

new production. We spent the whole time debating ANWR as if it were the only place in America we could drill. We have debated it for 40 years, and maybe we will continue to debate it, but it ended in a no advance-no retreat status—basically a draw—in the last Energy bill because all the energy was spent in a discussion of ANWR, which is a very important subject, but it is not the only place that has oil and has gas. We have a lot of it in the gulf. We are willing to drill.

This is the extraordinary find just off the coast of Louisiana—actually an outside distance of over 200 miles—most extraordinarily, 28,000 feet deep, 20,000 feet of water and 8,000 feet below the floor. This well in this small, little square will double the size of the reserves in the entire Gulf of Mexico. There is plenty of oil and gas in the gulf, and the great news is that Texas, Louisiana, Mississippi, and Alabama will do the drilling. We will be host for the industry. We respect the rights of other States that might choose other ways. Your State, Mr. President, has chosen a different way, other States look at the Atlantic coast and have chosen a different way, and Florida has chosen a different way. That debate is for another day.

Right now, the American people need this leadership team to act, to open 9 million new acres of land in the Gulf of Mexico. This has been agreed to by Democrats, by Republicans, by Florida, by Alabama, by Mississippi, by Louisiana, and by Texas, by all the Governors, starting with Governor Bush, to Governor Perry, to Governor Blanco, to Governor Riley, to Governor Barbour. You would think we could get this done before we leave.

This is a jack well, one little square. This is lease sale 181 and 181 south, which PETE DOMENICI has led in an extraordinary bipartisan effort with 72 votes on the floor to open this drilling. Many want to say it is not enough. It looks pretty big to me. We don't even know the oil and gas that is there because we haven't even tested it. Trust me, there is a lot of oil and gas. Check the industry, check the Web site about what must be there. And there is no fight about it. The only fight is we can't seem to get this bill passed when most everybody has agreed to it. Some people are holding out to drill off the coast of California or off the coast of New Hampshire or off the coast of New Jersey, which is not going to happen in the next week. It may not happen in the next year or two. But this can happen now. We need to make this happen now. The industry needs the oil and gas.

Why do I keep saying it is America's energy coast? Because this is the pipeline. I didn't make this up. This comes off of the Web site. It is from the Annual Florida Natural Gas Supplemental Gas Supply and Disposition from the Energy Administration. This is not from MARY LANDRIEU's office; this is from the Energy Administration. This

is where the natural gas is. This is where it comes from. The infrastructure is here, and our country desperately needs it.

Here is another chart that shows it in a more colorful fashion. This is the pipeline coverage. You can see the contributions of Texas, Louisiana, and Mississippi. This is the Superdome. It sits right here. There is Mississippi, Louisiana, and Texas. Right here is the heart of America's energy coast. We are proud of it.

There is not a whole lot of drilling going on up here, not a whole lot up here in the northwest, but the infrastructure is here.

We need to open up lease sale 181. The steady stream of revenue to restore this coast and to build these levees—\$8 billion—is produced off of this coast every year, and getting a portion of these revenues back to these States, opening additional reserves, and sharing these revenues to build this coast and to restore this coast is something we can get done.

In the spirit of the leadership and the spirit of the great victory last night, let this team in Washington get this victory for the country before we leave.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I certainly enjoyed the remarks of my friend from Louisiana.

#### MARKING THE 20TH ANNIVERSARY OF THE APPOINTMENT OF SUPREME COURT ASSOCIATE JUSTICE ANTONIN SCALIA

Mr. HATCH. Mr. President, I proudly rise to mark the 20th anniversary of a great event.

Twenty years ago today, Antonin Scalia took the oath of office to become an Associate Justice of the Supreme Court of the United States.

Through his dogged commitment to the fundamental principles of liberty, and the brilliance and passion with which he expresses that commitment, Justice Scalia is having a profoundly positive impact on our nation.

In the time I have this morning, I would like to offer a few general remarks about Justice Scalia's judicial philosophy, his judicial personality, and his judicial impact.

Antonin Scalia was born on March 11, 1936, in Trenton, New Jersey, the only child of immigrant parents.

After graduating first in his high school class, summa cum laude and valedictorian from Georgetown, and magna cum laude from Harvard Law School, he embarked on a legal career that would include stints in private practice, government service, the legal academy, and the judiciary.

