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Newsroom

February 15, 2016

A True Original(ist)

In Spring 2008, Justice Antonin Scalia (1936-2016) made an eventful visit to RWU Law as Distinguished Jurist in Residence. Here's what happened.

*This story by Michael M. Bowden originally appeared in the Summer 2008 edition of **Amicus Magazine**, predecessor publication to **RWU Law Magazine**. It is reproduced here in observance of Justice Scalia's passing on Saturday, Feb. 13, 2016.*



A TRUE ORIGINAL(IST)

It started at breakfast. After being glowingly introduced to assembled members of the Rhode Island bench and bar, Justice Antonin Scalia, the iconic conservative anchor of the U.S. Supreme Court for the past two decades, paused, surveyed the assembled luminaries and deadpanned, "I'm tired already."

Tireless might have been a better word. Before the meal was over, the 72-year-old Justice had already ejected a photographer from the room and commenced the drumbeat of two themes he would return to throughout the day: first, that he is an "originalist," a believer that the U.S. Constitution should be interpreted according to the "original intent" of the Framers; and second, that the competing interpretational model of a "living Constitution," evolving with the society it governs, is just so much "nonsense."

Asked by a state judge about the politically superheated state of the Supreme Court confirmation process in recent years, Justice Scalia – who was appointed by President Ronald Reagan in 1986 – replied, “I was predicting it 22 years ago. I said, ‘the Supreme Court is refashioning the Constitution. It has created some new rights and eliminated some old ones.’ And what happened in the interim is that the American people figured it out – that this body of nine people is revising the Constitution from year to year.

“So now they’re asking, ‘Are they going to write the Constitution I want?’ That’s what’s going on. It’s like having a mini constitutional convention every time you select a new justice. It’s crazy.”

‘Scalia’s Handcuffed’



Justice Scalia would expand upon that topic at a public lecture later in the day, but his next order of business was to teach a Constitutional Law II class to a packed house of 2Ls. His lecture began with a discussion of the separation of federal power into three branches of government – “one of my favorite topics,” he said, “because it was one of the Founders’ favorites.”

The former University of Virginia law professor began the lesson in classic Socratic fashion, picking three students at random and asking each to read a passage from the Constitution – respectively, Article I, Section 1 (vesting legislative power in Congress), Article II, Section 1 (vesting executive power in President), and Article III, Section 1 (vesting judicial power in U.S. Supreme Court).

“It’s all in there,” he said when they’d finished. “Lean and mean, the way everything is in there.”

Congress, he said, is supposed to be the “900-pound gorilla who determines how things get done,” while the Court simply determines whether the laws created by Congress minimally satisfy the criteria of the Constitution. But over the past 50 years, he complained, an activist Court has “fiddled” with the Founders’ system of checks and balances, adopting a results-oriented, “whatever-it-takes” approach, creating law rather than interpreting it.

“When the Court fiddles with the Constitution, it does so at *your* risk,” Justice Scalia said. “Whatever it takes’ is great if you want a monarchy. But it is not a good prescription for democratic self-governance. There are some things courts just can’t do. And so be it!”

In a Q & A after the lecture, one student asked the Justice for his views on flag-burning, and he returned to the theme of monarchy vs. self-governance. “I hate people who burn the flag,” he said. “And if I were king, I would not allow it.” Then he stretched his hands out and clasped his wrists together, adding with a wry grin, “But Scalia’s handcuffed. He cannot do all these mean, conservative things to society.”

“The Bill of Rights, you see, is a guarantee against the people,” Justice Scalia continued. “It is a self-limitation of the majority. It says, ‘the majority shall *not* rule’ with regard to, for example, religion or free expression. So one of the most important things I do is telling ‘the people’ to go take a walk.”

Asked by another student about *Bush v. Gore*, the Court’s controversial decision in the presidential election of 2000, Justice Scalia said, “You’re talking as though we were the Apex Court” – a reference to India’s supreme court, which Scalia recently visited and which has the power to summon parties on its own initiative.

“It was Al Gore who wanted to bring that [case] into the courts,” he said, adding that it was proper for the Supreme Court to grant certiorari because otherwise the Florida Supreme Court would have decided the election. He noted that the lingering uncertainty about the voting results had made the U.S. the “laughingstock of the world,” and that “most of the American people” were probably satisfied with the Court’s decision.

Baseball and Bobbleheads



A more personal interlude followed when Scalia entered a smaller classroom to meet with a few dozen leaders of School of Law student groups. The Justice was visibly more relaxed and casual in the intimate

setting, and Dean David Logan coaxed an appreciative laugh when he produced a limited-edition Justice Scalia bobblehead to sit by the actual Justice's side during the session.

