

Nino & Sonia:
The Dark Horse Heroes of Criminal Justice on the
Roberts Court
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INTRODUCTION

Since the founding of the United States, Presidents have chosen Supreme Court nominees who share similar ideological values, and nearly 90% of Supreme Court nominations have gone to members of the President's own political party.¹ With a few exceptions,² Presidents have generally been successful in achieving their ideological goals with their appointments.³ Although the degree to which ideology affects judicial decision-making remains contested, the notion that Justices' ideologies influence their behavior on the Supreme Court is nothing new.⁴

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¹ LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 26, 60 (2005).

² For example, when President George H.W. Bush nominated Justice David Souter to the Supreme Court, he did not expect that he would join the Court's liberal wing. *See id.* at 130.

³ *Id.* at 132.

⁴ *See, e.g.*, C. Herman Pritchett, *Divisions of Opinion among Justices of the Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890, 890 (1941) (finding that Supreme Court Justices

This Article examines the voting record of the Roberts Court Justices in criminal procedure cases to determine whether the Justices vote consistent with their ideologies in these cases. Specifically, we test the conventional judicial-behavior narrative, which predicts that ideologically liberal appointees will be sympathetic to criminal defendants, while ideologically conservative appointees will be relatively unsympathetic.⁵

II. METHODOLOGY

We obtained our data from the Supreme Court Database⁶ and included only criminal procedure cases. Because we are primarily concerned with voting trends of current members of the Roberts Court, we begin our analysis with the 2009 term,⁷ when Justice Sonia Sotomayor joined the Court, and end with the 2014 term.

To determine whether Justices' votes reflect their ideological leanings on criminal justice issues, we used the 2014 Martin-Quinn scores.⁸ This is a time-tested measure of judicial ideology that is based on the votes of the Justices in all non-unanimous cases.⁹ For Justice Anthony Kennedy, we supplemented our proxy with President Ronald Reagan's political affiliation (Republican) because his

“are influenced by biases and philosophies of government . . . , which to a large degree predetermine the position they will take on a given question. Private attitudes, in other words, become public law.”)

⁵ See CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 5 (2006).

⁶ MODERN Database: 2016 Release 01, SUPREME COURT DATABASE, <http://supremecourtdatabase.org/data.php> (last visited Jan. 25, 2017).

⁷ Our data set excludes Justice John Paul Stevens—who served on the Court during the 2009 term.

⁸ See Measures, MARTIN-QUINN SCORES, <http://mqscores.berkeley.edu/measures.php> (last visited Jan. 25, 2017). Using Martin-Quinn Scores, with lower scores indicating more liberal voting record, and zero as the cutoff between liberal and conservative, for the 2014 term, the Justices scored as follows: Ginsburg: -2.461, Sotomayor: -2.354, Kagan: -1.913, Breyer: -1.729, Kennedy: -.15, Roberts: .869, Scalia: 1.583, Alito: 2.037, Thomas: 3.24.

⁹ See *id.* Because the Martin-Quinn scores are based on votes, we could be accused of using votes to predict votes. *But see generally* Andrew D. Martin & Kevin Quinn, *Can Ideal Point Estimates Be Used as Explanatory Variables* (Oct. 8, 2005) (working paper, 2005), <http://mqscores.berkeley.edu/media/resnote.pdf>.

Martin-Quinn scores are indeterminate.¹⁰ For each vote in each case of our data set, we coded whether the Justice voted consistent with their ideology¹¹ or inconsistent with their ideology.¹²

Because we aimed to isolate the prevalence of ideological voting, we opted to remove all unanimous decisions from our dataset. There are a number of factors that may affect unanimous decisions, making them less reflective of ideological voting than other decisions.¹³ For example, according to Eric Posner, unanimous decisions may result from the Court's attempt to mask ideological disagreement and enhance the Court's image.¹⁴ On his account, at least some are a product of in-chambers compromises that do not actually reflect the Justices' opinions on the specific case.¹⁵ Some unanimous cases also contain concurrences that read more like dissents, which further complicates the ideological meaning that we can ascribe to individual votes in unanimous cases.¹⁶

In some cases, the Court considered multiple issues, which the data captured as multiple Justice votes. In these cases, the Justices made separate determinations for each issue.¹⁷ We included these

¹⁰ In all but the 2014 term, Justice Kennedy's Martin-Quinn Score has ranked as "weakly conservative," but during the 2014 term, he ranked as "weakly liberal." Taking his presidential appointment as well as all years prior to 2014 into account, we coded Justice Kennedy as "conservative." *Measures*, *supra* note 8.

