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## The Judicial Behavior of Justice Souter in Criminal Cases and the Denial of a Conservative Counterrevolution

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# The Judicial Behavior of Justice Souter in Criminal Cases and the Denial of a Conservative Counterrevolution

SCOTT P. JOHNSON\*

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## I. INTRODUCTION

From 1953 to 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.<sup>1</sup> In response to the liberal rulings of the Warren Court, Richard Nixon’s 1968 presidential campaign focused upon how he would appoint conservative

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1. See THOMAS G. WALKER & LEE EPSTEIN, *THE SUPREME COURT OF THE UNITED STATES: AN INTRODUCTION* 19 (1993). Walker and Epstein, two scholars with expertise concerning the Court, stated that Chief Justice Warren “presided over what can only be described as a constitutional revolution, generated by a group of justices who were perhaps the most liberal in American history.” See generally RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES* (1981).

justices to the Supreme Court.<sup>2</sup> During Nixon's first term as president, he appointed Chief Justice Warren Burger in 1969 to replace Earl Warren, and he subsequently appointed Harry Blackmun in 1970 and William Rehnquist and Lewis Powell in 1972.<sup>3</sup>

Nixon's four appointments during his first term, which constituted nearly half of the Supreme Court, began an attempt at a conservative counterrevolution.<sup>4</sup> The conservative counterrevolution would seem to have been solidified by the fact that Nixon and his Republican presidential successors, Ford, Reagan, and George H. W. Bush, appointed eleven Supreme Court justices from 1969 to 1991 without a Democratic president making a single appointment.<sup>5</sup> However, because appointments to the Court are unpredictable, more than a few of the eleven appointments emerged as moderate or liberal justices.<sup>6</sup>

Conservatives were still attempting to realize a counterrevolution when David Souter was chosen to replace Justice William Brennan, one of the most liberal justices who had ever served on the Court.<sup>7</sup> On July 25, 1990, President George H. W. Bush nominated David Souter at the request of two conservative Republicans from New Hampshire, U.S. Senator Warren Rudman and former governor John Sununu, who was serving as White House Chief of Staff for Bush.<sup>8</sup>

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2. THOMAS R. HENSLEY ET AL., *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 6 (1997). Nixon argued that the liberal decisions of the Warren Court "had resulted in a breakdown of law and order in American society . . ." *Id.*

3. *Id.*

4. *Id.*; see generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983).

5. The eleven appointments, in chronological order, were Chief Justice Warren Burger (1969), Associate Justice Harry Blackmun (1970), Associate Justice Lewis Powell (1972), Associate Justice William Rehnquist (1972), Associate Justice John Paul Stevens (1975), Associate Justice Sandra Day O'Connor (1981), Chief Justice William Rehnquist (1986), Associate Justice Antonin Scalia (1986), Associate Justice Anthony Kennedy (1988), Associate Justice David Souter (1990), and Associate Justice Clarence Thomas (1991). LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* 704–10 (2007). Jimmy Carter, the only Democrat serving as president between 1969 and 1992, did not have an opportunity to appoint a justice to the Supreme Court. LAWRENCE BAUM, *THE SUPREME COURT* 182 (9th ed. 2006).

6. HENSLEY ET AL., *supra* note 2, at 6–7. The conservative counterrevolution was stymied by the appointments of Justices Harry Blackmun and Lewis Powell by President Richard Nixon. *Id.* Blackmun became liberal in his behavior by the 1980s and Powell became somewhat of a moderate, shifting back and forth between the liberal and conservative blocs. *Id.* President Gerald Ford's appointment of Justice John Paul Stevens in 1975 yielded the most liberal justice currently serving on the Court. *Id.* at 7. President Ronald Reagan's appointment of Sandra Day O'Connor in 1981 produced a moderately conservative vote at best. *Id.* Reagan's fourth and final appointment to the Court was hampered by the Iran-Contra scandal in 1986 as well as two failed attempts to replace Justice Lewis Powell, with Robert Bork and Douglas Ginsburg. *Id.* at 8–11. Hence, the broader political context forced Reagan to nominate Justice Anthony Kennedy in 1988, who has proven to be a moderate on the Court. *Id.* at 11.

7. *Id.* at 75.

