EL NINO SCALIA

Antonin Scalia is dead. Say what you will, there is no rejoicing from me. Was Nino a malefactor in Supreme Court jurisprudence over the decades since his confirmation on September 26, 1986? Yes, and an irascible one as well. Once Bork got Borked, Scalia was the whipping post for all liberals, on the continuity of the spectrum. Did he earn that status? Yes, and maybe then some.

The hagiography of Nino is already quite well underway. I was out shopping for garden/landscaping things and had no idea until called by Marcy. It still took me a while to get back and dive into this. There are a million takes already underway on the net and in the press, such as the press may be these days. If you want a recap of the same old, this ain't it. And, for now, what I have to say is not all that long or extricated.

First off, let's talk about Scalia the man and Justice. As said above, once Bork got Borked, there was going to be a piñata for liberals (like me) to pound on. And, over the years, boy have I, and we, done just that. And for, mostly, good reason.

But anybody can blabber about what a prick Nino was. Fairly. But, in the current context, I want to do something different. As loathsome as Scalia often was, he was still somewhat of a hero to people that practice actual criminal law. No, not across the board, but enough that it ought be mentioned and left as a part of his legacy.

Why? Okay, this is a quick take:

Fourth Amendment: There is actually a long thread of Scalia decency on Fourth Amendment issues over the years. I have had occasion to quote him from both majority and dissents frequently. But, most recently, you can probably relate most easily to *United States v. Jones*, *Riley v. California* and, significantly, *Kyllo v. United States*. Now Scalia only penned *Jones* and

Kyllo, but his fingerprints were all over *Riley* too. This is just my opinion, but I am not sure that a lesser conservative justice on the court would have seen these decisions through, and allowed them to be as consensus as they were.

One law professor, Tim MacDonnell, put it this way:

> Since joining the United States Supreme Court in 1986, Justice Scalia has been a prominent voice on the Fourth Amendment, having written twenty majority opinions, twelve concurrences, and six dissents on the topic. Under his pen, the Court has altered its test for determining when the Fourth Amendment should apply; provided a vision to address technology's encroachment on privacy; and articulated the standard for determining whether government officials are entitled to qualified immunity in civil suits involving alleged Fourth Amendment violations. In most of Justice Scalia's opinions, he has championed an originalist/textualist theory of constitutional interpretation. Based on that theory, he has advocated that the text and context of the Fourth Amendment should govern how the Court interprets most questions of search and seizure law. His Fourth Amendment opinions have also included an emphasis on clear, bright-line rules that can be applied broadly to Fourth Amendment questions. However, there are Fourth Amendment opinions in which Justice Scalia has strayed from his originalist/textualist commitments, particularly in the areas of the special needs doctrine and qualified immunity.

I do not agree with everything in MacDonnell's article, but it is quite good and his dubious context is spot on. Scalia has been more than prominent in Fourth Amendment jurisprudence since his time on the court. I have serious

issues with many of the “exceptions” he has bought off on in the name of police expediency, but I can, and do, imagine a different justice being far, far, worse on the Fourth (can you say “Alito”? Of course you can). So, there is that. But, by the same token, I remember coming out of court and getting informed of the *Kyllo* decision. Several drinks were hoisted to Scalia that afternoon and night.

Then, there is the Sixth Amendment. This is an area on which Scalia gets scant attention and credit for. And, yes, if you practice criminal law, it is one of critical importance, whether pundits or the press realize it or not. Because if you happen to actually do criminal jury trials (or bench for that matter), you know the critical importance of being able to confront and cross-examine the witnesses and evidence against your client, the defendant. I have cited Scalia’s words, both successfully and unsuccessfully, for a very long time on confrontation issues. But the successes I, and clients, have had owe in large part due to Scalia. Here is a bit from David Savage, of the LA Times, from 2011 that summarizes Scalia’s Confrontation Clause championing about perfectly:

> The 6th Amendment to the Constitution says the “accused shall enjoy the right … to be confronted with the witnesses against him.” To Scalia, this clause not only gives defendants the right to challenge actual witnesses, but also the right to bar testimony from all those “witnesses” who did not or cannot testify in court. He takes this view even if the witness is dead.
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> Three years ago, Scalia led the court in reversing the murder conviction of a Los Angeles man who shot and killed his girlfriend. A police officer testified the victim had reported that Dwayne Giles threatened to kill her. Scalia said that testimony violated Giles’

> rights because he could not confront or cross-examine her.
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> “We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding,” Scalia said for 6-3 majority. This went too far for liberal Justices John Paul Stevens and Stephen G. Breyer.
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> Two years ago, Scalia spoke for a 5-4 majority reversing the conviction of an alleged cocaine dealer from Massachusetts because prosecutors did not bring to court a lab analyst whose test confirmed the bags of white powder were indeed cocaine. The dissenters, including Chief Justice John G. Roberts Jr. and Justices Anthony M. Kennedy and Samuel A. Alito Jr., said a lab technician who conducts a test is not a “witness” in the ordinary sense of the term.
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> In June, the court went one step further. The Scalia bloc, by a 5-4 vote, overturned the drunken-driving conviction of a New Mexico man because the lab analyst who testified about his blood alcohol did not actually work on the defendant’s blood sample. He put together an odd-couple coalition with Justices Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan.
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> “This is not a left-right split. This is principle versus pragmatism,” said University of Michigan law professor Richard Friedman.

Frankly, Scalia has only reinforced that since late 2011 when Savage wrote said words. If you practice in a criminal trial courtroom, you owe a debt of gratitude to Antonin Scalia for your ability to still confront and cross-examine witnesses and evidence. I don’t think it is

hyperbole to say that, without Scalia, this fundamental procedural right would be totally shit right now.

So, this is but a nutshell of the greater whole, and I am still trying to catch up. But those are my thoughts for now. Do not get me wrong, Antonin Scalia was never, nor will ever be, my favorite, nor even an overall positive Supreme Court Justice in my eyes. There is too much malignancy and caustic history from Scalia, on far too many fronts, for that to ever be the case. But the man is not yet even in the ground, and there were a couple of important positive things to say before the ultimate obituary is written.

And, on one other note, let's keep in mind that the warm and fuzzy stories of Scalia with Ruth Bader Ginsburg, from court interaction, to opera to shooting at animal trips is not the only history of Nino Scalia and women on the Supreme Court. He was, certainly less famously, in some instances, a frat boy jerk to Sandra Day O'Connor. So, take the lionization of the Kagan relationship with a healthy grain of salt.

Antonin "Nino" Scalia was a flawed, but important man. He is now gone. So, the biggest issue is, what happens now? Republican leadership did not have to announce that they will stall their asses off and try to prevent the confirmation of ANY nominee that Obama would put up. Frankly, that went without saying in today's Congress.

But, can they do that, will there be no Obama SCOTUS nominee confirmed, no matter what? I would not be shocked if that were not so. By the same token, the longest a confirmation battle has ever taken to confirm a SCOTUS Justice is 125 days (Obama has 361 left).

Obama has already said he will make a nomination, and I believe he will. If I had to bet right now, my bet is that the nominee is Sri Srinivasan. I have long thought this, and Sri, while being a decent guy, is a dead nuts

centrist, barely a “liberal” at all kind schlub that Obama loves. But I doubt the crazed GOP led Senate would confirm even a milquetoast centrist like Srinivasan. Let other speculation begin now even though the chances of confirmation of any nominee are close to nil.

Irrespective, the primary, and certainly the general, elections just got FAR more interesting. Frankly, this is the only part of the election I was really worried about from the get go. Now it is squarely on everyone’s plate.