¹¹ A liberal Justice voting liberally or a conservative Justice voting conservatively.

¹² A liberal Justice voting conservatively or a conservative Justice voting liberally.

¹³ See LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 124–37 (2013).

¹⁴ Eric Posner, *The Supreme Court Breakfast Table: Why Does the Court Usually Decide Cases 9-0 or 5-4?*, SLATE (July 1, 2014, 11:07 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_why_are_most_cases_either_9_0_or_5_4.html. But see Robert Barnes, *For These Supreme Court Justices, Unanimous Doesn't Mean Unity*, WASH. POST (July 1, 2014), https://www.washingtonpost.com/politics/courts_law/for-these-supreme-court-justices-unanimous-doesnt-mean-unity/2014/07/01/94003590-0132-11e4-b8ff-89afd3fad6bd_story.html (noting a University of Chicago professor and former Roberts clerk's skepticism about the Court's concern for its appearance).

¹⁵ See Posner, *supra* note 14.

¹⁶ See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2548 (2014) (Scalia, J., concurring) ("I prefer not to take part in the assembling of an apparent but specious unanimity.").

¹⁷ See, e.g., *Skilling v. United States*, 561 U.S. 358, 368 (2010) (finding that the defendant had received a fair trial, a conservative holding, but limiting the honest services

distinct votes as separate ideological votes in our data set.

III. RESULTS

Table 1 displays our results. The consistency variable ranged from 89% consistent for Justice Samuel Alito (with Justice Sotomayor close behind at 87% consistent) to 52% consistent for Justice Kennedy. On average, the conservative Justices were 71% consistent, and the liberal Justices were 79.5% consistent. Removing Justice Kennedy from the calculation (his results show his true nature as a “swing” vote) brings the conservative Justices to 76% consistent.

TABLE 1. CONSISTENCY RESULTS

	Percentage Consistent	Percentage Inconsistent
Alito	89%	11%
Sotomayor	87%	13%
Thomas	84%	16%
Ginsburg	82%	18%
Kagan	78%	22%
Breyer	71%	29%
Roberts	66%	34%
Scalia	65%	35%
Kennedy	52%	48%

We observed a few changes in the lineup of Justice ideology. Among the liberal Justices, we found Justice Sotomayor to vote more consistently liberal than Justice Ruth Bader Ginsburg, despite Justice Ginsburg’s ranking as the most liberal Justice on the Court during the period under analysis. Among the conservative Justices, we found Justice Alito to vote more consistently conservative than Justice Clarence Thomas, despite Justice Thomas’s reputation as the most conservative Justice on the Court. Leaving aside Justice Kennedy, we also found Justice Antonin Scalia to vote the least consistently of the

statute to bribery and kickback schemes, a liberal holding).

conservative Justices (or any of the Justices, for that matter)—less than Chief Justice John Roberts and far less than Justices Alito and Thomas. These observed changes are reflected in Table 2 below, comparing the ideological ordering on the Court in general to the ideological ordering in our results.

TABLE 2. COMPARISON OF JUSTICE IDEOLOGY FROM MOST TO LEAST LIBERAL

Martin-Quinn Ideological Ordering	Ordering in Our Criminal Cases
Ginsburg	Sotomayor
Sotomayor	Ginsburg
Kagan	Kagan
Breyer	Breyer
Kennedy	Kennedy
Roberts	Scalia
Scalia	Roberts
Alito	Thomas
Thomas	Alito

IV. ANALYSIS

Our results indicate that Justices Scalia and Sotomayor both vote more liberally than expected based on their aggregate voting patterns.¹⁸ Both also defied pre-nomination predictions in criminal procedure cases. We have identified prominent trends in cases from our data set that may explain these results.

