Scalia Remembered
By Arthur B. Macomber, Attorney

Coeur d'Alene, — A week ago Saturday, as I was walking precincts and meeting voters, the occupants of a home told me the sad news of the passing of Justice Antonin Scalia. I was further dismayed that evening to hear that Mr. Obama almost immediately stated he "plans to nominate a replacement." The latter message added insult to injury, as our President lacked the class to allow time for the knowledge to sink in, or to let America adjust, even for a couple of days before he made known his desire to replace the esteemed Justice. I am shocked and greatly saddened by this country's loss of a truly monumental jurist.

When I was in law school, I became aware of the dramatic impact Justice Scalia had on American law. At the ultra-liberal U.C. Hastings College of the Law, I felt the intellectual integrity of my law degree would be imperiled, and so I joined the Federalist Society, an organization which proved to be of great intellectual integrity. Since 1982, the Federalist Society had added a chapter on more than 180 law school campuses and many attorney chapters throughout the United States, influencing thousands of members of the legal community in legal doctrines buttressed by Justice Scalia's and other conservative jurists' opinions. I served as the president of my law school's student chapter, and stewarded vigorous panel debates and intellectual discussion on campus.

I was privileged to spend time with Justice Scalia in both formal and informal occasions. In 2011, I attended his Separation of Powers course along with about 70 other attorneys in Lake Tahoe, California. This ten-hour Continuing Legal Education course addressed the structure of the federal courts, the doctrine of standing, the Congressional non-delegation doctrine, and executive branch appointments and removal, as they relate to the separation of powers. It was a very thorough course, including about a four-inch high stack of reading materials and cases required to be read prior to attending. I was looking forward to attending, having recently finished Justice Scalia's book, *Making Your Case: The Art of Persuading Judges* (Thomas/West 2008), and Justice Story's two-volume *Commentaries on the Constitution of the United States* (Little, Brown, & Co. 1873). However, about two weeks prior to the Separation of Powers course I realized that I had not read Charles de Montesquieu's *The Spirit of Laws*! Montesquieu's analysis of the structure of governmental power was relied upon heavily by James Madison crafting the U.S. Constitution. Not wanting to be at an intellectual disadvantage, I procured the book and promptly read it.

I not only read it before going to Lake Tahoe, but crossed swords with Justice Scalia in class regarding some of Montesquieu's points. The Justice conceded my view, but with his statement that he had not read it in years I was astounded at his mental acuity, since I had finished it mere days before. In addition, I was impressed by his professionalism, because it was clear he had the ability but luckily not the temperament to quash me like a bug. Using the course materials, he encouraged the class to notice where parsing of language made common sense, but also to see the points where legal analysis devolved to "counting angels on the head of a pin." The practicalities of legal analysis were his forte, along with encouraging us not to second-guess or run ahead of the legislature. He said, "it's not a judge's job to make the law, it is just his job to say what the law is." I consider attending his class to be one of the high points of my legal career.

Later, at one of the informal gatherings, I shared with him a couple of my backstage opera house stories, and he was not only enthusiastic about the opera generally, but intrigued by my experiences. My recollection is that he treated me like a colleague, and not anything more or less. He was truly a pleasure: witty, acerbic, and funny with well-crafted jibes and word-play.

As a judge, Justice Scalia was an adherent to what is called originalism, a two-part theory of legal doctrine used for interpretation of both Constitution and statutes. The first part is the doctrine of textualism, which states that one interprets documents by reading the ink on the page. This I believe accords with a "citizen Republic" approach to the law, which is that ordinary people should be able to understand it. Textualism usually ignores so-called legislative intent — unless printed in the statute, and other extra-statutory sources of meaning. The second part of the doctrine is that the words on the page should be given the definition commonly known or used by the drafters of the statute or Constitution under scrutiny. In short, originalism is a common sense doctrine for a country of common people.

I agree with this approach to law for a free society, because it requires one to acknowledge the limitations plainly found in written legal documents, especially the U.S. Constitution. When you find limitations in the law, you also see limitations in its reach, which means that you have thus stumbled onto areas of society that are left open for the pursuit of happiness, because the law does not control those places.

This approach to the law is also proper, because it encourages a habit of analyzing the law in terms of the structure of the law as printed on the page. In other words, and by way of example, the core structure of the U.S. Constitution is that the people's House comes first in Article I, the executive branch is empowered in Article II, and the judicial branch is discussed in Article III. This structure allows us to see the relative importance of the three branches, i.e., the people come first, the executive second (primarily with his powers as commander-in-chief to protect the people), and thereafter the third branch to adjudicate disputes between people. This priority-driven structure is also found in the Bill of Rights; if one views the order of the first 10 amendments as a full set meant to be read in conjunction with the others. It is improper to read a Constitution or a statute by plucking out a word or phrase willy-nilly, but the entire document must be seen as a cohesive whole. Justice Scalia's originalism encourages adherence to this approach.

If one takes an oath to support the Constitution of the United States, or simply sees its affirmation and protection of God-given rights and liberty, one must concede the interpretive power of originalism, and its beneficial analysis of the structure in the design of government. America is forever indebted to Justice Scalia for his insights and rulings.

Justice Scalia believed that judges should not simply make things up, or adhere to bad precedent. He found no rights of privacy in the Constitution, and considered Roe v. Wade and its line of cases to be wrongly decided, based on his originalist approach. He believed that the U.S. Constitutional doctrine of enumerated powers has been improperly diminished, especially since the 1930s, and made great attempts in his decades on the Court to bend the law back into its proper shape in order to protect individual liberty and our rights to property and freedom of contract. In these efforts, Justice Scalia, like Justice Oliver W. Holmes before him, was viewed as a "great dissenter," which may one day lead to majority opinions restating the law as Justice Scalia saw it, which means toward better protection of civil liberties and criminal due process. I look forward to those days!

Finally, but perhaps first in importance, Justice Scalia was a devout Catholic, and a family man with nine children. His legal analysis mirrored a good parental approach, which is to look across the generations both forward and back to build a doctrine that will not only survive the ages, but one that might properly safeguard the freedoms with which we are blessed by God. Justice Scalia will be missed. For people such as he, there can be no replacement.

— Rest in Peace: 1936 to 2016 —

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