Vitriolic in Rhetoric, Independent in Spirit: Justice Antonin Scalia*

*Thomas Y. Man***

A few weeks ago (February 13, 2016), the United States Supreme Court lost Justice Antonin Scalia, the first Italian-American Justice and its longest-serving member. At age 79, Justice Scalia was the most senior Associate Justice and ranked only after Chief Justice John G. Roberts, Jr. in seniority on the nine-member high court. But he wasn't the oldest (Justice Ruth Bader Ginsburg is 82) and had displayed little sign of diminishing energy and intellectual prowess. At the beginning of the year, he visited Hong Kong and other Asia places. His sudden death caught everyone in surprise and added a new element of uncertainty to the already colorful election year politics. All of a sudden, nominating by President Obama a successor to Justice Scalia became a fresh spark of political contention between the Republican Party, which controls the Senate wielding the power to confirm any nominee for the Supreme Court, and the Democratic Party which rallies behind President Obama in asserting the president's Constitutional power (and "duty," as claimed by Obama) to nominate a new justice during the remaining months of the Obama presidency.[1] This brief note focuses not on this unfolding political debate subsequent to the death of Justice

---

* Note: An earlier version of this brief note was published in Chinese as a column article for public reading at Academic Criticism (学术批评网), March 9, 2016, http://www.acriticism.org/article.asp?Newsid=16629&type=1008. It has been adapted into English by the invitation of the editorial board of the Peking University Transnational Law Review.

** Professor from Practice, Peking University School of Transnational Law, Shenzhen, P.R. China; Adjunct Professor of Law, China University of Political Science and Law, Beijing, P. R. China. The author would like to acknowledge the support of the Collaborative Innovation Center of Judicial Civilization, China University of Political Science and Law, for research and writing of this note.

[1] As of this writing, President Obama has nominated Merrick Garland, Chief Judge of the U.S. Circuit Court of Appeals for the District of Columbia to fill the vacancy left by Justice Scalia, but the Senate Republicans, using their power to control the agenda, have refused to consider his nomination. *See* Manu Raju & Ted Barrett, *Grassley: If I can meet with a 'dictator,' I can meet with Garland*, CNN (Mar. 18, 2016), http://edition.cnn.com/2016/03/17/politics/garland-grassley-supreme-court-dictator/index.html.

Scalia; instead it discusses some of the most important aspects of Justice Scalia's political and judicial philosophy and his personal character with a view to shedding some comparative light on the ongoing process of judicial reform in China with respect to the importance of an independent judiciary.

As a leading proponent of the conservative judicial jurisprudence in the contemporary U.S. political arena, Justice Scalia's name is intimately associated with the judicial philosophy known as "Originalism."[2] Although he was not the first jurist to employ the concept "Originalism,"[3] he was nevertheless the most vocal "Originalist" and most influential judicial practitioner of Originalism by virtue of his long tenure on the Supreme Court. According to Scalia's version of the Originalist view he labeled invariably as "textualism" or "original meaning," when interpreting the U.S. Constitution and other statutes, the court ought to follow the text of the Constitutional or statutory provision and strictly construe the meaning of the provision in accordance with its meaning at the time of making. The court shall not expand or otherwise extend the meaning of such provision in the light of the evolving definitions of the relevant concepts or terminology.[4] An Originalist like Scalia scorns the theory of "Living Constitution," which believes that the court should treat the Constitution and other statutes as living documents whose meaning evolves with the changes of the American society and therefore should interpret these documents in accordance with the contemporary understanding reflecting the reality of today's society.[5] From his

---

[2] For a standard explication of "Originalism," *see* Robert H. Bork, *The Original Understanding*, *in* CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATIONS 47–68 (Susan J. Brison & Walter Sinnott-Armstrong eds., 1993).

[3] According to one account, Originalism emerged as a named judicial doctrine with the work of Robert Bork, then a Yale law professor, who wrote in the 1970s: "There is no other sense in which the Constitution can be what Article VII claims it to be: 'Law.' This means, of course, that a judge, no matter on what court he sits, may never create new constitutional rights or destroy old ones." *See* Robert Bork, *Neural Principles and Some First Amendment Issues*, 47 IND.L.J. 1, citing page (1971). Another account indicates that the term "Originalism" was coined by Paul Brest in his article, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 238 (1980).

