evidence,” he was quick to remind that the Framers embraced a particular means to that end. The Clause “commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” “Dispensing with confrontation because the evidence is obviously reliable,” he trenchantly concluded, “is akin to dispensing with jury trial because the defendant is obviously guilty. That is not what the Sixth Amendment prescribes.” He was proud of both decisions.

56 Id. at 576–77.
57 448 U.S. 56 (1980).
58 Crawford, 541 U.S. at 67–68.
59 Id. at 61.
60 Id. at 62.
Justice Scalia may be best known for his views about the proper methodology for statutory and constitutional interpretation. But his first love was an area of substantive law—constitutional structure—which shaped his answers to the underlying questions that appear in every case: Who decides? And how? Even his methods of statutory and constitutional interpretation were informed by these considerations. He eschewed the use of legislative history, for example, because it empowered the judiciary at the expense of Congress and because committee reports did not comply with the constitutional requirements of bicameralism and presentment. And he criticized judicial amendments of a living Constitution because they aggrandized the power of judges and disregarded the Constitution’s explicit means of amendment, all at the expense of the People and their representatives.

Throughout his tenure, Justice Scalia sought to honor the Constitution’s structure—its distinct horizontal and vertical lines of power—realizing that they were as essential to the preservation of individual liberty as the provisions of the Bill of Rights. He appreciated that men and women were not “angels,” and that electing (or appointing) them to government posts did not make it otherwise. By assigning three distinct kinds of government power (legislative, executive, and judicial) to three distinct branches of government, he believed, the Constitution prevented the concentration of government power in the same hands—considered by the Founders to be the epitome of tyranny.

In his iconic dissent in *Morrison v. Olson*, written early in his tenure, Justice Scalia put these principles to work. He objected that Congress’s attempt to restrict the President’s ability to remove an independent counsel—an officer who exercised executive power—violated Article II, which vests the executive power in the President and obligates him to take care that the laws be faithfully executed. As he saw it, the Constitution vested all—not some—of the executive power in the President. For Justice Scalia, this made *Morrison*

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61 The Federalist No. 51 (James Madison).
62 See The Federalist No. 47 (James Madison).
an easy case: “Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.”64

Justice Scalia was no less vigilant in preventing legislative incursions on the judicial power, exemplified by his opinion for the Court in *Plaut v. Spendthrift Farm, Inc.*, rejecting an attempt by Congress to reopen final judgments of Article III courts. As Scalia explained, the Article III judicial power gave federal courts the power to decide cases with finality, and the statute in question trespassed on that assignment. “The Framers of the Constitution,” he reasoned, built separation of powers into the structure because they had “lived among the ruins of a system of intermingled legislative and judicial powers,” and they established “high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.”66

At the same time Justice Scalia thought it essential that the Court stand sentinel over efforts by one branch to assume power allocated to another branch, he was insistent that the judiciary not use its final say over the meaning of federal law to aggrandize power the Constitution never gave it. Throughout his career, he rejected attempts to expand the judicial power beyond the limits embedded in Article III. Witness *Lujan v. Defenders of Wildlife*, where Justice Scalia wrote that “the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.” The requirement of standing, he explained, helped to identify those disputes properly—and improperly—resolved through the judicial process. Absent a claim that alleged a particularized, imminent injury of the kind redressable by courts, Justice Scalia concluded that the federal courts had no warrant to referee the dispute.

64 Id. at 699 (Scalia, J., dissenting).
66 Id. at 219, 239.
Justice Scalia likewise regarded the Constitution’s vertical separation of powers—federalism—as a core feature of the Constitution’s structure that needed to be preserved. He honored the States’ “residuary and inviolable sovereignty”\(^ {68} \) under the Constitution by joining the Court’s decisions recognizing limits on Congress’s power to regulate interstate commerce\(^ {69} \) and upholding the States’ sovereign immunity from suit.\(^ {70} \) Perhaps his most notable federalism opinion came in \textit{Printz v. United States},\(^ {71} \) in which the Court held that the Constitution prohibited Congress from commandeering state executive officials to enforce federal law. Permitting Congress to impress state executive officers into federal service, he reasoned, would threaten the States’ separate sphere of constitutional authority by “immeasurably” augmenting the power of the federal government at the expense of the States and eventually individual liberty.\(^ {72} \) “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch,” he explained, “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”\(^ {73} \)

