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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1.personal data questionnaire	re Antonin Scalia (36 pp.)	n.d.	P6 B6
2. paper	Judge Wallace (p. 9, partial)	n.d.	~~P5, P6~~ B6 CB 1/3/01

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

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- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

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Date: 8/6/96

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. personal data questionnaire and answers	re Anthony Kennedy (23 pp.)	n.d.	~~P6~~ B6
2. summary	of professional and personal information re Anthony Kennedy (13 pp.)	n.d.	~~P6~~ B6 CAS 1/3/01

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U.S. Department of Justice

Office of Legal Policy

Deputy Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

May 23, 1986

TO: Special Project Committee

FROM: Steve A. Matthews

SUBJECT: Judge Anthony M. Kennedy */

This memorandum discusses the body of work of Judge Anthony M. Kennedy since his appointment to the United States Court of Appeals for the Ninth Circuit in 1975. The discussion is based on a complete reading of all opinions authored by Judge Kennedy in the last eleven years (through about March 15, 1986) and a reading of selected cases in which Judge Kennedy was a member of the panel but did not write. (Those cases were selected on the basis of a review of the electronic database headnotes for each case in which Judge Kennedy participated.)

Judge Kennedy is recognized as one of the more conservative members of the Ninth Circuit. The fairly high percentage of his opinions that enjoy unanimous support from the panel would indicate that he is an effective leader and politician on the court as well. Since the Ninth Circuit is a predominantly liberal court, Judge Kennedy may have been required to restrict some of his opinions in order to gain a majority or to insulate his decisions from en banc review. Statements made below about weakness or confusion in some of his opinions should be taken with that grain of salt. Judge Kennedy is now 49 years old.

Judge Kennedy is generally very careful to confine his opinions to a discussion of those points necessary for deciding the case at hand. Moreover, those discussions are generally tailored fairly narrowly to the facts of the case. Consequently, it is not possible to provide, in his own voice, any explication of basic principles that Judge Kennedy has followed or would follow. Instead, one can speak only of tendencies discernible in his opinions. Even so, those tendencies are not monotonic.

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*/ This memorandum does not yet reflect Richard Willard's comments. He is reviewing a substantially identical earlier draft.

Rather, for any general trend, there are usually several counter-examples. The foregoing observations, in combination, make it difficult to say whether the tendencies described below accurately reflect Judge Kennedy's jurisprudence or whether they simply reflect the luck of the draw in his having participated in certain cases rather than in others for which the counter-examples might be more symptomatic. With that caveat, Judge Kennedy's opinions may be described as follows.

One tendency that manifests itself in several particular aspects is toward judicial restraint, classically defined. Judge Kennedy usually will narrow the scope of the issues involved, will narrow the announced rule, will avoid constitutional issues, will circumscribe the scope of review of lower court or administrative decisions, will follow precedent, and will be careful to avoid intruding on other centers of authority such as administrative bodies or states.

Take, for example, the avoidance of usurping the legislative/administrative role. In Arizona Socialist Workers v. Culbertson (10 */), Judge Kennedy was part of the unanimous panel which held that a district court could not reformulate an unconstitutional law so as to make it constitutional. Likewise, in United States v. Bell (68), Judge Kennedy noted that a poorly drafted jurisdictional exception would have to be revised by Congress rather than by the court. On the other hand, in NLRB v. Circle A&W (192), Judge Kennedy ruled that the administrative agency should have performed a balancing test before reaching its decision but then went ahead and upheld the agency's decision after himself performing the balancing test. A dissent in that case would have remanded so that the agency could investigate the facts and perform the balancing test.

Or consider the examples with respect to deference to state law. On the one hand, Judge Kennedy was able to write the following strong paragraphs in his dissent in Ostrofe v. Crocker (11):

> This sensitive development in the [state] law of employer-employee relations should not be pretermitted by heavy-handed interference from the federal courts in the name of enforcing laws designed only for protecting the nation's competitive economic system.
>
> I do not believe federalism is destined to fail, but neither is its continuance

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*/ Cases are identified in this memorandum by the number of the document where they appear in the notebooks on Judge Kennedy.

> necessarily assured. If it does disappear, it will be primarily because those charged with enforcement of federal laws cannot resist the temptation to expand their jurisdiction to the outermost limits of abstract logic, even where history and common sense tell us the independent processes of our state systems are sufficiently vital to afford all the protection needed against certain evils. The decision of the court here illustrates that failing, and I dissent from the opinion and the judgment.

On the other hand, in Vanelli v. Reynolds School District (5), Judge Kennedy incorrectly ignored the decision of the highest state court to have ruled on an issue in concluding that there was a property interest involved under Oregon state law in the context of a teacher dismissal. He also ignored the Oregon statutory rules for dealing with that "right", even though those rules would have established the perimeter of the right. Also, in Usery v. Lacy (187) Judge Kennedy upheld the applicability of OSHA regulations to what should have been a state law matter. Here, again, there was a very effective dissent that would have been a majority had Judge Kennedy supported it.

Darbin v. Nourse (301) is a good example of an appropriately narrowed rule. On the other hand, in United States v. Alpine (357) Judge Kennedy incorporated into the rule a dynamic concept. Having any judicially reviewable standard depend on a dynamic factor will, of course, allow for continuing judicial influence or control over what should, in the context of that case, have been a primarily administrative or legislative matter -- the allocation of scarce resources in a non-free market environment. See also, with respect to the use of a dynamic concept in describing a judicially reviewable standard, James v. Ball (4), discussed more fully below.

On another aspect of classical judicial restraint, Judge Kennedy several times avoided reaching a constitutional issue. See Gutierrez v. INS (29), Topic v. Circle Realty (50) and Robbins v. Cardwell (94).

One last aspect of classical judicial restraint is the meticulous observance of the rules of litigation, particularly with respect to standing, jurisdiction and statutes of limitations. Judge Kennedy, in the the several cases where the issue was presented, was careful to distinguish subject matter jurisdiction from either personal jurisdiction or standing. While there were one or two instances in which standing may have been doubtful, Judge Kennedy usually discussed these issues very ably. Particularly with respect to statutes of limitations, Judge Kennedy was quite firm. See, for example, Amella v. United States (42), Owens v. United States (43) and EEOC v. Alioto (52). Indeed, in once instance, Judge Kennedy quite properly held to a

rigid enforcement of the Speedy Trial Act, even though the very unfortunate result was the certain escape of the leading figure in a major international drug smuggling ring, United States v. Tirasso (131). On the other hand, Judge Kennedy ignored what seemed to be a very clear statutory provision to extend the period for filing an employment discrimination action to six or seven times the statutory period. See Lynn v. Western Gillette (51).