[4] Bork, *supra* note 2. For a critique of the "Original Intent" jurisprudence, a variation of Originalism, see LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 322–87 (1988).

[5] "[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great

appointment to the high court by President Reagan in 1986 until his death, Justice Scalia had openly expounded the tenets of Originalism in and outside the Supreme Court. Applying Originalism to judicial practice, his many opinions in a long series of significant Supreme Court decisions over a span of three decades consistently defended traditional morality and systems, making him a darling of the conservative right. The classic exposition of Originalism comes from Scalia's plain and straightforward language:

> The theory of originalism treats a constitution like a statute, giving the constitution the meaning that its words were understood to bear at the time they were promulgated.
>
> You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the Framers of the U.S. Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[6]

In terms of personality, Justice Scalia was expressive, vitri-

---

principles to cope with current problems and current needs," wrote Supreme Court Justice William Brennan (1956–1990 in office), a leading exponent of the "Living Constitution" philosophy. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 88 (Kermit L. Hall ed., 1992). In sharp contrast, Scalia once wrote, "[t]he worst thing about the Living Constitution is that it will destroy the Constitution." Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars: Constitutional Interpretation the Old Fashioned Way (Mar. 14, 2005) (transcript available at http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf). "The whole purpose of the Constitution is to prevent a future society from doing what is wants to do." Antonin Scalia, Speech at Catholic University of America: Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation (Oct. 18, 1996) (transcript available at http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml).

[6] Antonin Scalia, Speech at Catholic University of America: Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation (Oct. 18, 1996) (transcript available at http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml).

olic and stubborn. It seemed that his personal vocabulary contained no such concepts as moderation, temperance, flexibility or compromise, casting him not only in sharp contrast with most Supreme Court justices, past or present, but also making his character seemingly inconsistent with the traditionalistic temperament and conservative principles he had so unabashedly embraced. Scalia was a second generation Italian American. His father, a devout Catholic from Sicily, passed on to him the Catholic faith and traditional moralism.[7] Adhering to the Catholic creed against contraception, he and his wife (also a Catholic) had nine children and, at the time of his death, 28 grandchildren. He once told a journalist, half jokingly, that he and his wife had practiced "Vatican roulette."[8] The Catholic teaching of obeying authority conforms seamlessly with the Originalist tenet of adhering to the existing rules, including the words in their original meaning that the Founding Fathers had written into the Constitution more than 200 years ago. However, in expounding this traditionalistic jurisprudence, Scalia had never thought of conforming his advocacy to the traditionalistic temperament. He was a straight shooter, almost never making any effort to hide or sugarcoat his absolutist position or losing any opportunity to retort an opposite or different position. He displayed his unique style of straight talk not only in executing his official duties on the Supreme Court (such as oral arguments open to the public, closed-door conferences among justices or published court opinions) but also in extrajudicial public speeches and academic publications. For instance, he usually fired more questions than any other justices to legal counsels in open court arguments, employing his characteristic "in-your-face" style of questioning by frequently interrupting the legal counsel and asking pointed and challenging questions. He used the same style in extrajudicial public lectures and exchanges with journalists and audiences. Because of his extreme conservative standing on controversial issues, he was often confronted with tough questions from the audience, but his response was never diplomatic.[9]

---

[7] JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 17–24 (2009).

[8] Margaret Talbot, *Postscript: Antonin Scalia, 1936–2016*, THE NEW YORKER (Feb. 14, 2016), http://www.newyorker.com/news/news-desk/postscript-antonin-scalia-1936-2016.

