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“SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED”

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Kentucky Bar Association

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THE PRESENTERS

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SCALIA SPEAKS – FOREWORD

Justice Ruth Bader Ginsburg

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I first met Antonin Scalia when he served on the faculty of the University of Chicago's School of Law. He was in Washington, D.C., to deliver a lecture on an issue generating controversy among scholars of administrative law, a field in which then-Professor Scalia was a widely recognized leader. I disagreed, in considerable part, with the substance of his presentation, but his acumen, affability, and high spirits captivated me.

When Professor Scalia was appointed to the United States Court of Appeals for the D.C. Circuit in 1982, the court on which I had served since 1980, I joined my colleagues in welcoming him with delight. He brought his large family to the immediate pre-formal investiture oath taking, a ceremony needed to place him on the federal judiciary's payroll. I recall being uncertain whether Maureen Scalia was his wife or eldest daughter. He held his partner in life in highest esteem and often referred to her as Maureen, the beautiful. A 1960 Radcliffe graduate, Maureen was super smart, also master of the arts of raising children, managing social calendars, sewing haute couture clothes, and gourmet cooking. She and my husband, Supreme Chef Marty Ginsburg,* were most popular co-caterers of the Supreme Court spouses' quarterly gatherings for lunch in the Natalie Cornell Rehnquist Dining Room (until the addition of two male spouses, the Ladies Dining Room).

My friendship with Judge, later Justice, Scalia was sometimes regarded as puzzling, because we followed distinctly different approaches to the interpretation of legal texts. But in our years together on the D.C. Circuit, there was nothing strange about our fondness for each other. Best friend of our chief judge, J. Skelly Wright, was Circuit Judge Edward A. Tamm. Wright had served as a federal district court judge in New Orleans endeavoring, against massive resistance, to enforce desegregation in education and public transportation. Ed Tamm had been second in command to J. Edgar Hoover at the FBI. Wright was a registered Democrat, Tamm, a registered Republican. Yet the two were so close, they even shopped for clothes together. So it did not seem unusual that my closest D.C. Circuit colleagues were Carter appointee Harry Edward and Reagan appointees Robert Bork and Antonin Scalia.

Justice Scalia was known for opinions of uncommon clarity and inimitable style, writings that did not disguise his view of the opposing side. Yet, as he put it, he attacked ideas, not people. He was a well-schooled grammarian. Now and then he would call me, or stop by my chambers, to point out a slip I had made in an opinion draft. He did this, resisting circulation of a memorandum, copies to other justices, that might embarrass me. When we disagreed, my final opinion was always clearer and more convincing than my initial circulation. Justice Scalia homed in on all the soft spots, energizing me to strengthen my presentation.

Unlike my dear colleague Elena Kagan, I never sought to join Justice Scalia on his hunting adventures. But we several times traveled abroad together for exchanges with judges and lawyers in other lands. During a visit to India in 1994, I learned of his skill as a shopper. On a day free from judicial interchanges, our driver took us to his friend's coffee shop in

* See Associate Spouses in Memoriam, *Chef Supreme: Martin Ginsburg* (Supreme Court Historical Society 2011).

Agra. One rug after another was tossed onto the floor, leaving me without a clue which to choose. Justice Scalia pointed to one he thought Maureen would like for their beach house in North Carolina. I picked the same design in a different color. It has worn very well.

We shared a passion for opera and were twice supernumeraries at the Washington National Opera. Talented composer, librettist, pianist, and lawyer Derrick Wang wrote a comic opera titled *Scalia/Ginsburg*, which has been performed, in full or in part, in various venues. In his preface to the published libretto,* Justice Scalia described as a high point in his life a spring 2009 evening at the Washington National Opera's Ball held at the British Ambassador's Residence. In an elegant and spacious room, Justice Scalia joined two professional tenors at the piano for a medley of songs. He called it the famous Three Tenors performance. Both on and off the bench, Justice Scalia was a convivial, exuberant performer.

Most of all, I prized the rare talent Justice Scalia possessed for making even the most sober judge smile. When we sat side by side on the D.C. Circuit, I occasionally pinched myself hard to avoid uncontrollable laughter in response to one of his quips. On the Supreme Court, where we were separated by a few seats, notes he sent my way elicited a similar reaction.

This collection of speeches and writing captures the mind, heart, and faith of a justice who has left an indelible stamp on the Supreme Court's jurisprudence and on the teaching and practice of law. The work of his fine hand will both inspire and challenge legions of judges and advocates. If our friendship encourages others to appreciate that some very good people have ideas with which we disagree, and that, despite differences, people of goodwill can pull together for the well-being of the institutions we serve and our country, I will be overjoyed, as I am confident Justice Scalia would be.

