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THE JUDICIAL CAREER OF JUSTICE DAVID H. SOUTER AND HIS IMPACT ON THE RIGHTS OF CRIMINAL DEFENDANTS

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INTRODUCTION

Associate Justice David H. Souter retired from the United States Supreme Court on June 29, 2009 after a relatively short but influential career on the federal bench.[1] Justice Souter began his service on the Court in 1990 after his appointment by President George H. W. Bush and was expected to provide a critical vote for conservatives, particularly since he was replacing one of the most liberal justices in the Court's history, William Brennan.[2] In fact, conservative observers of the Court were told by John Sununu, White House Chief of Staff for George H. W. Bush from 1989–1991, that Justice Souter would be a "homerun" for conservatives.[3] However, Justice Souter proved to be anything but an ideological appointment.[4] While Justice Souter aligned more often with conservative justices during his early years on the Court, he shifted toward the liberal bloc of justices, namely Justices Ruth Bader Ginsburg, Stephen Breyer, and John Paul Stevens, during the latter years of his tenure.[5] Even in criminal justice

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[1] Peter Baker & Jeff Zeleny, *Souter's Exit to Give Obama First Opening*, N.Y. TIMES, May 1, 2009, *available at* http://www.nytimes.com/2009/05/02/us/02souter.html?_r=1&ref=davidhsouter.

[2] *See* THOMAS R. HENSLEY ET AL., THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 75 (1997).

[3] *See* David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES MAGAZINE, Sept. 25, 1994, at 64, *available at* http://www.nytimes.com/1994/09/25/magazine/justice-souter-emerges.html?pagewanted=all&src=pm.

[4] HENSLEY ET AL., *supra* note 2, at 76–77.

[5] Robert H. Smith, *Justice Souter Joins the Rehnquist Court: An Empirical Study of Supreme Court Voting Patterns*, 41 KAN. L. REV. 11 (1992); *see generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). Segal and Spaeth

cases, an area where Justice Souter displayed the most conservatism during his earlier years by supporting the government's position, it is important to recognize he did not behave as an ideological conservative.[6] In fact, during his last twelve years on the Court, Justice Souter revealed a tendency to rule in favor of criminal defendants' rights and disappointed conservatives frequently.[7] Apparently, Justice Souter rejected the original intent theory[8] of constitutional interpretation coveted by ideological conservatives in favor of a more practical and flexible application of precedent and interpretation of the law.[9]

This article documents the judicial career of Justice Souter from his time served as an attorney general and state judge in New Hampshire to his nearly two decades on the United States Supreme Court.[10] Based upon his written opinions and individual votes, Justice Souter clearly evolved into a more moderate, or even liberal, jurist than ideological conservatives would have preferred in cases involving the rights of criminal defendants.[11] Justice Souter gained respect during his tenure on the Court as an intellectual scholar by attempting to understand both sides of a dispute completely and by applying precedent and legal rules in a just manner.[12] However, he may also be remembered most as the justice who disappointed ideological conservatives by failing to complete a conservative revolution that had begun in the late 1960s.[13]

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argue that attitudes and values are the most important factors in explaining judicial behavior. The attitudinal model simply divides the behavior of justices into either liberal or conservative votes. For the purposes of this article, a liberal decision is a ruling that supports the rights of the individual, such as a vote in favor of a criminal suspect who has alleged that his or her rights were violated by the government. Conversely, a conservative decision is a ruling in favor of the government, such as a vote in favor of police officers who have claimed not to have violated the rights of a criminal defendant.

[6] *See* TINSLEY YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 185 (2005).

[7] *Id.* at 221–23.

[8] *See* HENSLEY ET AL., *supra* note 2, at 14. Original intent theory is a component of the legal model of judicial decision making. It is when a justice attempts to ascertain the intentions of the writers of the Constitution and then applies these intentions to a current case.

[9] *See id.* at 77.

[10] *See generally* YARBROUGH, *supra* note 6.

[11] LAWRENCE BAUM, THE SUPREME COURT 122–24 (9th ed. 2006).

[12] *See* YARBROUGH, *supra* note 6, at 198.

[13] *See generally* HENSLEY ET AL., *supra* note 2. From 1953–1969, Chief Justice Earl Warren led the U.S. Supreme Court in a liberal revolution by expanding the rights of criminal defendants and nationalizing nearly all of the Bill of Rights upon the states. As a response to the Warren Court's liberal rulings, Richard Nixon's 1968 presidential campaign focused upon how he would appoint conservative justices to the U.S. Supreme Court. During Nixon's first term as president, he appointed Chief Justice Warren Burger in 1969 to replace Earl Warren and subsequently appointed Harry Blackmun in 1970 and William Rehnquist and Lewis Powell in 1972. Nixon's four appointments during his first term, nearly one half of the Supreme Court, began what scholars considered an

SOUTER AS ATTORNEY GENERAL OF NEW HAMPSHIRE

From 1976–1978, David Souter served the state of New Hampshire as its attorney general.[14] In his role as attorney general, the state authorized Souter to issue opinions related to criminal law involving state and local law enforcement agencies.[15] During this period, most of the opinions issued by Attorney General Souter involved technical issues of law and were devoid of controversy.[16] In December of 1976, however, Souter made public comments about a divisive case involving a convicted murderer from Concord, New Hampshire.[17] Based largely upon prosecutorial witnesses who had made deals with the police in exchange for their testimony, Gary S. Farrow was convicted of murder.[18] An article published in a New Hampshire newspaper, the *Concord Monitor*, praised the public defenders assigned to Farrow but criticized police who had traded criminal charges for testimony.[19] Souter responded by authoring a guest column in the *Concord Monitor* where he praised the legal defense. Nevertheless, he also stressed that, in the interests of justice, the prosecutors were obligated to conduct a thorough investigation and present the best evidence of Farrow's guilt.[20] Souter maintained that the police and prosecutors from Concord deserved respect and argued justice had been served in the case.[21] Souter concluded the guest column by expressing support for the prosecutor's decision to drop criminal charges in exchange for witness testimony in the murder trial.[22] Souter's guest column provided evidence of his conservative behavior as attorney general in criminal procedure cases and revealed the beginning of a pattern whereby Souter consistently chose to support police officers and prosecutors throughout his state judicial career.[23]

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attempt at a conservative counterrevolution. The conservative counterrevolution would seem to have been solidified by the fact that Nixon and his successors, Republican presidents Ford, Reagan, and George H. W. Bush, were able to appoint eleven justices to the Court from 1969–1991, without an appointment being made by a Democratic president. However, because appointments to the Court are unpredictable, more than a few of the eleven appointments emerged as moderate or liberal justices. Hence, conservatives were still attempting to realize a counterrevolution with one of the last Republican appointments in 1990 when Justice William Brennan, one of the most liberal justices who had ever served on the Court, was replaced by Justice David Souter.

[14] *Id.* at 20; Linda Greenhouse, *An 'Intellectual Mind': David Hackett Souter*, N.Y. TIMES, July 24, 1990, at A1, *available at* http://www.nytimes.com/1990/07/24/national/24SOUT.html?pagewanted=all.

[15] YARBROUGH, *supra* note 6, at 29.

[16] Neil A. Lewis, *Combing the Past for Clues on Souter*, N.Y. TIMES, Sept. 2, 1990, at I28, *available at* http://www.nytimes.com/1990/09/02/us/combing-the-past-for-clues-on-souter.html.

[17] *See* YARBROUGH, *supra* note 6, at 29.

[18] *Id.* at 29–31; *see also* State v. Farrow, 386 A.2d 808, 810 (N.H. 1978).

[19] *See* YARBROUGH, *supra* note 6, at 29–62 (discussing the *Concord Monitor*'s coverage of the Farrow trial).

[20] *See id.* at 30.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 22.

During his years as attorney general of New Hampshire, Souter's conservatism was also evident in his support for the death penalty.[24] After the United States Supreme Court held that capital punishment did not violate the Eighth Amendment's cruel and unusual punishment clause in *Gregg v. Georgia*, states were given the option of applying the death penalty to criminal cases.[25] In his capacity as state attorney general, Souter testified before the New Hampshire House of Representatives, maintaining that a life sentence in prison was not an appropriate punishment for the capital offense of murder in the first degree.[26] Souter based his argument in favor of capital punishment largely upon his belief that the death penalty acted as a deterrent to homicide.[27] While New Hampshire theoretically reinstated the use of the death penalty in the post-*Gregg* era, the debates within the state house concerning the death penalty laws were irrelevant because New Hampshire has not carried out an execution of a defendant in the modern era.[28]

ASSOCIATE JUSTICE ON THE STATE SUPERIOR COURT

As a judge on the New Hampshire superior court from 1978–1983, Souter was known for issuing tough sentences to criminal defendants.[29] Souter validated his reputation for harsh sentencing in a 1981 case involving a felony charge for the theft of a firearm.[30] The defense and prosecution proposed a plea bargain reducing the potential felony conviction to probation, but Souter rebuffed the proposal, criticized the prosecutors for agreeing to it, and ordered the defendant to serve nine months in prison.[31]

While Souter had a reputation for being tough as a trial judge, he honored precedent that had expanded criminal defendants' rights and was even known to show sympathy, at times, for defendants.[32] For example, he once refused a plea bargain accepted by a defendant who had agreed to serve two years in prison for stealing one dollar.[33] Souter stated, "[i]t was cruel and inhumane to sentence

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[24] *Id.* at 36.

[25] *See* Gregg v. Georgia, 428 U.S. 227 (1976).

[26] *See* YARBROUGH, *supra* note 6, at 36.

[27] *Id.* at 29.

[28] *Id.* A jury recently voted to impose the death penalty in State v. Addison, No. 07-S-0254 (N.H. Super. Ct. Dec. 18, 2008). Katie Zezima, *Jury Issues First Death Penalty in New Hampshire Since the 1950s*, N.Y. TIMES, Dec. 19, 2008, at A29. In 1959, two convicts were sentenced to death in New Hampshire, but their sentences were invalidated based upon the 1972 U.S. Supreme Court ruling in *Furman v. Georgia*, 408 U.S. 238. *Id.*

[29] YARBROUGH, *supra* note 6, at 53–59.

[30] *Id.* at 59.

[31] *Id.*; *see also* Garrow, *supra* note 3, at 41.

[32] *See also* Ruth Marcus, *Souter: Conservative Mindset, Careful Jurist*, WASH. POST, July 25, 1990, at A6.

[33] YARBROUGH, *supra* note 6, at 54–55.

someone to two years for stealing a dollar."[34] Hence, Souter sought to treat everyone in the courtroom, including the defendants, with the utmost respect.[35]

Although many legal scholars viewed Souter as conservative because of his support for police and prosecutors in criminal cases, he would strive to exclude evidence that police had illegally seized or secured by way of a coerced confession.[36] Colleagues emphasized that Souter was most interested in producing a fair trial and was not a judge who blindly supported the state.[37] In a case involving a career burglar who possessed stolen goods in his home, Souter ruled much of the evidence inadmissible because police had gone beyond the orders in the search warrant in gathering evidence.[38] Souter was infuriated with the police not only because they went beyond the orders of the search warrant, but they had allowed the media into the defendant's home to broadcast a news story praising the police department for fighting crime in the area.[39] In an unrelated case involving alleged arson and second-degree murder, Souter excluded evidence when he learned police tampered with the evidence and coerced a confession from a female defendant by threatening to take away her child if she refused to cooperate in the criminal investigation.[40]

THE NEW HAMPSHIRE SUPREME COURT

Souter served on the New Hampshire Supreme Court as an associate justice from 1983–1990.[41] During his eight years on the state supreme court, he had a reputation for respecting precedent and interpreting the language of the law and the original intention of the framers in a formal manner.[42] Fundamentally, Justice Souter's legal opinions covered interpretations of state law in such areas as criminal procedure, family law, and negligence.[43] On criminal justice issues, Justice Souter was generally regarded as a justice who often voted conservatively against the rights of criminal defendants.[44] Justice Souter's voting record on the New Hampshire Supreme Court produced only nine votes out of eighty-two that favored criminal

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[34] *Id.*

[35] *Id.* at 54.

[36] *See* Marcus, *supra* note 32, at A6.

[37] *See* YARBROUGH, *supra* note 6, at 55.

[38] *Id.* at 56.

[39] *Id.* at 55–56.

[40] *Id.*

[41] *See* Greenhouse, *supra* note 14, at A19.

[42] *See* William S. Jordan, *Justice David Souter and Statutory Interpretation*, 23 U. TOL. L. REV., 491, 493 (1992); *see also* Marcus, *supra* note 32, at A6.

[43] *See* Greenhouse, *supra* note 14, at A1.