[9] *See generally* Biskupic, *supra* note 7, especially Chapter 12, "Quack,

Like his verbal language, Scalia's writing was equally harsh and vitriolic. His many Supreme Court opinions, either concurring or dissenting, are always violently polemical, sparing no opportunity to attack or criticize any opposing or differing views held by other justices, including his fellow conservative colleagues. In June 2015, the Supreme Court, by a 5 to 4 majority, upheld the right to marry by same-sex couples in *Obergefell v. Hodges*, which attracted a barrage of fierce attack from Scalia. His dissent accused the majority (who were described as "a select, patrician, highly unrepresentative panel of nine") of violating "a principle even more fundamental than no taxation without representation: no social transformation without representation."[10] In writing his opinions, Scalia was not satisfied with simply laying out his position, but often lambasted others (including his fellow justices) holding a view different from his own with invective and disparaging remarks, earning the well-deserved label of "poison pen and tongue" and writing "like a devil."[11] Another commentator wrote, "Scalia's opinions read like they're about to catch fire for pure outrage."[12] To his ideological foes of liberal justices, he never yielded an inch of ground on any issue, in and outside of the court, and used acerbic language to the extent possible in a judicial setting. Justice Ginsburg, a liberal, is reported to have said, half jokingly: "I love him. But sometimes I'd like to strangle him."[13] To his fellow conservatives, Scalia was hardly more lenient in his criticism if he found them to have fallen short of thoroughly conservative. In deciding *Obergefell v. Hodges*, Justice Anthony Kennedy, a fellow conservative with growing moderate views on social issues, joined the liberals' rank to write the majority opinion recognizing same-sex marriage. Scalia criticized Kennedy in a tone more vitriolic than that against the liberals, taunting the majority opinion as "couched in a style that is as pretentious as its content is egotistic."[14] Back in 2012, Chief

---

Quack," 252–75, and Chapter 13, "The Central Chair," 276–98, Chapter 14, "Showman of the Bench," 299–320.

[10] Obergefell v. Hodges, 135 S.Ct. 2584, 2630 (2015).

[11] Richard Wolf, *Questions swirl around longevity of Scalia legacy*, USA TODAY, Feb. 19, 2016, at 6A.

[12] Conor Clarke, *How Scalia Lost His Mojo*, SLATE (July 5, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/07/how_scalia_lost_his_mojo.html.

[13] Biskupic, *supra* note 7, at 277.

[14] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

Justice Roberts, another fellow conservative, chose to lend support to President Obama's healthcare legislation and wrote the majority opinion. Scalia attacked the majority opinion sharply: "The court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching."[15] On another occasion, Scalia accused Roberts of "faux judicial minimalism" and "judicial obfuscation" even when he concurred with Roberts's majority opinion.[16]

Scalia not only possessed a sharp tongue, but also utterly rejected compromise in judicial decision-making. He almost never modified his position in order to gain support from other justices, nor did he use any tacit maneuvering to achieve compromise or trade-offs. Because of the layered differences in political and social viewpoints and judicial philosophy among Supreme Court justices, it is extremely difficult, if not entirely impossible, to reach full consensus on almost any case that has landed on the court's docket, even if all justices have proceeded from the same, broadly defined constitutional framework to form his or her own opinion. In order to prevent individualized perspective from paralyzing the decision-making process, most justices are open, at various degrees, to consider the views of other justices and arguments from both sides and modify his or her own original position through oral arguments and closed-door conferences. Many justices, especially those who have had extensive executive or legislative experiences before judicial appointment and thus are adept at political deal making, are willing to engage in private exchange with fellow justices to minimize differences and build up consensus. Some justices are even willing to make limited, principled concessions on certain issues or cases in exchange for support from other justices on other issues or cases.[17] But Scalia had none of these. He held stubbornly on his view on every issue, every case, yielding to neither his ideological opponents nor his fellow conservatives as long as their

[15] National Federation of Independent Business v. Sebelius, 132 S.Ct. 2566 (2012).

[16] Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007). *See* MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 108 (2013).

[17] As noted by one Supreme Court scholar, in the Court's decision-making process, "bargaining is simple fact of life." WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 57 (1964). The late Justice Brennan would accept less than he wanted in order to gain a partial victory. *See* BISKUPIC, *supra* note 7, at 132.

views are different, significantly or slightly, from his own.