A. JUSTICE SCALIA: A STRANGE BEDFELLOW

In the context of criminal cases, Justice Scalia is the second-most inconsistent justice on the Court. Given our measures of ideology and Justice Scalia's reputation as a "conservative legal giant,"¹⁹ we find

¹⁸ See *supra* Table 2.

¹⁹ Ross Douthat, *Antonin Scalia, Conservative Legal Giant*, N.Y. TIMES, (Feb. 13, 2016), <https://www.nytimes.com/2016/02/13/opinion/antonin-scalia-conservative-legal->

this result surprising. We observe that Justice Scalia's perspective on constitutional criminal rights and procedures may have strong explanatory power over his liberal votes in criminal cases. Of his twenty-seven liberal votes, six related to the Fourth Amendment²⁰ and four related to the Sixth Amendment.²¹ In these cases, he expressed an expansive view of the protection afforded under both the Fourth and Six Amendments; he focused specifically on the scope of searches and seizures and the confrontation clause. Further, in these cases, Justice Scalia often found himself in the midst of an unlikely coalition of Justices, given his own ideological tendencies.

Prior to his appointment, Justice Scalia maintained a pro-prosecution reputation.²² On the D.C. Circuit he "impressed observers as a strong 'law and order' man,"²³ and was referred to as "the darling of tough-on-crime conservatives."²⁴ In fact, each of his criminal procedure opinions on the D.C. Circuit supported the prosecution.²⁵ Only after his nomination to the Supreme Court, however, did Justice Scalia's pro-defendant tendencies emerge.²⁶

giant.html.

²⁰ See *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (Justice Scalia joined the majority opinion); *Navarette v. California*, 134 S. Ct. 1683, 1692 (2014) (Scalia, J., dissenting); *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (Justice Scalia penned the majority opinion); *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (Justice Scalia joined the opinion of the Court); *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting); *Bailey v. United States*, 133 S. Ct. 1031, 1043 (2013) (Scalia, J., concurring).

²¹ See *Williams v. Illinois*, 132 S. Ct. 2221, 2264 (2012) (Justice Scalia joined Justice Kagan's dissent); *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012) (Justice Scalia joined the majority opinion); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (Justice Scalia joined the opinion of the Court); *Michigan v. Bryant*, 562 U.S. 344, 379 (2011) (Scalia, J., dissenting).

²² See Joanmarie Ilaria Davoli, *Justice Scalia for the Defense?*, 40 U. BALT. L. REV. 687, 689 (2011).

²³ George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1321 (1990).

²⁴ Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005).

²⁵ See Kannar, *supra* note 23, at 1321.

²⁶ See, e.g., Davoli, *supra* note 22, at 719–20 ("Justice Scalia's positive impact on the rights of criminal defendants has been largely unnoted. Justice Scalia has authored a variety of opinions in which the rights of the criminal defendant were upheld, even against long-accepted prosecutorial procedures."); Christopher E. Smith & Madhavi McCall, *Justice Scalia's Influence on Criminal Justice*, 34 U. TOL. L. REV. 535, 554 (2003) ("[Scalia's] interpretive and

Some commentators attribute these trends to Scalia's well-known judicial philosophy of originalism.²⁷ We observe specific refrains of originalism in the cases from our data.

In the Fourth Amendment context, Justice Scalia called on the Framers' concept of a people free from unreasonable searches and seizures.²⁸ He identified the British use of "general warrants"—"warrants not grounded upon a sworn oath of a specific infraction by a particular individual"—as a primary evil addressed by the Framers' inclusion of the Fourth Amendment.²⁹ Against this backdrop, he condemned the "suspicionless" DNA swabbing in *Maryland v. King*.³⁰ Using his characteristic interpretive lens, Justice Scalia also clarified the original meaning of a search: "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred."³¹

Justice Scalia's brand of originalism emerges even more clearly and prominently in Sixth Amendment cases. Perhaps the balancing tests required in most Fourth Amendment cases make it a less suitable area for an unencumbered application of originalism.³² In *Crawford v. Washington*, Justice Scalia stated that the Sixth Amendment must be interpreted with a focus on the principal evil at which it was directed: "use of *ex parte* examinations as evidence against the accused."³³ He lamented that the Court violated the Framers' intent "by replacing categorical constitutional guarantees

philosophical commitments have led him to take a stand in favor of defendants' rights with respect to several specific issues.").