[44] *See* Ann Devroy, *President Selects Souter, 50, for 'Intellect' and 'Ability': Court Nominee Called Classic Conservative*, WASH. POST, July 24, 1990, at A13.

defendants' rights, roughly eleven percent in the liberal direction.[45] Although Justice Souter was largely viewed as a traditional conservative, he developed a flexible interpretation of constitutional law during his years on the state supreme court and came to be respected by both Democrats and Republicans in New Hampshire as a justice who always understood the importance of providing a fair trial for criminal defendants.[46]

Justice Souter gained notoriety on New Hampshire's highest court in only a limited number of criminal justice cases of constitutional importance.[47] In *State v. Koppel* (1985), Justice Souter authored a dissenting opinion opposing the majority's holding that sobriety checkpoints violated the Fourth Amendment's unreasonable search and seizure clause.[48] Legal scholars speculated that Justice Souter anticipated the United States Supreme Court would rule conservatively on this issue, and the Court eventually upheld sobriety checkpoints five years later in *Michigan v. Sitz*.[49] Justice Souter also wrote a majority opinion supporting a New Hampshire law that permitted law enforcement to employ a mechanical device, a pen register, capable of detecting information from a telephone.[50] Justice Souter held that the pen register did not violate the search and seizure clause because its use did not constitute a search within the meaning of the Fourth Amendment.[51]

Regarding *Miranda* rights and the privilege against self-incrimination, Justice Souter was reluctant to favor criminal defendants on the state high court.[52] In *State v. Denney*, the majority opinion held that prosecutors could not admit evidence of the defendant's refusal to submit to a blood alcohol test.[53] Justice Souter dissented, ultimately favoring the prosecution's argument.[54] The majority reasoned that the defendant's refusal was inadmissible because police failed to warn the defendant that such a refusal could be used against him at trial.[55] In his dissent, Justice Souter argued that the police officers issued the *Miranda* warnings to the defendant and such warnings carried the implication that the refusal to submit to the test could be used against him in court.[56] Interestingly, Justice

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[45] *See* YARBROUGH, *supra* note 6, at 92.

[46] *Id.* at 93.

[47] *See, e.g.*, State v. Koppel, 499 A.2d 977 (N.H. 1985).

[48] *Id.* at 983 (Souter, J., dissenting); *see* Garrow, *supra* note 3, at 43.

[49] *See* 496 U.S. 444 (1990); *see also* YARBROUGH, *supra* note 6, at 86.

[50] *See* State v. Valenzuela, 536 A.2d 1252 (N.H. 1987); *see also* YARBROUGH, *supra* note 6, at 86.

[51] *Valenzuela,* 536 A.2d. at 1161–62.

[52] *See* YARBROUGH, *supra* note 6, at 91–92; *see generally* Miranda v. Arizona, 384 U.S. 436 (1966).

[53] *See* 536 A.2d 1242 (N.H. 1987).

[54] *Id.* at 1245 (Souter, J., dissenting).

[55] *Id.* (majority opinion); Jordan, *supra* note 42, at 512.

[56] *See* YARBROUGH, *supra* note 6, at 88 (citing *Denney*, 536 A.2d. at 1246 (Souter, J., dissenting)).

Souter had been on the winning side two years earlier in *State v. Cormier*, which also involved a prosecutor who used a refusal to submit to a blood alcohol test as evidence of the defendant's guilt.[57] In *Cormier*, Justice Souter maintained that the Fifth Amendment privilege against self-incrimination applied only to testimonial evidence, not physical evidence.[58]

In *Coppola v. State*,[59] Justice Souter again voted conservatively when he ratified the introduction of a defiant statement made by a defendant in a case involving the privilege against self-incrimination.[60] Appellant Vincent Coppola boasted to law enforcement during interrogation that they could not get him to confess to the sexual assault of an elderly woman.[61] In writing the unanimous opinion, Justice Souter held that Coppola's statement was not protected by the Fifth Amendment's privilege against self-incrimination and, therefore, could be admitted by prosecutors to establish Coppola's guilt.[62] In his opinion, Justice Souter drew a distinction between the right of a criminal suspect to remain silent which is protected within the self-incrimination clause, and Coppola's statement which implied that he committed a crime.[63]

Finally, Justice Souter caused controversy when he decided against the victim in a rape case based upon his respect for precedent.[64] In *State v. Colbath*,[65] Justice Souter wrote for a unanimous court, holding that the trial judge should have admitted the public behavior of the victim prior to an alleged sexual assault as evidence because such behavior was relevant in determining whether the alleged victim consented to the sexual act.[66] Justice Souter noted, because the alleged victim engaged in public behavior where she directed "sexually provocative attention" toward a number of male patrons in a tavern, including the defendant, such behavior must be considered as a factor when determining consent.[67] In *Colbath*, Justice Souter relied largely upon case precedent from *State v. Howard*,[68] which provided defendants the right to confront accusers, even though a rape-shield law arguably banned the admission of prior sexual behavior between the

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[57] *Id.* (citing State v. Cormier, 499 A.2d 986 (N.H. 1985)).

[58] *Id.* at 88–89.

[59] *See* 536 A. 2d 1236 (N.H. 1987)

[60] *Id.* at 1239; YARBROUGH, *supra* note 6, at 90.

[61] *See* YARBROUGH, *supra* note 6, at 90–91.

[62] *Coppola,* 536 A.2d at 1239.

[63] *Id.*

[64] *See* State v. Colbath, 540 A.2d 1212, 1217 (N.H. 1988).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See* 426 A.2d 457 (N.H. 1981).

victim and persons other than the defendant.[69] Justice Souter concluded that, while the sexual history of a rape victim was generally withheld from a jury, the rape shield law was not absolute.[70]

When President George H. W. Bush nominated Justice Souter to the United States First Circuit Court of Appeals, where he served briefly in 1990, the *Coppola* and *Colbath* decisions became an issue.[71] In particular, Senator Edward M. Kennedy raised concerns about Justice Souter's opinions in *Coppola* and *Colbath* during the Senate confirmation hearings.[72] However, Justice Souter was confirmed to the First Circuit seat by a unanimous vote, despite the concerns of the more liberal members of the United States Senate.[73] After serving only a few months on the First Circuit Court of Appeals and participating in only one decision,[74] President George H. W. Bush selected Justice Souter to replace Justice William Brennan, who announced his retirement from the United States Supreme Court at the age of eighty-four.[75]

During Senate confirmation hearings, Justice Souter offered, perhaps, the first hint that he was not an ideological conservative by endorsing a limited right to privacy and speaking respectfully about the liberal decisions that expanded the rights of criminal defendants during the Warren Court era (1953–1969).[76] Moreover, Souter praised Justice Brennan, the ultra-liberal who he was replacing, as one of the greatest protectors of the Bill of Rights.[77] Hence, most of the United States Senators viewed Justice Souter as a moderate based upon his performance during the confirmation hearings.[78] Justice Souter also was aided by the fact that, prior to his appointment to the Court, he had not published anything about his

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[69] *Id.* at 462.

[70] *See* Greenhouse, *supra* note 14, at A19.

[71] *See* YARBROUGH, *supra* note 6, at 96–98.

[72] *Id.*

[73] *Id.*; *see also* Maureen Dowd, *A Swift Nomination: Questions on Abortion To Be Left for Hearings on Confirmation*, N.Y. TIMES, July 24, 1990, at A19.

[74] *See* United States v. Waldeck, 909 F.2d 555 (1990). In *United States v. Waldeck*, Souter joined a unanimous three judge panel where the First Circuit Court of Appeals upheld the indictment and conviction of Waldeck who had appealed the decision of the U.S. District Court of New Hampshire to indict and convict him on five counts of tax evasion. Souter heard oral arguments in several other cases but did not take part in the opinions. Hence, the *Waldeck* decision was the only case that Souter formally ruled upon during his very brief tenure of service on the First Circuit.

[75] David S. Broder and Helen Dewar, *Bush Opens Drive For Court Nominee: Confirmation Hearings Set for September*, WASH. POST, July 25, 1990, at A1.

[76] *See* HENSLEY ET AL., *supra* note 2, at 76.

[77] *See* Christopher E. Smith & Scott P. Johnson, *Newcomer on the High Court: Justice Souter and the Supreme Court's 1990 Term*, 37 S.D. L. REV. 21, 24 (1992); *see also* Linda Greenhouse, *Filling In the Blanks*, N.Y. TIMES, Sept. 15, 1990, at A11.

[78] *See* Greenhouse, *supra* note 14, at A1.

legal views and refused to make public speeches or comments about his judicial philosophy.[79] Therefore, he was able to appear as a "stealth" candidate for the Supreme Court and was easily confirmed by a vote of ninety to nine.[80]

UNITED STATES SUPREME COURT JUSTICE DAVID SOUTER AND CRIMINAL JUSTICE CASES

The Policy Impact of a Freshman Justice

During his first year on the United States Supreme Court, Justice Souter immediately impacted the area of criminal justice.[81] During his first term, Justice Souter cast the decisive vote in six different five-to-four decisions where the Court established new "conservative" precedents that limited the rights of criminal defendants.[82] If these cases had been argued the previous term, Justice Brennan likely would have voted in favor of criminal defendants' rights.[83] Hence, Justice Souter's votes during the 1990–1991 term created broad policy implications in the area of criminal justice.[84] In *Arizona v. Fulminante*,[85] Justice Souter cast the decisive vote applying a harmless error analysis to the introduction of coerced confessions at trial.[86] In *County of Riverside v. McLaughlin*,[87] he again provided the tie-breaking vote to allow state law enforcement to hold persons placed under arrest without a warrant for as long as forty-eight hours before a magistrate determined probable cause.[88] Concerning prisoners' rights, Justice Souter voted with the conservative bloc to make it more difficult for prisoners to challenge their conditions of confinement and to provide states the power to mandate life sentences for drug convictions without the possibility of parole.[89] Finally, Justice

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[79] *Id.* Unlike Robert Bork, Souter did not have a paper trail of legal views that could harm him during the Senate confirmation hearings. Souter's only publication was a law review article which was a tribute to Justice Laurence Ilsley Duncan who had served on the New Hampshire Supreme Court from 1946–1976. *See* David H. Souter, *Mr. Justice Duncan*, 24 N.H.B.J. 81 (1983).

[80] *See* YARBROUGH, *supra* note 6, at 143–44.

[81] *See* Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice,* 75 JUDICATURE 238 (1992).

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *See* 499 U.S. 279 (1991).

[86] Thus if a judge mistakenly admitted a coerced confession into evidence, it does not necessarily require a defendant's conviction be overturned if sufficient evidence independent of the confession still would have resulted in a conviction. *See* FED. R. EVID. 103(a).

[87] *See generally* 500 U.S. 44 (1991).

[88] *McLaughlin*, 500 U.S. at 58–59; *Fulminante*, 499 U.S. at 302–03*; see also* Smith, *supra* note 5, at 40–41.

[89] *See* Harmelin v. Michigan, 501 U.S. 957, 996 (1991); Wilson v. Seiter, 501 U.S. 294, 303 (1991).

Souter decided against the rights of criminal suspects in two cases where he voted that no error had occurred, even though judges had failed to properly question and instruct jurors during criminal trials.[90]

It should be noted that on a few occasions Justice Souter demonstrated liberal behavior, such as his majority opinion in *Yates v. Evatt*,[91] which held that the South Carolina Supreme Court applied the incorrect harmless error standard when reviewing the jury instruction on malice given at a murder trial.[92] Hence, even in his first term, it was evident he was willing to author a liberal opinion in regard to the treatment of criminal suspects.[93]

While Justice Souter proved to be a decisive vote for the conservative members during the 1990–1991 term, he did not author any "important" opinions during his first year on the Court.[94] In fact, he authored an extremely low number of opinions relative to his colleagues.[95] Justice Souter wrote only twelve opinions (eight majority opinions, two concurrences, and two dissents) during his first term.[96] No other justice authored fewer than twenty-one during the 1990–1991 term.[97]

Interestingly, Justice Souter's first year saw the Court undergo severe gridlock at the end of the term.[98] A former clerk attributed this to a "breakdown in one chamber," further speculation that Justice Souter's refusal to utilize a word processor and his insistence upon composing his own opinions, rather than relying upon drafts from his law clerks, had caused the backlog.[99] In fact, after his first year, Justice Souter described the Court's workload to *The Boston Globe* by stating that it felt as if he had "walk[ed] through a tidal wave."[100]

Search and Seizure Cases

In search and seizure cases, Justice Souter joined the conservative bloc during his initial years, but he would exhibit a pattern of voting with the liberal justices and

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[90] *See* Schad v. Arizona, 501 U.S. 624, 645 (1991); Mu'min v. Virginia, 500 U.S. 415, 431–432 (1991).

[91] *See generally* 500 U.S. 393 (1991).

[92] *Id.* at 402.

[93] *See* YARBROUGH, *supra* note 6, at 166.

[94] *See* Johnson & Smith, *supra* note 77, at 242 Table 2.

[95] *Id.*

[96] *See* Smith, *supra* note 5, at 21.

[97] *See* Johnson & Smith, *supra* note 77, at 241.

[98] *See* YARBROUGH, *supra* note 6, at 160.

[99] *Id.*; Ned Zeman & Lucy Howard, *Souter: Slow Off the Mark*, NEWSWEEK, May 27, 1991, at 4.