President Reagan appointed Antonin Scalia in 1982 to the U.S. Court of Appeals for the D.C. Circuit, and then in 1986 to his current post on the Supreme Court.

President Reagan did not choose Justice Scalia simply because he is smart and talented.

With all due respect to the good Justice, there are many smart and talented people around.

No, President Reagan chose Justice Scalia because his smarts and talents are connected to a deeply considered and deliberately framed judicial philosophy rooted in the principles of America's founding.

Indeed, as Pepperdine law professor Douglas Kmiec has said, Justice Scalia "is the justice who works the hardest to construct a coherent theory of constitutional interpretation that does not change from case to case."

When the Judiciary Committee hearing on Justice Scalia's nomination opened on August 5, 1986, I quoted from the Chicago Tribune's evaluation that the nominee before us was "determined to read the law as it has been enacted by the people's representatives rather than to impose his own preference upon it."

Consider for a moment the vital importance of this simple principle.

Since the people and their elected representatives alone have the authority to enact law, the way they have enacted it is the only sense in which the law is the law.

The way they have enacted it, then, is the only legitimate way for judges to read it.

This fundamental principle is at the heart of Justice Scalia's judicial philosophy.

This principle springs directly from the separation of powers, which America's founders said was perhaps the most important principle for limiting government and preserving liberty.

Alexander Hamilton wrote in *The Federalist* No. 78 that there is no liberty if the judiciary's power to interpret the law is not separated from the legislature's power to make the law.

In his dissenting opinion in *Morrison v. Olson*, Justice Scalia highlighted the Massachusetts Constitution of 1780 which, to this day, contains what Justice Scalia called the proud boast of democracy, that this is a government of laws and not of men.

The Massachusetts charter, however, also states what is required for this boast to be realized.

It requires the separation of powers, including that the judiciary shall never exercise the power to make law.

Today, only 42 percent of Americans know the number of branches in the federal government and fewer than 60 percent can name even a single one.

But America's founders insisted that identifying them, defining them, and separating them is essential for liberty itself.

In *Marbury v. Madison*, the great Chief Justice John Marshall wrote that it is the duty of the judicial branch to say what the law is.

Not what the law says, but what the law is.

The law is more than simply ink blots formed into words on a page.

Saying what the law is requires saying what the law means, for that meaning is the essence of the law itself.

But here is the crux of the matter, Mr. President.

The meaning of the words in our laws comes from those who made them, not from those who interpret them.

Those who chose the words in our laws gave them life by giving them meaning, and the judicial task of saying what the law is requires discovering the meaning they provided.

The separation of powers, therefore, excludes from the judiciary the power to change the words or meaning of the law and secures to it the power to interpret and apply that law to decide cases.

As President Reagan put it when swearing in Justice Scalia 20 years ago today, America's founders intended that the judiciary be independent and strong, but also confined within the boundaries of a written Constitution and laws.

No one believes that principle more deeply, and insists on implementing it more consistently, than Justice Scalia.

President Reagan often used the general label judicial restraint for this notion of judges restrained by law they did not make and cannot change.

A speech last year at the Woodrow Wilson International Center for Scholars here in Washington was one of many instances in which Justice Scalia used the more specific label originalism for his judicial philosophy.

When judges interpret the law, he said, they must "give that text the meaning that it bore when it was adopted by the people."

Whether that simple statement elicits growls or cheers today, Justice Scalia was merely echoing America's founders.

James Madison said that the only sense in which the Constitution is legitimate is if it retains the meaning given it by those who alone have the authority to make it law.

This body unanimously confirmed Justice Scalia on September 17, 1986, the 199th anniversary of the Constitution's ratification.

I see that as having more than coincidental significance, for it is Justice Scalia's judicial philosophy that gives the most substance and power to the Constitution.

The Constitution cannot govern government if government defines the Constitution.

That includes the judiciary, which is as much part of the Government as the legislative or executive branch.

To once again cite Chief Justice Marshall from *Marbury v. Madison*, America's Founders intended the Constitution to govern courts as well as legislatures.

It cannot do so if, as Chief Justice Charles Evans Hughes famously claimed, the Constitution is whatever the judges say it is.