One student asked about the Justice's practice in hiring clerks, and Justice Scalia replied that he hires four per year, all from the top-tier schools. Acknowledging that there are "diamonds in the rough at every law school," he said, "all things being equal, I'd rather not have all these spoiled brats from the top-tier law schools – but I can't afford a single dud."

Speaking to another student about his early law career, the Justice said he'd started in Cleveland, Ohio, because – even in those days – big-city, big-firm life was "not a humane existence."

"Life is so much more than that," he said. "You have a responsibility to your family, to your community, to your church. So take my advice, and don't get yourself into a sweatshop" – adding with a smile, "even if you have to go to Cleveland."

Explaining his longstanding objection to allowing cameras in the Supreme Court, Justice Scalia reasoned that "for every one person who would indeed watch our proceedings from gavel to gavel, 100,000 more would see only a 15-second clip on the evening news" – and even that only when the Court heard controversial, socially divisive or otherwise "sexy" cases.

"In fact, the vast majority of what we do is real law – the IRS Code, the Bankruptcy Code, ERISA," the Justice said. "Why should I participate in the miseducation of the American people?"

While admittedly "not much of a sports fan," the Brooklyn-bred jurist said the Yankees are his favorite baseball team. However, he now prefers hunting, which he "learned from the good ol' boys on the Fifth Circuit."

Asked who he'd consider the greatest American, the Justice replied without hesitation, "George Washington. He was not the sharpest pencil in the box intellectually, and he was not even that great a general." Rather, Scalia offered, the first president's legendary charisma must have lain in his "very sound judgment and impeccable character. I would love to have met him."

'Stupid But Constitutional'

After a leisurely lunch with faculty members, the former academic took the podium and acknowledged the emphasis placed on faculty publishing top-quality scholarship at RWU and other law schools. However, he noted, "the influence you have in the classroom is far greater than the influence you have in publication – that's where you're passing on the most."

Soon after, Professor Jared Goldstein asked how it was possible to avoid injecting one's personal values into judicial decisions, notwithstanding the Justice's preference for originalist interpretation.

"It's impossible not to inject your own values *unless* you're an originalist," Scalia replied. "It's easy for an originalist to look at what the Founders meant. But once you depart from that standard and move into what it 'ought to be today' you have to inject your own values. Then you're subjecting yourself to nine unelected judges, nine oligarchs who are going to create the Constitution they think is good for you."

Professor Tim Kuhner asked Justice Scalia's views on the constitutionality of torture, and he replied, "If they decided to notch ears, I'd have to say it's stupid but not unconstitutional. I often wish I could give all of my colleagues on the Supreme Court a rubber stamp that says 'Stupid But Constitutional.'"

Professor Tony Simpson, a specialist in English legal history, closed the session with a complex question on Sir Edward Coke's theory of "artificial reason."

Scalia, obviously stumped, comically stammered, "Whoa! uh ... No?" before conceding his unfamiliarity with the topic.

'I'm Not a Nut'

That afternoon, Justice Scalia opened his main event of the day – attended by law students from all classes, as well as faculty members and local and national media – by again describing himself as part of "a small and hardy band of originalists." When he first began describing himself this way, he joked, people acted as though it were "some weird affliction – like, 'when did you start eating human flesh?'"

But "whatever else you think of us [originalists], don't call us new," he added. "It was orthodoxy until about 50 years ago." The new orthodoxy, he said, is the idea that "the Constitution is a living organism" that must evolve with the society's maturing "standards of decency – as if societies only mature, never rot."

The Justice said originalists take the opposite position. "The Constitution is not a living organism," he asserted. "It's dead. It's a legal document. It's not supposed to be flexible. It's rigid. That's the purpose of a constitution: to impart rigidity."

So if you want a "right" to suicide, abortion or homosexual sodomy, he said, then you should "create it the way most rights are created in a democracy: persuade your fellow citizens it's a good idea and pass a law. But don't bother me with it. It's not in the Constitution."

He said, "I am a textualist. I am an originalist. I am not a nut." As the audience roared with laughter, he added, "Non-originalism is not a valid theory of constitutional interpretation – it just means you don't agree with Scalia!"

During questions following the lecture, one student asked how the Justice's originalist position squared with the Fourth Amendment right "to be secure against unreasonable searches and seizures" in an age when the government spies on its own citizens in their homes using state-of-the-art surveillance technology the Framers could never have imagined.

"Sometimes you have to figure out the trajectory" of the original intent in such cases, Scalia said. But when the student pressed him on whether his personal and political values entered the process at that point, he cut off the question saying, "I don't have to defend originalism. It ain't perfect, but it's the best thing around."