[100] *See* YARBROUGH, *supra* note 6, at 160.

defending the rights of criminal defendants during his latter years on the Court.[101] An examination of Justice Souter's behavior reveals a conservative trend in his early years but also reveals a willingness to separate from the conservative bloc and rely upon a flexible and pragmatic approach to constitutional interpretation.[102] In short, unlike Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas, Justice Souter was prone to place constraints on the amount of discretion given to police officers in searching for and seizing evidence.[103]

During the 2000–2001 term, Justice Souter was assigned a majority opinion in a search and seizure case, which proved to be one of his more controversial opinions.[104] In *Atwater v. City of Lago Vista*, Justice Souter wrote for a conservative majority comprised of Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy, and held that the Fourth Amendment did not prohibit a warrantless arrest by police for a misdemeanor seat belt violation.[105] The controversy in the *Atwater* case involved the arrest of Gail Atwater for failing to secure her two small children with seat belts in the front seat of her pickup truck.[106] Texas law prohibited passengers, particularly small children, from riding in the front seat without seat belts.[107] While the Texas statute authorized police to arrest Atwater and charge her with a misdemeanor, police had the option of simply issuing her a citation, instead of arresting her.[108]

Atwater's attorney argued that, when the Constitution was drafted, authorities prohibited warrantless arrests under common law for misdemeanor offenses, unless someone had committed a violent act or disturbed the peace.[109] Justice Souter's majority opinion conceded that there was some substance to the argument presented by Atwater's counsel, but ultimately it failed because a close examination of English common law revealed that police were authorized to arrest persons for night walking and negligent carriage driving without a warrant.[110] In short, the common law rules that existed prior to the drafting of the Constitution and the subsequent development of American law did not support Atwater's

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[101] *Id.* at 234.

[102] *See* HENSLEY ET AL., *supra* note 2, at 76–77.

[103] *Id.* at 449, Table 9.2. Even during his initial terms on the Court from 1991–1994 where Souter voted more conservatively than in later terms, Souter voted conservatively in sixty-four percent of the search and seizure cases, while the conservative votes of Thomas (67%), Scalia (74%), and Rehnquist (90%) were more restrictive of Fourth Amendment rights. *Id.*

[104] *See* YARBROUGH, *supra* note 6, at 234.

[105] *See* 532 U.S. 318, 354 (2001).

[106] *Id.* at 323–24.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 327.

[110] *Id.* at 333–34.

argument.[111] Justice Souter concluded that an individual may be arrested by police without a warrant if there is "probable cause to believe that an individual has committed even a very minor criminal offense in [the officer's] presence."[112]

Two years after *Atwater*, Justice Souter wrote for a unanimous Court in a Fourth Amendment case concerning whether police officers may execute a search warrant by knocking on a suspect's door and waiting fifteen to twenty seconds before entering the home by way of force.[113] In *United States v. Banks*, FBI agents and North Las Vegas police obtained a warrant to search for cocaine in the apartment of Lashawn Lowell Banks.[114] After police knocked on Banks' apartment door loudly and shouted, "police search warrant," the officers waited fifteen to twenty seconds and then broke the door down with a battering ram.[115] Banks contended he was in the shower and did not hear the knock on the door or the officers announcing their presence with the search warrant.[116] Police officers seized crack cocaine, weapons, and other evidence of drug distribution at Banks' residence, which Banks sought to suppress at trial.[117]

Writing for a unanimous Court, Justice Souter concluded the forcible entry by law enforcement did not violate Banks' Fourth Amendment rights.[118] The Court's opinion concluded that law enforcement officials acted reasonably based upon the assumption that fifteen to twenty seconds was enough time for Banks to destroy the evidence.[119] Justice Souter reasoned that when police officers are in the process of searching and seizing evidence, the situation must be analyzed in light of exigent circumstances.[120] In *Banks*, the police officers had reasonable suspicion to believe evidence was being destroyed and, therefore, authorities were permitted to enter the residence forcibly without violating the search and seizure clause.[121]

Justice Souter's third majority opinion in the area of search and seizure exemplified his later shift toward the liberal bloc of the Court.[122] In *Georgia v.*

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[111] *See* YARBROUGH, *supra* note 6, at 234–35.

[112] *See Atwater*, 532 U.S. at 354.

[113] *See* United States v. Banks, 540 U.S. 33 (2003).

[114] *Id.* at 33.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 43.

[119] *Id.* at 38.

[120] *Id.* at 37.

[121] *Id.* at 43; *see also* Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (holding that the "knock and announce" principle is part of a reasonable inquiry, but police can enter a home if officers have a reasonable suspicion that evidence might be destroyed); Wilson v. Arkansas, 514 U.S. 927, 936 (1995).

[122] *See* YARBROUGH, *supra* note 6, at 168.

Randolph,[123] the justices dealt with the "co-occupant consent rule," or whether police could search a home when one occupant consented to a search while the other refused to consent.[124] When police officers responded to a domestic altercation at the residence of Scott and Janet Randolph in Americus, Georgia, Janet Randolph indicated to police that her husband, Scott, was a cocaine user and stated he had drugs inside the home.[125] While Janet Randolph consented to the search of the home, Scott Randolph refused to provide consent to allow police to search for evidence of drug use.[126] When the police officers commenced with the search, and seized cocaine from the home, Scott Randolph moved to suppress the drug evidence based upon a violation of his Fourth Amendment rights.[127]

In *Randolph*, Justice Souter wrote for a five-justce majority comprised of Justices Stevens, Ginsburg, Breyer, and Kennedy. Justice Souter's opinion held that, even if a co-occupant consented to the search by police, the other co-occupant could refuse a search if he or she was physically present at the time of the search.[128] Justice Souter concluded that the search and seizure of the drug evidence by police without a warrant must be considered unreasonable, and thus unconstitutional.[129] Justice Souter's majority opinion in *Randolph* appeared to contradict precedent established by the Court in *United States v. Matlock* and *Illinois v. Rodriguez* where the Court held that co-occupant consent did not violate the Fourth Amendment rights of the other co-occupant of a residence.[130] In *Matlock*, the Court held that a prosecutor may prove consent obtained by a third party who had common authority over the premises or other sufficient relationship to the premises or effects sought to be inspected.[131] In *Rodriguez*, the Court subsequently expanded upon *Matlock* by holding that police may rely upon a third party's consent so long as they reasonably believe the third party possessed the authority to consent, even if they did not have actual authority.[132] However, Justice Souter's majority opinion drew a distinction between the case facts in *Randolph* and the established precedent by asserting that the co-occupants refusing the searches in *Matlock* and *Rodriguez* were not physically present when the police were searching for evidence.[133]

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[123] *See generally* 547 U.S. 103 (2006).

[124] *Id.* at 106.

[125] *Id.* at 107.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 104.

[130] *Id.* at 121; *see also* Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990); United States v. Matlock, 415 U.S. 164, 177–78 (1974).

[131] *Id.*

[132] *Id.*

[133] *Randolph,* 547 U.S. at 106.

In *Brendlin v. California*, Justice Souter wrote a unanimous opinion for the Court involving the search and seizure of drug evidence from a passenger in a vehicle.[134] In *Brendlin*, police officers stopped a vehicle to check for registration despite having no reason to believe that the vehicle had broken any traffic laws.[135] One of the officers noticed that a passenger in the vehicle, Bruce Brendlin, was a parole violator; the officers subsequently arrested and searched Brendlin.[136] The search produced drugs and drug paraphernalia, which Brendlin sought to suppress by arguing that the police officers did not have probable cause or reasonable suspicion to stop the vehicle.[137]

In the unanimous opinion, Justice Souter ruled that Brendlin, as a passenger in the vehicle, could challenge the constitutionality of the traffic stop because he was considered seized for Fourth Amendment purposes.[138] Relying upon precedent established in *Florida v. Bostick*,[139] Justice Souter concluded that the seizure of an individual by police has occurred when a reasonable person would not feel free to terminate the encounter with police.[140] The passenger, similar to the driver, had his freedom limited by police and had been seized within the meaning of the Fourth Amendment.[141] Therefore, the passenger did have a right to challenge the constitutionality of the search conducted by the police officers.[142]

While the *Brendlin* opinion can be viewed as a liberal ruling, it should be recognized that the other eight justices agreed with Justice Souter's opinion and, therefore, the decision did not cause an ideological split.[143] In fact, the *Brendlin* ruling was not substantive in nature because the justices simply held that Brendlin, as a passenger, was considered seized for purposes of the Fourth Amendment and could challenge the admission of evidence gathered by the police officers.[144] Justice Souter's opinion deferred to the state courts to decide the more controversial issue of whether the defendant could actually suppress the evidence.[145]

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[134] *See* 551 U.S. 249, 254–56 (2007).

[135] *Id.* at 252.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 251.

[139] *See generally* 501 U.S. 429 (1991); *infra* notes 154–55 and accompanying text.

[140] *See Brendlin,* 551 U.S. at 253–54.

[141] *Id.* at 255–57.

[142] *Id.* at 263.

[143] *See id.* at 250.

[144] *Id.* at 263.

[145] *Id.*

Justice Souter's last opinion for the Court in the area of search and seizure involved the strip search of a thirteen-year-old female student by school officials in the case of *Safford Unified School District v. Redding*.[146] In *Safford*, Justice Souter authored the majority opinion in a six-to-three decision holding that the strip search of the female student was a violation of her Fourth Amendment rights, even though school officials suspected she was distributing prescription drugs to other students.[147] Although school officials had a reasonable suspicion to conduct a limited search of the female student's outer clothes and backpack,[148] Justice Souter concluded that the search became unreasonable when school officials asked the student to remove her clothes down to her underwear, and then pull out her bra and the elastic band of her underwear to check for prescription drugs.[149] Because the student was suspected of distributing only common pain relievers, prescription-strength ibuprofen and over-the-counter naproxen, the school officials should have understood that the specific drugs being searched for did not pose a serious threat.[150] Therefore, Justice Souter held that the strip search was extremely intrusive given the lack of danger to other students and the absence of any evidence that the student was hiding the drugs in her underwear.[151]

Justice Souter's authorship of Court opinions, his votes cast in important cases, as well as his concurring and dissenting opinions, illustrated his flexibility and independence in his judicial decision-making and unveiled a later trend toward favoring criminal defendants.[152] In search and seizure cases, Justice Souter cast two important votes during his earlier years on the Court, suggesting he would join with ideological conservatives. First, during his freshman term, Justice Souter joined a conservative majority in *Florida v. Bostick*,[153] where the Court held that the questioning of bus passengers by police and the request for consent to search their luggage did not violate the Fourth Amendment rights of a defendant.[154] In *Bostick*, the legal reasoning of the Court was based upon the idea that a reasonable person would have understood that he or she could refuse to cooperate.[155] Second,

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[146] *See generally* 557 U.S. 364 (2009).

[147] *Id.* at 368.

[148] *Id.* Unlike law enforcement officials who require probable cause to justify a search, school officials are only required to establish reasonable suspicion. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

[149] *Safford*, 557 U.S. at 374.

[150] *Id.* at 375–76.

[151] *Id.* at 366–67.

[152] *See* YARBROUGH, *supra* note 6, at 185–86.

[153] *See* 501 U.S. 429, 431–40 (1991).

[154] *Id.*

[155] *Id.* at 437. In *Bostick*, the Florida State Supreme Court relied upon *Michigan v. Chestnut*, 486 U.S. 567 (1988), in holding that a passenger on a bus had his search and seizure rights violated because he was "not free to leave" when approached by police. *Id.* However, the U.S. Supreme Court

in *Arizona v. Evans*, Justice Souter also voted with the conservative majority to extend the "good faith" exception to the exclusionary rule in cases where a clerical error causes an otherwise legal search and seizure to become illegal.[156] In *Evans*, however, Justice Souter expressed concern in a separate concurrence that it might be necessary to apply the exclusionary rule as a deterrent against other governmental employees, not simply police officers, to prevent false arrests and the illegal seizures of evidence.[157]

During his latter years on the Court, Justice Souter showed a penchant for siding with the liberal bloc in search and seizure cases.[158] For example, Justice Souter dissented from the conservative majority in *United States v. Drayton*,[159] a case almost identical to *Bostick*, in that the search involved the pat down of bus passengers by police.[160] Justice Souter argued in his dissenting opinion that the pat down by police was not a consensual exercise and the police gave passengers every indication that they did not have a free choice to refuse the search.[161] In *Illinois v. Caballes*,[162] Justice Souter also dissented from the conservative majority, which held that the search of an automobile trunk by a drug-sniffing police dog pursuant to a routine traffic violation was constitutionally valid.[163] Finally, in *Hudson v. Michigan*,[164] a case very similar to *Banks*, Souter voted against the five conservative justices in the majority, joining a dissent written by Justice Breyer.[165] In *Hudson*, the majority held that, while police had violated the "knock and announce" rule by waiting only three to five seconds before entering a private residence to search for drug evidence with a warrant, the violation did not require that the evidence be suppressed.[166] According to the "knock and announce" rule, police are required to wait a reasonable amount of time between knocking on the door and announcing their presence and then entering a home with a search warrant.[167] The fact that

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remanded the case back to the Florida court based on the fact that the passenger was "not free to leave" because the bus was departing, not because of police coercion. *Id.* at 437–38. The Florida court could not simply rule in favor of the defendant without understanding the context of the encounter between Bostick and the police. *Id.*

[156] *See generally* 514 U.S. 1 (1995).

[157] *Id.* at 18 (Souter, J., concurring).

[158] *See generally* YARBROUGH, *supra* note 6.

[159] *See generally* 536 U.S. 194 (2002).

[160] *Id.* at 208 (Souter, J., dissenting).

[161] *Id.* at 212.

[162] *See generally* 543 U.S. 405 (2005).

[163] *Id.* at 410 (Souter, J., dissenting).

[164] *See generally* 547 U.S. 586 (2006).

[165] *Id.* at 605 (Breyer, J., dissenting); *see also* United States v. Banks, 540 U.S. 31 (2003).

[166] *See Hudson*, 547 U.S. at 599.