If the Constitution is little more than an empty linguistic glass that judges may fill or a checkbook full of blank checks that judges may write, it is not much of anything at all. We all know better.

I am not sure what such a collection of words without meaning might be called, but it is not a Constitution.

Thankfully, Justice Scalia rejects such an anemic and shape-shifting view of the Constitution, insisting that even judges must be the servants rather than the masters of the law.

Justice Scalia insists that judges stick to judging so the Constitution can indeed be the Constitution.

Analyzing Justice Scalia's jurisprudential approach in the *Arkansas Law Review*, one scholar described what he called the justice's meticulous, almost obsessive, attention to language.

Let us remember that the epicenter of the remarkable system of government America's founders crafted is indeed a written Constitution.

They, too, were obsessed with language.

President George Washington warned in his 1796 farewell address against changing the Constitution through what he called usurpation rather than the formal amendment process.

George Mason actually opposed ratification of the Constitution, in part because giving the Supreme Court too much power to construe the laws would let them substitute their own pleasure for the law of the land.

President Thomas Jefferson said that "our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."

Justice Scalia appears to be in some good obsessive company.

No one should assume that while originalism is relatively straightforward to describe, it is either perfect or easy.

Writing in the *University of Cincinnati Law Review* just a few years into his Supreme Court service, Justice Scalia himself acknowledged that originalism is, in his words, not without its warts.

But it is consistent with, I would say compelled by, the principles underlying our form of Government.

And it is certainly better than the alternative, which puts judges rather than the people in charge of the law's meaning and the nation's values.

Let me emphasize that Justice Scalia's judicial philosophy is about the process of interpreting and applying the law, to whatever ends the law requires.

That process can produce results in individual cases that political conservatives or liberals will support or oppose.

But when the law, and not the judge, decides the outcome of cases, those who do not like the outcome can work to change the law.

When, however, the judge and not the law decides the outcome of cases, the people are nearly always left with no voice at all.

Justice Scalia's critics attack his judicial philosophy for the same reason he embraces it.

Originalism limits a judge's ability to make law.

The famed Senator and Supreme Court orator Daniel Webster once said that "there are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters."

Justice Scalia has often said that judges are no better suited to govern than anyone else, and certainly have no authority to do so.

Unelected judges, no matter how well-intentioned, do not have the power to be our masters.

The temptation and danger of judges making law reminds me of a scene in *The Fellowship of the Ring*, the first installment of the *Lord of the Rings* trilogy.

Gandalf the wizard has discovered that Bilbo's ring is indeed the One Ring of power and Frodo insists that he take it.

Gandalf wisely says: Understand Frodo, I would use this ring from the desire to do good. But through me, it would wield a power too great and terrible to imagine.

In that same spirit, Justice Scalia declines the power to make law.

As Hamilton put it, the great and terrible cost of judges rather than the people making law would be liberty itself.

Thomas Jefferson warned that by playing with the meaning of the Constitution's words, the judiciary would turn the charter into a mere thing of wax that they would twist and shape into any form they chose.

In the last 70 years or so, the judiciary has been doing a lot of twisting and shaping.

One of Justice Scalia's predecessors on the Supreme Court, Justice George Sutherland, was also one of my predecessors as a Senator from Utah.

Justice Sutherland wrote this in 1937:

The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to . . . convert what was intended as inescapable and enduring mandates into mere moral reflections.

In 1953, Justice Robert Jackson lamented what had become a widely held belief that the Supreme Court decides cases by personal impressions rather than impersonal rules of law.

Many people, conservatives as well as liberals, do not seem to mind this trend so long as it is their moral reflections and their personal impressions that are twisting and shaping the Constitution.

Many people, conservatives as well as liberals, applaud or criticize the Supreme Court when it amends the Constitution, depending on whether they like the Court's amendments.

Yet I ask my fellow citizens, both conservatives and liberals: would you rather have your liberty secured by moral reflections and personal impressions or enduring mandates and impersonal rules of law?

If you cede to judges the power to make law when you support the law they make, what will you say when

judges—and they will—make law you oppose?

Liberty requires separating judges from lawmaking.

Liberty requires that judges take the law as they find it, with the meaning it already has, apply it to decide concrete cases and controversies, and leave the rest to the people.

