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Introducing Justice Scalia

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It is a daunting privilege for me to introduce Justice Antonin Scalia. The task was given to me by Justice Tom Gray because of the coincidence that Justice Scalia and I both share a common ethnic background and a particular interest in advocacy: that, no doubt, is where my qualification for the task and our similarities end. What makes the task of introducing his Honour particularly daunting is that he comes with a formidable, and at times intimidating, reputation. It is also difficult to know what one might say about his Honour to an Australian audience. His Honour has a rich and complex history, and has made a rich and complex contribution to American jurisprudence. Some of that is likely to be known by some in an Australian audience whilst others may know little about him. A good deal of what the public thinks it knows about his Honour may also be misinformed and perceived through the prism of politics, partisanship and prejudice.

His Honour was born in New Jersey on 11 March 1936 and was an only child. His father, Salvatore, had arrived in America in 1920 at the age of 17 with his family from the Sicilian village of Sommatino. His father became a scholar of romance languages and taught his son, the future justice, “to value the words

of a text”.¹ His mother Catherine was born in the United States but was also of Italian heritage. In 1974 his Honour became an assistant attorney general of the United States a few days before President Nixon’s resignation.² In 1982 President Regan first appointed his Honour to a position on the appeals court in Washington DC and in 1986 nominated him for the seat on the US Supreme Court which he continues to occupy.

His Honour’s role as a member of the United States Supreme Court, and perhaps his personality, have placed him in the centre of many of the great controversies of a great nation. Many here will have heard of the incident with his Honour involving then Vice President Dick Cheney and a duck shooting expedition, and of course most of us will be aware of some of the controversy surrounding the decision in the *Gore v Bush* case. Such controversies, and the role of the Supreme Court in the United States, appear to have made his Honour somewhat of a household name. Indeed, I came across an unexpected reference to him as I was thinking about what I might say in this introduction. At the time I was sitting in an airplane on a long haul flight pondering this event and paying little attention to a then recently released cop comic movie I had selected in the entirely accurate expectation that it would be undemanding. The film, “The Other Guys”, has little enduring value but early in the film includes a reference to Justice Scalia. The reference to his Honour was fleeting but enough to show that his Honour is an icon to some as an influential conservative in modern American life.

¹ Joan Biskupic, *American Original* (Sarah Crichton Books, 2009) 17.
² Ibid 33.

There seems no doubt that his Honour has become an icon in the eyes of friend and foe. It is hard to pick up any reference to him, his judgments or his extra judicial writing that does not reflect a strong view for or against him. The New York Times of 3 January 2010 carried an article by Jeffrey Rosen which began:

Love him or hate him, Antonin Scalia has had greater influence on the way Americans debate the law today than any other modern Supreme Court justice. Conservatives hail Scalia as the founding prophet of their true faith – the Jurisprudence of Original Understanding – and the leader of the opposition to moral relativism and judicial imperialism in the age of Obama. Liberals scorn Scalia as a show-off and intellectual bully who is quick to betray his constitutional principles when they clash with his fervent belief as a crusader in the culture wars.³

Much that is written about the man often ascribes his views to causes that may not bear close scrutiny and which may brush aside the intrinsic strength of argument of his Honour's positions. There is, in any event, no doubt that we have before us a man of some significance.

The principal qualification for his participation in this conference, however, is not his political views or his role as a movie icon, but, rather, his skill, experience and advocacy of advocacy. His skills are legendary and by all

³ Jeffrey Rosen, "A Man of Influence," *The New York Times*, 3 January 2010.

accounts have at times been devastating.⁴ There are many accounts of his Honour sparring with counsel in court and of the demolition of arguments presented by skilful advocates in their own right.⁵ It is hard not to have an envious admiration for the fresh directness of some of the exchanges between his Honour and counsel appearing in the Court. In the 2007 case testing the constitutional rights of prisoners in the US naval base at Guantanamo Bay in Cuba his Honour's blunt and direct question to the former US solicitor general was this:

Do you have a single case in the 200 years of our country or, for that matter, in the five centuries of the English empire in which habeas [corpus] was granted to an alien in a territory that was not under the sovereign control of either the United States or England?⁶

After more sparring counsel offered another argument introduced with "I'll take one more chance, Justice Scalia". To which his Honour promptly replied: "Okay, try them. I mean, line them up".⁷

A commitment to advocacy and the careful crafting of words is not new. His biographer records accounts by his Honour's colleagues from the 1970s of his Honour (then a young lawyer working in the Nixon administration), with fountain pen fussing and fussing over language.⁸ His ease and mastery of words, and of their expression, create powerful and effective images that

⁴ E. Lazarus, *Closed Chambers* (Random House, 1998) 276.