*Ruth Bader Ginsburg
Associate Justice
Supreme Court of the United States
July 2017*

* The libretto, as originally written, appears in 38 *Columbia Journal of Law & the Arts* 237 (2015).

REVIEW: THE JUSTICE ON HIS SOAPBOX

John F. Duffy

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Lawyers, professors, law students and even nonlawyers love to read the legal opinions of Supreme Court Justice Antonin Scalia, not only for their clarity and precision but also for their honesty, candor and, quite often, entertaining wit. During his tenure from September 1986 to his death in February 2016, Scalia was also the court's strongest advocate for textualism and originalism, legal principles demanding that the text and its original meaning control the interpretation of statutes and the Constitution. That unflagging commitment to principle, even more than his talent for finding the right words, made Scalia one of the greatest and most influential justices of our era.

Scalia's brilliant writing and commitment to principle permeate "Scalia Speaks: Reflections on Law, Faith, and Life Well Lived," a collection of speeches co-edited by his son Christopher and his former law clerk Edward Whelan. The book supplies what Scalia's judicial opinions could not: insight into the more fundamental set of principles that guided the man's entire life. The speeches are divided into six sections, only one of which is devoted to the law. But it is the five other sections that are the most illuminating. Here we learn Scalia's outlook on, among other things, character, friendship, education, sports, political philosophy and faith.

Scalia had a deep appreciation of moral character, a central subject in numerous speeches. It is the reason he considered "morality" and "moral formation" essential to civic and higher education. It is a lesson he drew from the Holocaust (the topic of an entire speech): that without firm commitment to "uncompromisable standards of human conduct," such as the fundamental Christian teaching that, "it is wrong to hate anyone," even the "most educated, most progressive, most cultured countries in the world" can commit unspeakable horrors. And it is the reason why he chose George Washington, a recurrent figure in the speeches, as his favorite founder.

That choice may seem surprising for someone who himself prized intellect and good writing. Why not Thomas Jefferson, the author of the Declaration of Independence and founder of the University of Virginia, where Scalia started his teaching career? Or James Madison, a co-author of "The Federalist Papers" and an icon of the modern right, whose silhouette adorns the seal of the conservative Federalist Society? Or Alexander Hamilton, another "Federalist" co-author, who has always been a hero of Scalia's hometown of New York City? Yet "all those well-published, intellectual geniuses looked up to, deferred to, stood in awe of, George Washington," Scalia notes. Washington's "honor," "constancy" and "steady determination" made him a "man who be believed, trusted, counted on." He became the indispensable man because his very "force of character" pulled together a bickering group of intellectuals for a single great cause.

Underlying Scalia's appreciation of moral character was his faith in God. It formed an essential part of his views on higher education and became a wellspring for his courage to be "different" and "to go against the world." It was even why, in part, he liked turkey hunting, which afforded him quiet time alone, out in the woods, where "you can pray to the Creator." "Scalia Speaks" may not convert any nonbelievers, but it should at least force the worldly wise to confront the truth that one of the great public thinkers of our time was proud to have his "wisdom regarded as stupidity" and to be a "fool for Christ's sake."

Scalia's nonideological friendships, which some have seen as puzzling, were another sign of his faithfulness to greater values. His fast friendship with fellow Justice Ruth Bader Ginsburg, despite their profound political differences, is well-known, and Justice Ginsburg provides a heartfelt foreword to this volume of speeches. Another was with Mary Lawton, a government lawyer virtually unknown outside the Beltway but so personally inspiring that both the the Justice Department and the American Bar Association now confer awards in her honor. When Scalia was appointed to head of the Office of Legal Counsel during the Ford administration, he was warned that Lawton, then a deputy in the office, might be "too ideological, and of the wrong ideology." Yet the two became friends because of her "irrepressible" personality. She was "never a brooder, never a mope." Even her anger was such "an exuberant, hearty, cheerful anger" that "it was more fun to be in the company of an angry Mary than to be in the company of a satisfied and contented someone else." Those are the words of someone who prized transcendent spirit far above politics.

Witty writing runs throughout the book. What's the difference between government and religion? Government's "responsibility is the here, not the hereafter." What advice did Scalia receive when he asked friends what to talk about for his first commencement address? "They all said to talk about...fifteen minutes" And my own personal favorite: What was the country's favorite sport during his youth? "Americans overwhelmingly preferred baseball, a game in which a lot of people stand around while not much happens, to soccer, a game in which people run back and forth furiously while not much happens."