Professor John Jeffries of the University of Virginia Law School writes that Justice Scalia “is the most nearly consistent of our judges. He cares more about methodology than is usual among judges, worries more about fidelity to the law laid down, feels himself more closely bound by external sources, and is more dedicated to a vision of constitutional law as something distinct and apart from constitutional politics.”

That is precisely the kind of judge America needs on the bench.

The second thing I want briefly to describe, is what has been called Justice Scalia’s judicial personality.

It animates, communicates, and gives practical force to his judicial philosophy.

It turns up the volume, making people sit up and take notice of what, from someone else, might be little more than some quiet ramblings at a seminar somewhere.

One way to describe Justice Scalia’s judicial personality would be simply to read from his opinions.

Even while enjoying his powerful prose, however, this might miss the real point.

Justice Scalia’s piercing logic, witty and provocative writing, verbal jousting in speeches and debates, and aggressive questions in oral argument are but means to an end.

He uses wit, humor, logic, sarcasm, and the rest to expose the premises and implications of arguments, to assert and defend important principles, and to make the necessary application of those principles absolutely inescapable.

Justice Scalia does not suffer fools gladly, nor will he ignore the man behind the jurisprudential curtain.

His judicial personality makes his judicial philosophy more potent and, quite frankly, impossible to ignore.

As a result, the adjectives attached to his name by media, political activists, and commentators seem to be multiplying, as if a single descriptive—or even two or three—just will not do.

Some call him outspoken, provocative, or fiery; others say he is aggressive, engaging, and articulate.

One profile said he is colorful, controversial, and combative; another said he is testy, witty, and sarcastic.

If adjectives are a measure of one’s presence, Justice Scalia is very present indeed.

Justice Scalia is also a funny man.

What is not to like about a judge who uses words such as pizzazzy when talking about constitutional interpretation?

I had no idea how to spell pizzazzy until I read it in one of Justice Scalia’s speeches.

Following our modern penchant for everything statistical, we also have empirical evidence that Justice Scalia is indeed the funniest member of the highest court in the land.

Professor Jay Wexler at Boston University Law School examined transcripts of Supreme Court oral arguments, noting when they identified laughter.

During the October 2004 term, Justice Scalia was way ahead of the laugh pack, good for slightly more than one laugh per session.

Finally, I want to address Justice Scalia’s judicial impact in two respects.

The first is the impact that comes directly from him, from his judicial personality propelling his judicial philosophy.

One biography cites an unnamed Supreme Court observer noting that if the mind were muscle, Justice Scalia would be the Arnold Schwarzenegger of American jurisprudence.

The inherent power of the principles on which Justice Scalia stands, propelled by the way in which he asserts and defends them, force us confront, whether we like it or not, the issues most basic to a system of self-government based on the rule of law.

As a result, Harvard law professor John Manning writes, Justice Scalia has had a palpable effect on the way we talk and think about the issues of judicial power and practice.

In addition to the immediate work of judges, which is to decide cases, Justice Scalia has prompted, poked, and prodded us to grapple more seriously with these fundamental issues.

But he is not simply a judicial provocateur. When he enrages, he also engages. If Justice Scalia had no impact, he would get no attention. Even the commentators that call him a bully, or worse, feel they have to call him something. His harshest critics know they cannot ignore him.

Scholars or political activists can no longer simply describe the political goods they want judges to deliver, they must defend why judges have the authority to deliver those goods.

Justice Scalia has helped lead this transformation by so powerfully and consistently arguing that the political ends do not justify the judicial means.

As a result, the left-wing groups that today fight President Bush’s judicial nominees often use Justice Scalia as the bogey-man, the model they say America must avoid.

To borrow an image from one of Justice Scalia’s many famous dissenting opinions, he is used by some as the proverbial ghoul in the night, used to scare citizens and small children.

Somehow, I think, that is fine with Justice Scalia because, even as a foil, his judicial philosophy must be reckoned with.

He is indeed a happy warrior.

His speech at Harvard in September 2004 was typical.

According to news reports, nearly three times as many sought tickets as

obtained them and he held the rapt attention of a standing-room-only crowd.

Legal scholars from across the political spectrum concede Justice Scalia’s impact.

Professor Michael Dorf of Columbia Law School, for example, says that because of Justice Scalia’s influence, we start more often with text rather than its history when looking at written law.

