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JUSTICE SAMUEL ALITO

A Tribute to Justice Scalia

For three decades, it was impossible to think of the Supreme Court without thinking of Antonin Scalia. On the night of February 12-13, 2016, Justice Scalia died, but he will long be remembered.

For those of us who had the privilege of knowing Nino, as we called him, what will come to mind first are his human qualities. He was a delightful friend and colleague. He had a big personality; I think he filled every room he entered. He was charming, engaging, voluble, learned, witty, impatient, and nearly always very frank. On every occasion when the Court has met since his death, his absence has been palpable. The Justices have a tradition of toasting each colleague's birthday with a song. Nino had a fine voice, and he always led the singing. Since his departure, we have been out of tune.

Both within the Court and on the outside, Nino will be remembered for changing the way the Supreme Court works. His effect on oral argument was profound and almost immediate. When I was arguing cases in the Supreme Court just prior to Nino's arrival, many of the Justices asked few questions, but with Nino on the bench, oral argument was transformed. After a two-week argument session during his first term, a journalist counted up the total number of questions asked by each Justice. Nino, the most junior Justice, had asked 126 questions, more than 30 percent of the total. By contrast, Justice Blackmun had asked eleven questions, Justice Powell one, and Justice Brennan zero.¹ Today, there are so many questions that it is sometimes hard to get one in.

Nino also changed the tenor of our proceedings. Oral argument became a contact sport. Ever the professor, he approached oral argument like an old-time practitioner of the Socratic art. Every attorney who appeared before the Court could expect a sweat-inducing workout.

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1. Stephen J. Adler, *Scalia's Court*, *AM. LAW.*, March 1987, at 18.

On the bench, Nino was formidable, but he was also entertaining. The Court reporters who prepare transcripts of our arguments include a note whenever the audience laughs, and every once in a while, someone counts up the number of times each Justice induces audience laughter. These surveys invariably identified Nino as the funniest Justice.

Nino also introduced a new opinion-writing style—sharper, cleaner prose, laced with memorable phrases. His majority opinions were lucid and to-the-point, but his distinctive voice emerges most clearly in his separate opinions, where he did not need to accommodate anybody else’s preferences. These writings featured a very New York, in-your-face attitude. They are fun to read—unless you are the target of his criticism.

I got a taste of this during my first full term on the Court in a case called *Hein v. Freedom from Religion Foundation*.² The case involved the issue of taxpayer standing to raise an Establishment Clause claim. Taxpayers generally do not have standing to challenge the constitutionality of government programs,³ but in *Flast v. Cohen*⁴ the Court held that taxpayers do have standing to raise Establishment Clause claims. Assigned to write for the Court, I drafted an opinion that I hoped would hold five votes. The opinion distinguished but did not overrule *Flast*.

Nino cared a lot about standing and thought that *Flast* was indefensible,⁵ so he refused to join my opinion and aimed a withering fusillade at the plurality.⁶ My attempt to distinguish *Flast*, he thundered, was “utterly meaningless,” inconsistent with the “rule of law,” “[un]principled,” and “[in]sane.”⁷ I knew the comments were not personal. That was just Nino’s way. He did not pull his punches, and he was unwilling to compromise his principles in order to rack up wins.⁸

None of us now on the Court writes quite like Nino, and I doubt that we could if we tried. But it is easy to see Nino’s influence in our opinions and in those of lower court judges. In this and many other ways, Nino left his mark.

Although Nino’s impact on the inner workings of the Court is important, his greatest contributions by far go to the central question for all members of

2. 551 U.S. 587 (2007).

3. See *id.*, at 599; *Frothingham v. Massachusetts*, 262 U.S. 447 (1923); *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

4. 392 U.S. 83 (1968).

5. See *Hein*, 551 U.S. at 618 (Scalia, J., concurring in the judgment).

6. *Id.* at 631.

7. *Id.* at 618, 628.

8. See William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 GEO. WASH. L. REV. 1601 (2012).

the federal judiciary: What is our proper role under our Constitution? Nino had clear answers. He was, in my view, the most theoretical Justice ever to sit on the Supreme Court. He had well-thought-out theories about statutory and constitutional interpretation, and he stuck to them.