²⁷ Kannar, *supra* note 23, at 1302; Bibas, *supra* note 24, at 184; David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1881 (2008).

²⁸ *Navarette v. California*, 134 S. Ct. 1683 at 1692 (2014) (Scalia, J., dissenting).

²⁹ *Maryland v. King*, 133 S. Ct. 1958 at 1980–81 (2013) (Scalia, J., dissenting) (referring to sources such as the first Virginia Constitution, the Maryland Declaration of Rights, ratification debates, and Madison's draft of the Fourth Amendment).

³⁰ *Id.* at 1989.

³¹ *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (internal quotations omitted).

³² See Bibas, *supra* note 24, at 185.

³³ 541 U.S. 36, 50 (2004).

with open-ended balancing tests.”³⁴ Referring to the judiciary’s abuses of confrontation rights in the sixteenth and seventeenth centuries, Justice Scalia asserted that “[n]ot even the least dangerous branch [could] be trusted to assess the reliability of uncross-examined testimony in politically charged trials or trials implicating threats to national security.”³⁵ And in *Michigan v. Bryant*, he invoked the Framers’ imputed disapproval of the majority’s “enfeebled view of the right to confrontation.”³⁶

Justice Scalia’s comparatively low consistency percentage³⁷ and his emphasis on originalism in Fourth and Sixth Amendment cases suggest that his interpretive theory, which happens to produce liberal outcomes in a surprising number of criminal procedure cases, overrides his political ideology in such cases.³⁸ Notably, originalism also leads Justice Scalia to consistently side with the Government on other criminal justice issues.³⁹ Certain constitutional criminal issues may be particularly well-suited to this interpretive theory, but where the originalist outcome is less clear, we likely expect Justice Scalia to fall back on conservative ideology.

B. JUSTICE SOTOMAYOR: THE DEFENDANTS’ RIGHTS JUSTICE

Our results indicate that Justice Sotomayor is the most ideologically liberal Justice on the Court in criminal cases.⁴⁰ This is

³⁴ *Id.* at 67–68.

³⁵ *Michigan v. Bryant*, 562 U.S. 344, 394 (2011).

³⁶ *Id.* at 389.

³⁷ *See supra* Table 1.

³⁸ *See* Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court’s Criminal Docket*, 104 MICH. L. REV. 67, 67–68 (2005) (“Some justices may have ideas about interpretation that happen to produce outcomes friendly to one side or another as byproducts.”).

³⁹ *See* Smith & McCall, *supra* note 26, at 547; Farnsworth, *supra* note 38, at 71.

⁴⁰ Since her first term on the Court, Justice Sotomayor has not been hesitant to move to the left of Justice Ginsburg in criminal cases and has proved herself a champion of defendants’ rights. *See, e.g.*, *Heien v. North Carolina*, 135 S. Ct. 530, 542 (2014) (Sotomayor, J., dissenting); *Kaley v. United States*, 134 S. Ct. 1090, 1105 (2014) (Justice Sotomayor joined Chief Justice Roberts’s dissent); *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012) (Sotomayor, J., dissenting); *Cullen v. Pinholster*, 563 U.S. 170, 206 (2011) (Sotomayor, J., dissenting); *Renico v. Lett*, 559 U.S. 766, 780 (2010) (Justice Sotomayor joined Justice Stevens’s dissent).

especially surprising on two fronts. First, in the aggregate, Justice Ginsburg is statistically the most liberal Justice.⁴¹ Second, media reports and studies conducted on then-Judge Sotomayor's rulings as a district and appellate judge predicted that she would "rule with the top court's conservatives on questions of criminal justice."⁴² But Justice Sotomayor's rulings in criminal cases on the Court paint a drastically different picture. Of the eighty-two criminal cases we studied, Justice Sotomayor voted liberally in seventy-one of the cases.

