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High Court's Colorful Man in Black

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WASHINGTON— In the cramped US Supreme Court press gallery, the view is so obstructed that an officer holds up cards to indicate which justice is speaking. With seven men on the bench, it's easy to confuse the softer tones of Justices John Paul Stevens, Anthony Kennedy, and Stephen Breyer.

But one voice is unmistakable. Its penetrating pitch crows lawyers, and it can range from a controlled explosion to a dancing light-hearted mockery. That's Justice Antonin Scalia - no need to look at the card.

Articulate and fiery, Justice Scalia stood out from the start. From forcefully written conservative decisions to gloves-off verbal jousting, from his philosophy of law to his sporty role as bon vivant on the Washington social scene, Scalia makes waves. He may not be the most politic or influential vote-getter on the bench. Yet since joining the nation's highest legal body 13 years ago, Scalia has overseen - some say singlehandedly - a basic shift in the court's underlying approach to law and the Constitution.

Certainly he is one of the most colorful of the nine court members. No other justices have one, let alone two, Web sites set up by admirers. Some conservatives talk about "Nino," as he's known to friends, as a future United States president. (Scalia says no.)

Moreover, Scalia has stayed in the news, even if the Supreme Court, with its lightest term in years, hasn't. He is cited around town for his lone dissent in the 1988 case that upheld the independent-counsel law, in the Iran-contra investigation. With Kenneth Starr's investigation of the White House now front and center, Scalia's dissent, which raises the likelihood of partisan abuse by a prosecutor, is being passed around like manna in Democratic circles.

Some court observers expected that Scalia, with his academic brilliance and government experience, would be another William Brennan, a skillful consensus-builder for his cause. Yet his combative style and hard-edged legal theories have alienated him from court centrists such as Justices Sandra Day O'Connor and Anthony Kennedy. Papers of the late Justice Thurgood Marshall show Scalia's sarcasm could annoy even affable Chief Justice William Rehnquist, a fellow conservative.

Instead, Scalia's impact has been on the way the court approaches constitutional law itself. By adhering to methods he calls "originalism" and "textualism," Scalia has prompted the justices to be more self-conscious about how they interpret law. Rather than following judicial interpretation of law, originalists go directly to the source - to the language of the Constitution of 1791, or to the post-Civil War 14th Amendment in 1868 that forbade discrimination.

"Scalia is at the heart of a major shift on the court in how cases are presented and how legislative history is understood," says Michael Dorf of Columbia University in New York. "We used to start with history in thinking about interpreting law; now we start with language."

This shift is apparent on both the liberal and conservative sides of the bench. "We are all originalists now," says liberal scholar Ronald Dworkin, who differs with Scalia not on methods but on how they are applied.

Before the mid-1980s, the justices did not often hang their decisions on a theoretical legal framework. "Before Scalia, until the late '80s, the justices would issue a ruling and say, 'Here is why our opinion makes sense,' and then support it with some law and history," says Mark Tushnet of the Georgetown University Law School and a former clerk for Justice Thurgood Marshall. "But now everyone is much more conscious about looking at what the text [of the Constitution] says - and quite often less conscious about how that might fit into a social or practical context."

"Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible," Scalia stated in a lecture at Princeton University in New Jersey three years ago.

A good example was Scalia's opinion last year in the Brady handgun case, an important ruling in that it continued to shift power from Washington to the states. The question was whether local or state police could be required to enforce a federal policy about checking the background of people buying firearms. A 5-to-4 majority said they did not have to.

Writing for the court, Scalia argued that the plain text of the Constitution sets out an equal separation of powers between states and the federal government. The opinion bypassed the history of federal-state relations as ruled on by the court over time. Scalia rejected any "balancing analysis" that would give more weight to federal than state government. That isn't in the framework of the Constitution, he argued.

Another example is Scalia's blistering dissent in the 1992 Casey decision, which upheld a woman's right to

choose abortion and turned back Pennsylvania's effort to curb that right. Scalia argued that because the Constitution says nothing about protecting abortion rights, the court cannot override the will of the people to restrict that practice.

Scalia, the father of nine, is himself an only child. His father was an Italian immigrant who became a professor of Romance languages at Brooklyn College in New York; his mother, an Italian-American, taught public school.

Scalia graduated magna cum laude from Harvard Law School in 1960 and went on to a series of jobs in private and public life. He worked for a Cleveland law firm, returned to the groves of academe at the University of Virginia, then packed off for six years as an assistant attorney general in the Nixon and Ford administrations. When President Reagan nominated him in 1982 to serve on the US Court of Appeals, Scalia was camped out at the University of Chicago. He joined the high court in 1986, becoming the first Italian-American justice.

Scalia is a devout Roman Catholic, which some court observers say informs, at least in part, some of his views. The Scalias worship at a suburban Virginia church known for its orthodox-minded congregation, one that recently erected a monument to unborn children.

In 1996, when the high court had accepted two important "right to die" cases dealing with the practice of euthanasia, Scalia came under fire for giving a speech - while the case was still before the court - in which he said there is "no constitutional right to die."

A year earlier, in a speech at the Mississippi College of Law, Scalia waded into the conservative side of the culture wars over religion in the public arena, coming out for a greater presence of religion and infuriating church-state separationists. He attacked "elites" and others whom he sees as hostile to faith, stating, "We must pray for the courage to endure the scorn of the sophisticated world."