There is also some tension within Judge Kennedy's opinions in the context of another one of the classic terms of the debate over the appropriate judicial role -- "result-oriented jurisprudence." For example, in two cases, despite the presence of very sympathetic plaintiffs, Judge Kennedy enforced the somewhat harsh rule required by law. See Aitken v. Retirement Fund (183) and Riplinger v. United States (343). On the other hand, in two cases that were probably correctly decided on the basis of law, Judge Kennedy insisted that the decision reached was necessary because a contrary decision would simply have been unfair. See NLRB v. Apollo (207) and Allen v. Greyhound (236).

Another important criterion for evaluating Judge Kennedy's jurisprudence concerns the sources of authority to which he looks in deciding a case. Two of Judge Kennedy's opinions are noteworthy specifically for the fact that, in hard cases, they looked to precisely the right kinds of sources. In Chadha v. INS (1) Judge Kennedy examined the structural relationships among the various branches of the federal government to determine a separation of powers issue and in Oliphant v. Schlie (344; Judge Kennedy dissented in this case and the holding was subsequently reversed by the Supreme Court) he looked to historical sources to determine the jurisdiction of an Indian tribe over a non-Indian. On the other hand, Judge Kennedy sometimes gives entirely too much weight to statements of legislative history, including in some instances subsequent legislative history. See FTC v. Simeon (215) and United States Stewart (329). Indeed, in one instance, Judge Kennedy held that legislative history had the force of statutory law and was binding on the implementing administrative agency. See NLRB v. HMO (196).

A large part of Judge Kennedy's jurisprudence is a reliance on precedent. These instances are, of course, of little interest except when the facts of a case are such as to allow for the expansion or contraction of a precedential rule and in such instances, Judge Kennedy has a mixed record. First, the good news. In Topic v. Circle Realty (50), Judge Kennedy correctly ruled that an unincorporated association and three individuals did not have standing to bring an action under a particular provision of the Fair Housing Act for an injunction against racial "steering" by real estate brokers, even though the Supreme Court had allowed an action for a similar injury by residents of an apartment complex against their landlord based on another section of the Fair Housing Act. And in Fisher v. Reiser (359), he declined to expand the right-to-travel cases to require a

state to provide benefits to former residents. See also United States v. Shreve (76), United States v. Gallegos-Curiel (77) and United States v. Gardner (90).

The entries on the other side of this particular ledger are, however, more serious. In Beller v. Middendorf (2), a case involving the validity of naval regulations prohibiting homosexual conduct -- the same issue subsequently decided by Judge Bork in Dronenburg v. Zech -- Judge Kennedy somewhat grudgingly upheld the validity of the regulations. He spoke very favorably of "privacy rights" and formulated the rationale for validity very narrowly, thus giving very narrow scope to Supreme Court precedent that upheld a state's criminalization of homosexual conduct. Also, in California Medical v. FEC (3), Judge Kennedy wrote the majority opinion in a 5-4 en banc decision (Judge Wallace, inter alios, dissenting) which expanded the Buckley v. Valeo distinction between direct expenditures and contributions to candidates by analogizing contributions to political committees more closely to contributions to candidates (non-speech) than to direct expenditures (speech). (The Supreme Court subsequently affirmed the Ninth Circuit's decision, also in a 5-4 vote. The breakdown was Marshall, Brennan, Stevens, Blackmun and White in the majority to affirm Judge Kennedy's opinion; Burger, Rehnquist, Powell and Stewart in the minority, arguing that the case had not been appropriately before the court of appeals and not reaching the merits.) It is worth noting that, had Judge Kennedy voted with the dissent, he could have established a majority for the highly defensible proposition that contributions to political action committees involve speech so that regulation of such contributions would require strict scrutiny. (That part of the ruling could have survived the Supreme Court's decision since Justice Blackmun, part of the Supreme Court majority, based his decision on a finding that the regulatory lines were drawn with sufficient narrowness.) Instead, Judge Kennedy read the Supreme Court precedents so as to avoid challenging the congressional decisions embodied in the Federal Election Campaign Act. Again, in James v. Ball (4) Judge Kennedy expanded the "one-man, one-vote" rule of Reynolds v. Sims by writing the majority opinion for a split panel that distinguished a Supreme Court precedent which had recognized an exception to that rule on facts very similar to the ones in the case before Judge Kennedy. This is a very troubling decision in a number of ways. (Judge Kennedy also indicated an uncritical acceptance of Reynolds v. Sims in McMichael v. County of Napa (302). But see Aranda v. Van Sickle (54), in which Judge Kennedy, after some hesitation, concluded that the particular plaintiffs were not entitled to an electoral system that assured the election of persons who shared the plaintiffs' ethnic background.) Judge Kennedy also expanded bad precedent or contracted good precedent in Western Waste v. Universal Waste (18) and United States v. Rubalcava-Montoya (107).

The discussion so far has centered on the appropriate role and activity of a judge. The remainder of this memorandum will

deal with two broad substantive areas of law, the first being the law of intergovernmental relations and the second being the law of government-citizen relations.

On separation of powers questions, Judge Kennedy's record is again somewhat mixed. Generally, he seems to favor the judiciary in any contest between the judiciary and another branch. See, for example, Pacemaker v. Instromedix (6), G.I. Trucking v. United States (239) and Agana Bay v. Supreme Court (305). Judge Kennedy's opinion in each of those three cases has one or more substantial weaknesses. Agana Bay, in particular, is troubling insofar as Judge Kennedy there suggested a substantial limitation on any substantive congressional authority over the appellate jurisdiction of the Supreme Court. On the other hand, see Topic v. Circle Realty (50) in which Judge Kennedy, in an aside, refers to some undefined constitutional limits on the authority of federal courts. In the only major case involving a legislative-executive conflict Chadha v. INS (1), Judge Kennedy looked to the right sources and reached the right result although his discussion in this admittedly very difficult case was weak in some respects.

With respect to structural tensions between the federal government and the states, Judge Kennedy usually came down on the side of the federal government. In United States v. Helsley (8), Western Waste v. Universal Waste (18) and Usery v. Lacy (187), mentioned above, Judge Kennedy took a practically unlimited view of congressional authority under the commerce clause. And in United States v. Oregon (285), Judge Kennedy upheld a district court's injunction against an allegation that it improperly interfered with Indian treaty fishing rights by stating, "if states can regulate treaty fishing in the interest of conservation, then, a fortiori, a federal court with jurisdiction over all parties may do the same." Of course, it simply is not the case that federal courts can do anything states can do. On the other hand, see Ostrofe v. Crocker (11), discussed above.