[167] *Id.* at 589. Since Congress passed the Espionage Act of 1917, the "knock and announce" rule has been part of federal statutory law at 18 U.S.C. § 3109 (2012). See also *Miller v. United States*, 357 U.S. 301 (1958), and *Sabbath v. United States*, 391 U.S. 585 (1968), for application of the statute.

Justice Souter voted differently in the similar cases discussed above suggests that his behavior was not driven by ideology, but rather the flexible application and interpretation of the law to the circumstances at hand.[168]

In other areas of search and seizure, Justice Souter also seemed to be applying a flexible approach in his decision making process.[169] For example, Justice Souter voted to strike down a police roadblock designed to arrest drug traffickers in *Indianapolis v. Edmond*.[170] Then, in *Illinois v. Lidster* where the Court held in favor of police officers stopping motorists to gather information concerning crimes committed in the community, Justice Souter concurred and dissented in parts by advocating for local control.[171] Here, Justice Souter joined Justice Stevens's concurring and dissenting opinion which maintained that local judges were better suited to decide the constitutionality of the roadblocks based upon the local conditions and practices of a community.[172] Finally, in 1995, Justice Souter voted conservatively by joining a Court majority which held that the drug testing of high school students who wanted to compete in athletics was not a violation of the Fourth Amendment.[173] However, six years later, Justice Souter voted with the liberal majority in a case where the Court held that the drug testing of pregnant women who sought pre-natal care at a hospital was a violation of the search and seizure clause.[174]

The Privilege Against Self-Incrimination (Right to Remain Silent) and Miranda v. Arizona

Justice Souter's opinions regarding the Fifth Amendment provided consistent support for the rights of criminal suspects for the most part.[175] In four of the five opinions written by Justice Souter during his tenure on the Court, he demonstrated a willingness to side with criminal defendants concerning the privilege against self-incrimination.[176]

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[168] *See* YARBROUGH, *supra* note 6, at 198 (discussing Souter's flexible approach toward constitutional interpretation).

[169] *Id.*

[170] 531 U.S. 32 (2000).

[171] *See* 540 U.S. 419, 421 (2004).

[172] *Id.* at 429–30.

[173] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995).

[174] Ferguson v. City of Charleston, 532 U.S. 67, 85–86 (2001).

[175] *See* Corley v. United States, 556 U.S. 303, 306 (2009); Missouri v. Seibert, 542 U.S. 600 (2004); United States v. Patane, 542 U.S. 630, 645 (2004) (Souter, J., dissenting); United States v. Balsys, 524 U.S. 666 (1998); Withrow v. Williams, 507 U S. 680 (1993).

[176] *See* cases cited *supra* note 175 (listing the self-incrimination cases in which Justice Souter voted).

Justice Souter's first opinion for the Court involving the Fifth Amendment's self-incrimination clause occurred in *Withrow v. Williams*.[177] In addition to dealing with the privilege against self-incrimination, known to the general public as the right to remain silent, Justice Souter's opinion in *Withrow* addressed whether to extend a conservative precedent from the Burger Court era established in *Stone v. Powell*.[178] In *Stone*, the Burger Court denied attempts by state prisoners to challenge the constitutionality of a search and seizure in federal habeas corpus proceedings if the defendant had a fair chance to raise such issues during trial and on appeal.[179] The Burger Court concluded that any attempt during federal proceedings to exclude evidence based upon an illegal search and seizure did not follow the intended purpose of the exclusionary rule, which was created to deter misconduct by police officers.[180]

In *Withrow*, Justice Souter wrote a unanimous opinion for the Court holding that the *Stone* precedent did not extend to state convictions based upon confessions that police officers may have obtained in violation of *Miranda* warnings.[181] Justice Souter concluded the defendant did have a right to federal habeas corpus review and that the trial court should have excluded any incriminating statements given as a result of the violation of the *Miranda* safeguards.[182] The case involved police officers in Romulus, Michigan questioning Robert Allen Williams, a suspect in a double murder.[183] Without the benefit of a *Miranda* warning, Williams admitted that he provided the shooter with the weapon after the police officers threatened to "lock him up" if he refused to talk.[184] Williams was convicted of first-degree murder after the trial court refused to exclude his incriminating statements by finding that he received his *Miranda* warnings in a timely fashion.[185] However, unlike the *Stone* ruling, where the failure to exclude evidence based upon an illegal search and seizure did not violate a fundamental trial right, Justice Souter reasoned that the *Miranda* warnings needed to be acknowledged at the trial stage because the warnings prevent the use of unreliable confessions at trial.[186]

Justice Souter issued his second opinion for the Court involving the privilege against self-incrimination in *United States v. Balsys*,[187] a case involving an inves-

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[177] *See generally* 507 U.S. 680 (1993).

[178] *See id.* at 682–83; *see generally* Stone v. Powell, 428 U.S. 465 (1976).

[179] *See Stone*, 428 U.S. at 494–95.

[180] *Id.*

[181] *See Withrow,* 507 U.S. at 682–83.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* at 684.

[186] *Id.* at 688–95; Stone v. Powell, 428 U.S. 465, 494–95 (1976).

[187] *See generally* 524 U.S. 666 (1998).

tigation by the United States government into the activities of a resident alien during World War II.[188] Because Aloyzas Balsys feared that his testimony in an American court of law could allow a foreign country to prosecute him, he claimed a privilege against self-incrimination under the Fifth Amendment.[189] While Balsys was not afraid of being prosecuted by authorities in the United States, he was concerned that his statements about his activities during World War II could subject him to prosecution in Germany, Israel, or Lithuania.[190] In writing for the majority in a seven-to-two decision, Justice Souter held that the Fifth Amendment's privilege against self-incrimination did not protect Balsys's refusal to provide information to the United States authorities because he feared prosecution by a foreign nation.[191] Based upon the case facts of *Balsys*, Justice Souter asserted that the Fifth Amendment privilege against self-incrimination could not be extended beyond criminal proceedings in the United States.[192]

Despite Justice Souter's conservative opinion in *Balsys*, he was known to vote consistently to uphold the liberal precedent that had established the *Miranda* warnings.[193] During the 1999–2000 term, Justice Souter voted with a seven-justice majority to strike down the Omnibus Crime Control Act of 1968,[194] which had threatened to overturn the Court's decision in *Miranda*.[195] Four years later, Justice Souter continued his support for *Miranda* and the privilege against self-incrimination when he wrote for a plurality opinion in *Missouri v. Seibert*.[196] In *Seibert*, Justice Souter's opinion argued that a murder confession could be excluded because police used a two-step strategy wherein officers would secure a confession from a suspect without *Miranda* warnings and then *Miranda* warnings would be issued to gain the confession a second time.[197]

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[188] *Id.* at 669.

[189] *Id.*

[190] *Id.* at 670.

[191] *Id.* at 669.

[192] *Id.* at 698. Souter conceded that it is possible for the United States to apply the privilege against self-incrimination in collaboration with a foreign nation, but such cooperation was not possible in *Balsys* given the legal argument presented in the case. *Id.*

[193] *See, e.g.*, Dickerson v. United States, 530 U.S. 428 (2000).

[194] 18 U.S.C. § 3501 (2012), *declared unconstitutional by Dickerson*, 530 U.S. at 443–44. The legislation was officially titled The Omnibus Crime Control and Safe Streets Act of 1968 and was designed by Congress to overturn the precedent established in *Miranda.* The congressional law co-existed with *Miranda* for thirty-four years until the U.S. Supreme Court decision in 2000 invalidated the Omnibus Control Act.

[195] *See Dickerson,* 530 U.S. 428.

[196] *See generally* 542 U.S. 600 (2004).

[197] *Id.* at 605. Justice Souter was joined in his majority opinion by Justices Stevens, Ginsburg, and Breyer. While Justice Kennedy did not join Souter's opinion, he did file a concurring opinion in voting with the majority. *Id.* at 618 (Kennedy, J., concurring). Justice Kennedy argued that, while he agreed with a large part of Justice Souter's opinion, the admission of statements was appropriate if

During the same term as *Siebert*, Justice Souter expressed further support for *Miranda* when he dissented from the Court's five-justice majority in *United States v. Patane*.[198] In *Patane*, the Court ruled that physical evidence seized by law enforcement does not have to be excluded, even if it was discovered because of incriminating statements voluntarily made to police without the issuance of *Miranda* warnings.[199] Justice Souter's dissenting opinion, joined by Justices Stevens and Ginsburg, accused the majority of ignoring the ramifications of providing an evidentiary advantage to police officers who ignore *Miranda*.[200] Moreover, he added that the *Patane* decision would provide an incentive for police officers to forego the issuance of *Miranda* warnings.[201]

Justice Souter's final opinion for the Court relating to *Miranda* warnings was *Corley v. United States*, where the justices split five to four in favor of a criminal defendant's appeal.[202] In *Corley*, Justice Souter wrote for the liberal majority holding that some confessions to FBI agents about committing a federal crime cannot be admitted at trial, even if the confessions were voluntary.[203] The case involved Johnnie Corley, who was convicted of armed bank robbery and sentenced to fourteen years in prison.[204] Corley attempted to exclude his written and verbal confessions because of a federal rule, known as the McNabb-Mallory rule, which required his confessions to have been given within six hours after his arrest and required that he appear before a magistrate without delay.[205] There was some question as to whether the police obtained Corley's confessions within the six-hour period and twenty-nine and a half hours had passed after his arrest before he finally appeared before a magistrate.[206] In 1968, Congress passed

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it furthered important goals without compromising the basic tenets of *Miranda*. *Id.* at 619. Hence, not every violation of *Miranda* should require a suppression of evidence secured by interrogators. *See id*. at 618.

[198] *See* United States v. Patane, 542 U.S. 630, 645 (2004) (Souter, J., dissenting).

[199] *Id.* at 644 (majority opinion). Justice Clarence Thomas authored the majority opinion for the Court and stated that the failure to provide *Miranda* warnings to a criminal suspect does not constitute a violation of the privilege against self-incrimination per se. *Id.* The Court remanded the case for further consideration based upon an accurate interpretation of *Miranda*. *Id.*

[200] *Id.* at 645 (Souter, J., dissenting).

[201] *Id.*

[202] *See* Corley v. United States, 556 U.S. 303, 306 (2009).

[203] *Id.*

[204] *Id.* at 311.

[205] The U.S. Supreme Court created the McNabb-Mallory rule in order to protect defendants from being detained by law enforcement for lengthy periods as well as to ensure presentment without unreasonable delay before a magistrate to be formally charged with a crime. In *Mallory*, the Court ruled a confession inadmissible in federal court because the confession was given seven hours after arrest and the defendant was not brought before a magistrate in a timely manner because of an unnecessary delay. *See* Mallory v. United States, 354 U.S. 449 (1957). *Mallory* reinforced an earlier and similar decision by the Court in *McNabb v. United States*, 318 U.S. 332 (1943).

[206] *See Corley*, 556 U.S. at 311–12.

a federal law altering the McNabb-Mallory rule in an attempt to allow such voluntary confessions to be admissible.[207] The critical issue in *Corley* was whether Congress eliminated, or simply limited, the McNabb-Mallory rule because, after the 1968 alteration, lower court judges began interpreting and applying the rule differently.[208] Some federal judges allowed voluntary confessions, so long as law enforcement secured the confession within six hours from the time of the arrest and there was no unnecessary or unreasonable delay in presenting the defendant to a magistrate. Other federal judges interpreted the 1968 federal law to allow voluntary confessions, assuming the six-hour rule and any delay in presentment to a magistrate were no longer relevant.[209]

The district court ruled that Corley's confessions were admissible by applying the federal rule and finding no violation of the six-hour period or any unreasonable delay in bringing Corley before a magistrate.[210] The Court of Appeals for the Third Circuit also held that the voluntary confessions were admissible. However, the panel majority simply focused on the fact that the confessions were given voluntarily and neglected to consider whether the confessions were made within the six-hour time limit and whether the twenty-nine and a half hour delay in bringing Corley before a magistrate was reasonable based upon the circumstances surrounding his arrest and detainment.[211] In effect, the Third Circuit did not

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[207] *See* 18 U.S.C. § 3501 (2012); FED. R. CRIM. P. 5(a). The federal law stated that a voluntary confession would not be inadmissible simply because of a delay in bringing the defendant before a magistrate as long as the confession was deemed voluntary and was made within six hours of the arrest. The federal law also extended the six-hour time limit if the delay in bringing the defendant before a magistrate was reasonable and based upon extenuating circumstances such as the distance to be traveled to the nearest magistrate.

[208] *Corley*, 556 U.S. at 313. The ambiguous language of the 1968 federal law caused a dispute among lower federal court judges concerning whether the law eliminated, or simply limited, the McNabb-Mallory rule.

[209] *Id.*

[210] *See* United States v. Corley, Crim. No. 03-775, 2004 U.S. Dist. LEXIS 8698, at *2–5 (E.D. Pa., May 10, 2004).