Many scholars and ministers view Scalia's religious bent with some irony. From the point of view of most denominations in the US, Scalia is the one who engineered the Smith decision, which is considered to be the most regressive Supreme Court ruling ever on American religious liberty. The 1990 opinion, which he wrote, allowed the state of Oregon to prohibit native Americans from using peyote in religious ceremonies. But its sweep was broader: The opinion also eliminated legal protections for the religious exercise of minority faiths, while keeping intact majority rights.

The Smith ruling brought together a religious coalition of more than 80 faiths that, in turn, worked with Congress to reinstate the protections. But the high court struck down the Religious Freedom Restoration Act last June.

Currently, Washington is abuzz over Scalia's 1988 dissent on independent counsels. Congress passed the

law creating the office after Watergate, in an effort to hold the executive branch more accountable. For years, federal courts backed the right of the executive branch to investigate itself. But after President Nixon fired special prosecutor Archibald Cox during Watergate, that view came to be seen as folly.

Scalia, however, sees a danger in independent counsels who are not necessarily neutral actors but may be motivated by political passion. He argues that "picking the man" and then searching for a crime reverses the proper notion of justice. "The independent counsel was formed in an era when 'regulation' was thought to be something scientific," says a former Scalia law clerk. "Nino said 'No!' These are political entities."

Supporters of the law say that it may be flawed but that oversight on crimes in high places is needed; they also note that Lawrence Walsh, the Iran-contra investigator, was a conservative Republican.

For the most part, Scalia is a happy warrior. He usually votes with Justice Clarence Thomas and Chief Justice Rehnquist on the right. He plays the intellectual outsider crying in the wilderness, but does so with a wink and a smile - perhaps because his theories have partly carried the day in the areas of federalism, individual rights, and the First Amendment.

In recent years, Scalia has set out his ideas about judges who, in his view, make law on the basis of personal bias. He dates that practice to the English common-law era, when judges made law to fit practical needs, and he says it continues today in the nation's law schools.

"What intellectual fun all of this is! It explains why first-year law school is so exhilarating: It consists of playing common-law judge, which in turn consists of playing king - devising, out of the brilliance of one's own mind, those laws that ought to govern mankind." Scalia writes with undisguised sarcasm in "A Matter of Interpretation," a 1995 book.

Scalia's critics are diverse and numerous. Their basic complaint is that his originalist ideas tend to freeze the Constitution in time rather than allow it to speak to contemporary needs. Scalia himself has referred to the founding document as "a statue."

Some Scalia critics also see inconsistencies in the justice's application of originalism. When it comes to abortion, which he opposes, Scalia is among the first to note that there's nothing in the Constitution explicitly supporting that right. Yet when it comes to states' rights, which he has sought to broaden, Scalia treats the 10th Amendment as if it gives states power to ignore congressional requests to comply with federal regulations - even though the Constitution gives no affirmative rights to states, critics say.

"States' rights, executive privilege, qualified immunity, all the things Scalia seems to support, are part and parcel of the judge-made law he says he doesn't agree with," gripes a constitutional lawyer who has a case before the court.

"Scalia seems to feel that original interpretation is everything," says Georgetown University's Dr. Tushnet. "He exalts text and history above practical issues, like how a ruling affects the machinery of government in the real world. That's a concern he doesn't seem to have."

Yet in some cases, like the one to criminalize the burning of the American flag, Scalia does not side with the patriotic or traditional camp. He argues that dissent is an American trait. Notes a former Scalia law clerk: "He doesn't always vote the way a conservative Republican would want. He can be brought to see and do the principled thing, even when his instincts run contrary."

In Justice Scalia's Own words

'The enemies of single-sex education have won; by persuading only seven Justices ... that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 states.'

- Dissenting from the court's 7-to-1 decision that forced the Virginia Military Institute to admit women, 1996

'Leaving [religious] accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself....'

- Writing for the court in a ruling that allows states to forbid native Americans from using peyote for religious purposes, 1990

'It is no more compatible with [states'] independence and autonomy that their [police] officers be dragooned into administering federal law than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.'

- Writing for the majority in a ruling invalidating a US request that local sheriffs check the backgrounds of gun buyers, 1997

The Man Behind the Robe

* New Jersey born, Antonin Scalia is the only child of a Sicilian immigrant and a first-generation Italian-American, both teachers. He's the first Italian-American to serve on the United States Supreme Court.

* Graduated first in his class in high school and at Georgetown University. Earned his law degree at Harvard.

* Served in two positions in the Nixon administration - including a Justice Department post where he gave legal advice to the president and the attorney general.

* Named to the federal bench by President Reagan in 1982 and the high court in 1986.

* Married and the father of nine children.

* First member of high court with facial hair since Charles Evans Hughes in 1941. He also keeps a social profile in Washington. Among his loves: opera, pizza with anchovies, and playing the piano and singing at parties.

* One of the few people who can make fellow Justice Ruth Bader Ginsburg laugh (according to the justice herself).

* Has won a devoted conservative following for his withering dissents and pointed opinions. He's the star of several Web sites:

The Cult of Scalia

www.members.aol.com/schwenkler/scalia/

The Scalia Shrine

www.johnh.wheaton.edu/~johnmitch/scalia.html

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