America’s founders, it seems to me, assumed that judges would always start with the text and be kept in check because the meaning of that text already exists.

This is why America’s founders could call the judiciary the weakest and least dangerous branch.

Putting statutory text ahead of statutory history would be a judicial no-brainer to them.

If Professor Dorf is correct, we should first lament that the courts had gotten so far off course and then cheer Justice Scalia for helping point the way back.

The second, more general, way of looking at Justice Scalia’s impact has a human face.

Like every Federal judge, Justice Scalia each year has the assistance of law clerks, those super-brainy, hyperkinetic workhorses who seem able to leap a courthouse in a single bound after virtually no sleep.

As his Judiciary Committee hearing opened 20 years ago, Justice Scalia introduced his law clerk Patrick Schiltz who had helped him prepare and who would go on to clerk for him on the Supreme Court.

Several months ago, this body confirmed Patrick Schiltz to be a U.S. District Judge in Minnesota.

In 2004, we confirmed Mark Filip, who clerked for Justice Scalia during the October 1993 term, to be a U.S. District Judge in Illinois.

In 2003, we confirmed Jeffrey Sutton, who clerked for Justice Scalia during the October 1991 term, to the U.S. Court of Appeals for the Sixth Circuit.

Justice Scalia must be proud of these former clerks who now sit on the Federal bench, and the many who have argued cases before him, even when he might vote against their position or reverse one of their decisions.

Justice Scalia’s former clerks are now serving in many significant positions throughout the country.

They are partners at the Nation’s leading law firms, on the faculty of the Nation’s leading law schools, and heading legal teams at the Nation’s major corporations.

Some, such as Solicitor General Paul Clement, serve in the top tier of the executive branch.

Ed Whelan, who clerked for Justice Scalia during the October 1991 term, served as my counsel when I chaired the Judiciary Committee and is now president of the Ethics and Public Policy Center here in Washington.

Through these talented and dedicated men and women who have served in his

chambers, Justice Scalia's impact extends far beyond the halls of the Supreme Court.

Mr. President, I have received letters from some of Justice Scalia's former law clerks offering their own thoughts, reflections, and congratulations on this important anniversary.

I ask unanimous consent that they be made part of the record at the conclusion of my remarks.

The PRESIDING OFFICER (Mr. BURR). Without objection, it is so ordered.

(See exhibit 1.)

Mr. HATCH. While I have just scratched surface, my time is almost gone.

Justice Antonin Scalia is the kind of judge America needs and the kind of man Americans would want living next door.

He considers aggressively and defends passionately the principles responsible for the ordered liberty that makes America the envy of the world.

He refuses to let politics supplant principle and with a confident humility, or perhaps a humble confidence, submits himself to the rule of law and the collective judgment of his fellow citizens.

In the process, by the force of the principles in which he believes and the personality with which God has blessed him, Justice Antonin Scalia has made our liberty more secure, our citizenry and leaders more responsible, and given us all plenty to ponder, and chuckle about, along the way.

Mr. President, I have such respect for the Federal judiciary. I have such respect for those who interpret the laws rather than make them. Justice Scalia is at the head of the pack.

Justice Scalia, congratulations on your first 20 years on the Supreme Court. Thank you for all you continue to do for our Nation.

EXHIBIT 1

SEPTEMBER 21, 2006.

Senator ORRIN HATCH,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR HATCH: I am writing you on the occasion of Justice Antonin Scalia's twentieth anniversary as a member of the United States Supreme Court to reflect on some of the enormous contributions the justice has made to our public life during his service on the Supreme Court. I first met the justice almost twenty-five years ago at the very first Federalist Society conference ever held which was at Yale Law School. I was struck then and am struck now by his vivacious intellectual manner, his tremendous enthusiasm and energy, and by his sharp wit. Justice Scalia is a brilliant man of many talents, and he is in my view the intellectual leader of the Court. I thought I would write you this letter to describe some of the many ways in which Justice Scalia has distinguished himself on the Supreme Court.

First, the justice is one of the most gifted writers ever to serve on the Supreme Court of the United States. Not since Justice Robert Jackson has anyone served on the Court with such a gift and flair for writing. Since his appointment to the Court on September 26, 1986, Justice Scalia has emerged as a brilliant, outgoing, and very outspoken Justice.