As is well known, Nino's theory of statutory interpretation was textualism. He tirelessly preached that a statute should be read to mean what its words would convey to an ordinary reader. The intent of those who wrote the words or voted for the law and the so-called purpose of the law are irrelevant. And in Nino's book, legislative history was worse than useless; it was anathema.

With Nino on the bench, savvy Supreme Court advocates either side-stepped any reference to legislative history or mentioned it very delicately. A tried and true circumlocution went like this: "For those who find legislative history helpful, I note . . ." Every now and then, however, an attorney, exhibiting either boldness or naiveté, would plunge right in and stress the importance of a passage in a committee report or some even less exalted form of legislative history. And then the show would begin. Nino would lean forward and challenge the attorney: "Did the House or Senate vote on that report? Did the President sign it?" Now that Nino is gone, when an attorney points to legislative history, I instinctively expect the old fireworks – but nothing happens.

Nino is no longer with us to lead the textualist campaign, but his influence is still felt. During his time on the bench, this theory had an enormous influence on the federal courts. To appreciate this, it is helpful to call to mind where things once stood. As Nino recounted in his book, *A Matter of Interpretation*, there was a time not long ago when the subject of statutory interpretation was sorely neglected.⁹ Law schools did not teach the subject, and scholars had little interest in the field.¹⁰ The canons of interpretation were scorned.¹¹ Legislative intent, as shown by legislative history, and legislative purpose figured prominently in Supreme Court decisions.

Here are two (admittedly extreme) examples. In 1971, in a case called *Citizens To Preserve Overton Park, Inc. v. Volpe*,¹² the Supreme Court wrote that because the legislative history was unclear it would look to the text of the law. That same year, in *Griggs v. Duke Power Company*,¹³ a landmark decision inter-

9. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14-15 (Amy Gutmann ed., 1997).

10. *Id.*

11. *Id.* at 25-27.

12. 401 U.S. 402, 412 n.29 (1971) ("The legislative history of [the statutes at issue] is ambiguous Because of this ambiguity, it is clear that we must look primarily to the statutes themselves to find the legislative intent.").

13. 401 U.S. 424 (1971).

preting a provision of Title VII of the Civil Rights Act of 1964, the Court's opinion does not even mention what the statute says, much less explain how it supports or can be reconciled with the Court's interpretation.¹⁴

With Nino carrying the textualist flag, the federal courts' approach to statutory interpretation has changed dramatically. Textualism has won, if not universal acceptance, at least the pole position among the competitors. For now, no federal court is likely to do what the Supreme Court did in *Overton Park* or *Griggs*.

Nino's originalist theory of constitutional interpretation has also been influential. If nothing else, it has stimulated deeper thinking about how judges should interpret the Constitution. Laurence Tribe has written that we are all originalists now.¹⁵ And there is a sense in which that is true, although I am sure that Nino regarded some of the new varieties as imposters.

The big questions that Nino tackled will never be settled, and it is impossible to say how his theories will fare in the years ahead or how his work will be assessed. Hostile critics in academia and the media savaged Nino during his lifetime, and I am sure that efforts to undo his influence will continue. Some will take up the familiar strategy of impugning his character. Others will portray him as a colorful and amusing but out-of-touch figure. I am sure that Nino foresaw this, but he was unaffected. He once told an audience to "pray for the courage to endure the scorn of the sophisticated world."¹⁶ He had that all-too-rare courage.

Nino was one of a kind, a never before seen combination of scholar, proselytizer, pugilist, and *primo uomo*. He is sorely missed.

14. The text of the relevant provision, 42 U.S.C. § 2000e-2, is reproduced in a footnote in the opinion of the Court, but the Court says nothing about its terms. *Id.* at 426 n.1.

15. Laurence H. Tribe, Comment, *in* SCALIA, *supra* note 9, at 67 (paraphrasing the views of Ronald Dworkin).

16. Arthur Jones, *Scalia Defends Christian Beliefs*, NAT'L CATH. REP., Apr. 26, 1996, at 6.