In view of Justice Scalia’s appreciation of separation-of-powers principles and his scholarship as a professor, it should come as no surprise that the Court’s administrative-law docket engaged him. His opinions touched many areas of administrative law, including the scope and limitations of \textit{Chevron} deference.\(^ {74} \) He was a tireless defender of the proposition that judicial deference to agency interpretations should not depend on a case-by-case determination of whether Congress would want the Court to defer based on multiple

\(^ {68} \) \textit{Printz v. United States}, 521 U.S. 898, 918–19 (quoting \textit{The Federalist} No. 39 (James Madison)).


\(^ {71} \) 521 U.S. 898 (1997).

\(^ {72} \) \textit{Printz}, 521 U.S. at 922.

\(^ {73} \) Id. at 921 (quoting \textit{Gregory v. Ashcroft}, 501 U.S. 452, 458 (1991)).

unranked and unweighted factors. At the same time, he made clear that *Chevron* does not permit courts reflexively to credit whatever reading of a statute an agency tenders and thus does not permit courts to abdicate their *Marbury* function to interpret the law. His decisions underscore that, if an agency’s interpretation is inconsistent with Congress’s clear direction, courts need not—indeed cannot—disregard Congress’s commands. As he acknowledged early in his tenure, his commitment to giving primacy to the statutory text necessarily meant that *Chevron* deference will matter less often, and will affect fewer case outcomes, than if he “permit[ted] the apparent meaning of the statute to be impeached by legislative history” or other sources outside the text Congress enacted. *Chevron*, he explained, does not compel courts to defer merely because a statute contains some ambiguity; the mere “presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation” the agency advances. “It does not matter,” Justice Scalia memorably observed, “whether the word ‘yellow’ is ambiguous when the agency has interpreted it to mean ‘purple.’”

One other area of substantive law deserves mention. When people think of transformative criminal law opinions, *Mapp v. Ohio*, *Miranda v. Arizona*, and decisions restricting capital punishment come to mind. But to Justice Scalia, many of those Warren Court landmarks transformed the pre-existing law precisely because they had no basis in the Constitution. He thus led the charge to limit...

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76 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
79 *Clearing House*, 557 U.S. at 525.
the reach of *Mapp* \(^{83}\) and critiqued *Miranda* \(^{84}\) and many death-penalty decisions. \(^{85}\)

That is not to say he resisted the rights of criminal defendants. He just preferred to enforce a different set of rights—those protections that, in his view, were properly grounded in the Constitution’s text and history. He became an uncompromising defender of those rights. Take the breathtaking impact of his commitment to the Sixth Amendment’s trial by jury. When Justice Scalia dissented in *Almendarez-Torres v. United States* \(^{86}\) to point out that laws that create new statutory maximum sentences on the basis of judicial factual findings violate the jury guarantee, he launched a wholesale shift in the Court’s view of sentencing laws. A majority of the Court ultimately came around to his viewpoint through three system-changing decisions, one of which (*Blakely*) he wrote, all of which he joined. \(^{87}\) Sentencing laws in the state and federal courts have shifted markedly ever since.

Justice Scalia led a similar transformation of the Sixth Amendment’s Confrontation Clause. \(^{88}\) That shift also began with a vigorous dissent (joined by Justices Brennan, Marshall, and Stevens), in which he maintained that the Court had “subordinat[ed]” the Constitution’s textual demand that the defendant had a right “to be confronted with the witnesses against him” to “currently favored public

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\(^{84}\) See, e.g., Dickerson v. United States, 530 U.S. 428, 448 (2000) (Scalia, J., dissenting) (arguing that “Miranda was objectionable for innumerable reasons”).


\(^{88}\) U.S. CONST. amend. VI.
policy” when it allowed a child witness to testify by one-way closed circuit television. In *Crawford*, the Justice persuaded six colleagues to join his opinion for the Court insisting that out-of-court testimonial statements by witnesses are barred unless the defendant had a prior opportunity to examine the witness and the witness is currently unavailable. This, too, led to a sea change in the handling of criminal cases.