With respect to government-citizen relations, there are three substantive areas: civil rights, criminal rights, and novel claims of constitutional protection. Before turning to those, there is one analytical issue that should be mentioned. Judge Kennedy is usually very careful to consider the important question of who enjoys a right or who has the ability to assert it. See Pacemaker v. Instromedix (6), Ostrofe v. Crocker (11), Fine v. Barry and Enright (19), Topic v. Circle Realty (50), United States v. Medina-Verdugo (88), United States v. Peele (120) and United States v. Humphrey (127). In only one case did Judge Kennedy fail to spot the importance of this issue, United States v. Hodge and Zweig (256).

On the first substantive issue -- civil rights -- Judge Kennedy is generally quite good. He frequently emphasizes the importance of intent in discrimination. See, e.g. Topic v. Circle Realty (50), Flores v. Pierve (53) and Fadhl v. San

Francisco (58). In Spangler v. Pasadena (49) Judge Kennedy wrote that a court should relinquish jurisdiction when the effects of a prior constitutional violation have been remedied and there is no continuing violation. He wrote further (anticipating the decision in Norfolk by seven years) that there is no constitutional obligation to maintain a particular racial mix in schools; the obligation is only to refrain from segregating schools according to race. And in AFSCME v. Washington (308), Judge Kennedy wrote a strong opinion rejecting the doctrine of comparable worth.

There are only two debits on the books here. In Bates v. Pacific Maritime (57), Judge Kennedy wrote for a unanimous panel imposing quotas on an employer. In that case, however, the only issue was whether the employer was a successor corporation bound by a prior consent decree. The validity of the quotas were not before the court. Less easily dismissed is the panel decision in Legal Aid v. Brennan (322; Judge Kennedy participating but not writing) in which employment goals imposed under Executive Order 11246 were upheld as not discriminatory and in which the theory of underutilization was accepted.

Judge Kennedy's track record in the field of criminal rights is also generally quite good with an occasional exception. Judge Kennedy's usual rule here seems to be that the constitutional standard requires that law enforcement activity be reasonable and that a defendant receive a fair trial rather than an error-free trial (see, e.g., United States v. Shreve (76), United States v. Hillyard (79) and United States v. Sledge (87). As counter examples, however, see United States v. Jones (78), United States v. Rubalcava-Montoya (107), United States v. Rettig (111) and United States v. Penn (165).

The final category involves novel claims of constitutional protection and this category presents some of the most disturbing aspects of Judge Kennedy's jurisprudence. Judge Kennedy's best effort in this context was Fisher v. Reiser (359) in which he held that a workers compensation beneficiary, who moved outside of the state providing the benefits, was not entitled to cost-of-living increases provided to instate beneficiaries. This was despite a claim that the denial of those increases restricted the right to travel. On the other side are decisions such as James v. Ball (4), in which Judge Kennedy not only applied the "one-man, one-vote" rule in a context where the Supreme Court had found it inapplicable but argued that such constitutional rights of participation might ebb and flow with changed material circumstances, thus providing a rhetorical background for the recognition of other new rights later on; Vanelli v. Reynolds (5), in which Judge Kennedy recognized a due process right based on a probationary employee school teacher's "property interest" in the job from which he had been dismissed for sexual misconduct with students; and Beller v. Middendorf (2) in which Judge Kennedy very grudgingly upheld the validity of naval regulations prohibiting homosexual conduct. In Beller Judge Kennedy not only stated the rule much more narrowly than either the Constitution

or precedent required, he cited Roe v. Wade and other "privacy right" cases very favorably and indicated fairly strongly that he would not uphold the validity of laws prohibiting homosexual conduct outside of the context of the military. This easy acceptance of privacy rights as something guaranteed by the Constitution is really very distressing.

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THIS FORM MARKS THE FILE LOCATION OF ITEM NUMBER 1 LISTED ON THE WITHDRAWAL SHEET AT THE FRONT OF THIS FOLDER.

SUMMARY
of
PROFESSIONAL AND PERSONAL INFORMATION
CONCERNING
ANTHONY M. KENNEDY
Attorney at Law

I. Personal and Family Information

II. Educational Background

III. Description of Practice

A. Principal Clients

B. Major Cases Tried to Completion

C. Litigation Matters Settled Before Trial

D. Subjects Covered in Practice

E. Illustrative Special Projects

IV. Academic Pursuits

RONALD W. REAGAN LIBRARY

THIS FORM MARKS THE FILE LOCATION OF ITEM NUMBER 2 LISTED ON THE WITHDRAWAL SHEET AT THE FRONT OF THIS FOLDER.

ANTONIN SCALIA

Judge Scalia is also an articulate and devoted adherent to the interpretavist theory of adjudication described more extensively in the memorandum on Judge Bork. Scalia's primary focus has been on separation of powers, justiciability and administrative law questions. He has repeatedly emphasized that the judicial role is solely to decide the rights of individuals. Thus, absent an express statutory mandate, he denies standing to persons who seek to have courts resolve generalized grievances and otherwise assiduously ensures that cases are susceptible to judicial review, most notably in a number of ground-breaking opinions on congressional standing. Scalia couples his appreciation for the limited role of the courts with respect for coordinate branches and has written several very significant opinions dealing with the deference due to the Executive, particularly in foreign affairs and the enforcement of laws.

In short, Scalia's judicial philosophy almost precisely mirrors that of Bork, with the exception of one subtle difference in emphasis which may affect their decision-making in a quite narrow range of cases. In seeking to determine the breadth of rights contained in the constitutional text, Scalia would probably be more inclined than Bork to look at the language of the constitutional provision itself, as well as its history, to determine if it grants an affirmative mandate for the judiciary to inject itself into the legislative process. Absent such an affirmative signal, Scalia's natural belief in the majoritarian process and his innate distrust of the judiciary's ability to implement, or even to discern, public policy or popular will, would probably lead him to leave undisturbed the challenged activity. While Bork certainly shares these precepts of judicial restraint, he will be somewhat more inclined in certain circumstances to give broader effect to a "core" constitutional value. Bork would look less to history, and more to the general theory of government reflected by the Constitution's overall structure, to provide guidance on the limits of judicial action. In the broader scheme of things, this divergence is quite minor, but it is the reason that Scalia severely criticized Bork's "sociological jurisprudence" in the Ollman libel case.