What accounts for Justice Sotomayor's rise as the defendant's rights Justice? Perhaps, as Epstein, Landes, and Posner have discussed,⁴³ Justice Sotomayor turns to her priors when she is faced with ambiguous areas of the law. Indeed, her repeated use of "commonsense"⁴⁴ in her decision making indicates that she has no qualms with using her prior experiences to navigate the law in criminal procedure cases.⁴⁵ But a closer look at her prior experiences reveals an interesting discovery. Her upbringing and professional experience are nearly identical to those of Justice Alito—the most ideologically conservative Justice on criminal cases. Justices Sotomayor and Alito are virtually indistinguishable on paper: they are almost the same age; they were both born and raised in the New York metropolitan area in Catholic families; they both attended Princeton University and Yale Law School; they both worked as prosecutors; and they both served as judges on federal courts of appeals.⁴⁶ But the similarities end there.

⁴¹ See *supra* Table 2.

⁴² Jess Bravin & Nathan Koppel, *Nominee's Criminal Rulings Tilt to Right of Souter*, WALL STREET J. (June 5, 2009, 12:01 AM), <http://www.wsj.com/articles/SB124415867263187033>.

⁴³ EPSTEIN, LANDES & POSNER, *supra* note 13, at 8.

⁴⁴ See, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *J.B.D. v. North Carolina*, 564 U.S. 261 (2011); *Skilling v. United States*, 561 U.S. 358 (2010) (Sotomayor, J., dissenting).

⁴⁵ See Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, YALE L.J.F. 409, 422 (2014).

⁴⁶ PAUL FINKELMAN, *THE SUPREME COURT: CONTROVERSIES, CASES, AND CHARACTERS FROM JOHN JAY TO JOHN ROBERTS 1283–85* (2014).

Although they have nearly identical academic and professional pedigrees, Justices Sotomayor and Alito had different socioeconomic upbringings, which could account for how they view criminal defendants. Justice Sotomayor was raised in a South Bronx public housing project by Puerto Rican immigrants. In contrast, Justice Alito was raised in Trenton, New Jersey by his mother, an elementary school principal, and his father, an Italian immigrant and prominent member of the New Jersey state legislature.⁴⁷ Justice Sotomayor's experience as a lower-middle class Latina and Justice Alito's experience as a middle class white male may account for their varying ideologies.⁴⁸ But the Justices' childhood upbringings, alone, are unlikely to account for their divergent ideologies: Justice Thomas had a lower class upbringing as an African American in the Jim Crow South,⁴⁹ but he is considered the most ideologically conservative Justice on the Court.⁵⁰

Justices Sotomayor and Alito also had different prosecutorial experiences. Justice Sotomayor was "in the thick of things" in New York City's district attorney's office, whereas Justice Alito predominately dealt with drug and immigration cases in the U.S. Attorney's Office for the District of New Jersey and so did not "see the day-to-day carnage in neighborhoods from murders, rapes, burglaries, robberies, and assault, or interact with the victims of those crimes" as Justice Sotomayor did.⁵¹ But this theory fails to account for Justice Sotomayor's conservative rulings as a federal judge on the Southern District of New York and on the Second Circuit. As a district court judge, Justice Sotomayor handed down longer sentences than her colleagues,⁵² and as a Second Circuit judge, Justice

⁴⁷ See ROY M. MERSKY & TOBE LIEBERT, 21 HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916–2006: SAMUEL A. ALITO, JR. xv (2007); FINKELMAN, *supra* note 46, at 1283.

⁴⁸ See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA DECISIONS, AND DEVELOPMENTS 301 (5th ed. 2012).

⁴⁹ See CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY 15–16 (2000).

⁵⁰ See *supra* Table 2.

⁵¹ Barkow, *supra* note 45, at 422–23.