This marvelous book surely will be required reading for anyone seeking to understand the mind of this great jurist and conservative thinker. But I would go further and say that it should be required reading for anyone who wishes to understand the mind of a great American, a figure so important to our history that his passing influenced the presidential election held months later. If "Scalia Speaks" can be said to have one fundamental flaw – one shared with the man's life – it is that it ends too soon.

Mr. Duffy is a professor of law at the University of Virginia. He once served as a law clerk to Justice Scalia.

MORRISON V. OLSON, 487 U.S. 654 (1988)
CASE SYLLABUS

Full opinion available online at <https://supreme.justia.com/cases/federal/us/487/654/>.

***Morrison v. Olson*, 487 U.S. 654 (1988)**

No. 87-1279

Argued April 26, 1988

Decided June 29, 1988

487 U.S. 654

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

This case presents the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978 (Act). It arose when the House Judiciary Committee began an investigation into the Justice Department's role in a controversy between the House and the Environmental Protection Agency (EPA) with regard to the Agency's limited production of certain documents that had been subpoenaed during an earlier House investigation. The Judiciary Committee's Report suggested that an official of the Attorney General's Office (appellee Olson) had given false testimony during the earlier EPA investigation, and that two other officials of that Office (appellees Schmults and Dinkins) had obstructed the EPA investigation by wrongfully withholding certain documents. A copy of the Report was forwarded to the Attorney General with a request, pursuant to the Act, that he seek appointment of an independent counsel to investigate the allegations against appellees. Ultimately, pursuant to the Act's provisions, the Special Division (a special court created by the Act) appointed appellant as independent counsel with respect to Olson only, and gave her jurisdiction to investigate whether Olson's testimony, or any other matter related thereto, violated federal law, and to prosecute any violations. When a dispute arose between independent counsel and the Attorney General, who refused to furnish as "related matters" the Judiciary Committee's allegations against Schmults and Dinkins, the Special Division ruled that its grant of jurisdiction to counsel was broad enough to permit inquiry into whether Olson had conspired with others, including Schmults and Dinkins, to obstruct the EPA investigation. Appellant then caused a grand jury to issue subpoenas on appellees, who moved in Federal District Court to quash the subpoenas, claiming that the Act's independent counsel provisions were unconstitutional and that appellant accordingly had no authority to proceed. The court upheld the Act's constitutionality, denied the motions, and later ordered that appellees be held in contempt for continuing to refuse to comply with the subpoenas. The Court of Appeals reversed, holding that the Act violated the Appointments Clause of the Constitution, Art. II, §2, cl. 2; the limitations of Article III; and the principle of separation of powers by interfering with the President's authority under Article II.

Held:

1. There is no merit to appellant's contention – based on [*Blair v. United States*](#), 250 U. S. 273, which limited the issues that may be raised by a person who has been held in contempt for failure to comply with a grand jury subpoena – that the constitutional issues addressed by the Court of Appeals cannot be raised on this appeal from the District Court's contempt judgment. The Court of Appeals ruled that, because appellant had failed to object to the District Court's consideration of the merits of appellees' constitutional claims, she had waived her opportunity to contend on appeal that *Blair* barred review of those claims. Appellant's contention is not "jurisdictional" in the sense that it cannot be waived by failure to raise it at the proper time and place. Nor is it the sort of claim which would defeat jurisdiction in the District Court by showing that an Article III "Case or Controversy" is lacking. Pp. 487 U. S. 669-670.

2. It does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division. Pp. 487 U. S. 670-677.

(a) Appellant is an "inferior" officer for purposes of the Clause, which – after providing for the appointment of certain federal officials ("principal" officers) by the President with the Senate's advice and consent – states that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Although appellant may not be "subordinate" to the Attorney General (and the President) insofar as, under the Act, she possesses a degree of independent discretion to exercise the powers delegated to her, the fact that the Act authorizes her removal by the Attorney General indicates that she is to some degree "inferior" in rank and authority. Moreover, appellant is empowered by the Act to perform only certain, limited duties, restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. In addition, appellant's office is limited in jurisdiction to that which has been granted by the Special Division pursuant to a request by the Attorney General. Also, appellant's office is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over, the office is terminated, either by counsel herself or by action of the Special Division. Pp. 487 U. S. 670-673.