Justice Scalia also was a stalwart defender of the Constitution’s prohibition against vague criminal laws. Consider his treatment of the residual clause of the Armed Career Criminal Act, which triggers higher penalties for those who commit violent felonies. The clause raised vexing questions about what crimes were included in its scope, prompting Justice Scalia to urge the Court to invalidate the Clause as vague: “We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution.” While he initially raised these concerns in dissent, here too he persuaded a majority to see his point of view. In *Johnson v. United States*, he wrote the opinion striking down the clause as unconstitutionally vague. The rule of law is indeed a law of rules, as thousands of criminal defendants have come to appreciate.

Justice Scalia not only took seriously the Constitution’s many criminal procedure protections. He also respected venerable canons of statutory construction that protected liberty. Exhibit A is the rule of lenity, which had no greater advocate on the Court than Justice

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90 *Crawford*, 541 U.S. at 53–54.
That Justice Scalia, whose first stint in public service came in a Republican administration promising law-and-order judges, ended up where he did on so many matters of criminal law shows that he worked to follow his principles where they led him.

No account of Justice Scalia’s contribution to this Court would be complete without mentioning his remarkably clear and vivid writing—qualities praised in the last three Justices to occupy his seat: Justices Jackson, Harlan, and Rehnquist. Scalia’s writing stands out for its lucidity, poignant wit, and succinctness—and the inventive, memorable images sprinkled throughout.

The images were memorable precisely because they captured the substance of the legal point the Justice was making. Surely there was a separation-of-powers problem with the creation of “a sort of junior-varsity Congress,”97 or a deep flaw in a dormant Commerce Clause test that asked judges to divine “whether a particular line is longer than a particular rock is heavy.”98 By the same token, who could argue with his observation that Congress “does not . . . hide elephants in mouseholes,”99 or his injunction that no government has the “authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules”?100 The Justice could cut to the heart of a matter and signal that a colorful opinion was coming just by reframing the question presented: “It ha[s] been rendered the solemn duty of the Supreme Court of the United States . . . to decide What Is Golf.”101 Other opinions would


99 Whitman, 531 U.S. at 468.


send the reader scurrying to the dictionary, though not to Webster’s Third. \(^{102}\) Think of his criticism of large-scale state-run DNA databases: “Perhaps the construction of such a genetic panopticon is wise”—he wanted you to look it up—but he “doubt[ed] that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.” \(^{103}\)

In other cases, his sometimes playful language was aimed at the serious business of moving the Court’s jurisprudence in his preferred direction. Has the *Lemon* test every fully recovered from Justice Scalia’s critique in *Lamb’s Chapel v. Center Moriches Union Free School District*?

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under . . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart . . . , and a sixth has joined an opinion doing so.

The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs “no more than helpful signposts.” Such a docile and useful monster is


worth keeping around, at least in a somnolent state; one never knows when one might need him.104

The lively wit, off-the-beaten-path imagery, and rigorous analysis that mark his opinions are all the more impressive given their quantity. By any measure, including the Harvard Law Review’s opinion count, his output was prodigious. Over 30 years, Justice Scalia authored 870 opinions, including 281 majority (or plurality) opinions. Many of Justice Scalia’s most memorable contributions appear in separate writings. While a number of his 274 dissents are well and widely known, concurring opinions occupied an even larger share of his work. Over three decades, Justice Scalia authored 315 concurrences—the second most of any Justice who joined the Court since the Harvard Law Review began tabulating opinions by author in 1949.

Justice Scalia appreciated that vibrant debate today can lay the foundation for persuading readers tomorrow—himself included. More than once he acknowledged that new and better arguments had persuaded him to alter views he had expressed in prior cases.105 And when an oversight in an earlier case was called to his attention, he confessed error, borrowing a page from Justice Jackson to explain: “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.”106 The North Star to Justice Scalia was getting the reasoning right—an admonition he never ceased to urge on others and never desisted to accept for himself.