[211] *Corley*, 556 U.S. at 311–12. Johnnie Corley was arrested in eastern Pennsylvania by federal agents at 8:00 a.m. on September 17, 2003. FBI agents kept him at a local police station while they questioned individuals residing in the area where he was arrested. At 11:45 a.m., Corley was taken to a Philadelphia hospital for treatment of a cut on his hand that he got when police were chasing him. At 3:30 p.m., Corley was transported from the hospital to the FBI office in Philadelphia and informed that he was a suspect in a bank robbery committed in Norristown, Pennsylvania. Instead of bringing Corley before a magistrate whose chambers were located in the same building as the FBI office, federal agents questioned him in an attempt to secure verbal and written confessions. From 5:30 p.m. until 6:30 p.m., Corley gave agents an oral confession and the agents decided to hold him overnight because he was exhausted. On the following morning of September 18, 2003, Corley was again interrogated and signed a written confession before being presented to a federal magistrate judge at 1:30 p.m., almost 30 hours after his arrest. *See also* United States v. Corley, 500 F.3d 210 (3d Cir. 2007).

apply the McNabb-Mallory rule and acted as if the federal law passed in 1968 had eliminated it.[212]

Justice Souter's majority opinion disagreed with the Third Circuit's decision by stating that the 1968 federal law did not eliminate the McNabb-Mallory rule, but merely limited it.[213] Justice Souter concluded that the voluntary confessions might be inadmissible if it was determined that the confessions were given beyond six hours from the time of the arrest and if federal agents neglected to bring the defendant before a magistrate in a timely fashion.[214] Justice Souter wrote that, if voluntary confessions were admitted regardless of the delay in presenting a defendant to a magistrate to be formally charged, then federal agents would freely question suspects for long periods and such custodial secrecy would lead to a large percentage of people confessing to crimes that they did not commit.[215] Hence, Justice Souter vacated the Third Circuit's decision and remanded the case for further consideration to evaluate whether Corley's oral and written confessions should be treated as given beyond the six-hour period from arrest.[216] If the confessions were judged to have occurred prior to the defendant's appearance before a magistrate and beyond the six-hour period from the time of the arrest, the Third Circuit would be required to determine whether the delay in bringing Corley before the magistrate was unnecessary or unreasonable which could, in turn, make the confessions inadmissible.[217]

"Fair Trial" Rights

During Justice Souter's second term on the Court (1991–1992), he had already begun to reveal a liberal trend in criminal justice cases.[218] Souter's first significant opinion regarding Sixth Amendment trial rights involved a five-to-four decision in *Doggett v. United States*, where the Court held that a convicted defendant had been denied the right to a speedy trial.[219] In this particular case, Marc Doggett was indicted on federal drug charges in 1980 but, before federal agents could arrest him, he left the United States for Panama.[220] After traveling

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[212] The panel majority of the Court of Appeals for the Third Circuit argued that it was bound by circuit precedent which had held that the federal law passed by Congress in 1968 abrogated the McNabb-Mallory rule. *See Corley*, 500 F.3d at 212 (citing Gov't of Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974)).

[213] *Corley*, 556 U.S.at 306.

[214] *See id.* at 322.

[215] *Id.* at 320–21.

[216] *Id.* at 323.

[217] *Id.* at 322–23.

[218] *See* YARBROUGH, *supra* note 6, at 168.

[219] *See* 505 U.S. 647, 648 (1992).

[220] *Id.* at 649.

from Panama to Colombia, Doggett returned to the United States in 1982 where he lived for six years before a credit check revealed an outstanding warrant for his arrest and the United States Marshals Service apprehended him.[221]

In *Doggett*, the Justices clearly voted along ideological lines.[222] Justices Souter, White, Stevens, Kennedy, and Blackmun cast their five votes in the liberal direction favoring Doggett's Sixth Amendment rights, while Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas sided conservatively with the federal prosecutors.[223]

In Justice Souter's majority opinion, he reasoned that the eight-year period between Doggett's indictment in 1980 and his arrest in 1988 raised serious concerns about whether Doggett had received a speedy trial under the Sixth Amendment.[224] Justice Souter noted that the federal government was negligent in pursuing Doggett and the eight-year gap between indictment and arrest had created significant problems for Doggett's legal counsel in preparing his defense.[225] Justice Souter recognized that a lengthy delay most likely would cause a number of unidentifiable problems for Doggett in his attempt to receive a fair trial and that the delay itself caused a presumption of prejudice against Doggett.[226]

Ten years after the *Doggett* ruling, Justice Souter wrote for a unanimous Court in *United States v. Vonn*, a right-to-counsel case that involved the interpretation of Rule 11 of the Federal Rules of Criminal Procedure.[227] Rule 11 details the process that a judge must follow to ensure that a criminal defendant understands and voluntarily accepts a guilty plea.[228] A "harmless error" standard is used when determining whether a judge has deviated from Rule 11's procedures.[229] Under this analysis, a judge's actions will be upheld unless the deviation infringed upon the defendant's substantial rights.[230]

In *Vonn,* Alphonso Vonn had been charged with armed robbery and informed by a magistrate judge that the Sixth Amendment afforded him the right to legal

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[221] *Id.* at 650.

[222] *Id.* at 648.

[223] *Id.*

[224] *Id.* at 652.

[225] *Id.* at 653.

[226] *Id.* at 654. A lengthy period of time between indictment and a trial may cause problems for the defense because evidence might be lost, the memory of witnesses may fade, and persons associated with the case could disappear or die.

[227] *See* 535 U.S. 55, 57 (2002); *see generally* FED. R. CRIM. P. 11.

[228] *See* FED. R. CRIM. P. 11(h).

[229] *See Vonn*, 535 U.S. at 62.

[230] *Id.*

counsel.[231] However, when Vonn entered a guilty plea at a later stage of the criminal proceedings, the court failed to convey to Vonn that he had a right to counsel.[232] Because Vonn's attorney raised the issue of Rule 11 in a negligent manner after the trial court phase, Justice Souter's opinion held that Vonn could not benefit from the error.[233] Under the Federal Rules of Criminal Procedure, if a defendant negligently raises a Rule 11 objection, the burden shifts from the government to the defendant, who must establish that the error violated a substantial right.[234] In the end, the Court vacated and remanded the case to the Ninth Circuit where Vonn maintained the burden to satisfy the plain-error rule and the Ninth Circuit could review the entire record to determine the effect of any error on the rights of Vonn.[235]

Two years later, in *United States v. Dominguez Benitez*, Justice Souter relied upon the precedent established in *Vonn* relating to the application of Rule 11.[236] In this case, Justice Souter wrote a unanimous opinion for the Court in a case involving the defendant, Carlos Dominguez Benitez, who pled guilty to conspiracy.[237] Because Benitez had three prior convictions, the court rejected his plea agreement, sentenced him to a mandatory ten-year prison term, and denied him the option of withdrawing his guilty plea.[238] Benitez raised a Rule 11 claim because the court had not informed him in advance of his plea that he would be prevented from withdrawing it in the event that the court rejected the sentencing agreement.[239] Relying upon the *Vonn* precedent, Justice Souter asserted in his opinion that, because Benitez did not file the Rule 11 claim in a timely manner, the defendant maintained the burden of proving that a different outcome would have occurred in the trial but for the plain error of the court.[240]

During the 2004–2005 term, Justice Souter authored a five-justice majority opinion in *Rompilla v. Beard*, which continued a trend by the Court (since 2000) of ruling in favor of defendants in Sixth Amendment cases.[241] In *Rompilla*,

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[231] *Id.* at 60.

[232] *Id.* at 60.

[233] *Id.* at 63.

[234] *Id.* at 73–74.

[235] *Id.* at 55–56.

[236] *See* 542 U.S. 74, 75 (2004).

[237] *Id.* at 74.

[238] *Id.* at 78.

[239] *Id.* at 79.

[240] *Id.* at 85.

[241] *See* 545 U.S. 374, 377 (2005). From 2000–2005, the U.S. Supreme Court voted in favor of defendants' Sixth Amendment rights in eleven cases (including *Rompilla v. Beard*): *Miller-El v. Dretke*, 545 U.S. 231 (2005); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004), *Crawford v. Washington*, 541 U.S. 36 (2004); *Fellers v. United States*, 540 U.S.

Justice Souter focused upon the right to counsel for Ronald Rompilla, a criminal defendant sentenced to death by the state of Pennsylvania for murder based upon a number of aggravating circumstances.[242] One of the aggravating circumstances presented by prosecutors to justify a death sentence was Rompilla's history of felony convictions, including rape and assault.[243] The majority opinion held that Rompilla's defense counsel should have introduced evidence of his various personal problems, which would have served as mitigating factors at the sentencing stage.[244] For instance, Rompilla had limited mental capabilities, was abused as a child, and was diagnosed with fetal alcohol syndrome and schizophrenia.[245] His counsel failed to introduce the mitigating evidence, even though it had been introduced when Rompilla was convicted of felony rape several years earlier.[246] Justice Souter concluded that Rompilla received inadequate counsel because his defense lawyers had not met the standard of reasonable competence established by the American Bar Association (ABA).[247] In regard to the Court overturning Rompilla's death sentence, Justice Souter quoted directly from the ABA standards:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.[248]

In sum, Rompilla's counsel failed because the introduction of the mitigating evidence from his prior rape conviction during the capital-sentencing phase could have produced a different punishment.[249] Because of the Supreme Court's

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519 (2004); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Massaro v. United States*, 538 U.S. 500 (2003); *Ring v. Arizona*, 536 U.S. 584 (2002); *Alabama v. Shelton*, 535 U.S. 654 (2002); and *Williams v. Taylor*, 529 U.S. 362 (2000).

[242] *Rompilla*, 545 U.S. at 378.

[243] *Id.* at 378.

[244] *Id.* at 389.

[245] *Id.* at 391.

[246] *Id.* at 390–91.

[247] *Id.* at 390.

[248] *Id.* at 387.

[249] *Id.* at 393.

decision in *Rompilla*, the state of Pennsylvania was required to provide the convicted murderer with a new capital sentencing hearing or commute his death sentence to life in prison.[250]

In addition, during the 2004–2005 term, Justice Souter wrote a second opinion for the Court concerning the right to a fair trial.[251] In *Miller-El v. Dretke*, Justice Souter wrote the Court's majority opinion, with the justices split by a vote of six to three, ruling that the Dallas County District Attorney's Office racially discriminated in issuing peremptory challenges of jurors in a capital murder case.[252] Justice Souter led the majority in holding that the Dallas prosecutors had violated the Equal Protection Clause of the Fourteenth Amendment as well as Miller's Sixth Amendment right to a fair trial by an impartial jury.[253] Justice Souter wrote: "The prosecutors used their peremptory strikes to exclude 91% of the eligible black venire panelists, a disparity unlikely to have been produced by happenstance."[254] In *Miller-El*, Justice Souter joined a liberal bloc of justices concerned about the fair trial rights of a defendant amidst serious concerns about the racial composition of a jury and positioned himself against Chief Justice Rehnquist and Justices Scalia and Thomas.[255]

Justice Souter wrote his final opinion dealing with the Sixth Amendment in *Rothgery v. Gillespie County, Texas*,[256] which involved the question of whether a defendant should be guaranteed a right to counsel at his initial proceeding before a magistrate judge.[257] Rothgery was denied court appointed counsel at his initial proceeding where he learned that he was erroneously charged with a felony possession of a firearm.[258] After the initial hearing, Rothgery posted bond but was repeatedly denied appointed counsel because Gillespie County, Texas had an unwritten rule of denying free counsel to indigents out on bond until a prosecutor entered an indictment.[259] When prosecutors finally indicted and rearrested Rothgery, he was unable to post the increased bond amount and was required to spend three weeks in jail until, finally, appointed counsel was able to

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[250] *Id.* At the request of the murder victim's family, Ronald Rompilla was eventually given a life sentence on August 13, 2007 in exchange for Rompilla waiving all appeal rights in any court. *See New Voices-Victims' Families,* DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/new-voices-victims-families (last visited Dec. 5, 2012).

[251] *See* Miller-El v. Dretke, 545 U.S. 231, 235 (2005).

[252] *Id.*

[253] *Id.* at 236.

[254] *Id.* at 241.

[255] *Id.* at 235.

[256] *See* 554 U.S. 191, 193 (2008).

[257] *Id.* at 194–95.

[258] *Id.* at 194–96.

[259] *Id.* at 196.

file the necessary paperwork to dismiss the indictment based upon the erroneous information used by police officers.[260] Rothgery brought a section 1983 civil rights claim against Gillespie County, arguing that had the court appointed him legal counsel at the initial proceeding, a lawyer would have been able to prove that Rothgery was not a felon and his false arrest for possession of a firearm would have been dismissed earlier.[261] Instead, because the court denied Rothgery counsel until the indictment, he lost his freedom for three weeks.[262] Justice Souter's opinion for the eight-justice majority held that Rothgery's initial appearance before a magistrate judge marked the onset of the adversarial process and Gillespie County violated his Sixth Amendment right to counsel by denying his request for a lawyer.[263] While Gillespie County had justified the denial of counsel based upon prosecutors not having been involved in the initial proceeding, Justice Souter asserted that courts are to provide counsel to defendants even if prosecutors are not required to be made aware of or even involved with the initial proceeding.[264] Citing *Michigan v. Jackson* and *Brewer v. Williams*, Justice Souter noted that the United States Supreme Court has consistently recognized that the right to an attorney applies at the initial appearance before a judge, or magistrate, at which time a defendant is told of the formal charges against him and the restrictions placed upon his freedoms.[265]

Eighth Amendment and Capital Punishment

Justice Souter supported the death penalty during his time served as attorney general and state judge in New Hampshire.[266] The first significant case for Justice Souter on the United States Supreme Court pertaining to the death penalty was *Payne v. Tennessee*.[267] In *Payne*, Justice Souter aligned with the conservative majority in a six-to-three vote, upholding the use of victim impact statements

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[260] *Id.* at 196–97.