His sharp and pointed opinions, which all too often are dissents, include many memorable lines. From the beginning, Justice Scalia has also been a very active participant in the Court's oral arguments where he asks probing and effective questions.

While serving on the Supreme Court, Justice Scalia became the most active proponent of originalism among the justices, and it is fair to say he is the leading proponent of originalism in American law today. Originalism is, of course, the theory that constitutional language should be interpreted according to the original meaning the relevant words had when they were enacted into law. Justice Scalia defended this theory in an important public lecture which was published under the title *Originalism: The Lesser Evil* and then in a book called *A Matter of Interpretation: Federal Courts and the Law*. Justice Scalia's originalism is evident in many of the most important decisions he has written or joined including his opinions rejecting the use of substantive due process in abortion, homosexual rights, or assisted suicide cases. On criminal law and procedure cases, Justice Scalia's originalism has sometimes led him to favor criminal defendants claims with respect to issues such as the right to jury trial in sentencing, in determining the scope of the Confrontation Clause, and in evaluating whether the President has power to detain citizens who are enemy combatants without a court hearing.

Justice Scalia has qualified his support for originalism in two important ways which illustrate his intellectual depth and contribution to legal theory. First, he has made it clear in constitutional cases that it is the original meaning of the text which controls and not the original intentions of those who wrote the text. Justice Scalia applies this approach as well in statutory interpretation cases where he has led a campaign for formalism and against any reliance on legislative history. Justice Scalia's formalism has had a big effect on the Court, and the justices make much less use now of legislative history than they did when Justice Scalia was first appointed. The revival of formalism is thus another major accomplishment of the Justice's during his twenty year tenure on the Supreme Court.

Second, Justice Scalia has also argued that when the original meaning of the constitutional text would enmesh judges in balancing judges ought in those cases to announce a minimalist rule to further judicial restraint. As a result, Justice Scalia rejects on judicial restraint grounds allowing judges to assess the proportionality of punishments under the Eighth Amendment or the necessity of federal laws under the Necessary and Proper Clause or the unconstitutionality of broad delegations of power to the executive under the non-delegation doctrine. Justice Scalia has defended his approach in an important law review article called *The Rule of Law as a Law of Rules*. In this article, Justice Scalia makes it clear that when the original meaning of the text would enmesh judges in balancing he thinks they should abstain from acting instead. This too is a major contribution to the theory of judicial restraint in judging.

Justice Scalia's most important opinions on the Court include: his dissent in *Planned Parenthood of Pennsylvania v. Casey*, where the Court reaffirmed *Roe v. Wade* and his dissent in *Morrison v. Olsen*, where the court upheld the constitutionality of court appointed special prosecutors. The Morrison dissent amusingly came to be hailed by liberals as prophetic during the Clinton impeachment proceedings, and it helped lead to a situation where the political branches jointly decided to junk the special prosecutor law in 1999. Other very important

Scalia opinions include: his majority opinion in *Printz v. United States*; his concurrence in *Bush v. Gore*; and his dissents in *Romer v. Evans* and in *Lawrence v. Texas*. Justice Scalia was also a critical fifth member of the majority which found that flag burning was protected speech under the first Amendment. In recent years, Justice Scalia has led a campaign to preclude the Court from relying on foreign law in many constitutional cases. But most important of all, no other justice who has served on the Court since Justice Scalia's appointment in 1986 has ever been able to match him in his intellectual leadership of the Court or in writing ability. A brilliant mind and a sharp pen have guaranteed Justice Scalia a place in American history as one of our most influential justices.

Best wishes.

STEVEN G. CALABRESI,  
*Professor of Law.*

NEW YORK UNIVERSITY  
SCHOOL OF LAW,  
*New York, NY, September 24, 2006.*

Hon. ORRIN G. HATCH,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR HATCH: I am pleased to join the celebration of the 20th anniversary of Justice Scalia's swearing in as a Supreme Court Justice by submitting this letter to the Congressional Record. Although it is somewhat ironic that this tribute to Justice Scalia will be contained in pages of legislative history that he so often derides, I think even he will be convinced that, in this instance, the legislative history is authoritative. After all, if, as he has noted, the use of legislative history is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends," he will see many friends and admirers today. I proudly include myself in that group. Justice Scalia has been a valued mentor and serving as his law clerk was an honor I will always treasure.