Since the 1980s the Supreme Court has maintained a precarious balance between liberals and conservatives, making the vote of one or two justices holding the middle ground of the particular issue in contest the decisive force for the court's decision. Such "swing votes" by these moderate justices invariably become the focus of attention by both camps. Each camp has tried hard not to offend these moderates in order to gain their pivotal support. But Scalia had consistently scolded such strategy. His aggressive and uncompromising personality had on numerous occasions alienated potential allies, to the extent of strangling personal relationships. Early in his justiceship in the late 1980s, Scalia developed a relationship "like oil and water" with Justice Lewis Powell, even though they were reasonably similar in political view and judicial philosophy.[18] In particular, it is widely believed that Scalia's failure in cultivating a cordial working relationship with Justice Sandra Day O'Connor, a moderate conservative who held the swing vote on a number of important social issues including abortion, had helped frustrate the conservatives' repeated attempts during the 1990s and 2000s to overturn *Roe v. Wade*, the landmark Supreme Court case that legitimized women's rights to abortion. On more than one occasions, Scalia openly ridiculed O'Connor's minimalist, pragmatic approach to abortion, which not only pushed O'Connor to the opposing camp in deciding specific cases but also caused serious strains in their personal relations. For example, he attacked one of O'Connor's' majority opinions on abortion as so flawed that her rationale "cannot be taken seriously." It is hard to believe that such words would not have been taken personally by O'Connor, who commented to others that "sticks and stones will break my bones, but words will never hurt me," but then quickly added, "That probably isn't true."[19] People close to the court (such as law clerks to the two justices) observed that if Scalia had showed more willingness to listen to the concerns voiced by O'Connor

[18] The "oil and water" phrase was coined by John C. Jefferies, Jr., Powell's biographer, quoted from Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia,* THE NEW YORKER, March 28, 2005, also available at http://www.newyorker.com/magazine/2005/03/28/supreme-confidence.

[19] JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 277 (2005).

and used less acerbic language in his criticism, he would have been able to gain her support. But he was capable of doing neither. As a result, the personal relationship between them was measurably cold to the point that either had been seen to have paid individual visits to the other's office across the corridors to confer on issues before the court, a practice common among the justices who share the same office building.[20]

Scalia's stubbornness had gained him adulation from Republicans and other conservative operatives but also visible dismay from the same groups. On the one hand, they loved him for his unswerving Originalism and steadfast conservative political stance. On the other hand, they were disappointed in his failure to employ tactics to win judicial battles due to his rigidity and deplorable interpersonal skills. When Chief Justice William H. Rehnquist died in 2005, Scalia, as the ranking conservative justice, had all the right qualifications, politically as well as in terms of intellectual brilliance and judicial experiences, to be picked by President George W. Bush to succeed Rehnquist. Scalia also appeared to be prepared to take up this challenge,[21] but was passed by President Bush. Although not explicitly articulated, concerns by Bush's advisors on the perceived lack of leadership skills by Scalia due to his overly aggressive personality have widely been speculated to be one of the reasons that doomed his hope for the Chief Justice post.

Under the US system of separation of powers ordained by the Constitution, the judiciary, as the only non-political branch of the government, exercises judicial power independently. Judges, especially federal judges appointed pursuant to Article III of the Constitution, are expected not to participate in partisan or other political activities that may erode public confidence in judges' independence, integrity and impartiality. Historically, most Supreme Court justices have strictly followed this practice by refraining from making public statements on political issues or otherwise appearing in public events in order not to create the

[20] A law clerk for Justice O'Connor once told a reporter, "There are cases she might have been persuadable had he been more sensitive to the need to cultivate her—even just to the extent of not actively attacking her . . . . I think his tone with her has pushed her against him. I never saw them calling or coming to one another's chambers, as Justices will occasionally do, if they have differing but similar opinions." Talbot, *supra* note 18.

[21] Talbot, *supra* note 18.

