Antonin Scalia: Shades of Things to Come

Editor's Note: The following remarks were delivered by Dean Gerhard Casper at the investiture of former Law School professor Antonin Scalia as a Judge of the United States Court of Appeals for the District of Columbia Circuit, on September 30, 1982. While in important respects these remarks have been overtaken by history, they are nevertheless reprinted here in their entirety for those among our readers who would like to learn what the Dean had to say about Justice Scalia before he was elevated to his present, even more august position of Associate Justice of the Supreme Court.

What do Judges Scalia, Mikva, and Bork have in common? When I became Dean in 1979, I of course looked for things which needed improvement. One deficiency that immediately caught my eye was the Law School’s underrepresentation on this Court with its very special place in the American legal system. I thought it was important for us to acquire at least a minority interest. Do not ask me how the appointments of our graduates Mikva and Bork and our faculty member Scalia were accomplished. My political influence is nonexistent; my resort to prayer must have fallen on equally deaf ears. Nor could I afford expensive lawyers for a proxy fight. But there they are. I am now utterly baffled by my next challenge—indeed, I think I have to admit defeat already. Just as with my faculty, each of these three judges is committed to his own opinions. I am afraid there is no way I can get them to vote their shares in unison.

Especially the lawyers in the audience will want to learn more about Judge Scalia, though he is, of course, known in town through his prior service with the government as General Counsel of the Office of Telecommunications Policy, as chairman of the Administrative Conference of the United States, and as head of the Office of Legal Counsel at the Department of Justice. To what influences was he exposed in Chicago? The task of conveying something about his Chicago experiences is a delicate one under the circumstances. You will forgive me, therefore, for speaking somewhat obscurely and indirectly.

Before Judge Scalia’s appointment to this Court, the highest position ever achieved by a member of our faculty—obviously, not counting the office of Attorney General—had been that of Pope—but only in fiction. Walter Murphy’s bestselling novel, The Vicar of Christ, describes the unlikely career of a lawyer who made it up from war hero to law professor, down to dean of a law school, up to Chief Justice of the United States, down to Trappist monk and, finally, up to Pope. As those of us who are faced with mid-life crises wonder about professional opportunities and role models, this novel provides all of us with food for thought—and hope.

You may have guessed by now that the crucial episode on the way to Rome that did more for preparing the future Pope than any of his other activities was not Washington but his service as a law professor at the University of Chicago. The hero’s name is Walsh. I quote:

Well, I confess to having had a certain preformed opinion about Walsh, but when I met him I was not unfavorably impressed, not favorably at all. I had not then realized that he had been an associate professor of law at the University of Chicago. Still, it was not lacking in congruence. Like the institution itself, he was bright, quick, and intellectually just a bit raw for more cultivated eastern tastes. He always wanted

While his new position certainly makes him a supreme pontiff of the secular, American kind, I express no opinion on the question whether Justice Scalia has now become “papabile”—a potential pope. The pool of candidates is large. While the press has made much of the fact that Justice Scalia is a Roman Catholic, as a former student of the Canon Law, I should like to point out that there is no legal requirement that popes, at the time of their election, be priests, or, for that matter, Catholics. (Dean’s footnote.)
to leap and tear the throat out of a problem. He took no aesthetic pleasure in measuring a problem and living with it for a time before deciding whether it was even desirable to try to slay it. In short, he was more quick than wise. He never appreciated the comfort that a worthy enemy could provide. That and a certain lack of judicial humility were his most obvious flaws as a jurist.4

Well, this characterization is not unhelpful, provided you take each of its elements and stand it on its head to account for the author’s obvious East Coast bias. Once you have done that, you get an especially accurate sense of Nino Scalia: intellectually refined, he takes great aesthetic pleasure in measuring a problem. Both wise and quick, he has always appreciated the comfort that a worthy enemy can provide. As for judicial humility—well, it will come, as it reputedly always does, with the judicial robes.

There is another recent novel which addresses the same issue. Its authenticity is indisputably greater since it was written by our faculty colleague Saul Bellow. In The Dean’s December the question is raised why its protagonist, Cord, became a professor in Chicago. “Why a college, and why here?” his sisters inquired. He couldn’t really answer, but he did say, “For me it’s more like the front lines. Here is where the action is.” Cord’s sister was not satisfied with the answer and thus repeated her question. “What advantage do you see here?” I quote Cord’s answer: “There’s the big advantage of backwardness. By the time the latest ideas reach Chicago, they’re worn thin and easy to see through. You don’t have to bother with them and it saves lots of trouble.”5

This suggests that Nino was attracted to Chicago because being a professor there is efficient. This particular efficiency consideration aside, I hasten to add that the burden of integrating law and economics will rest more on the shoulders of a former Yale Law School Professor here6 and on those of a new Judge on the Court of Appeals for the Seventh Circuit7 than on this newest addition to your court.

Nino has been a magnificent friend and colleague—thoughtful, straightforward and honest, and exceptionally probing in his discussion of legal matters. You should know that he possesses a highly developed sense of the absurd, especially when it comes to discovering unintended consequences of regulatory reform—a field of which he is a master. We shall miss his critical perceptivity now that he has been “elevated” from the chair to the bench. In compensation, those of us who are left behind below may sit back and wonder about how Judge Scalia will adjust from one role to the other. For instance...  