(b) There is no merit to appellees' argument that, even if appellant is an "inferior" officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch – that is, to make "interbranch appointments." The Clause's language as to "inferior" officers admits of no limitation on interbranch appointments, but instead seems clearly to give Congress significant discretion to determine whether it is "proper" to vest the appointment of, for example, executive officials in the "courts of Law." The Clause's history provides no support for appellees' position. Moreover, Congress was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers, and the most logical place to put the appointing authority was in the Judicial Branch. In light of the Act's provision making the judges of the Special Division ineligible to participate in any matters relating to an independent counsel they have appointed, appointment of independent counsel by that court does not run afoul of the constitutional limitation on "incongruous" interbranch appointments. Pp. 487 U. S. 673-677.

3. The powers vested in the Special Division do not violate Article III, under which executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III. Pp. 487 U. S. 677-685.

(a) There can be no Article III objection to the Special Division's exercise of the power, under the Act, to appoint independent counsel, since the power itself derives from the Appointments Clause, a source of authority for judicial action that is independent of Article III. Moreover, the Division's Appointments Clause powers encompass the power to define the independent counsel's jurisdiction. When, as here, Congress creates a temporary "office," the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place, it may vest the power to define the office's scope in the court as an incident to the appointment of the officer pursuant to the Appointments Clause. However, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's request for the appointment of independent counsel in the particular case. Pp. 487 U. S. 678-679.

(b) Article III does not absolutely prevent Congress from vesting certain miscellaneous powers in the Special Division under the Act. One purpose of the broad prohibition upon the courts' exercise of executive or administrative duties of a nonjudicial nature is to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches. Here, the Division's miscellaneous powers – such as the passive powers to "receive" (but not to act on or specifically approve) various reports from independent counsel or the Attorney General – do not encroach upon the Executive Branch's authority. The Act simply does not give the Division power to "supervise" the independent counsel in the exercise of counsel's investigative or prosecutorial authority. And, the functions that the Division is empowered to perform are not inherently "Executive," but are directly analogous to functions that federal judges perform in other contexts. Pp. 487 U. S. 680-681.

(c) The Special Division's power to terminate an independent counsel's office when counsel's task is completed – although "administrative" to the extent that it requires the Division to monitor the progress of counsel's proceedings and to decide whether counsel's job is "completed" – is not such a significant judicial encroachment upon executive power or upon independent counsel's prosecutorial discretion as to require that the Act be invalidated as inconsistent with Article III. The Act's termination provisions do not give the Division anything approaching the power to remove the counsel while an investigation or court proceeding is still underway -- this power is vested solely in the Attorney General. Pp. 487 U. S. 682-683.

(d) Nor does the Special Division's exercise of the various powers specifically granted to it pose any threat to the impartial and independent federal adjudication of claims within the judicial power of the United States. The Act gives the Division itself no power to review any of the independent counsel's actions or any of the Attorney General's actions with regard to the counsel. Accordingly, there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court. Moreover, the Act prevents the Division's members from participating in

any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that

office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office.

Pp. 487 U. S. 683-685.

4. The Act does not violate separation of powers principles by impermissibly interfering with the functions of the Executive Branch. Pp. 487 U. S. 685-696.

(a) The Act's provision restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, does not impermissibly interfere with the President's exercise of his constitutionally appointed functions. Here, Congress has not attempted to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch. [Bowsher v. Synar](#), 478 U.S. 714; and [Myers v. United States](#), 272 U.S. 52, distinguished. The determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official does not turn on whether or not that official is classified as "purely executive." The analysis contained in this Court's removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. Cf. [Humphrey's Executor v. United States](#), 295 U.S. 602; [Wiener v. United States](#), 357 U. S. 349. Here, the Act's imposition of a "good cause" standard for removal by itself does not unduly trammel on executive authority. The congressional determination to limit the Attorney General's removal power was essential, in Congress' view, to establish the necessary independence of the office of independent counsel. Pp. 487 U. S. 685-693.

(b) The Act, taken as a whole, does not violate the principle of separation of powers by unduly interfering with the Executive Branch's role. This case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit. Other than that, Congress' role under the Act is limited to receiving reports or other information and to oversight of the independent counsel's activities, functions that have been recognized generally as being incidental to the legislative function of Congress. Similarly, the Act does not work any judicial usurpation of properly executive functions. Nor does the Act impermissibly undermine the powers of the Executive Branch, or disrupt the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions. Even though counsel is to some degree "independent" and free from Executive Branch supervision to a greater extent than other federal prosecutors, the Act gives the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties. Pp. 487 U. S. 693-696.

267 U.S.App.D.C. 178, 838 F.2d 476, reversed.

REHNQUIST, C.J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a

dissenting opinion, post, p. 487 U. S. 697. KENNEDY, J., took no part in the consideration or decision of the case.