appearance of entanglement with individuals or organizations of particular political persuasion. Scalia acted differently, at least as compared with most other justices. Consistent with his outspokenness on the bench, he took part in much more public activities than his colleagues by giving speeches and publishing articles and was much less selective than his colleagues in being intimately associated with public figures and individuals whose political or economic interests were arguably implicated by cases coming before the Supreme Court. This had brought him repeated controversies. For instance, he never attempted to conceal his close personal relationship with Dick Cheney, Vice President during the Bush administration (2000–2008). In 2004 it was reported by the news media that Scalia took a duck-hunting trip with Cheney in Louisiana hosted by a businessman. At that time, the Supreme Court was reviewing a case in which a governmental energy task force headed by Cheney was a party. That a justice went out on a private vacation trip with a political figure who was arguably involved in a case that was under the court's review posed serious questions, at least on the appearance, on the justice's impartiality in adjudicating the case, even if no applicable code of conduct had been violated. This incident ignited a wave of media reports and negative commentaries requesting Scalia recuse himself from hearing the case, which made other justices feel exceedingly uncomfortable.[22] But Scalia brushed aside all criticisms and refused to recuse himself. He responded to a question on the hunting trip from the audience at a college speech by imitating duck voice "Quack, Quack,"[23] an act not imaginable for other justices. On another occasion, during a pubic speech in January 2003, Scalia openly criticized a decision by the U.S. Court of Appeals for the Ninth Circuit holding that public school teachers' leading the recitation of the Pledge of Allegiance to the American flag, with its "under God" language, violated the freedom of religion of atheist children and parents.[24] This was a rare act, contrary to the usual practice of Supreme Court justices to refrain from making public comments on lower court decisions. For this

[22] Biskupic, *supra* note 7, at 259–60.

[23] The case is *Cheney v. United States District Court for the District of Columbia,* 541 U.S. 913 (2005). *See* Biskupic, *supra* note 7, at 256–57.

[24] The case is *Elk Grove Unified School District v. Newdow,* 542 U.S. 1 (2004). *See* Biskupic, *supra* note 7, at 267.

act, Scalia was forced to recuse himself next year when the case was accepted for review by the Supreme Court.[25]

One of the reasons for Scalia to insert himself into the public debate on politically sensitive issues by openly declaring his judicial philosophy and political and social preferences, even at the risk of recuse from hearing particular cases, was his strong desire to disseminate conservative ideas through public expression. For him, it was part of his unique strategy of public relations, as he firmly believed that the effectiveness of his effort to spread the Originalist tenets was partly conditioned by his personality. "One of the ways to get people to pay attention to ideas," he said, "is to get people to pay attention to you."[26] Such reasoning and conduct were decisively inconsistent with the prevailing ethos of moderation and self-restraint characteristic of the judiciary.

In retrospect, over the 30 years of Scalia's tenure on the Supreme Court, he had more setbacks than victories. This trend had intensified with the passage of time, resulting in him issuing more and more dissenting opinions. It reflected the gradual change of tide in the American sentiment toward increasing tolerance and inclusiveness on social issues and the reluctant retreat of traditionalist culture and ideology represented by Scalia.[27] From the American liberals' perspective, Scalia represented the lost world of the past generations of anti-progressive, backward-looking, "reactionary" ethos based on outdated, moralistic traditionalism, who "devoted his professional life to making the United States a less fair, less tolerant, and less admirable democracy." He "wanted the world to be in uniform and at a sort of moral attention forever."[28] Most illustrative of Scalia's moralistic traditionalism was his vocal, persistent and adamant opposition to legalization of same-sex marriage. In 2003, the Supreme Court

---

[25] Biskupic, *supra* note 7, at 268.

[26] Robert Wolf, *Questions swirl around longevity of Scalia legacy*, USA TODAY, February 19, 2016, at 6A, also available at http://www.usatoday.com/story/news/politics/2016/02/18/supreme-court-justice-antonin-scalia-legacy/80465762.

[27] "The Court must be living in another world," declared Scalia in 1996. "Day by day, case by case, it is busy designing a Constitution for a country I do not recognize." JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 181 (2006).

[28] Jeffery Tobin, *Looking Back*, THE NEW YORKER, (Feb. 29, 2016), http: http://www.newyorker.com/magazine/2016/02/29/antonin-scalia-looking-backward.

ruled in *Lawrence v. Texas* that for the first time in history struck down a Texas law that criminalized homosexual sex. In his dissent, Scalia wrote bitterly,

> Today's opinion is the product of a Court which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . Many Americans do not want persons who openly engage in homosexual conduct as partners in their business . . . as teachers in their children's schools, or boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.[29]