8. TINSLEY E. YARBROUGH, *DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT* 102–06 (2005).

Since his appointment to the U.S. Supreme Court, Justice Souter has proven to be anything but an ideological appointment.<sup>9</sup> While Justice Souter did align more often with conservative justices during his early years on the Court, he has shifted recently toward the liberal bloc of justices, namely Justices Ruth Bader Ginsburg, Stephen Breyer, and John Paul Stevens.<sup>10</sup> Even in criminal justice cases, an area where Justice Souter displayed conservative ideals during his earlier years with a bias toward the government's position, it is important to recognize that he has not behaved as an ideological conservative.<sup>11</sup> In fact, during his last ten years on the Court, Justice Souter has shown a tendency to rule in favor of criminal defendants' rights, frequently disappointing right-wing groups.<sup>12</sup> Justice Souter has rejected the original intent theory of constitutional interpretation coveted by ideological conservatives in favor of a more practical and flexible application of precedent and interpretation of the law.<sup>13</sup>

The following article documents the judicial career of Justice David Souter from his time served as an attorney general and state judge in New Hampshire until his recent tenure on the U.S. Supreme Court.<sup>14</sup> Based upon his written opinions and individual votes, Justice Souter clearly has evolved into a more liberal jurist than ideological conservatives would have preferred in the area of criminal justice.<sup>15</sup> Over the course of his judicial career, Justice Souter has gained respect as an intellectual scholar by attempting to completely understand both sides of a dispute and applying precedent and legal rules in a flexible—albeit technical—manner in the hope of achieving justice.<sup>16</sup> However, Justice Souter may be remembered most as the justice who disappointed ideological conservatives by failing to complete a conservative counterrevolution that had begun with President Richard Nixon's first appointment to the Court in 1969.

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9. HENSLEY ET AL., *supra* note 2, at 76–77.

10. Robert H. Smith, *Justice Souter Joins the Rehnquist Court: An Empirical Study of Supreme Court Voting Patterns*, 41 U. KAN. L. REV. 11, 12–13 (1992); see generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). Segal and Spaeth argue that attitudes and values are the most important factors in explaining judicial behavior. *Id.* The attitudinal model simply divides the behavior of justices into either liberal or conservative votes. HENSLEY ET AL., *supra* note 2, at 18–19. 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.

11. See YARBROUGH, *supra* note 8, at 185.

12. *Id.* at 221–23.

13. HENSLEY ET AL., *supra* note 2, at 77.

14. See generally YARBROUGH, *supra* note 8.

15. BAUM, *supra* note 5, at 122–24.

16. YARBROUGH, *supra* note 8, at 198.

## II. SOUTER AS ATTORNEY GENERAL OF NEW HAMPSHIRE

From 1976 to 1978, David Souter served as attorney general for the State of New Hampshire.<sup>17</sup> In his role as attorney general, Souter issued opinions related to criminal law involving state and local law enforcement agencies.<sup>18</sup> During this time period, most of the opinions issued by Souter lacked controversy and usually involved technical issues of law.<sup>19</sup> However, in December of 1976, Souter did comment publicly on a divisive case involving a convicted murderer from Concord, New Hampshire.<sup>20</sup> The murder conviction of Gary S. Farrow was based largely on witnesses who had made deals with prosecutors in exchange for their testimony.<sup>21</sup> A New Hampshire newspaper—the *Concord Monitor*—had published an article praising the public defenders provided to Farrow but criticizing the prosecution for trading criminal charges for testimony.<sup>22</sup> Souter responded by authoring a guest column in the *Concord Monitor* where he praised the legal defense but 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.<sup>23</sup> According to Souter, the Concord police and prosecutors deserved respect, and justice had been served in the murder case.<sup>24</sup> Souter ended the guest column by expressing support for the prosecuting attorney's decision to drop criminal charges in exchange for witness testimony in the murder trial.<sup>25</sup> This guest column provided evidence of Souter's conservatism in criminal procedure cases during his brief stint as attorney general in and also began a pattern of Souter consistently supporting police officers and prosecutors throughout his state judicial career.<sup>26</sup>

Souter's conservatism was also evident in his support of the death penalty during his years as attorney general of New Hampshire.<sup>27</sup> After the U.S. Supreme Court re-legalized the use of capital punishment in *Gregg v. Georgia*, Souter provided testimony before the New Hampshire House of Representatives where he stated that a life sentence in prison was not a

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17. *Id.* at 20; Linda Greenhouse, *An 'Intellectual Mind': David Hackett Souter*, N.Y. TIMES, July 24, 1990, at A1.

18. YARBROUGH, *supra* note 8, at 29.

19. Neil A. Lewis, *Combing the Past for Clues on Souter*, N.Y. TIMES, Sept. 2, 1990, at 128.

20. YARBROUGH, *supra* note 8, at 29.

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

22. *See* YARBROUGH, *supra* note 8, at 29.

23. *Id.* at 30.

24. *Id.*

25. *Id.*

26. *Id.* at 22.