All of the Justices play a significant role during their time on the Supreme Court by virtue of their votes in the important cases of the day. But most Justices fail to leave a lasting imprint on the law that goes beyond those votes. Justice Scalia's jurisprudence, in contrast, will long outlast his time on the bench. For he has spent his twenty years on the Court not merely voting in important cases; he has been articulating his vision of the Court's place in the constitutional order. Anyone interested in the Supreme Court—from legal scholars to litigants, politicians to pundits—must reckon with his impassioned and intelligent defenses of originalism and textualism. These methodologies have never had a more brilliant advocate on the bench, and generations of law students will wrestle with the arguments he has developed in his opinions. Whether you agree or disagree with Justice Scalia's jurisprudence, there is no denying the brilliance or coherence of his vision of the Supreme Court.

It is important to note that this clarity has not come without costs to the Justice. It takes courage for a judge to stake out a clear position on what methodology he or she will follow in constitutional and statutory cases. For this transparency allows outside observers to assess the judge's performance by a clear metric. It is so much easier for a judge to take each case as it comes without declaring an overarching method or approach. This flexibility allows the judge to change positions from case to case and vote his or her preferences without much constraint. Justice Scalia has not allowed himself that indulgence. Even if we cannot predict his vote in a given case, we know how to judge his performance, for he has told us in

no uncertain terms the values he seeks to uphold and the approach he is committed to follow.

I will let history assess how each of the Justice's votes has measured up to the standards he has set for himself. But two things are clear. First, there are countless examples that prove the Justice's fealty to his methodological commitments. The Justice has not shied away from the consequences of his chosen methodologies, even when it has meant overturning an anti-flag burning law in *Texas v. Johnson*, 491 U.S. 397 (1989), or rejecting the government's attempt to deprive an American citizen accused of terrorism of his procedural rights in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). There are numerous other illustrations of his commitment, including a multitude of criminal law cases where the Justice has protected the rights of defendants. These cases demonstrate that the Justice is not merely a great intellect; he has the courage of his convictions.

Second, and more importantly, regardless of how Justice Scalia himself has performed under the standards he has set for himself, we must thank the Justice for articulating those standards brilliantly, cogently, and colorfully for twenty years. His opinions are not only educational, they are engaging. They make us think about the role of the Court in our democracy, the nature of rights, and the balance of power in government. His opinions are also beautifully written; he is a master artisan of the craft of judicial opinion writing. Whether his opinions prompt howls of delight or screams of disgust, they are full of life, just like the Justice himself.

I hope we can look forward to at least twenty more years of Justice Scalia's service. But even if he served not a day more, his place in history is both assured and well-deserved.

Sincerely,

RACHEL E. BARKOW,  
*Associate Professor of Law.*

BOSTON UNIVERSITY  
SCHOOL OF LAW,  
*Boston, MA, September 25, 2006.*

Senator ORRIN HATCH,  
*U.S. Senate,*  
*Washington, DC.*

DEAR SENATOR HATCH: One of the greatest privileges of my life was the opportunity to clerk for Justice Antonin Scalia, who has now reached his twentieth year on the Supreme Court. He taught me lessons about law, writing, and life that I will always value. I am particularly fond of two of his favorite sayings that he would trot out when pointing out to law clerks some deep complexity that they had missed: "Nothing is easy" and "It's hard to get it right." Right answers, in law and elsewhere, do not come from slogans, party platforms, or warm feelings. They come from hard work, intellectual rigor and honesty, and a willingness to check premises and follow arguments where they lead. Justice Scalia's example in this regard was, and still is, inspiring.

I also recall—more fondly with distance—Justice Scalia's practice of checking every citation that his clerks put into a draft. Justice Scalia's meticulous concern for accuracy is truly remarkable, and the world would be a better place if more people shared it.

It has been a pleasure and an honor for me to watch this man and this mind in action. I am grateful for the opportunity to recognize one of the finest people ever to sit on the United States Supreme Court.

Sincerely,

GARY LAWSON,  
*Professor of Law.*

SEPTEMBER 26, 2006.