Scalia is obviously a superb intellect and scholar who has produced an extraordinarily impressive body of academic writings on a broad range of issues, particularly administrative law. He has also written probably the most important opinions of any appellate court judge during the last 4 years, without a single mistake. While he has not focused on the "big picture" jurisprudential questions to quite the same extent as Bork, his writings on separation of powers and jurisdictional questions reflect a fundamental, well-developed theory of jurisprudence in an area that had received all too little attention. He also reasons and writes with great insight and flair,

which gives additional influence to his opinions and articles. He has been particularly diligent in ferreting out bad dicta in his colleagues' opinions and otherwise aggressively attempted to reshape the law through dissents and en banc review. Like Bork, he would not slavishly adhere to erroneous precedent. More so than Bork, he is generally respected as a superb technician on "nuts and bolts" legal questions.

Scalia is an extremely personable man, although potentially prone to an occasional outburst of temper, and is an extremely articulate and persuasive advocate, either in court or less formal fora. Unlike Bork, he would have to undergo a relatively brief "get-acquainted" period on the Supreme Court and it is conceivable that he might rub one of his colleagues the wrong way. Scalia's background as a private practitioner for six years, a law professor at the Unviersity of Virginia, Georgetown, and Chicago, Counsel to the Office of Telecommunications, Assistant Attorney General for the Office of Legal Counsel, and a judge on the U.S. Court of Appeals for the D.C. Circuit, makes abundantly clear his technical qualifications. While he received only a "qualified" rating from the American Bar Association for the D.C. Circuit, this can only be described as slanderous nonsense. Scalia just turned 50 years old and exercises regularly. Although he smokes heavily, and drinks, he should have a lengthy career on the Court.

ANTONIN SCALIA

Antonin Scalia believes in and practices judicial restraint. He recognizes the importance of the threshold questions; he grasps that barriers to adjudication such as standing and the nonreviewability of certain executive branch decisions must be maintained (or, as the case may be, reconstructed). Otherwise, those barriers torn down, judges will be deciding issues either not theirs to decide, or not properly presented.

As a judge, Scalia actively polices the borders of his courtroom. In addition to addressing issues of justiciability that have been briefed, he also raises them on his own. Not only does his initiative in this respect illustrate the depth of his commitment to judicial restraint; it also commends him as a Justice who would be vigilant on these most basic issues even even when the executive branch is not.

As for deciding issues properly before him as a judge, Scalia has consistently demonstrated restraint. He defers to the judgments of other institutions unless it is clear that the Constitution or federal statutes command otherwise. These institutions are primarily executive branch agencies, as his court has special responsibility for reviewing agency decisions. His court hears few cases in which federalism questions arise, although on the one occasion where it arose explicitly, Scalia objected on federalism grounds to the imposition of a federal deregulatory policy upon the states.

On constitutional questions Scalia has proved an "interpretivist" -- i.e., someone who believes that the only starting point for constitutional adjudication is the text of the Constitution as illuminated by the intentions of those who framed, proposed, and ratified its provisions. Scalia has not written an opinion in a constitutional case that might be called archival, as Rehnquist's was in his dissent in Jaffree, where he reviewed the history of the framing of the establishment clause in great detail. But Scalia does seek to interpret the Constitution; he understands that it is a written document, and that its meaning is tied to what its Framers intended.

Further, as an interpretivist, Scalia understands that a judge may be obliged to go beyond what courts have said about the Constitution in order to determine what in fact the Constitution says. He recognizes -- an important distinction -- that there often is a difference between the Constitution and constitutional law.

Scalia's major interest is not the criminal law. But he has written three major criminal law opinions that testify to his belief in the criminal law as a system for determining guilt or innocence -- i.e., the truth.

Scalia's philosophical compass points correctly -- in favor of less government, in favor of free markets, in favor of traditional values. His legal experience ranges from private practice (Jones, Day) to public service (as Assistant Attorney General for the Office of Legal Counsel), from teaching law

(Virginia, Georgetown and Chicago) to deciding legal issues (as a judge on the U.S. Court of Appeals for the D.C. Circuit). He is an able and stylish writer who is, more importantly, persuasive with fellow judges and, most importantly, persuasive with the Supreme Court. Numerous Scalia opinions, some of them dissents, have become majority opinions in the Supreme Court. He clearly is a leader.

As a nominee for the Court, Scalia probably would encounter some opposition from the obvious sources. But he is well-respected and well-liked by lawyers and law professors. He is articulate, friendly, and courteous, and as the first Italian-American nominated to the Court, he would have the support of a non-ideological constituency whose exertions in his behalf might sway fence-sitting Democrats in an election year. All in all, Scalia would have to be regarded as highly confirmable.

Scalia's greatest substantive virtue is undoubtedly his understanding of and demonstrated commitment to separation of powers. His interest in jurisdictional issues stems from his grasp of separation of powers. And he will argue on the basis of this principle against devices that violate it (the legislative veto, for example).

The following review of Scalia does not cover his OLC opinions, which should be found and studied. Also, Scalia is strongly on the record in favor of non-discrimination -- he has written an excellent law review piece taking off on Bakke. But at a luncheon he made some informal remarks about the Equal

Protection Clause (to the effect that its meaning can change with the times) that warrant further inquiry in this area.

This memorandum seeks to appraise Judge Scalia as a potential nominee for the Supreme Court in light of the profile of an ideal candidate devised by the task force.

I. Philosophy

A. Judicial Restraint

During his tenure on the bench, Scalia has written the most important scholarly work and opinions of anybody writing in this area. He has been especially creative and successful in transforming the common intuition that "courts are running the country" into a set of coherent principles about what courts should not do.

1. Limited role of the courts in our tripartite system/Awareness of the importance of strict justiciability requirements

Scalia has stated his theory about the proper limitations on the role of courts most comprehensively in an article entitled Standing and the Separation of Powers discussed at Law Review Binder Tab 25. In that article, Scalia argues that the doctrine of standing plays a vital part in confining courts to their proper role in our tripartite governmental system. That role, he contends, quoting Marbury v. Madison, is "solely, to decide the rights of individuals." It is not, as Judge Wright suggested in a D.C. Circuit environmental case, "to see that important purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy," Calvert Cliffs Coordinating Commission v. AEC. As Scalia explains, non-enforcement of particular laws may be a mechanism of political correction spurred by a new election in which the "important purposes" were vehemently rejected. Thus, Scalia writes,"Yesterday's herald may be today's bore, although we judges in the seclusion of our chambers may not be sufficiently au courant to notice."

Scalia suggests the following rule of standing as capturing this view of the function of the courts: so long as the law sought to be enforced was enacted for the benefit of everybody, enforcement of the "important legislative purposes" should presumptively be treated as committed to the executive branch. This permits the electoral process to lead, for example, to changes in agency interpretation of transportation legislation from a pro-regulatory to a deregulatory approach--the kind of decision that courts, "selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle over concrete result, and (just in case any connection with the man in the street might subsist), removed from all accountability to the electorate," would be terrible at making.

