

**REMARKS BY
THE HONORABLE J. MICHAEL LUTTIG
IN TRIBUTE TO
ASSOCIATE JUSTICE ANTONIN SCALIA
NEW YORK UNIVERSITY SCHOOL OF LAW
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Things as they are in political Washington these days, I was urged by friends to begin this afternoon by *denying* any friendship with our honoree. At the very least, I was told, do not concede any such thing. This is not a man, they reminded, who moves about in camouflage—save, of course, when he is with the Vice President.

Well, with my customary pliancy to politics, I will respond to this well-intentioned injunction in this way: I *do* deny that Justice Scalia is a friend of mine. He is not. He is one of my closest friends.

For those who demand fealty to politics, I do, however, offer up this renunciation. At least where matters of law are concerned, it is no more comfortable being Justice Scalia's friend than it must be being his foe. The friend who is fool is suffered no more gladly than the fool who is not. Lest you doubt, consider these missives, the like of which his friends—not his enemies, his *friends*—risk receiving from him on any day of the week.

Dear Mike: I have just read your first opinion. Looks like a summary reversal to me. Sincerely, Antonin Scalia.

Dear Mike: It occurred to me, as I read several of your more recent opinions, that you must not have access to the United States Reports. Please be advised that I have made arrangements with the Marshal here at the Court for you to have 24-hour access to our library for purposes of reading our opinions, by which, incidentally, as an *inferior* court judge, you are bound. Sincerely, Antonin Scalia.

Dear Mike: As should be apparent from this week's unanimous reversal of your court, I cannot even fathom how one could reasonably take the position that you did. Had it not been for your precipitate telephone call chastising me, I would have been prepared to believe that even you understood that such a

holding was indefensible and had voted to concur only because you believed yourself bound by prior circuit precedent. Sincerely, Antonin Scalia.

Now, as the last of these attests, I cannot represent that each of these letters was written by him without any provocation whatsoever from me; I have not been able to resist all of his influence. Still, from anyone but him I would be quite disinclined to take such thinly veiled ad hominem “sitting down,” as the saying goes. So, as I prepared my remarks for this afternoon, I began finally, after all these years, to ask myself “just why *do* I take the likes of this from this man? Who is he? And by what measures does he have the right, or as I am sure he might correct me, the ‘standing,’ to roam at large with such insufferable comments?” Well, the answers, frankly, are these.

This jurist to whom we pay tribute today truly is a man of immense intellect. Dazzling intellect, even. On this aspect of him, there is apparent consensus. Indeed, he perhaps has no equal in all of the Supreme Court’s history. He sees clearly what others see only dimly, when they see at all. That which eludes the rest of us, somehow is always within *his* grasp. The intractable is, to him, the simple; he can resolve the most vexing of conundrums, disentangle the most entangled of analytical threads, and unknot the hardest conceptual knots. For him, the impenetrable is penetrable, and effortless—or so it seems.

Like no other, he is able to reach into a case, seize its essence from among all the distractions, understand not only its doctrinal implications, but also its systemic implications (this latter I might add despite what would be for most a crippling disability—his academic bent) and he can reason to resolution with a facility and pellucidity seldom witnessed.

What is more, this most exquisite of intellects does not exist within our honoree unalloyed. As if to punctuate the point, to him was also portioned the even rarer gift that is often withheld from those of vast intellect: he is able to impart through the written word all that even his brilliant mind can conjure.

In words like those of no other who has taken seat on the High Court does this man speak. His words bring law to life, as they bring life to law. His words persuade or critique, they excite or incite, they please or anger, or they comfort or agitate—*all* upon command. There is neither idea nor emotion that he cannot capture and commit to page—and with perfect clarity. So complete

and honed is his pencraft that, for him, if it is within life, it is within the reach of his composition.

The fusion of these twin gifts, it should come as no surprise, produces a yield worthy indeed. When in the form of opinion, it defies refutation. Upon his pages, the question to be resolved leaps out in edifying relief; the law is captured masterfully replete with all of its texture and nuance; the analysis is developed both flawlessly and pungently; and the dictates of the law appear, suddenly, as if all along self-evident. So utterly powerful is the prose that issues from his pen that one is discouraged from rejoinder, if not even from attempt. In fact, often are those who oppose him relegated to empty observation of unexplained disagreement, if this. By even those who believe themselves in disagreement, it is wondered as often as not just how it is possible to come to a conclusion different than his.

For this man, every opinion, whether ordinary or landmark, is a performance virtuoso.

Many learn of the results decreed by the tribunal of which he is a member, but only infrequently are its opinions pored over for their insight, for their illumination, or for their mastery—that is, with one exception.