Hon. ORRIN HATCH,  
*U.S. Senate,*  
*Washington, DC.*

DEAR SENATOR HATCH: I write to join you in extending congratulations to Justice Scalia on the occasion of his twentieth anniversary on the Supreme Court of the United States. I had the great privilege to clerk for Justice Scalia during his third term on the Supreme Court, October Term 1988. As a teacher of various separation of powers courses, first at Columbia and now at Harvard Law School, it has been a happy part of my job to follow his career closely. Although it is impossible to capture Justice Scalia's many achievements in a brief tribute, it is worth noting just one of the ways he has managed to change not only the law, but also the way we think about the law.

I refer to the rules of the game by which judges read legislation. When I graduated from law school one year before President Reagan (with the Senate's advice and consent) appointed Justice Scalia to the Court, the question of legitimacy lay deep in the background of the way federal judges approached Congress's handiwork. Although the dominant way of thinking about the law was known as the Legal Process school, little was said about the relationship between the legislative process and its output. The central precept of the time was that judges should be guided by notions of "reasonableness." If legislation was awkward in relation to its apparent purpose, judges should make it more coherent and smooth out its rough edges. Who could be against that? Surely, no one could object to reasonableness in the abstract.

The difficulty is this: Those in your line of work know all too well that in the popularly elected bodies to which our Constitution wisely assigns the task, lawmaking requires compromise. Although sometimes the word "compromise" is used pejoratively as the opposite of "principle," the fact is that compromise represents the way that a society as large and diverse as ours works out the inevitable disagreements that people of good faith have about the way we should solve the most pressing problems that we face. Sometimes compromises—good, socially valuable, even life-saving compromises—are awkward, rough-hewn, and uneven. The Court's former impulse to smooth out the rough edges of legislation—to make it always "reasonable," no matter what the text required—ignored that reality.

No one drove this lesson home more forcefully than Justice Scalia. Twenty years ago, he began to try to persuade his colleagues on the bench and at the bar that the clear import of the enacted text best captures the lines of compromise that legislators work so hard to reach. In the old days, the Court was prone to say that even the clearest text had to yield to some often ill-defined "spirit" or "purpose" that judges perceived to lie behind a statute. See *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). Today, the Court is much more likely to emphasize that "[t]he best evidence of [statutory] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). Or it might explain that judges "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994). In short, the Court now recognizes that the compromises brokered in a complex, untidy, but ultimately democratic process of passing legislation are not for federal courts to second-guess.

That change in judicial practice, I submit, is a healthy one. It is much more respectful

of the kind of democracy our Constitution adopts. It is much more respectful of the wise process by which you and your colleagues make law—a process whose rules of procedure and whose practices quite obviously stress the importance of compromise. Greater judicial respect for that legislative reality has grown during, and because of, Justice Scalia's tenure on the Supreme Court. It is one of the many things for which Justice Scalia—and the Senate, which confirmed him without dissent—have reason to be proud.

Thank you for the opportunity to join you in celebrating Justice Scalia's first twenty years on the Court.

Very truly yours,

JOHN F. MANNING.

Mr. HATCH. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

#### RECESS

The PRESIDING OFFICER. Under the previous order, the hour of 12:30 p.m. having arrived, the Senate stands in recess until 2:15 p.m.

Thereupon, the Senate, at 12:30 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mr. VOINOVICH).

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. BOND. I ask unanimous consent to proceed as in morning business for up to 8 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### AMERICA'S SECURITY

Mr. BOND. Mr. President, today we are speaking about security. The major topic of discussion has been, are we safer today? Well, we are safer because of the actions this administration and the Congress have taken, backed up by our brave Americans in the military, intelligence, and law enforcement agencies.

But recently, there has been another politically motivated selected leak of classified information. Regrettably, I am talking about the National Intelligence Estimate, a fraction of which was reported on in the *New York Times* and, I believe, misinterpreted.

Beside the fact that leaks of this nature, 6 weeks before elections, are clearly politically inspired, these leaks are also illegal and they make the job of our intelligence agency operatives even more difficult. For example, how can intelligence operatives report on the strengths and weaknesses of our allies when those conclusions will be spread on the record? Our policymakers need to know, but what good is it to tell the world what we think about the people we depend upon?

With that said, I have read the NIE in question. It is not what the paper