Scalia concludes that a reinvigorated standing doctrine would take more seriously the prudential component of the bar on courts deciding "generalized grievances" so as not readily to infer Congressional intent to create rights of action to enforce such grievances. In some instances a proper standing doctrine would even treat that bar as constitutionally imposed, and thus not repealable by Congress.

In addition to his article, Scalia's most important opinions in the area of judicial restraint (two of which have formed the basis for major Supreme Court revision of the law on this topic) flesh out this general theory into concrete doctrines. In Chaney v. Heckler, Cases Binder II, Tab 24, [1] Scalia revitalized the doctrine of the non-reviewability of prosecutorial-type exercises of discretion by federal agencies. The tradition of the non-reviewability of such decisions, like the standing theory Scalia advocates, is a mechanism for creating political checks on the enforcement of legislative policies. In Chaney the panel majority held that the FDA had erroneously declined to investigate whether drugs used for lethal injections were "safe and effective" for that purpose. Scalia in dissent seized on the peculiarity of the panel's result to advocate radical change in the law of judicial review of agency action. The D.C. Circuit had written many opinions stating that there was a "presumption of reviewability" of all agency action. Scalia argued that nothing in Supreme Court cases compelled that conclusion, and that where core executive functions such as prosecutorial discretion were at issue, the opposite presumption should govern. His view was accepted by the Supreme Court 7-1-1, with Brennan going along halfway and Marshall concurring in reversal on other grounds.

His other major opinion in this area which formed the basis for a Supreme Court change in the law was CNI v. Block, II, 29. The panel held that despite explicit provisions making judicial review of milk marketing orders available to milk handlers and producers, consumers also had standing to challenge those orders. Scalia dissented, arguing that the combination of the narrowly crafted judicial review proceedings with the breadth of the class that would be encompassed by such a grant of standing indicated that no standing on the part of consumers should be implied. The Supreme Court did not reach the standing issue, but concluded for very similar reasons that review was precluded by statute. In doing so it issued a very important modification to the "presumption of reviewability." It stated

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[1] Hereinafter citations to the cases binders will use only the Roman numeral for the volume and the Arabic numeral for the tab number.

that that presumption was not a strict evidentiary presumption, and could be rebutted not only by explicit Congressional statement to the contrary, but "inferences of intent drawn from the statute as a whole." To demonstrate how important that reformulation is, on the basis of it the D.C. Circuit en banc unanimously rejected a suit challenging the non-appointment of Independent Counsel to investigate the "briefing book" affair. It grounded that view on the theory that the complete statutory framework provided for judicial review of other aspects of the appointment process and did not provide for judicial review of a decision not to appoint. It therefore inferred from the statute as a whole that Congress did not intend such review to be available. Before CNI that case would almost certainly have come out the other way.[2]

Another extremely important opinion Scalia wrote on standing and the separation of powers is Moore v. House of Representatives, III, 33. That case involved essentially whether courts should be the arbiters of intra- or inter-branch political disputes. Some Members of Congress sought to challenge the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), on the ground that it had not originated in the House. The majority opinion by Wilkey dismissed on the ground that "equitable discretion" counseled against court intervention in this intra-Congressional dispute. Scalia argued instead that the proper ground for dismissal was that the Congressmen lacked standing, and the court therefore lacked constitutional power to intervene, because the origination clause, like other structural provisions of the Constitution, was intended to create rights not in the Members of Congress but in the people. This proposition later formed the basis for Judge Bork's dissent from a panel opinion finding that it could review and find unconstitutional the President's exercise of the pocket veto. Its importance is difficult to overstate: if the allocation of powers in the Constitution gives rise to private rights on the part of those upon whom they are conferred in the exercise of those powers, the courts will be the arbiter of inter-branch disputes, and will thus be the true sovereign. This issue is pending before the Supreme Court on our petition for certiorari in the pocket-veto case.

Scalia couples his appreciation for the limited role of the courts in our tripartite system with respect for coordinate branches. He has written several very significant opinions

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[2] Scalia also wrote a panel majority opinion applying CNI to preclude review of Veterans Administration regulations in Gott v. Walters, III, 30. The full court granted rehearing en banc in that case, however, and it was subsequently settled.

dealing with the deference due the Executive in foreign affairs. One of these is Ramirez de Arellano v. Weinberger, I, 16a-b. In that case the plaintiff was an American citizen living on a ranch in Honduras. The ranch was owned by several corporations of which the plaintiff was the ultimate sole owner. According to his allegations, the United States had accidentally constructed the training base for Honduran and Salvadoran soldiers on that ranch rather than on publicly owned property. The plaintiff sought an injunction against continuation of the base's operation. Scalia, first writing for a majority of the panel and then in dissent from the en banc court, argued that equitable discretion forbade issuance of any non-monetary remedy, although monetary relief could be sought in the Claims Court. The chief equitable factor counseling against non-monetary relief on which Scalia relied was the intrusion by the courts into the foreign affairs and defense fields as to which the executive is the expert that such a remedy would entail. This analysis strikes the proper balance between the executive and judiciary, and, not coincidentally, as Scalia's standing article explains, between the individual and the state as well. The plaintiff, if he can prove his claims of U.S. responsibility, can recover for the taking of his property, but cannot stop the executive's conduct of defense and foreign affairs for the benefit of all Americans.

Although Scalia did not succeed in establishing his analysis as law of the circuit in that case, [3] he was successful in doing so in a later case, demonstrating another quality that would make him an excellent Supreme Court candidate, i.e. persistence. In Sanchez-Espinosa v. Reagan, I, 16c, Ginsburg and Tamm joined his opinion finding that an injunction against continued funding of the Contras would be improper on equitable discretion grounds. That opinion also was notable for being one of very few court of appeals cases since Bivens to decline to imply a damages remedy for a violation of an alleged constitutional right. Nicaraguans sought damages under the Fourth and Fifth Amendments. Scalia, after assuming without deciding that those Amendments protected non-citizens abroad, held that nevertheless the peculiarity of permitting probably hostile foreign citizens to chill exercise of governmental duties by the threat of a damages action required at least that Congress explicitly create such a right of action.