⁵² *Supreme Court Nominee Judge Sonia Sotomayor: Tough on White-Collar Crime*,

Sotomayor affirmed criminal convictions 92% of the time and reversed convictions only 2% of the time.⁵³

Epstein, Landes, and Posner's research on lower federal courts may reconcile Justice Sotomayor's tough-on-crime rulings as a lower federal judge with her pro-defendant rulings as a Supreme Court Justice. They find that court of appeals judges who desire promotion to the Supreme Court "audition" for the Court by altering their voting behavior to appear desirable for the position.⁵⁴ Being "tough on crime" increases the odds of being promoted to the Court, and as such, auditioners tend to be harsher on defendants than non-auditioners.⁵⁵ Auditioners in the Court's promotion pool share certain characteristics, and unsurprisingly, Justice Sotomayor had many of these characteristics at the time of her nomination: she was fifty-four years old, non-white and female, a graduate of Yale Law School, a Second Circuit judge, and rated "well qualified" by the American Bar Association.⁵⁶ Justice Sotomayor's characteristics as a district court judge also qualified her as an auditioner for the court of appeals. These characteristics coupled with Justice Sotomayor's "tough on crime" voting record while on the Southern District of New York and the Second Circuit corroborate the likelihood that she was an auditioner for the Supreme Court. Indeed, the commentators find that Justice Sotomayor had one of the highest probabilities of being in the Court's "promotion pool."⁵⁷

As early as 1991, rumors circulated that Justice Sotomayor could be a viable prospect for the Supreme Court,⁵⁸ and although she was unanimously confirmed to the Southern District of New York, Republicans attempted to block her nomination to the Second Circuit in 1997 because they feared that she was on a "rocket ship" to the

TRAC REPORTS (July 8, 2009), <http://trac.syr.edu/tracreports/judge/213>.

⁵³ MAJORITY STAFF OF THE S. JUDICIARY COMM., SONIA SOTOMAYOR: THE CRIMINAL JUSTICE RECORD, U.S. SENATE 1362 (2010), <https://www.gpo.gov/fdsys/pkg/GPO-CHRG-SOTOMAYOR/pdf/GPO-CHRG-SOTOMAYOR-2-6-124.pdf>.

⁵⁴ EPSTEIN, LANDES & POSNER, *supra* note 13, at 362, 363 tbl.8.8.

⁵⁵ *Id.* at 262.

⁵⁶ *Id.* at 343, 350–52, 355.

⁵⁷ *Id.* at 357.

⁵⁸ MEG GREENE, SONIA SOTOMAYOR: A BIOGRAPHY 105 (2012).

Supreme Court.⁵⁹ Her background put her neatly into the promotion pool, so she had every incentive to improve her chances of being appointed to the Supreme Court.⁶⁰ Part of her strategy may have been being tough on crime, and even if this theory lacks merit, we know that her tough-on-crime record was “immensely helpful in softening Republican fears” during her Supreme Court confirmation hearings.⁶¹

Upon elevation to the Supreme Court, Justice Sotomayor began voting liberally in criminal procedure cases. Within her first term on the Court, Justice Sotomayor immediately started voting in favor of criminal defendants—even when unaccompanied by her liberal colleagues—which could indicate that her promotion to the Supreme Court freed her from ambitions for a higher office and enabled her to exhibit her sincerely held liberal views.⁶²

CONCLUSION

The Supreme Court is currently in a period of flux. The passing of Justice Scalia and the confirmation of Justice Neil Gorsuch may have particular significance for criminal defendants. Prior to his confirmation, some commentators looked to Justice Gorsuch’s rulings on the Tenth Circuit to predict that he would follow in Justice Scalia’s footsteps in criminal procedure cases.⁶³ However, Justice

⁵⁹ Neil A. Lewis, *G.O.P., It’s Eyes on High Court, Blocks a Judge*, N.Y. TIMES (June 13, 1998), <http://www.nytimes.com/1998/06/13/nyregion/gop-its-eyes-on-high-court-blocks-a-judge.html>.

⁶⁰ EPSTEIN, LANDES & POSNER, *supra* note 13, at 349.

⁶¹ David Lightman & Michael Doyle, *Sotomayor Hearings Offer Lessons for Future Nominees*, MCCLATCHY (July 17, 2009, 4:33 PM), <http://www.mcclatchydc.com/news/politics-government/article24546760.html>.

⁶² See Lee Epstein et al., *Ideological Drift among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1489 & n.28 (2007).