But yet, to conclude that his power derives wholly, or even in large part, from these conjoined gifts—as considerable as they are—would be not only to misunderstand, but also to underestimate, this jurist. Such power as his cannot be of the mind; certainly it cannot be of the mind alone. *And it is not.* His power comes from deeper within. If you wish to know this man, put down his résumé, and seek him there.

There is where you will find the profundities of the jurist—his inextinguishable passion, his utter commitment to principle, his unyielding conviction as to right, and his unsubduable courage to testify to all that he believes, even when to do so comes, as it emphatically has, at unthinkable price to person. *These* constitute the man. His intellectual ideas have the centrifugal force that they do because they are powered by these constituents of the spiritual.

Equipped thus, did our honoree ascend to the Highest Court now two decades ago, passionately possessed of a view of law and of the role of the judiciary in the constitutional order that far surpassed in refinement that of all but a handful of those who had come before him, if that. This was a man neither jurisprudentially neophytic nor jurisprudentially adrift. His was an already-steadfast belief that, while law is of man, it partakes of the sacred, and therefore must not be subject to the whim of man; that, as guardians of

that law, jurists are not to act out their own will in their decisions, but rather, they are to give effect to the will of those for whom they but hold power in trust. And disarmingly, he arrived fully prepared to live, himself, in accordance with the principles by which he proposed that others live. He would be first, he promised, to refuse to drink from the cup of power that recognizes no limits.

Predictable it was, then, in retrospect, that this man's eloquent expression and spirited defense of his pure principles would soon command the attention of his brethren. And so it happened. And as their attention was turned, a conversation was begun, a conversation which, had it not begun at his invitation, may never have begun at all. A conversation that forced consideration of views held but considered little and *re*consideration of views much considered but regarded as fixed.

And what followed has been the dramatic alteration of the entire landscape of law.

The alterations have not always been the particular ones that he has sought, and for which at times he has even implored. They have not always been even in the direction he has counseled. But they have invariably borne his imprint. Where he has not won the debate, he has defined its terms, and *thereby* affected its outcome. Where he has been unable to achieve the particular change he sought, he has nonetheless wrought change from what had been and from what might have been. It would be fair to say that no area of the law has been spared his influence, be it statutory or constitutional.

Perhaps even more significant, though, is the impact that he has had on the judicial mindset, which both precedes and transcends the decision of individual disputes. That which, once affected, will dictate into the future the eventual course of law. Here, he has opened judicial minds to the troubling paradox that courts themselves chafe at rules that prevent them from working their personal will, and thus in truth are only uncomfortably guardians of a rule of law. He has forced into the judicial consciousness that courts are as susceptible to hypocrisy as every other, unwilling to be bound by the rules that even they themselves have fashioned. And as he has reminded the judiciary of the source of its power, and thereby reminded it of the limitations that it accepted by oath, he has impressed upon the judicial conscience not only the constitutional, but the moral necessity, for accountability to those on whose behalf the courts exercise their derivative power.

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If all of these should remain infixed within the judicial mind even for a time, the impact that this man will have had, as the conscience of law, will be disputable by no one.

But, in the end, the most consequential and lasting of our honoree's contributions may well lie far beyond the particulars of any decision, far beyond any doctrinal development within the decided caselaw, and even far beyond the effect that he has had on the collective judicial mind. That contribution is this: for the first time in history, he has, as judicial ombudsman, laid the judicial process open and bare for public scrutiny in a way that none has done before. And in so doing, he has awakened America to the rule of law and to the dangers that the rule of law faces from within that Branch charged foremost with its nurture and protection.

Today, many believe that the Nation is poised to decide nothing less momentous than whether we will or will not have law separate and distinct from politics and judicial whim, or whether the three will become, and, worse, become accepted as, one in the same. If, as a Nation, we *are* finally to confront and openly decide this question of questions, it will be in no small part because our honoree has, through the words that have filled his allotted pages in the United States Reports, ignited its debate. For, when he writes, he writes of nothing less than the definition of law itself and the legitimate role that the judiciary is to play in the preservation of that law.

Antonin Scalia has offered up unequivocal and unapologetic answers to these profound questions, which answers may be accepted or rejected by future generations. He may or may not ultimately be proven prophet. But whether he is or is not, this much will be undeniable: not only will this jurist have been largely, if not wholly, responsible for the fact that these most fundamental of questions that can be asked in a democracy were finally asked at all. But as a consequence of the principles and convictions to which he has courageously and forcefully given voice, the influence that he will have exerted on the final resolution of these questions will be palpable in every sinew of the process that preceded.

Mr. Justice Scalia, it is high honor to join in this tribute to you and to the contributions that you have made to law through your singular devotion to the Constitution. As trying at times as it is for one, like myself, who has remained within your impressive sphere, it is a privilege to have been first, your hapless law clerk, and then,

your friend, along your inspirational journey. May you continue to serve with the same distinction that has marked your service for the past two decades on the Supreme Court of the United States.