[261] *Id.* at 197; *see generally* 42 U.S.C. § 1983 (2012).

[262] *Rothgery,* 554 U.S. at 196.

[263] *Id.* at 197–98.

[264] *Id.* at 194. Texas law stipulated that police officers were required to bring Rothgery before the magistrate judge for a determination of probable cause, the setting of bail, and the formal appraisal of charges. *Id.* at 195. The hearing is commonly referred to as an "article 15.17 hearing." *Id.*

[265] *See* Michigan v. Jackson, 475 U.S. 625, 636 (1986) (holding in a six-to-three vote that when police began an interrogation after a defendant's assertion at an arraignment of his right to counsel, any waiver of the defendant's right to counsel for that interrogation was not valid); Brewer v. Williams, 430 U.S. 387, 406 (1977). The Court voted five to four that a defendant's conviction for murder must be overturned because the defendant led officers to the victim's body without the presence of defense counsel. *Brewer*, 430 U.S. at 406.

[266] *See* YARBROUGH, *supra* note 6, at 36.

[267] *See* 501 U.S. 808, 810 (1991).

during the sentencing phase of a death penalty case.[268] Justice Souter authored a concurring opinion in *Payne* asserting that the withholding of victim impact statements would provide an unfair advantage to the defendant.[269] Justice Souter argued that, because the defendant was allowed to introduce mitigating evidence in his favor at the sentencing phase, a denial of victim impact statements would imbalance the entire process.[270]

Justice Souter, however, departed from the majority in his concurrence when he expressed concern that, while the *Payne* ruling had correctly overturned two precedents, the majority dismissed the precedent as grounded on "administrative convenience."[271] Whereas Chief Justice Rehnquist's majority opinion and Justice Scalia's separate concurrence declined to emphasize the significance of precedent, Justice Souter's concurrence focused upon the "fundamental importance" of *stare decisis* and the necessity for "some 'special justification'" supporting a departure from precedent.[272] Hence, even during his first term on the Court, Justice Souter started to reveal a streak of independence from his conservative brethren that would surface more frequently in the coming years.[273]

In *Sochor v. Florida* Justice Souter wrote his first opinion for the Court concerning the death penalty.[274] *Sochor* involved a jury recommendation for a death sentence where the trial court instructed jurors to decide upon four aggravating factors, including such vague factors as "heinousness" and "coldness."[275] While the jury recommendation did not specify which aggravating factors existed, the judge ruled in favor of the existence of the four aggravating factors, but found no evidence of any mitigating factors in issuing a death sentence.[276] Justice Souter's complex opinion for the Court held that the state of Florida's "heinousness" factor was outside the jurisdiction of the United States Supreme Court.[277] But, Justice Souter's opinion did hold that the Florida Supreme Court made an Eighth Amendment error when it did not produce enough evidence to uphold the "coldness" factor and should have independently reviewed the judge's decision regarding the aggravating and mitigating factors.[278] Justice Souter's opinion for

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[268] *Id.*

[269] *Id.* at 839.

[270] *Id.*

[271] YARBROUGH, *supra* note 6, at 164. In *Payne*, the Court overturned two cases: *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989).

[272] *See Payne,* 501 U.S. at 842.

[273] *See* YARBROUGH, *supra* note 6, at 162.

[274] *See* 504 U.S. 527, 531 (1992).

[275] *Id.* at 529–30.

[276] *Id.* at 529.

[277] *Id.* at 534.

[278] *Id.* at 540.

the Court resulted in a unanimous ruling on the jurisdictional issue related to the "heinousness" factor, while the ruling on the "coldness" factor produced a non-ideological divide among the justices.[279]

Three years later, in *Kyles v. Whitley*, Justice Souter authored a majority opinion where he ordered a new trial for a defendant who had been sentenced to death in Louisiana for first-degree murder.[280] Justice Souter's opinion, joined by Justices Ginsburg, Breyer, Stevens, and O'Connor, concluded that the defendant was entitled to a new trial after a revelation that state prosecutors withheld evidence that could have produced an acquittal for the defendant.[281]

Justice Souter's last majority opinion in a capital punishment case was *Kelly v. South Carolina*.[282] Again, Justice Souter sided with the same liberal bloc of justices from the *Kyles* decision holding that a defendant was entitled to have the judge, or legal counsel, instruct the jury that the defendant would not be eligible for parole if he received a life sentence.[283] In the absence of such jury instruction, the jury imposed a death sentence for the defendant, instead of a life sentence without the possibility of parole.[284] Justice Souter argued in his opinion that due process required the jurors to be informed through jury instructions by the judge or through arguments presented by legal counsel.[285]

In the recent, and more publicized, cases involving the death penalty, Souter consistently voted with the liberal bloc on the Court in ideologically divisive cases.[286] In *Atkins v. Virginia*, Justice Souter voted with a liberal majority to prohibit the use of the death penalty for the mentally challenged and voted with a liberal majority in *Roper v. Simmons* to deny execution for any defendant under the age of eighteen.[287] As in the *Kelly* decision, Justice Souter opposed the conservative bloc of justices, namely Chief Justice Rehnquist and Justices Scalia and Thomas, as the Court overturned precedents from the 1980s because of a

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[279] *See generally id.* at 529–51.

[280] *See* 514 U.S. 419, 421–22 (1995).

[281] *Id.* at 454.

[282] *See* 534 U.S. 246, 247 (2002).

[283] *Id.* at 248.

[284] *Id.* at 250–51.

[285] *Id.* at 256–57.

[286] *See* Robert Barnes, *High Court Rejects Death for Child Rape: Penalty Reserved for Murder and Crimes Against State*, WASH. POST, June 26, 2008, at A01.

[287] *See* Roper v. Simmons, 543 U.S. 551, 554 (2005); Atkins v. Virginia, 536 U.S. 304, 305 (2002).

growing national trend against such executions.[288] In Justice Souter's final vote in a death penalty case, he again sided with the liberal bloc in prohibiting states from executing defendants convicted of child rape.[289]

During his early years on the Court, Justice Souter established a moderate voting record in capital punishment cases.[290] However, in the latter part of his service on the Court, Justice Souter became more consistent in voting to limit the application of the death penalty where due process rights had been violated and to abolish the use of the death penalty in cases involving the mentally challenged, minors, and defendants convicted of child rape.[291] Hence, for the better part of his tenure on the Court, Justice Souter defied the conservative bloc of justices in a significant number of cases involving the death penalty.[292]

Prisoners' Rights and the Cruel and Unusual Punishment Clause

Justice Souter's opinions in terms of prisoners' rights and the Eighth Amendment also demonstrated his ideological independence, although he wrote only four opinions in this area during his tenure on the Court.[293] Early in Justice Souter's career, he wrote for a conservative majority in *Rowland v. California Men's Colony*.[294] In *Rowland*, Justice Souter was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia in holding that only natural persons may qualify as indigents in filing an *in forma pauperis* petition.[295] The California Men's Colony was a representative association, which served as an advisory council for the prison warden.[296] The organization, comprised of prisoners, claimed that the California Department of Corrections violated its right against cruel and unusual punishment and tried to file an *in forma pauperis* petition in federal court.[297] In

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[288] Editorial, *Death Penalty in Review: Capital Punishment Loses Ground, for Good Reasons*. WASH. POST, Dec. 23, 2007, at B06. The Court cases overturned by *Atkins* and *Roper* were: *Penry v. Lynaugh,* 492 U.S. 302 (1989), which held that states could execute the mentally challenged; and *Thompson v. Oklahoma*, 487 U.S. 815 (1988), which held that states could execute defendants who were sixteen years of age or older.

[289] *See* Kennedy v. Louisiana, 554 U.S. 407, 411 (2008). The U.S. Supreme Court voted five to four that it was a violation of the Eighth Amendment for a state to execute someone found guilty of child rape. *Id.* The death penalty must be reserved for murderers and defendants who commit acts of treason against the state. *Id.*

[290] *See* HENSLEY ET AL., *supra* note 2, at 586 Table 12.2. In capital punishment cases from 1991–1994, Souter voted in the liberal direction ten out of eighteen times.

[291] *Kennedy*, 554 U.S. at 413; *Roper*, 543 U.S. at 577; *Atkins,* 536 U.S. at 321.

[292] *See* HENSLEY ET AL., *supra* note 2, at 586.

[293] *Id.* at 162.

[294] *See* 506 U.S. 194, 196 (1993).

[295] *Id.* at 194.

[296] *Id.* at 196.

[297] *Id.* at 196–97.

his majority opinion, Justice Souter ruled against the California Men's Colony and held that only individual persons as defined by the plain meaning of a federal law could file suit in federal court as indigents and the organization itself did not constitute a person under federal law.[298]

In the following term, Justice Souter wrote another influential opinion concerning prisoners' rights and the Eighth Amendment in *Farmer v. Brennan*,[299] which established controlling precedent in the area of inmate on inmate rape, as well as sexual misconduct by prison officials against inmates.[300] In *Farmer*, Justice Souter led the Court in creating a two-part test to determine whether a prisoner's right against cruel and unusual punishment has been violated.[301] The first part of the test requires a prisoner to show a substantial risk of serious harm based upon an objective standard; the second part requires evidence that prison officials are culpable based on deliberate indifference to an inmate's health or safety.[302] The circumstances surrounding this case involved a transvestite prisoner who was transferred to a more violent prison, placed in the general population, and sexually assaulted.[303] The prisoner claimed that prison officials deliberately ordered the transfer with knowledge that such an assault would occur.[304] After the Court created the two-part test in *Farmer*, the case was remanded to the district court to reconsider its denial of the prisoner's request for a discovery motion as well as the charges against the prison officials.[305]

In *Booth v. Churner*,[306] Justice Souter wrote a unanimous opinion holding that, under the Prisoner Litigation Reform Act of 1995, a prisoner must exhaust the administrative remedies available before filing a civil lawsuit in federal court regarding prison conditions.[307] In other words, a prisoner cannot sue for monetary damages in federal court until the administrative process is completed.[308] Justice Souter wrote a highly technical opinion where he focused on the broad statutory intent of Congress in defining the words "administrative remedies" and "available."[309]

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[298] *Id.* at 211–12.

[299] *See* 511 U.S. 825, 828 (1994).

[300] *Id.*

[301] *Id.* at 834.

[302] *Id.*

[303] *Id.* at 830.

[304] *Id.* at 830–31.

[305] *Id.* at 850–51.

[306] *See* 532 U.S. 731, 733 (2001).

[307] *Id.* at 734.

[308] *Id.*

[309] *Id.* at 736; *see also* 42 U.S.C. § 1997e(a) (2012).

Finally, Justice Souter's last opinion dealing with prisoners' rights and the Eighth Amendment was *Roell v. Withrow*.[310] In *Roell*, Justice Souter wrote for a five-justice majority in favor of a prisoner who filed a federal lawsuit claiming that his right against cruel and unusual punishment had been violated because prison officials had ignored his medical needs.[311] The key issue in *Roell* concerned whether prison officials agreed to have the case heard before a federal magistrate, instead of a district court judge.[312] After the federal magistrate ruled in favor of the prisoner, prison officials objected and argued that a district court judge should have heard the dispute.[313] Justice Souter's opinion concluded that it could be inferred that the prison officials had consented to the case being heard by the federal magistrate because the prison officials participated in the entire litigation process and did not object until after the magistrate's decision.[314]

THE IDEOLOGICAL VOTING BEHAVIOR OF JUSTICE SOUTER (1991–2009)

As with Justice Souter's written opinions, an empirical analysis of individual votes cast by Justice Souter from 1991–2009 reveals a liberal tendency on issues related to criminal justice, namely in Fourth, Fifth, Sixth, and Eighth Amendment cases.[315] The first column of Table 1 displays Justice Souter's ideological voting behavior during his early years on the Court (1991–1997), while the second column of Table 1 documents Justice Souter's shift toward liberal voting over the last decade (1998–2009).[316] Finally, the third column in Table 1 provides a comprehensive summary of Justice Souter's ideological voting from 1991–2009.[317]

While Justice Souter began as a conservative in Fourth Amendment search and seizure cases, he deviated from the conservative bloc frequently in his last years on the Court.[318] According to Table 1, Justice Souter's voting behavior was solidly conservative in search and seizure cases from 1991–1997.[319] During these initial years on the Court, Justice Souter voted sixty-two percent in the conservative

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[310] *See* 538 U.S. 580, 582 (2003).

[311] *Id.*

[312] *Id.*

[313] *Id.* at 583.

[314] *Id.* at 590–91.

[315] The individual votes of Justice David Souter were compiled from HENSLEY ET AL., *supra* note 2, at 449–51, 496–99, 538–43, and 586–88, as well as from the published cases in the *United States Reports* found on the following websites: www.findlaw.com and www.supremecourtus.gov (the official website of the U.S. Supreme Court). *See generally* HAROLD J. SPAETH, MICHIGAN STATE UNIV., U.S. SUPREME COURT JUDICIAL DATABASE, 1953–97 (1998).

[316] HENSLEY ET AL., *supra* note 2, at 449–51, 496–99, 538–43, and 586–88.

[317] *Id.*

[318] *See* YARBROUGH, *supra* note 6, at 234.