One other noteworthy point about Scalia in this area: he is extremely aggressive and successful in spotting jurisdictional

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[3] The Supreme Court subsequently vacated the en banc majority opinion and remanded the case for consideration of "later developments."

issues on his own when they are not briefed. In Ramirez de Arellano v. Weinberger, supra, at his instigation the court ordered the Act of State defense briefed. The grounds Scalia used in dismissing the suit also had not been briefed and he also noted a possible standing issue we had not discussed. In Gott v. Walters, supra, he raised the question whether judicial review was precluded by statute when no party had briefed it to the court of appeals. In Maryland People's Counsel v. FERC, III, 37, he raised a standing issue that FERC had completely missed. In ATA v. ICC, III, 42, he raised a ripeness issue ICC had missed. In Northrop v. McDonnell Douglas, III, 47, he asked a question nobody had thought of, i.e. whether third party discovery could be obtained against the government in the absence of an explicit waiver of sovereign immunity.

This is an important ability for two reasons. First, being able to spot that the court is being asked to do something inappropriate even when one is not told demonstrates real depth of understanding of the principle of judicial restraint. *Second*, even in an administration committed to that principle, as the above list demonstrates, sometimes these arguments are not made, either as a result of client resistance or pure oversight. In the Carter years, the Justice Department political appointees actively resisted jurisdictional arguments. Because administrations' approaches to the role of the courts will differ, it is very helpful for the court to be sensitive to separation of powers problems even if the executive is not. Having a Justice with Scalia's instinct for discovering these issues could be vital in those circumstances.

2. An interpretivist approach to constitutional law

Scalia has been aggressively interpretivist in his approach to constitutional law from the bench, as well as in his scholarly writing and Congressional testimony. His major judicial opinions in constitutional law have mostly been in the First Amendment area. In CCNV v. Watt, I, 1, he argued in a dissent from an en banc decision that the First Amendment's protection of "freedom of speech and of the press" should not be extended to provide equivalent full First Amendment protection for "symbolic speech" such as a demonstration involving sleeping in Lafayette Park to protest the Administration's treatment of the homeless. Although governmental attempts to regulate expressive conduct designed purely to attack its expressive content would receive full First Amendment scrutiny, where the government had a facially plausible reason for such regulation not turning on the conduct's expressive content, that should suffice to pass First Amendment scrutiny. As well as being *sensible*, the opinion is interpretivist in its focus on the text of the First Amendment in deciding its scope. It is also aggressive in that while it reconciles the results of prior

Supreme Court "symbolic speech" cases, it adopts a very different analysis from that the Court used anywhere.

Scalia has also sought to narrow New York Times v. Sullivan. In that case the Supreme Court for the first time subjected state libel law requirements to First Amendment scrutiny and devised a framework making it much more difficult for "public figures" to recover for libel. The Court held that they must prove "actual malice," that is, intentional or reckless libel, in order to be able to recover. This entire enterprise was conducted with very little grounding in the history of interpretation of the federal or state constitutional protections for freedom of the press. Accordingly Scalia has sought to construe the opinion very narrowly, and has suggested that he thinks it should be overruled.

In Tavoulareas v. Piro, I, 2, he joined a MacKinnon opinion refusing to exclude evidence of editorial process and climate in a libel case on the ground that it would violate the First Amendment to permit such evidence to be considered by a jury. He also wrote a portion of that opinion narrowly construing a later Supreme Court libel case requiring appellate courts to conduct some kind of "independent analysis of the facts found by the trial court." He held that that requirement applied only to the question of "ultimate fact" (which is really a question of law and thus properly reviewable de novo by an appellate court) regarding the reporter's "actual malice".

In Ollman v. Evans, I, 4, he dissented from the en banc court's conclusion that a statement that a professor "had no status" in the academic community was a statement of opinion entitled to absolute constitutional protection against libel suits. That case involves the only sharp exchange between him and Bork, who agreed that it was entitled to absolute protection because it took place in the context of a highly politicized tenure fight. More important than their disagreement over the result in this case is an exchange between Bork and Scalia on whether a "freshening stream of libel suits" justifies finding new First Amendment protections against such suits. Bork contended that it did, and Scalia vehemently disagreed. In my view, there is less to this disagreement than meets the eye; but it nevertheless should be noted. Scalia also pointed out in this opinion that there was no need to devise new protections for the press against libel suits, because it was already "fulsomely [i.e. excessively] protected by New York Times.

That strongly suggests that Scalia believes that decision should be overruled. [4]

Scalia also joined Bork's opinion in Dronenburg v. Zech, I, 5, in which the panel held that the Supreme Court's right to privacy cases should not be extended to include a right to engage in homosexual activity because they stated no coherent principle with boundaries a court could demarcate and should therefore be limited to their facts.

Outside the First Amendment area, Scalia made the interpretivist case against the legislative veto which the Supreme Court struck down on those grounds in INS v. Chadha, Law Review Binder Tabs 12-13. He reasoned that the Constitution created an executive, legislative, and judicial branches, that Congress only had legislative power, and that the only way it could exercise that power was by a vote of two houses subject to Presidential veto. The legislative veto, being a device outside that framework, was unconstitutional. Some conservatives disliked this position on the ground that the veto was a device to bring the bureaucracy under control. Scalia contended that that was not an argument for an extra-constitutional procedure, and that in any event the Framers probably wrought more wisely than the argument presupposed, because the veto probably encouraged Congress to legislate more vaguely and delegate more broadly in the illusion that it could rely on the veto (in fact exercised only once) to block agency action later.

As the above discussion demonstrates, Scalia's interpretivism is not the equivalent of a belief that courts should never find anything unconstitutional. In addition to the legislative veto, even in the speech area, he has criticized the fairness doctrine as constitutionally suspect. See Law Review Binder Tab 20. He also has a strong pro-free-exercise-of-religion record. He testified very strongly in favor of tuition tax credits. See Congressional Testimony Binder at Tabs 11-13. His testimony in this area is not only sensible in policy terms but demonstrates his ability to distinguish between what the Supreme Court has said about the Constitution and what the Constitution says. In particular, he urged Congress to make its own independent evaluation of the constitutionality of such legislation, rather than concern itself with the Court's ahistorical and flawed approach. He also joined Judge Ginsburg's denial of rehearing en banc in Goldman v. Secretary of Defense, I, 6. That case involved an order by the military barring a colonel from wearing a yarmulke after having permitted

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[4] Rehnquist, joined by Burger, dissented from refusal to grant certiorari in Ollman on the ground that the majority's view was incomprehensible.

it for twenty years. The panel upheld the order. Judge Ginsburg's dissent did not state that that result was necessarily wrong, but pointed out that it presented a very difficult question which the court's opinion did not adequately analyze. Judge Bork did not join that dissent.