While Justice Scalia’s writing frequently leapt off the page, advocates before the Court often confronted his tenacity and wit long before he unsheathed his pen. Before 1986, oral argument in the Court was more disquisition than dialogue. Counsel could lead the Court on a leisurely stroll through the facts, the procedural history, and the argument—interrupted by questions only a handful of times. During then-Assistant Attorney General Scalia’s only argument before the Supreme Court, in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, he faced a total of twelve questions from two justices; the other seven justices said not a word. Scalia won the case. But he took a different approach to the Court’s argument sessions once he arrived on the other side of the bench. He peppered lawyers with questions, sometimes posing thirty or forty in a single argument. If he found an answer unsatisfactory, he pursued the point through short, often flinty-minded, follow-up inquiries. While his approach to oral argument was unique when he joined the Court, that is no longer so. Most members of the Court have embraced an engaged style of questioning, and the advocates appreciate it (most of the time).

Even after Justice Scalia left the academy to start his judicial career, he maintained his connection with the law schools—nearly all of them—by accepting scores of invitations over the years to speak with students and professors. In one sense, he never left teaching; his classroom just got bigger. He often thought of the audience of his opinions as today’s and tomorrow’s law students, and relished opportunities to talk to students about his theories of judging and about the many useful ways to use a law degree.

Justice Scalia’s productivity and many contributions to the law could leave the misimpression that he left little time for anything else—that he was all work and no play. Only someone who did not know him could make that mistake. This son of Trenton and Queens became an avid hunter and fisherman, both of which allowed him to see and experience the Nation’s breadth and diversity. He and Maureen looked forward to their annual visits to the Fifth Circuit, where he was the Circuit Justice, each year giving the “duck call

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award” to district court judges reversed by the Fifth Circuit only to be vindicated by the Supreme Court. He relished meals with friends, colleagues, and law clerks, often at the late but much-beloved A.V. Ristorante, replete with anchovy pizza and an occasional glass of red wine. He was an ever-present mentor to his many law clerks, often traveling to their cities to speak at local events, always taking time to give career advice. He found a way despite his many other commitments to write several books.\textsuperscript{108} He took time to indulge his love of music, even appearing with one of his “best buddies,” Justice Ginsburg, in a local opera production.\textsuperscript{109} And of course he was deeply devoted to his large and remarkably close family. Stories about family trips were a staple of Chambers conversations, including descriptions of summer trips to “Nag’s End,” the North Carolina beach house that Maureen named in honor of her own years of indefatigable advocacy. He loved to tell the story of his grandson, who, when told at a young age that his grandfather worked at the Supreme Court, exclaimed proudly, “Pop-Pop is the Court Jester.” Through it all, the Justice did everything in his brim-filled life with unstinting vigor, curiosity, engagement, and a twinkle in his eye.

As Justice Scalia once observed, “[w]hen participating in programs such as this, consisting of brief memorial tributes, one sometimes fears that he will paint a portrait of his departed friend that others will not recognize—that perhaps he saw or thought he saw colorations of character or personality that others did not; rose where they saw pink, or violet where they saw purple.” As was true of the colleague Justice Scalia was honoring then, “[t]hat is not a problem when one stands up to talk about” Antonin Scalia: “His colors were bright, and they neither changed nor were ever dissembled.”\textsuperscript{110}


\textsuperscript{109} Statement of Justice Ruth Bader Ginsburg, Supreme Court of the United States (Feb. 15, 2016), https://www.supremecourt.gov/publicinfo/press/press releases/pr_02-14-16; see also Piers Morgan, supra note 5.

ry ing on our tradition dating to the days of Chief Justice Marshall, it is accordingly:

RESOLVED that we, the members of the Bar of the Supreme Court of the United States, express our deepest respect for the late Justice Antonin Scalia; our loss at his passing from this life; our admiration for his commitment to the Nation, its charter, and this Court; and our enduring gratitude for the example he set in his life both within and beyond the law; and we have further

RESOLVED that the Acting Solicitor General be asked to present these resolutions to the Court, and that the Attorney General be asked to move that they be inscribed upon the permanent records of the Court.

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\[\text{35 U.S. (10 Pet.) vii, viii (1836).} \]