

The Forthrightness of Justice Scalia

Ryan J. Walsh[†]

Justice Scalia was a frank man. Not only that, he was transparent. You often knew what he thought or how he felt even before he told you (which he always did) just by watching his face. There was nothing furtive or guarded or calculating about him. He seemed to hide nothing. In a city full of cagey powerbrokers, this made him unusual. And to his law clerks (and, I suspect, his colleagues and friends), it endeared him.

He was refreshingly direct even about little things, heedless of any foreseeable awkwardness. I once reviewed an opinion with him in his office while nursing a minor cold. We were only a few minutes in when I noticed him shifting in his seat and furrowing his brow. He grumbled, “Would you please grab some tissues and blow your nose? Your sniffing is driving me nuts!” My embarrassment quickly gave way to laughter, and he cracked a smile. A prior term, he and Mrs. Scalia hosted the law clerks for dinner, a yearly tradition. But weeks went by, and the clerks neglected to send the Justice and his wife a thank-you note. Then, one afternoon, Justice Scalia passed the law clerks’ desks on his way to the elevator and snapped, “You people better be good at what you do, because you’re very rude!” Only the Justice could have delivered that line in a way that both chastened and amused. He had a gift for coating his candor with charm.

Even his emotions were an open book. Often he was in a great mood and full of cheer. But every once in a while a “summer thunderstorm,” as Justice Thomas called them, would roll through chambers. At about 1:30 one afternoon, Justice Scalia unexpectedly called a meeting of the law clerks to go over his conference notes, which covered some cases assigned to me. I was on my way back from Union Station (I’d volunteered to pick up a surprise gift for a co-clerk) when the same co-clerk texted me to double-quick. When I returned to chambers, it was clear the meeting had been going for some time. It was also clear that

[†] Chief Deputy Solicitor General, State of Wisconsin. The views expressed here are the author’s alone.

the Justice was angry—and was ignoring me. Eventually we locked eyes, and he snarled, “Don’t ever be outside the building past 1 o’clock without my permission!” After the meeting, I checked with his veteran assistant to see whether this was some long-standing policy. She laughed. “He won’t even remember the ‘rule’ tomorrow.” Later that week, I was to have lunch with an old professor friend, who was also a friend of the Justice’s. There was a chance we’d be out past one o’clock, so I sought leave from the Boss. He looked at me as if I’d gone crazy. “*I don’t care whether you’re out for lunch past one! If you get your work done, it’s none of my business where you are.*” I thanked him and left, but then in the hallway I heard him shout, “In fact, Ryan . . . Ryan?” “Yes, Justice?” “In fact, I think you should take at least a *three-hour lunch with the professor!*” He flashed a knowing smile. Possibly he had recalled his earlier edict, issued in haste, and had been pleased to overrule it.

More than just humorous eccentricity, Justice Scalia’s outspokenness was part of what made him a great judge. Everyone has biases, and some are known to us. One of the best ways to neutralize conscious biases is simply to acknowledge their existence—openly, so that others are made aware of them. In his own way, Justice Scalia would do exactly that when discussing with his law clerks how to vote in pending cases. One of the cases my term presented a fairly straightforward question of statutory interpretation. The law clerks had a pretty good sense that, under textualist principles, the result in the case should be *A*. And so that’s the way the Justice needed to vote. (Our most important duty was to keep him consistent, he told us.) But when Justice Scalia opened up conversation about the case, he declared that he would have nothing to do with result *A*. The behavior of the litigant seeking *A* had been entirely unfair, he said. He added that he had even known people who had been harmed by that litigant’s indefensible conduct. Result *A* would be terribly unjust. He went on. The Justice was very worked up. You could see it on his face. Once he stopped, the clerks hesitated for a few seconds because it seemed as if the Justice was quite firm that he would vote for result *B* at conference, not *A*—his jurisprudential commitments notwithstanding. But we quickly came to our senses. *Of course he wasn’t ending debate before it began*, we realized; *he was starting a fight*. And so the fight commenced, and in the end his principles prevailed. It became clear that he knew how he had to vote in that case, but

something inside him was resisting. Rather than keep that deep-seated disposition under wraps, pretending as if it didn't exist and so allowing it to wield covert and unchecked influence on his thinking, Justice Scalia got it out in the open, where it would be tested in the fire of reasoned argument. It was an object lesson in unprejudiced decisionmaking.

He brought the same forthrightness to his relations with his colleagues. They all knew what to expect from the Justice, and it was not "go along to get along." Phone calls and memos from our chambers to the effect of "I can't join that!" were common. Sometimes they turned into opinions concurring in the judgment. I will always think of that as the classic Scalia opinion. Even if four or more justices were willing to go along with his favored judgment and even if they agreed with 95 percent of his reasoning, if he regarded any part of their proposed majority opinion as incorrect, he would usually not join it, even if that meant a 4–1–4 fractured decision. He was particularly determined not to join a writing that he thought sneakily "distinguished," rather than honestly confronted, bad precedent. In one case, he scolded the lead opinion—even though he mostly agreed with it—for "reinterpret[ing]" two controlling cases "beyond recognition," "describ[ing] what" those opinions "might have been, but assuredly not what [they were]."¹ In another major case that term, he declined to join an opinion that reached a conclusion he wholeheartedly supported but that "reads like a really good lawyer's brief for the wrong side, relying on cases that are *so close* to being on point that someone eager to reach the favored outcome might swallow them."²

His guilelessness worked in the other direction, too. A law clerk might suggest that the Justice "work on" one of his colleagues, to coax him or her to go along with one of his proposed opinions. He would refuse. "I don't 'lobby,'" he said. His colleagues' votes would be guided by their own understandings of what the law required. And if they got it wrong, his job was to challenge their legal conclusions in a no-holds-barred separate opinion—out in the open. He wasn't a back-channels guy.

¹ *Schuette v Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 134 S Ct 1623, 1642 (2014) (Scalia concurring in the judgment).

² *Bond v United States*, 134 S Ct 2077, 2095 (2014) (Scalia concurring in the judgment).

Courts can be mysterious. From the outside, it can be difficult to know for sure whether judges are doing their jobs right, whether they are consistently dispensing justice with intelligence and impartiality. The good fortune of a law clerk is the opportunity to pull back the curtain and get a look for one's self up close at the machinery of justice. Perhaps some are disappointed by what they see. Those of us who clerked for Justice Scalia were not. We learned that, in his chambers, the system worked exactly as it should.