3. Appropriate deference to agencies

Many of the justiciability doctrines discussed above demonstrate Scalia's commitment to the principle of deference to agencies as well as his commitment to a limited judicial role. That is because one reason for judicial restraint is a belief that other institutions, including agencies, are better (and constitutionally more appropriate) decisionmakers in given areas than the courts. A holding that a court cannot review an agency's decision is in that sense the ultimate statement of deference.

In addition, Scalia has been a consistent advocate of the principle of appropriate restraint in cases where judicial review is required. He wrote a seminal article urging the courts to stop going beyond the Administrative Procedure Act in inventing new procedural hurdles for agencies to clear in decisionmaking. See Law Review Binder, 1.

His behavior on the bench bears out his commitment to the principle of appropriate deference. Not counting cases where he urged dismissal of a petition for review on jurisdictional grounds, in agency cases in which he wrote the opinion, a rough count shows that he advocated affirmance of the agency 21 times and reversal only 8, all of which were justified. E.g., IV, 70 (upholding agency policy choice against substantive challenge but requiring notice and comment); 71 (finding railroads could not charge shippers for costs caused by the railroads' own lack of diligence); 76 (reversing EPA's conclusion that having found a violation, it could refrain from ordering GM to remedy its old cars' noncompliance with Clean Air Act because GM had agreed to have its new cars offset the pollution the old cars would cause; but stating in dictum that EPA could take that into account as a matter of prosecutorial discretion).

Going beyond the numbers, Scalia wrote a very important opinion sustaining NHTSA's revocation of its 5 mile per hour bumper standard and replacement of it with a 2.5 mile per hour standard. Center for Auto Safety v. NHTSA, III, 53. The critical portion of the opinion states that it is sufficient ground for an agency to revoke a regulatory measure that it finds that its original grounds for enacting it were flawed. In addition to making it easier for a court to affirm an agency in general, this standard creates an advantage for deregulation over regulation, since it will be easier to find flaws in prior regulations and revoke them than to justify new regulations.

One last point should be noted about Scalia's judicial behavior in this area. He is very careful in crafting relief not to order agencies to take particular actions, and is frequently willing to leave even actions he finds flawed in place to permit the agency to provide new justifications for them, or figure out how to respond to the finding of illegality. See, e.g., IV, 59, 70.

As an academic, Scalia also advocated the proposition that agencies ought not be allowed to find extensive powers in vague congressional mandates. He advocated a minor revival of the delegation doctrine, see Law Review Binder Tabs 15-16; and principally urged that the only way of accomplishing genuine regulatory reform was by Congress passing clearer statutes, id. at Tabs 3-5. He also enthusiastically endorsed Executive Order 12291, id. at Tab 6.

4. Deference to states in their spheres

This issue does not arise very frequently in the D.C. Circuit. On the one occasion where it came up explicitly, Scalia wrote a strong dissent objecting to the I.C.C.'s attempt to impose deregulation on the States on the ground that the statute did not satisfy the test that a federal statute must "clearly state" its purpose of preempting the States' police powers before a federal court will hold that it does so. Illinois Commerce Commission v. ICC, IV, Tab 67.

5. A disposition toward less government rather than more

Scalia's dispositions on this subject are generally well known. Before becoming a judge, he was Editor of A.E.I.'s Regulation magazine, whose analyses of the consequences of various federal programs were influential in the intellectual and subsequent political movement away from the regulatory approach. He was also a strong supporter of tuition tax credits on the ground that they would increase parental choice regarding their children's education.

These sympathies have manifested themselves in Scalia's work as a judge, although not more than would be proper for a judge committed to neutral principled jurisprudence. The most notable example is Scalia's opinion in Center for Auto Safety v. Peck, the bumper case, III, 53. That opinion is the only D.C. Circuit case to sustain any of National Highway Transportation Administration's deregulatory measures. As discussed in section 3 above, it also lowered the standard of review for deregulation. Finally, it takes NHTSA to task for understating safety benefits of its deregulatory measure by not taking into

account that consumers will be free to choose 5 mile per hour bumpers even if they are not required to do so by regulation, and quotes Adam Smith in answer to the petitioners' claim that NHTSA's conclusions correspond with those of the auto manufacturers. Slip op. at 32 n.11. See also Kansas Cities v. FERC, IV, 57.

B. Basic Principles

1. Recognition that the federal government is one of enumerated powers

Along with the case discussed above in section A 4, Scalia's only writing in this area is a piece in the Harvard Journal of Law & Public Policy, entitled The Two Faces of Federalism, discussed at Law Review Binder Tab 21. While recognizing the strengths of federalism in giving people more choices concerning how much government they want, the article does not endorse local autonomy in all situations. Rather, it notes that the Framers intended to empower the national government to override regulatory measures by the States that impeded interstate commerce. He suggests as possible areas where that might be proper state regulation of cable television, rent control, and product liability. He does not endorse any as necessarily appropriate for this purpose, but argues that they should be considered. He also contends that forces opposing government expansion cannot renounce the use of federal power to promote their ends entirely, or they will end up fighting the pro-government forces on one front while the other side is fighting on both.

2. Appreciation for the role of the free market in our society

See sections A 5, B 1 above.

3. Commitment to strict principles of nondiscrimination

Scalia wrote a scathing article attacking affirmative action, Bakke, Weber, the notion of "voluntary" goals under OFCCP, and the concept of collective restorative justice as racist in principle and promotive of racism in practice. See Law Review Binder at Tab 22.

In Toney v. Block, I, 10, he ruled that in cases where the employee established his prima facie case by showing a "pattern and practice" of discrimination throughout the company, rather than by showing that discrimination was a factor in the particular employement decision regarding him that he challenged, the employer need not rebut that showing by "clear and convincing" evidence. He also joined Bork dissents from

denials of rehearing en banc in two cases. One involved the court's refusal to apply the Supreme Court's Grove City holding concerning the limitations of the Civil Rights Acts' reporting requirements to particular programs to the identical language of the Rehabilitation Act. The other involved the court's finding that employers were strictly and vicariously liable for sexual harassment by one of their employees. I, 15. The Supreme Court has granted certiorari in both cases. He also joined Tamm's opinion in Steele v. FCC rejecting preferences for women in radio licensing decisions. I, 14a.

While rejecting race-conscious remedies and frivolous discrimination claims, Scalia is firmly committed to true non-discrimination.

4. Respect for Traditional Values

Scalia is a strong believer in traditional values. As noted above, he has testified frequently in favor of tuition tax credits. He opposes Roe v. Wade both on jurisprudential and moral grounds. He favors restoration of the status quo ante, in which the issue was left to the States. He has also, however, endorsed the Hatch Amendment, which would have given the States and federal government concurrent power to regulate abortion, on the grounds that it was both substantively better and better in terms of respect for federalism than the current state of affairs created by Roe. See Law Review Binder at Tab 23.