Scalia was aware of the diminishing influence of his conservative traditionalism.[30] He once remarked, self-deprecatingly, that one could "fire a cannon loaded with grapeshot in the faculty of any major law school" but "not hit an originalist."[31] The demise of his judicial philosophy was mostly the result of the shifting political and social beliefs held by the American public, but his loss of so many judicial battles in deciding close cases was also determined, at the personal level, by his stubbornness, loathing to compromise and in-discriminatory aggressiveness. In addition to being vitriolic, Scalia's self-grandiosity precluded him from thinking and acting in less idiosyncratic manners. It was reported that he once asked one of his law clerks rhetorically, "What is a smart guy like me doing in a place like this?"[32]

Needless to say, Scalia was a justice surrounded by controversies. From his colorful judicial career, we can clearly observe the tidal changes of the American political, social and cultural life over the last several decades. Furthermore, for a Chinese observer outside the context of the American judicial politics, the characteristic "Scalian" judicial phenomenon also provided a unique

---

[29] Lawrence v. Texas, 539 U.S. 558, 602 (2003).

[30] In 2009, after nearly 25 years on the Supreme Court, Scalia characterized his court victories as "damn few." BISKUPIC, *supra* note 7, at 363.

[31] Talbot, *supra* note 18.

[32] ROSEN, *supra* note 27, at 203.

window to perceive the role and position of American judges as individuals in the U.S. constitutional framework as a comparison to the Chinese judges in the Chinese context.

Scalia served on the federal bench for 35 years, including five years on the U.S. Circuit Court of Appeals for the District of Columbia and 30 years on the Supreme Court, and had made countless enemies, mostly political and ideological but also some personal, in and outside the courthouses. He fought his enemies through political debates and judicial arguments, often fiercely and with ferocious intensity, within the broad and flexible constitutional framework. He, like almost all other U.S. judges, had never feared for his personal safety because his political and personal foes, including the litigants whose interests had been adversely impacted by his court decisions, had ever thought of any means to defeat or destroy him other than meeting him head-on in political debates and judicial arguments.[33] Jim Obergefell, the named party to the landmark same-sex marriage case whose claim to constitutional equal protection for himself and his partner and other same-sex couples had been relentlessly rejected by Scalia in dissent displayed no trace of personal hatred toward the demised justice. Upon learning Scalia's death Obergefell tweeted: "Thank you for your service to our country, Justice Scalia. Condolences to your family and friends."[34]

Under the U.S. Constitution, a federal judge like Justice Scalia, once confirmed by the Senate upon the President's nomination, enjoys life-long tenure and income security[35] and is not subject to any administratively-type supervision and direction within and without the judicial institutions. On the Supreme

---

33 This presents a sharp contrast with Chinese judges who, despite the lack of open disagreements within themselves in judicial decisions and reasoning, are often faced with harassments and other concerns for personal and family security. The recent tragic killing of a trial court judge in Beijing allegedly by an individual whose case was heard by the slain judge is just one extreme example that manifested this lack of personal security and tranquility by Chinese judges. For a thoughtful analysis, *see* 季卫东 (Ji Weidong), 中国法律秩序的正当性危机——从女法官被枪杀反思大陆司法制度 [*The Legitimacy Crisis of the Chinese Legal Order: Reflection on the Killing of the Chinese Woman Judge*], 凤凰周刊 [PHOENIX WEEKLY], issue 8, (2016).

34 Talbot, *Postscript: Antonin Scalia, 1936–2016*, THE NEW YORKER (Feb. 14, 2016), http://www.newyorker.com/news/news-desk/postscript-antonin-scalia-1936-2016.

35 U.S. CONST. art, III, § 1.

Court, all justices are equal in status and weight of opinion. The Chief Justice serves only as the chair of procedures without any administrative power over other justices.[36] Individual independence based on equal standing and freedom from administrative supervision enables each justice to freely express his or her views, including those critical of fellow justices or the Chief Justice, without fear of retaliation or punishment. Within the federal judicial system, a court of the superior level has the legal authority to review, amend, vacate or overturn a judgment by an inferior court, but possesses no power to censor, or otherwise punish, a judge of the inferior court for any criticism by such judge expressed as individual views of a decision or holding of a superior court, including the Supreme Court. For instance, Michael McConnell, a well-known conservative jurist, when sitting on the U.S. Court of Appeals for the Tenth Circuit (2002–2009), frequently voiced his disagreements with, and criticism of, Chief Justice Roberts and Justice Scalia for the decisions on certain social issues, which McConnell deemed to have deviated from the Originalist position they vowed to hold dearly.[37] Similarly, Richard Posner, Judge of the U.S. Court of Appeals for the Seventh Circuit, has openly criticized Scalia's inclination to take religion over the Constitution in his judicial jurisprudence.[38]

