THE YALE LAW JOURNAL

JUSTICE SONIA SOTOMAYOR

A Tribute to Justice Scalia

I am proud to name myself one of the seventeen Justices lucky enough to have served with Justice Scalia during his tenure with the Court. Much has been said these past few months about the mark he has left on our Court and on our country. Pages have been written of the contribution he made to textualist and originalist principles of review, of his captivating writing style. With this I wholeheartedly agree. But my story with Justice Scalia was shaped more by our shared passion for the substance of things. Justice Scalia would freely admit that he liked to "stir things up," and to say that some of his positions on substantive issues were considered controversial would not, I think, have been taken by him as an insult.

During his tenure with the Court, Justice Scalia made a name for himself as one of the most provocative figures on the Court. As the common saying goes—it is better to be looked over than overlooked—and that Justice Scalia's views have provoked, and continue to provoke, strong response within the legal community is a tribute to just how important and powerful Justice Scalia's presence has been in our current legal culture. Controversies like the ones Nino delighted in are also healthy: They help raise our awareness of how difficult it can be to identify and navigate the conflicts that we will all inevitably feel at times—as lawyers, as judges, or as individuals—in integrating our personal sense of morality with the norms of our profession and with the law.

His reputation was partly a product of his lively personality. He was consistently quick-witted and outspoken with his views, and sometimes even combative in his opinions and at oral argument. In particular, he used some of his most searing words when deciding constitutional questions that touch on those issues that currently vex us most as a country: topics such as euthanasia, abortion, gay rights, and the proper place of religion in public life.

AUTHOR. Associate Justice, Supreme Court of the United States.

Of course, Justice Scalia and I did not always agree on these most difficult of topics. But, I think the general public would be surprised to know just how frequently we *did* agree. By my count, we heard 430 cases together, and we ended up on the same side in 315 of them. Seventy-three percent is not inconsequential.

One area on which our views frequently overlapped was criminal law, and in particular cases involving the Fourth Amendment's protections against unreasonable searches and seizures. He and I often found common ground on cases involving the fast-changing world of modern investigatory techniques, juxtaposed with the law's centuries-old protections. It is often the case in this area of the law that the law lags behind technology. The struggle is in how to ensure constitutional protections keep up with this technology. I recall fondly his comment that his opinions on the scope of criminal law safeguards in the Bill of Rights should make him the favorite Justice among criminal defendants across the country.

United States v. Jones[1] is forefront in my mind when I think of Justice Scalia. There, the Court grappled with whether the attachment of a GPS tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements, constituted a search or seizure within the meaning of the Fourth Amendment. I lost count of the number of communications Justice Scalia and I exchanged with one another, tweaking words and phrases to keep his majority opinion open for my concurrence. Getting him to change a particular word could require a herculean effort, because he was such a wordsmith. But I remember our conversations well. It calls to mind another conversation when he told me: "You know, you are a bulldog. You get a bone, and you won't let it go. I'm one too; that's why I like you so much." I will miss those conversations.

When talking with Justice Scalia about *Jones*, and in a number of our Fourth Amendment cases, his perspective made me take a step back and consider where we are today as a society, and from whence we came. In many respects, he forced me to think more broadly about my own jurisprudence in this area. And so, in *Maryland v. King*,[2] a case which explored the limits of the Fourth Amendment as applied to DNA swabs for investigatory purposes, I joined Nino in his dissent. In talking to him, I saw there was value to the lines he draws. He made me understand that it was the principle involved in the constitutional protections that motivated him.

Justice Scalia spent his life defending and marking the constitutional protections in the Court's criminal law jurisprudence, and it had meaning for him

1. 132 S. Ct. 945 (2012).

2. 133 S. Ct. 1958 (2013).

beyond the practical application on any particular case. His influence in this area will not be soon forgotten. Nor will his influence upon those of us fortunate enough to have known him.