⁵ Biskupic, above n 1, 213-15, 300-17.

⁶ Ibid 311.

⁷ Ibid 311.

⁸ Ibid 89.

impact like a stealth bomber. His criticism of the use of legislative history to derive the meaning of a statute provides an example. In a speech given in the mid 1980s his Honour noted that the use of legislative history as a technique for statutory interpretation was relatively new to the United States common law adding:

Some creatures that seem pleasant and tractable in their infancy – tiger cubs, for example – are better abandoned when they reach their full natural development. Now that legislative history has reached its adulthood, perhaps it is time to reconsider whether we want to live with it.⁹

His Honour may not have used many words in that passage, and his technical legal analysis may have been economically brief, but what was conveyed in those few words was a sense that a technique of legislative interpretation was both dangerous and uncontrollable but that its supporters may see it naively as friendly and tameable.

Such command of language has had a powerful effect upon US jurisprudence during his Honour's tenure on the Supreme Court. A dominant theme in US constitutional jurisprudence has been the extent to which the written instrument must be read to give effect to its original intent.¹⁰ In some respects the kernel of that debate was put by Justice Scalia when he asked rhetorically:

⁹ Ibid 94.

¹⁰ Antonin Scalia, *A Matter of Interpretation* (Princeton, 1997).

Would anyone vote for a constitution which said “Those general norms set forth in this document ... do not refer to the people’s current understanding of what is embraced by those terms, but rather shall bear the meaning assigned, from time to time, by unelected and life tenured committees of lawyers”.¹¹

By referring to these passages I would not wish to be thought to be agreeing with him. Whether I do or not is, of course, wholly irrelevant. My point is rather to draw attention to the skill with which his Honour directed debate and analysis by the choice of words and by their expression.

It is a skill that his Honour has exercised with legendary wit and self confidence. His biographer recorded an exchange between Senator Specter and Justice Scalia before his confirmation hearings. His Honour was making a courtesy visit to the Senator before the hearing and the Senator had thought of asking the nominee a question that might stump him. The question was “What is the difference between a shifting use and a springing use”. The nominee’s answer as recorded by Senator Specter was as follows:

Well, I’ll tell you, Senator. It’s like these two guys who were riding in taxi cabs that had a collision in mid town Manhattan. And while the drivers were exchanging information, the passengers started to talk. And one said, “What do you do?”. And the other guy said, “I’m a lawyer”. The first passenger said,

¹¹ Quoted in *New South Wales v Commonwealth of Australia* (2006) 229 CLR 1, [772] (Callinan J).

“Hey that’s interesting. So am I. Where do you work?”. “I work on Wall Street”. “Hey, you know, I do too. Which firm?”. The other passenger named a firm. The other passenger rejoined that he worked there also adding “I’m in property law section”. “I’m in property, too. What do you do?”. “Shifting uses”. “Well, that’s why I don’t know you: I’m in springing uses”.¹²

According to Specter the answer had the effect of making him forget the question. It also had the effect, through humour and personality, of controlling the discussion.

A few years ago Justice Scalia joined with Professor Bryan A Garner to co-author a book on advocacy.¹³ In it the authors provide valuable guidance on the art of persuasion by unpicking and laying out for view and analysis the techniques, elements and material which together make up the process of persuasion. It provides an invaluable guide for advocates in any jurisdiction. The book reveals a deep and close attention by the authors to advocacy in all of its detail and precision. The one omission, and it is a large omission, is the absence of any discussion or advice about the single most important skill of advocates: ambush and surprise. I only mention that because in these introductory remarks about his Honour I have not been able to foreshadow what his Honour may be saying to us: that is to be our surprise and in that tactic we see again his Honour’s great mastery and skill of the art. We are

¹² Biskupic, above n 1, 118-9.

¹³ A. Scalia and B.A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson/West, 2008)

very privileged indeed to be hearing from someone who has made so close a study of the art and who himself has been so effective a practitioner of the art.