Independence in person, position and opinion provides the institutional foundation for federal judges to act in accordance with their own political and judicial convictions and personal understanding of the related legal principles and reasoning and to express their views freely without yielding to any extrajudicial pressure, whether it is from other judges, the superior courts, the executive and legislative branches, the press, or the general public. Despite his staunch adherence to traditional conservative values and vitriolic rhetoric had pitted him in losing battles against liberal and moderate justices (and sometimes, other fellow conservatives), Scalia was able to hold his ground, uttering his views

---

[36] *See* PHILIP COOPER & HOWARD BALL, THE UNITED STATES SUPREME COURT: FROM THE INSIDE OUT 132–58 (1996).

[37] ROSEN, *supra* note 27, at 217.

[38] Richard Posner & Eric Segall, *Justice Scalia's Majoritarian Theocracy*, THE NEW YORK TIMES (Dec. 2, 2015), http://www.nytimes.com/2015/12/03/opinion/justice-scalias-majoritarian-theocracy.html?smtyp=cur; Richard Posner, *In Defense of Looseness*, THE NEW REPUBLIC (August 27, 2008), https://newrepublic.com/article/62124/defen se-looseness.

in an unreserved manner. Ironically, because of this candor and transparency, ideological foes are still able to get along well as personal friends as long as political debates do not escalate to personal attack between individual justices. Ideologically, Justice Ginsburg, a celebrated liberal, is Scalia's political mimesis on the high court. On most issues coming before the Supreme Court they held different or opposite views and were often engaged in fierce debates in oral arguments and private conferences. But such clashes in political views and judicial approach did not prevent them and their families from developing close personal relations. Their families spent almost every New Year's Eve together, and Ginsburg and Scalia often performed on stage together sharing their common passion for opera. On one occasion when Ginsburg's husband was hospitalized, Scalia was the only person outside Ginsburg's family who had visited him in the hospital.[39] Scalia had said openly that if he had been stuck on a desert island, Ginsburg was the liberal he'd most like to be stuck with.[40] Justice Ginsburg noted fondly of their seemingly odd friendship in her personal tribute to Justice Scalia upon his death:

> Towards the end of the opera Scalia/Ginsburg, tenor Scalia and soprano Ginsburg sing a duet: "We are different, we are one," different in our interpretation of written texts, one in our reverence for the Constitution and the institution we serve. From our years together at the D.C. Circuit, we were best buddies. We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation. Justice Scalia nailed all weak spots—the "applesauce" and "argle bargle"—and gave me just what I needed to strengthen the majority opinion.[41]

Evidently, political debates and criticism, including seemingly unfair or unpleasant criticism made in a harsh and irritating tone, may work to benefit both individuals on the giving and receiving ends if conducted within a reasonable context. To

---

[39] Talbot, *supra* note 8.

[40] Talbot, *supra* note 18.

[41] Statement from the Supreme Court Regarding the Death of Justice Antonin Scalia (Updated), Supreme Court of the United States (Feb. 15, 2016), http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-14-16.

achieve this mutual benefit necessarily requires both parties enjoy true independence as individuals. Such personal independence encompasses at least independence in spirit and expression and independence in physical means and social standing. If this personal independence has its roots in the human nature of yearning for freedom and self-governance, its survival relies heavily on effective protection by political and social institutions. With regards to judicial functions, judicial independence in terms of both judicial institutions and independent individuals as judges is the prerequisite for the judiciary to resolve disputes fairly and impartially. Whereas judicial independence does not necessarily guarantee justice, it is certain that judicial fairness and justice will not be secured without genuine independence of the judicial branch, the courts, and the judges.