In his capacity as a dispassionate academic critic of the courts, Professor Scalia, in 1978, wrote a much-cited Supreme Court Review article on Vermont Yankee in which he criticized both this Court of Appeals and the Supreme Court.8 We all remember Vermont Yankee, of course, as the case in which Justice Rehnquist, speaking for a unanimous Court, expressed a distaste for “Monday morning quarterbacking” in football. At the time and in his article, Professor Scalia suggested that it would be interesting to see “what further steps the Supreme Court may take to bring the D.C. Circuit into line.” Quite interesting, I should say, and perhaps a little more so now that our former colleague has become a member of the court which is responsible for the vast majority of significant administrative law de-

5Saul Bellow, The Dean’s December, p. 133–34.
6The Dean’s reference must be to Judge Bork.
7Appeals for the Seventh Circuit
decisions." In Judge Scalia's interest, I hope it will continue to be so responsible for a long time, current efforts in the Congress to the contrary notwithstanding.

Permit me to say a word about what used to be Nino's and still is my favorite pastime—criticism of the courts. I am increasingly unhappy about the state of the art. There was a time, not too long ago, when it was considered respectable and valuable for lawyers to sit down and do a painstakingly detailed analysis of a single decision—examine the validity of its reasoning, ponder its implications. Nino's Vermont Yankee article is an elegant example. Without having studied the subject empirically, I have a sense that the genre is increasingly disfavored—disfavored even by authors of law review comments. Its place seems to be taken by more speculative essays which seem less interested in understanding than in the approval or disapproval of outcomes. In this world view, the courts are filled with heroes and villains rather than with professionals to whose professional performance we apply professional standards above everything else. In recent years various tendencies have combined to strengthen further the notion that law is essentially an empty vessel into which we pour, and therefore may pour, almost anything. The indisputable ambiguity of law seems to make the laborious task of immersing ourselves in judicial opinions and their institutional background a futile, and therefore dispensable, undertaking.

The responsibility for this development lies mostly with certain trends in legal education—some of them not unpraiseworthy in their intent. Other developments may also have contributed. As the impression spreads that judicial opinions are not infrequently put together in the manner of congressional committee reports accompanying legislative bills, incentives to treat them as anything more than political scorecards decrease. Some, indeed, read like scorecards, especially those that divide opinions into discrete parts which individual judges join or leave alone as their individual views seem to dictate.

My colleague Frank Easterbrook, in a recent Harvard Law Review article, viewed this development as inevitable and chided critics of excessive division as being naive or misleading about the world of judicial decision-making. I am not so sure about this. I think the public has a fair claim that the law of the land be articulated not only in a well reasoned and clear manner but also with an eye to integration of differences. For better or worse, it is a function of law, especially in the United States, to define both descriptively and prescriptively what we are all about. This is not to say, of course, that dissent, even dissent within majorities, should be avoided at all costs.

Be that as it may, academic critics of the courts and the law should be fair and clear about the point where their own preferences come into play. Neither law nor its history can be infinitely manipulated to suit our own views. "Subjectivity does not mean that anything goes."

From its inception in 1960, the Supreme Court Review has carried on its front page a quotation from Judge Learned Hand which I may be permitted to quote: "While it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. . . . Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand them."

I promise Judge Scalia that we shall attempt to criticize and praise his opinions in an uninhibited, robust, wide-open, dispassionate and understanding way. We can only hope that he will receive equally candid treatment from other academics and from his new colleagues on the various benches that make up the federal judicial system.

We wish him well and Godspeed in his new ventures—so important to our present and our future.

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"The statement "my colleague" is still technically correct because the judge is a Senior Lecturer at the Law School. At Frank Easterbrook’s investiture as a Judge for the United States Court of Appeals for the Seventh Circuit, in April of 1985, Dean Casper said the following:

"I am most grateful for this opportunity to dispel a nasty rumor. As you may recall, Judge Posner of this court served as the first Lee and Brenna Freeman Professor of Law at the University of Chicago at the time the President of the United States chose him to fill a vacant seat on this bench. Last year I recommended to the President of the University the appointment of Frank Easterbrook to fill the chair vacated by Judge Posner. This caused immediate speculation on the Midway that I was trying to have Professor Easterbrook appointed to this court, or, to put it less delicately, that I was trying to get rid of him. A moment's reflection will show how unjust this speculation was.

Following Judge Posner's appointment, nobody could have reasonably believed that the Freeman professorship, while not a necessary condition, was a sufficient one for appointment to the federal bench. Now, of course, there exists a strong statistical correlation since, as of today, all incumbents of that chair have been made federal judges. I have been told that journalists and colleagues at the Law School are paying close attention to my next move—the former with curiosity, the latter with a mix of expectation and apprehension. They are wasting their time. Contrary to what some people believe in light of the recent elevation to the federal appellate bench of Professors Posner, Scalia, and now, Easterbrook, there is no reason to call for the impeachment of President Reagan. At least as far as I know, it is not true that the President has unconstitutionally delegated part of his power of appointment to the law faculty of the University of Chicago."