[319] *See* HENSLEY ET AL., *supra* note 2, at 449–51.

direction, or against the rights of criminal defendants, and sided with the liberal position only thirty-eight percent of the time.[320] However, from 1998–2009, a complete reversal is revealed in Table 1 as Justice Souter voted sixty-one percent for the liberal position in search and seizure cases, while voting conservatively only thirty-nine percent of the time.[321] According to Table 1, in search and seizure cases from 1991–2009, Justice Souter cast slightly more than one-half (fifty-five percent) of his overall votes for the liberal position.[322] In sum, Justice Souter was moderately liberal in search and seizure cases and his flexibility in this area made him one of the more unpredictable "swing votes" on the Court.[323]

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[320] Justice Souter cast sixteen votes in search and seizures cases from 1991–1997. In the following ten cases, Souter voted conservative against the Fourth Amendment rights of the criminal defendants: *Florida v. Bostick*, 501 U.S. 429 (1991); *Florida v. Jimeno*, 500 U.S. 248 (1991); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *California v. Hodari D.*, 499 U.S. 621 (1991); *California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Padilla*, 508 U.S. 77 (1993); *Arizona v. Evans*, 514 U.S. 1 (1995); *Whren v. United States*, 517 U.S. 806 (1996); *Ohio v. Robinette*, 519 U.S. 33 (1996); and *Maryland v. Wilson*, 519 U.S. 408 (1997).

In the following six cases, Souter voted liberal in favor of the Fourth Amendment rights of criminal defendants: *Soldal v. Cook County, Illinois*, 506 U.S. 56 (1992); *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *Wilson v. Arkansas*, 514 U.S. 927 (1995); *Veronica v. Acton*, 515 U.S. 646 (1995); *Richards v. Wisconsin*, 520 U.S. 385 (1997); and *Chandler v. Miller*, 520 U.S. 305 (1997).

[321] Souter cast forty-four votes from 1998–2009 in search and seizure cases. During this time period, Souter voted liberal in favor of the Fourth Amendment rights of criminal defendants in the following twenty-seven cases: *Campbell v. Louisiana*, 523 U.S. 392 (1998); *Pennsylvania v. Scott*, 524 U.S. 357 (1998); *Minnesota v. Carter*, 525 U.S. 83 (1998); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Wilson v. Layne*, 526 U.S. 603 (1999); *Wyoming v. Houghton*, 526 U.S. 295 (1999); *Florida v. White*, 526 U.S. 559 (1999); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Florida v. JL*, 529 U.S. 266 (2000); *Bond v. United States*, 529 U.S. 334 (2000); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Ferguson v. Charleston*, 532 U.S. 67 (2001); *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Drayton*, 536 U.S. 194 (2002); *Board of Education of Independent School District v. Earls*, 536 U.S. 822 (2002); *Kaupp v. Texas*, 538 U.S. 626 (2003); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Illinois v. Lidster*, 540 U.S. 419 (2004); *Thornton v. United States*, 541 U.S. 615 (2004); *Illinois v. Caballes*, 543 U.S. 405 (2005); *Georgia v. Randolph*, 547 U.S. 103 (2006); *Samson v. California*, 547 U.S. 843 (2006); *Hudson v. Michigan*, 547 U.S. 586 (2006); *Brendlin v. California*, 551 U.S. 249 (2007); *Arizona v. Gant*, 556 U.S. 332 (2009); *Herring v. United States*, 555 U.S. 135 (2009); and *Safford v. Redding*, 557 U.S. 364 (2009).

In the following seventeen cases, Souter voted conservative against the Fourth Amendment rights of criminal suspects from 1998–2009: *United States v. Ramirez*, 523 U.S. 65 (1998); *Hanlon v. Berger*, 526 U.S. 808 (1999); *Atwater v. Lago Vista*, 532 U.S. 318 (2001); *Illinois v. McArthur*, 531 U.S. 326 (2001); *United States v. Knights*, 534 U.S. 112 (2001); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Banks*, 540 U.S. 31 (2003); *Maryland v. Pringle*, 540 U.S. 366 (2003); *Brousseau v. Haugen*, 543 U.S. 194 (2004); *Devenpeck v. Alford*, 543 U.S. 146 (2004); *United States v. Flores-Montano*, 541 U.S. 149 (2004); *Muehler v. Mena*, 544 U.S. 93 (2005); *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006); *United States v. Grubbs*, 547 U.S. 90 (2006); *Virginia v. Moore*, 553 U.S. 164 (2008); *Arizona v. Johnson*, 555 U.S. 323 (2009); and *Pearson v. Callahan*, 555 U.S. 223 (2009).

[322] *See supra* notes 320–21.

[323] *See* HENSLEY ET AL., *supra* note 2, at 77; YARBROUGH, *supra* note 6, at 234.

In Fifth Amendment cases, Justice Souter also demonstrated a conservative voting pattern during his early years on the Court.[324] From 1991–1997, Table 1 illustrates that Justice Souter voted fifty-five percent in the conservative direction, or against the rights of criminal defendants, and forty-five percent for the liberal side in cases pertaining to the privilege against self-incrimination, double jeopardy, and due process claims.[325] However, from 1998–2009, Justice Souter dramatically reversed this earlier pattern by increasing his liberal voting percentage for the rights of criminal suspects to seventy-five percent and decreasing his conservative percentage to twenty-five percent in Fifth Amendment disputes.[326] Overall, Justice Souter's entire record from 1991–2009 in Fifth Amendment cases revealed sixty-seven percent of his votes cast in favor of the rights of criminal defendants with an increasingly liberal trend over time.[327]

In Sixth Amendment cases involving the trial rights of criminal defendants, Justice Souter again exhibited the same behavioral pattern that was revealed in Fourth and Fifth Amendment cases.[328] From 1991–1997, Justice Souter

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[324] HENSLEY ET AL., *supra* note 2, at 496. Hensley reported that Souter voted conservatively in seventy-one percent of Fifth Amendment cases from 1991–1994. *Id.* Souter participated in seven cases involving the Fifth Amendment during this time period. *Id.*

[325] Souter cast eleven votes from 1991–1997 of which the following six were conservative: *Arizona v. Fulminante*, 499 U.S. 279 (1991); *United States v. Felix*, 503 U.S. 378 (1992); *United States v. Davis*, 512 U.S. 452 (1994); *Schiro v. Farley*, 510 U.S. 222 (1994); *United States v. Ursery*, 518 U.S. 267 (1996); *Hudson v. United States*, 522 U.S. 93 (1997). In the following five cases, Souter voted liberal from 1991–1997: *Withrow v. Williams*, 507 U.S. 680 (1993); *United States v. Dixon*, 509 U.S. 688 (1993); *Department of Revenue of Montana. v. Kurth Ranch*, 511 U.S. 767 (1994); *Bennis v. Michigan*, 517 U.S. 1163 (1996); and *Kansas v. Hendricks*, 521 U.S. 346 (1997).

[326] Souter voted in thirty-two cases involving Fifth Amendment rights from 1998–2009. Souter voted liberal in the following twenty-four cases: *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Monge v. California*, 524 U.S. 721 (1998); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *Mitchell v. United States*, 526 U.S. 314 (1999); *Portuondo v. Agard*, 529 U.S. 61 (2000); *Nelson v. Adams USA*, 529 U.S. 460 (2000); *United States v. Hubbell*, 530 U.S. 27 (2000); *Dickerson v. United States*, 530 U.S. 428 (2000); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *McKune v. Illinois*, 536 U.S. 24 (2002); *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003); *Sell v. United States*, 539 U.S. 166 (2003); *Stogner v. California*, 539 U.S. 607 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *DeMore v. Kim*, 538 U.S. 510 (2003); *Yarbrough v. Alavardo*, 541 U.S. 652 (2004); *Missouri v. Seibert*, 542 U.S. 600 (2004); *United States v. Lara*, 541 U.S. 193 (2004); *United States v. Patane*, 542 U.S. 630 (2004); *Smith v. Massachusetts*, 543 U S. 462 (2005); *Deck v. Missouri*, 544 U.S. 622 (2005); *Bobby v. Bies*, 556 U.S. 825 (2009); *Corley v. United States*, 556 U S. 301 (2009); and *Yeager v. United States*, 557 U.S. 110 (2009).

In the following eight cases, Souter voted conservative from 1998–2009: *United States v. Balsys*, 524 U.S. 666 (1998); *Ohio v. Woodward*, 523 U.S. 272 (1998); *Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *American Manufacturers v. Sullivan*, 526 U.S. 40 (1999); *Seling v. Young*, 531 U.S. 250 (2001); *Price v. Vincent*, 538 U.S. 634 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); and *Wilkie v. Robbins*, 551 U.S. 537 (2007).

[327] *See supra* notes 325–26.

[328] Sixth Amendment trial rights include the right to counsel, right to a jury trial, right to a speedy and public trial, the right to confront witnesses, the right to subpoena witnesses in your

voted conservatively nearly two-thirds of the time (sixty-four percent) in Sixth Amendment cases, while registering a liberal vote only thirty-six percent of the time.[329] Nevertheless, Justice Souter's voting record again changed significantly from 1998–2009 when he recorded a liberal rating of sixty-nine percent, while only thirty-one percent of his votes were cast in favor of the government's position.[330] Overall, Justice Souter was a fairly liberal justice in Sixth Amendment cases, having voted for the trial rights of defendants in sixty percent of the cases from 1991–2009.[331]

In criminal justice cases, Justice Souter reserved his most liberal voting record for Eighth Amendment issues concerning the death penalty and prisoners' rights.[332]

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favor and the right to be informed of charges against you. *See generally* FRANCIS HELLER, THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION (1951); ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN JURISPRUDENCE (1992).

[329] From 1991–1997, Souter participated in fourteen cases involving Sixth Amendment rights. Souter voted liberal in the following five cases: *Yates v. Evatt*, 500 U.S. 391 (1991); *Doggett v. United States*, 505 U.S. 647 (1992); *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Riggins v. Nevada*, 504 U.S. 127 (1992); and *Victor v. Nebraska*, 511 U.S. 1 (1994).

In the following nine cases, Souter voted conservative: *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Estelle v. McGuire*, 502 U.S. 62 (1991); *Michigan v. Lucas*, 500 U.S. 145 (1991); *Mu'min v. Virginia*, 500 U.S. 415 (1991); *White v. Illinois*, 502 U.S. 346 (1992); *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Nichols v. United States*, 511 U.S. 738 (1994); *Shannon v. United States*, 512 U.S. 573 (1994); and *Lewis v. United States*, 518 U.S. 322 (1996).

[330] Souter voted in forty-two Sixth Amendment cases from 1998–2009. During this time frame, Souter voted in the liberal direction in the following twenty-nine decisions: *Gray v. Maryland*, 523 U.S. 185 (1998); *Lilly v. Virginia*, 527 U.S. 116 (1999); *Neder v. United States*, 527 U.S. 1 (1999); *Strickler v. Greene*, 527 U.S. 263 (1999); *Williams v. Taylor*, 529 U.S. 362 (2000); *Glover v. United States*, 531 U.S. 198 (2001); *Texas v. Cobb*, 536 U.S. 162 (2001); *Mickens v. Taylor*, 535 U.S. 162 (2002); *Ring v. Arizona*, 536 U.S. 584 (2002); *Alabama v. Shelton*, 535 U.S. 654 (2002); *Woodford v. Garceau*, 538 U.S. 202 (2003); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Massaro v. United States*, 538 U.S. 500 (2003); *Blakeley v. Washington*, 542 U.S. 296 (2004); *Crawford v. Washington*, 541 U.S. 36 (2004); *Fellers v. United States*, 540 U.S. 519 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 543 U.S. 499 (2005); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Rita v. United States*, 551 U.S. 338 (2007); *Indiana v. Edwards*, 554 U.S. 164 (2008); *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008); *Harbison v. Bell*, 556 U.S. 180 (2009); *Hedgpeth v. Pulido*, 555 U.S. 57 (2009); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Montejo v. Louisiana*, 556 U.S. 07 (2009); and *Oregon v. Ice*, 555 U.S. 160 (2009).

In the following thirteen cases, Souter voted in favor of the conservative side from 1998–2009: *United States v. Scheffer*, 523 U.S. 303 (1998); *Martinez v. California*, 528 U.S. 152 (2000); *United States v. Martinez-Salazar*, 528 U.S. 304 (2000); *United States v. Vonn*, 535 U.S. 55 (2002); *Iowa v. Tovar*, 541 U.S. 77 (2004); *United States v. Dominguez Benitez*, 542 U.S. 74 (2004); *Florida v. Nixon*, 543 U.S. 175 (2004); *Holland v. Jackson*, 542 U.S. 649 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *Wright v. Van Patten*, 552 U.S. 120 (2008); *Kansas v. Ventris*, 556 U.S. 586 (2009); *Rivera v. Illinois*, 556 U.S. 148 (2009); and *Vermont v. Brillon*, 129 S. Ct. 1283 (2009).

[331] *See supra* notes 329–30.

[332] YARBROUGH, *supra* note 6, at 238.

Unlike the earlier stages of the criminal justice process invoking the Fourth, Fifth, and Sixth Amendments, Table 1 shows Justice Souter as consistently liberal across time in Eighth Amendment cases.[333] Even in his earlier years on the Court, Souter voted a majority of the time (fifty-five percent) with the liberal bloc[334] and, in his last decade on the Court, he increased his liberal votes in favor of criminal defendants to three out of every four cases (seventy-five percent) involving Eighth Amendment protections.[335]

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[333] *Id.* at 255–56 (noting that Souter voted more conservatively in Fourth, Fifth, and Sixth Amendment cases than in Eighth Amendment cases from 1991–2005); *see also* Scott Johnson, The Written Opinions and Voting Behavior of Justice David Souter in Criminal Justice Cases (Apr. 26–27, 2008) (paper presented at the Third Annual Appalachian Spring Conference in World History, Criminal Justice, and Economics, providing a descriptive analysis of Souter's voting record in criminal cases from 1991–2007) (on file with author).