⁶³ See Sam Hananel, *Neil Gorsuch Could Be the Supreme Court’s Wild Card in Criminal Justice Cases*, BUS. INSIDER (Mar. 14, 2017, 2:33 AM), <http://www.businessinsider.com/neil-gorsuch-on-criminal-justice-law-2017-3>; Sean D. Reyes, *Gorsuch Successfully Balances Criminal Law, Personal Liberty*, THE HILL (Mar. 3, 2017, 1:40 PM), <http://thehill.com/blogs/pundits-blog/the-judiciary/322197-for-law-enforcement-gorsuch-successfully-balances-criminal>; Ephrat Livni, *Scalia 2.0: Trump’s US Supreme Court Nominee Neil Gorsuch Is a Lot Like Scalia, with One Key Difference*, QUARTZ (Jan. 31, 2017), <https://qz.com/899622/trumps-us-supreme-court-nominee-neil-gorsuch-is-a-lot-like-scalia-with-one-key-difference>.

Gorsuch's record on the Tenth Circuit may not accurately represent his criminal procedure voting tendencies. If Justice Gorsuch fails to align with Justice Scalia's pro-defendant tendencies, he could potentially move the Court to the right on criminal justice issues. Though our results indicate that pre-confirmation predictions may have very little predictive power in criminal procedure cases, the voting behavior of Justices Scalia and Sotomayor identified in this Article certainly informs predictions about the Court moving forward.

With Justice Scalia's recent passing, we consider his legacy. Justice Scalia has certainly fulfilled President Reagan's ideological goals in a range of issues from abortion to the Second Amendment.⁶⁴ Republicans have praised him as an ideal Justice and model for Supreme Court appointments⁶⁵ but would his votes for criminal defendants have made President Reagan proud? The once "darling of tough-on-crime conservatives"⁶⁶ ultimately considered himself "the darling of the criminal defense bar."⁶⁷ Since his passing, both conservatives⁶⁸ and liberals⁶⁹ have reflected on his liberal criminal procedure jurisprudence in memoriam. It is unlikely that President Reagan would have been pleased with Justice Scalia's expansion of defendants' rights in Fourth and Sixth Amendment cases, but given

⁶⁴ See WALTER F. MURPHY, C. HERMAN PRITCHETT & LEE EPSTEIN, *COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 147 (5th ed. 2002); EPSTEIN & SEGAL, *supra* note 1, at 132.

⁶⁵ See, e.g., Orrin Hatch, *Justice Antonin Scalia: Champion of Liberty*, NAT'L REV. (Feb. 25, 2016, 4:00 AM), <http://www.nationalreview.com/article/431883/justice-antonin-scalia-champion-liberty-judicial-self-restraint>.

⁶⁶ Bibas, *supra* note 24, at 184.

⁶⁷ See Robert J. Smith, *Antonin Scalia's Other Legacy: He Was Often a Friend of Criminal Defendants*, SLATE (Feb. 15, 2016, 7:28 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_often_a_friend_of_criminal_defendants.html ("I have defended criminal defendants' rights—because they're there in the original Constitution—to a greater degree than most judges have.").

⁶⁸ See, e.g., Paul Clement, *In Scalia, Criminal Defendants Have Lost a Great Defender*, USA TODAY (Feb. 19, 2016, 3:28 AM), <http://www.usatoday.com/story/opinion/2016/02/19/scalia-funeral-constitution-defendants-jury-paul-clement-column/80575460>.

⁶⁹ See, e.g., Eric Segall, *Liberals Might Miss Justice Scalia More than They Think*, SALON (Feb. 14, 2016, 2:44 PM), http://www.salon.com/2016/02/14/liberals_might_miss_justice_scalia_more_than_they_think.

the sea change in criminal justice reform,⁷⁰ conservatives and liberals alike may praise him for this jurisprudence for years to come.

⁷⁰ See Trevor Timm, *Is the Political Imperative to be 'Tough on Crime' Finally Over?*, GUARDIAN (July 18, 2015, 8:15 EDT), <https://www.theguardian.com/commentisfree/2015/jul/18/political-imperative-tough-on-crime>.