5. Recognition of the importance of separation of powers principles of Presidential authority

Scalia's experience as Assistant Attorney General for the Office of Legal Counsel has undoubtedly given him great understanding of separation of powers principles with perhaps something of a bias in favor of Executive power. His general views on judicial restraint discussed at A 1 above, his deference as a judge to other branches discussed at A 1 above, and his campaign against the legislative veto discussed at A 2 above, make him a very strong candidate in this area.

6. Disposition toward criminal law as a system for determining guilt or innocence

Although this is not one of Scalia's great areas of interest, he has written three major criminal law opinions (not counting Chaney v. Heckler, the lethal injection case discussed at A 1 above). All of these oppose creation of technical obstacles in criminal trials in the name of the Constitution.

In United States v. Cohen, II, 18, he wrote an opinion for the en banc court rejecting an equal protection challenge to a federal law requiring commitment of defendants found not guilty by reason of insanity only if they had committed a crime in the District of Columbia. In United States v. Byers, II, 19, he wrote for a plurality of the court that the Fifth and Sixth Amendments did not forbid compulsory psychiatric examination of defendants pleading insanity, nor did they require a lawyer's presence during the examination. And in United States v. Richardson, II, 20, he dissented from the majority view that a defendant's complaint of double jeopardy could not be adjudicated before completion of the second trial, but rejected the double jeopardy challenge on the merits. The Supreme Court agreed with his views.

In other cases, he has voted fourteen times to sustain convictions or sentences or refusals to suppress evidence, once to reverse a portion of a conviction, justifiably, II, 22 (Lyons case), and once to remand for further consideration of whether the defendant was entitled to discovery of evidence, id. (North American Reporting case). (He subsequently voted in that case to affirm the district court's conclusion that the defendant was not so entitled, id.)

II. Legal Competence

Scalia's background as a private practitioner for six years with Jones, Day, a law professor at University of Virginia, Georgetown, and Chicago, Counsel to the Office of Telecommunications, Assistant Attorney General for the Office of Legal Counsel, and a judge on the U.S. Court of Appeals for the D.C. Circuit, makes abundantly clear his technical qualifications.

He writes superbly, with the kind of flair that helped Holmes, Frankfurter, Black, and Harlan exercise influence even beyond the force of the reasoning in their opinions. See, e.g., Chaney dissent I, 24, slip op. at 901-02, in which Scalia argued that the FDA lacked authority to regulate drugs used for lethal injections because

> the state is as much the ultimate consumer of the drug as it was of the electricity previously used for the same purpose; and the condemned prisoner executed by injection is no more the "consumer" of the drug than is the prisoner executed by firing squad a consumer of the bullets.

See also, at the same tab, his very short dissent from denial of rehearing. His style is fairly combative, but has not given offence to any other member of the D.C. Circuit.

III. Strong Leadership on the Court/Young and Vigorous

As most of the discussion above indicates, Scalia has been the conservative judge the most to be reckoned with on the D.C. Circuit. He also has a very successful record in the Supreme Court. The Court adopted his approach in Chaney, II, 24, and Richardson, II, 20; an approach very similar to his in CNI v. Block, III, 29; and agreed with him in result without reaching his reasoning in CCNV v.Watt, I, 1. It also granted certiorari in a case from which he had dissented, Washington Post v. Department of State, V, 97, but the case was mooted out. Finally, it vacated and remanded the en banc opinion in Ramirez, I, 16b, from which Scalia had dissented, although the Court gave no clear reasons for its action. It has not yet reversed any of his decisions.

Along with writing very strong opinions himself, Scalia has two qualities that, according to Time, have made Brennan the most influential Justice on the current Supreme Court. See Time article in Articles package at ___. First, he has an engaging personality, and can thus persuade judges who do not start out in agreement with him to go along with him or at least make some concessions. See American Lawyer article in Articles package at ___. Second, he has been tireless in chasing down and eliminating bad dictum from his colleagues' opinions, whether in cases where he was on the panel, which he goes over with a fine tooth comb, or in cases where he was not, regarding which he frequently sends memos asking for changes in language.

Two other points not addressed in the profile that seem important to me are a judge's attitude toward precedent and the extent to which he does his own work. First, regarding precedent: In light of some of the Supreme Court's cases, our candidate will need a willingness to depart from previous cases, and a strategic grasp of how to go about doing so. Scalia has a very strong record in this area both on and off the bench as well. On the bench, he suggested in CCNV, I, 1, that the Supreme Court rethink its entire "symbolic speech" theory, while explaining how all its previous cases could be reconciled with his approach. He found a very narrow way of reading an incomprehensible Justice Stevens libel case in Tavoulareas, 2. He indicated that he favored overruling New York Times in Ollman, 4. He joined Bork in mocking the privacy cases in Dronenburg, 5. Undeterred by the full court's vacation of his Ramirez opinion, he reinserted his theory into his opinion in Sanchez-Espinoza, 16c. He led the court with a majority opinion overruling a prior D.C. Circuit case holding D.C. citizens to be a suspect class for equal protection purposes in Cohen, II, 18. He urged the court to depart from its precedents on agency prosecutorial discretion in Chaney, II, 24, and persuaded the Supreme Court to modify its test on the subject. In between the D.C. Circuit and Supreme Court opinions, he meanwhile essentially disregarded the D.C. Chaney majority

opinion onthe ground that it had improperly departed from previous law of the circuit. ICI, II, 28. He gave similar grounds for disregarding circuit precedent in Moore, III, 33. And he gave a powerful argument why "tests" explaining statutory language should not be treated as the last word on the subject in ADAPSO, III, 54.

Before becoming a judge, Scalia also expressed strong views against giving the Supreme Court's holdings in the religion cases any significance beyond their particular facts. See Congressional Testimony Binder at Tabs 11-13.

Second, regarding delegation to law clerks: Scalia does more work himself on every opinion than any other judge in the circuit. He writes from clerks' drafts, but reworks them so completely that they are unrecognizable. He also reads every case cited. This approach avoids any possibility that the views of his law clerks rather than his own will determine the outcome of cases.

Conclusion

In my review of Scalia's writings as a judge I did not find a single opinion in which either the result reached on the ground of decision seemed problematic. Furthermore, I only found one he has joined (as opposed to written) about which I had serious reservations. See Hobson, Cases Binder V, Tab 115. Finally, he has written many of the most important opinions written recently by any federal judge.