[334] From 1991–1997, Souter participated in twenty cases that dealt with the Eighth Amendment. Souter issued a liberal vote in the following eleven cases: *Parker v. Dugger,* 498 U.S. 308 (1991); *Richmond v. Lewis*, 506 U.S. 56 (1992); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Sochor v. Florida*, 504 U.S. 527 (1992); *Morgan v. Illinois*, 504 U.S. 719 (1992); *Helling v. McKinney*, 509 U.S. 25 (1993); *Johnson v. Texas*, 509 U.S. 350 (1993); *Austin v. United States*, 509 U.S. 602 (1993); *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Romano v. Oklahoma*, 512 U.S. 1 (1994); and *Kyles v. Whitley*, 514 U.S. 419 (1995).

During this same time period, Souter handed down nine conservative votes in the following Eighth Amendment disputes: *Payne v. Tennessee*, 501 U.S. 808 (1991); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Lankford v. Idaho*, 500 U.S. 110 (1991); *Arave v. Creech*, 507 U.S. 463 (1993); *Rowland v. California Men's Colony*, 506 U.S. 194 (1993); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Tuilaepa v. California*, 512 U.S. 967 (1994); and *Harris v. Alabama*, 513 U.S. 504 (1995).

[335] From 1998–2009, Souter participated in thirty-two cases involving Eighth Amendment issues. In the following twenty-four cases, Souter voted in the liberal direction: *United States v. Bajakajian*, 524 U.S. 321 (1998); *Weeks v. Angelone*, 528 U.S. 225 (2000); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Penry v. Johnson*, 532 U.S. 782 (2001); *Kelly v. South Carolina*, 534 U.S. 246 (2002); *Porter v. Nussle*, 534 U.S. 516 (2002); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Rowell v. Withrow*, 538 U.S. 580 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Smith v. Texas*, 543 U.S. 27 (2004); *Schiro v. Summerlin*, 542 U.S. 348 (2004); *Nelson v. Campbell*, 541 U.S. 637 (2004); *Brown v. Payton*, 544 U.S. 133 (2005); *Roper v. Simmons*, 543 U.S. 551 (2005); *Brown v. Sanders*, 546 U.S. 212 (2006); *Panetti v. Quatermann*, 551 U.S. 930 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Abdul-Kabir v. Quartermann*, 550 U.S. 233 (2007); *Erickson v. Pardus*, 551 U.S. 89 (2007); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Baze v. Rees*, 553 U.S. 35 (2008); *Medellin v. Texas*, 552 U.S. 491 (2008); and *Snyder v. Louisiana*, 552 U.S. 472 (2008).

From 1998–2009, Souter issued eight conservative votes in the following Eighth Amendment cases: *Buchanan v. Angelone*, 522 U.S. 269 (1998); *Hopkins v. Reeves*, 524 U.S. 88 (1998); J*ones v. United States*, 526 U.S. 227 (1999); *Booth v. Churner*, 532 U.S. 731 (2001); *Bell v. Cone*, 535 U.S. 685 (2002); *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Oregon v. Guzek*, 546 U.S. 517 (2006); and *Kansas v. Marsh*, 548 U.S. 163 (2006).

TABLE 1: IDEOLOGICAL VOTING RECORD OF JUSTICE DAVID SOUTER IN CRIMINAL JUSTICE CASES, 1991–2009

Time Period	(1991–1997)		(1998–2009)		(TOTALS)	
Constitutional Issue	Liberal	Conservative	Liberal	Conservative	Liberal	Conservative
4th Amendment	6 (38%)	10 (62%)	27 (61%)	17 (39%)	33 (55%)	27 (45%)
5th Amendment	5 (45%)	6 (55%)	24 (75%)	8 (25%)	29 (67%)	14 (33%)
6th Amendment	5 (36%)	9 (64%)	29 (69%)	13 (31%)	34 (60%)	22 (40%)
8th Amendment	11 (55%)	9 (45%)	24 (75%)	8 (25%)	35 (67%)	17 (33%)

DISCUSSION AND CONCLUSION

Justice Souter's written opinions and voting behavior in criminal justice cases highlight two trends.[336] First, Justice Souter evolved from a conservative state judge and United States Supreme Court justice, who initially voted with Chief Justice Rehnquist and Justices Scalia and Thomas during his early years, into a jurist who aligned more frequently with the liberal bloc comprised of Justices Stevens, Ginsburg, and Breyer.[337] Interestingly, President George H. W. Bush nominated Justice Souter with the expectation that he would provide another conservative vote on a Court in the midst of a conservative revolution.[338] However, legal scholars recognize that Justice Souter practiced moderate pragmatism on the Court and directly challenged conservative justices, such as Scalia, in intellectual debate.[339] Secondly, Justice Souter followed a historical approach demonstrated by the Court throughout the twentieth century of providing more protection for defendants at the later stages of the criminal justice process.[340] Justice Souter apparently was more concerned about the power of government brought to bear upon a defendant's liberty as he or she moves closer to punishment in the form of confinement or the death penalty.[341]

In sum, the two trends displayed by Justice Souter suggest a moderately liberal justice who favored a measured and balanced approach in his opinion writing and voting behavior in criminal justice cases.[342] The following sections below provide

[336] *See* SPAETH, *supra* note 315 (compiling evidence of Souter's shift to the liberal end of the spectrum); HENSLEY ET AL., *supra* note 2, at 417 (discussing the Court's historical trend of providing protection for defendants at the latter stages of the criminal justice process).

[337] *See* HENSLEY ET AL., *supra* note 2, at 449, 496, 538.

[338] *See id.* at 7; *see also* BAUM, *supra* note 11, at 122–27.

[339] *See* Garrow, *supra* note 3.

[340] *See* HENSLEY ET AL., *supra* note 2, at 417.

[341] *Id.*

[342] *See* Johnson, *supra* note 333.

a review of Justice Souter's written opinions and voting behavior, which clearly provide evidence of the two trends discussed above.[343]

Fourth Amendment Search and Seizure Cases

In search and seizure cases, Justice Souter's opinions for the Court in *Atwater v. City of Lago Vista* and *United States v. Banks*, as well as his overall voting record, illustrated his conservatism in siding with law enforcement, particularly during his initial years on the Court.[344] Justice Souter clearly was more conservative in search and seizure cases than in any other area of criminal justice, which highlights the historical trend of limiting the rights of individuals during the earlier stages of the criminal justice process.[345] However, in the latter part of his career, Justice Souter developed an independent streak, particularly with his written opinions in *Georgia v. Randolph* and *Safford v. Redding* and liberal votes in such landmark cases as *Indianapolis v. Edmond* and *Illinois v. Lidster*, as well as the drug testing cases.[346] Hence, Justice Souter's behavior can best be characterized as moderate in the area of search and seizure with a more liberal pattern of siding with the rights of criminal defendants during his last decade on the Court.[347]

Fifth, Sixth, and Eighth Amendment Rights

In contrast to Justice Souter's behavior in search and seizure cases, he demonstrated a stronger pattern of liberalism by providing more protection for the rights of defendants during the latter stages of the criminal justice process.[348] Concerning Fifth Amendment rights, Justice Souter expressed strong support for the privilege against self-incrimination with his opinions in *Withrow v. Williams*, *Missouri v. Seibert*, and *Corley v. United States* and wholeheartedly supported the *Miranda* precedent with his votes in such cases as *Dickerson v. United States* and *United States v. Patane*.[349] As displayed in Table 1, Justice Souter's overall voting

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[343] *See* HENSLEY ET AL., *supra* note 2, at 417.

[344] *See* United States v. Banks, 540 U.S. 31, 33 (2003); Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).

[345] *See* HENSLEY ET AL., *supra* note 2, at 417.

[346] Safford v. Redding, 557 U.S. 364 (2009); Georgia v. Randolph, 547 U.S. 103, 105 (2006); *see also* Illinois v. Lidster, 540 U.S. 419, 420 (2004); Ferguson v. City of Charleston, 532 U.S. 67, 69 (2001); City of Indianapolis v. Edmond, 531 U.S. 32, 33 (2000); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 647 (1995).

[347] *See generally* YARBROUGH, *supra* note 2.

[348] *See* HENSLEY ET AL., *supra* note 2, at 417.

[349] Corley v. United States, 556 U.S. 303 (2009); United States v. Patane, 542 U.S. 630, 645 (2004); Missouri v. Seibert, 542 U.S. 600 (2004); Dickerson v. United States, 530 U.S. 428 (2000); Withrow v. Williams, 507 U.S. 680 (1993).

record in Fifth Amendment cases of sixty-seven percent in favor of criminal defendants was considerably higher than his liberal percentage of fifty-five percent in search and seizure cases.[350]

Justice Souter's decisions concerning defendant's trial rights vindicated his reputation as a "pro-fair trial" judge developed during his years as a state court judge in New Hampshire.[351] Justice Souter's opinions for the Court in *Doggett v. United States*, *Rompilla v. Beard*, and *Miller-el v. Dretke* caused sharp ideological divisions as he represented liberal majorities in each case.[352] These opinions were consistent with Justice Souter's later shift toward liberalism in Sixth Amendment cases as he voted seventy-percent of the time in favor of defendants' rights from 1998–2009.[353] This contrasted sharply with Souter's conservative votes from 1991–1997.[354] Although Justice Souter did author two opinions with conservative outcomes involving trial rights in *United States v. Vonn* and *United States v. Dominguez Benitez*, these cases were less controversial because the justices voted together to form unanimous decisions.[355]

Finally, Justice Souter reserved his strongest support for defendants at the final stage of the criminal justice process.[356] With the exception of a few cases handed down during his earlier terms on the Court, such as *Payne v. Tennessee* and *Rowland v. California Men's Colony*, Justice Souter's written opinions and voting record consistently favored the rights of convicted criminals in Eighth Amendment cases involving capital punishment and prisoners' rights.[357] In fact, Justice Souter sided with criminal defendants in Eighth Amendment cases even during his initial terms on the Court (1991–1997), a period that saw him vote more frequently with the conservative bloc in all other areas of criminal justice.[358]

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[350] *See supra* notes 320–21, 325–26 for all of the Fourth and Fifth Amendment cases participated in by Justice Souter.

[351] *See* YARBROUGH, *supra* note 6, at 55.

[352] Miller-El v. Dretke, 545 U.S. 231, 235 (2005); Rompilla v. Beard, 545 U.S. 374, 377 (2005); Doggett v. United States, 505 U.S. 647, 648 (1992).

[353] *See supra* Table 1.

[354] *See* HENSLEY ET AL., *supra* note 2, at 538.

[355] United States v. Dominguez-Benitez, 542 U.S. 74, 75 (2004); United States v. Vonn, 535 U.S. 55, 57 (2002).

[356] *See* HENSLEY ET AL., *supra* note 2, at 586. From 1991–1994, HENSLEY ET AL. document ten of eighteen votes (fifty-six percent) by Justice Souter in the liberal direction in Eighth Amendment and Capital Punishment cases.

[357] Rowland v. Cal. Men's Colony, 506 U.S. 194, 196 (1993); Payne v. Tennessee, 501 U.S. 808, 810 (1991). For an example of the impact of Souter's liberal behavior in the area of the Eighth Amendment, see Charles Lane, *5-4 Supreme Court Abolishes Juvenile Executions*, WASH. POST., Mar. 2, 2005, at A1.

[358] *See* HENSLEY ET AL., *supra* note 2, at 586.

While Justice Souter may have supported tough sentences for criminal defendants and the use of the death penalty as a state attorney general and state judge, he clearly rejected the ultra-conservative behavior demonstrated by such Court members as Justices Antonin Scalia and Clarence Thomas.[359]

In the end, Justice Souter did not behave as an ideological conservative.[360] Instead, he demonstrated the streak of independence that began during his years as a state judge and which garnered him praise from liberals and conservatives in his home state.[361] In the area of criminal justice, Justice Souter's behavior of distributing justice based upon a more practical and flexible interpretation of the law earned him the respect of legal scholars, but disappointed Republicans hoping for another conservative vote in the tradition of Rehnquist, Scalia, and Thomas.[362] In sum, Justice Souter's impact in the area of criminal justice cannot be understated.[363] As noted by Linda Greenhouse, a Pulitzer Prize winning reporter for *The New York Times*, Souter's evolution toward the liberal end of the ideological spectrum "[was] probably as responsible as any single factor for the failure of the conservative revolution."[364]

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[359] *See* YARBROUGH, *supra* note 6, at 55–59. For evidence of Justice Clarence Thomas' conservatism, see Christopher E. Smith & Scott P. Johnson, *The First Term Performance of Justice Clarence Thomas*, JUDICATURE 76, 172–178 (1993). *See also* CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY (2000). For evidence of Justice Antonin Scalia's conservative behavior, see Richard A. Brisbin, *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1, 1–29 (1990).

[360] *See generally* Garrow, *supra* note 3.

[361] *See* HENSLEY ET AL., *supra* note 2, at 76.

[362] *See generally* Garrow, *supra* note 3.

[363] *Id.* at 64.

[364] *Id.*