27. *Id.* at 36.

suitable punishment for the capital offense of murder in the first degree.<sup>28</sup> Souter's argument in favor of capital punishment was based largely upon his belief that the death penalty would deter individuals from committing murders.<sup>29</sup> New Hampshire ultimately did reinstate the use of the death penalty, but the death penalty has not been administered in New Hampshire since 1939.<sup>30</sup>

### III. ASSOCIATE JUSTICE ON THE STATE SUPERIOR COURT

As an associate justice on the New Hampshire Superior Court from 1978 to 1983, Souter had a reputation of issuing tough sentences for criminal convicts.<sup>31</sup> Souter showed his tendency toward harsh sentencing in a 1981 case where he rejected a plea bargain attempt by defense lawyers and prosecutors who had reduced a lenient sentence for felony conviction.<sup>32</sup> In overturning the plea bargain of probation for a female defendant who had stolen a .357 Magnum revolver, Souter ordered the defendant to serve nine months in prison and chastised prosecutors for accepting the deal.<sup>33</sup>

Although Souter was tough as a trial judge, he respected precedent expanding criminal defendants' rights and was even known to show sympathy, at times, for defendants.<sup>34</sup> 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.<sup>35</sup> Souter stated that "it was cruel and inhumane to sentence someone to two years for stealing a dollar."<sup>36</sup> Hence, Souter was known for treating everyone in the courtroom, including defendants, with the utmost respect.<sup>37</sup>

Although Souter was viewed as conservative because he supported police and prosecutors in criminal cases, he would exclude evidence if it had been illegally seized or if it was the result of a coerced confession.<sup>38</sup> Colleagues emphasized that Souter was most interested in producing a fair

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28. 428 U.S. 227 (1976); YARBROUGH, *supra* note 8, at 36.

29. YARBROUGH, *supra* note 8, at 29.

30. *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 on a 1972 U.S. Supreme Court ruling. *Id.*

31. YARBROUGH, *supra* note 8, at 53–59.

32. *Id.* at 59.

33. *Id.*; see also David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, at 41.

34. YARBROUGH, *supra* note 8, at 55; see also Ruth Marcus, *Souter: Conservative Mindset, Careful Jurist*, WASH. POST, July 25, 1990, at A6.

35. YARBROUGH, *supra* note 8, at 55.

36. *Id.*

37. *Id.* at 54.

38. Marcus, *supra* note 34, at A6.

trial and was not a judge who blindly supported the state.<sup>39</sup> In one particular case, Souter ruled much of the evidence inadmissible because police had gone beyond the orders in the search warrant when collecting evidence, even though the case involved a career burglar who possessed a stockpile of stolen goods in his home.<sup>40</sup> In addition, Souter was angered by police who had not only gone beyond the search warrant but had allowed the media into the defendant's home to broadcast a news story praising the police department for fighting crime in the area.<sup>41</sup> In another case involving alleged arson and second-degree murder, Souter excluded evidence when it was revealed that police had tampered with the evidence and had also forced a confession from the female defendant by threatening to take away her child if she did not cooperate in the investigation.<sup>42</sup>

#### IV. NEW HAMPSHIRE SUPREME COURT JUSTICE

Souter served as an associate justice of the New Hampshire Supreme Court from 1983 to 1990.<sup>43</sup> During his seven years on the state supreme court, he was known for respecting precedent and interpreting the language of the law and the original intention of the framers in a technical manner.<sup>44</sup> Justice Souter's written opinions mainly involved statutory interpretation, in areas such as criminal procedure, family law, and negligence.<sup>45</sup> On criminal justice issues, Justice Souter was generally regarded as a conservative judge who consistently voted against the rights of criminal defendants.<sup>46</sup> A summary of Justice Souter's voting record while on the state supreme court revealed only nine votes in favor of criminal defendants' rights out of a total of eighty-two votes, roughly 11% in the liberal direction.<sup>47</sup> Although Justice Souter was largely viewed as a traditional conservative, he eventually developed a flexible interpretation of constitutional law and came to be respected by both Democrats and Republicans in New Hampshire as a judge who always ruled in the interests of promoting fair trials for defendants.<sup>48</sup>

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39. YARBROUGH, *supra* note 8, at 55.

40. *Id.* at 56.

41. *Id.*

42. *Id.*

43. Greenhouse, *supra* note 17, at A1.

44. William S. Jordan, III, *Justice David Souter and Statutory Interpretation*, 23 U. TOL. L. REV. 491, 493 (1992); Marcus, *supra* note 34, at A6.

45. Greenhouse, *supra* note 17, at A1.

46. Ann Devroy, *President Selects Souter, 50, for 'Intellect' and 'Ability,'* WASH. POST, July 24, 1990, at A1.

47. YARBROUGH, *supra* note 8, at 92.

48. HENSLEY ET AL., *supra* note 2, at 76.

New Hampshire's highest court provided notoriety for Justice Souter in only a limited number of criminal justice cases of constitutional importance, such as the case of *State v. Koppel*.<sup>49</sup> In *Koppel*, Justice Souter wrote a dissenting opinion in which a majority of the court had struck down sobriety checkpoints as a violation of the Fourth Amendment's search-and-seizure clause.<sup>50</sup> Scholars have speculated that Justice Souter was anticipating a conservative trend on the U.S. Supreme Court at this time because the Court eventually upheld sobriety checkpoints five years later in *Michigan Department of State Police v. Sitz*.<sup>51</sup> Justice Souter also wrote a majority opinion where he supported a state law that allowed police to employ a mechanical device capable of detecting information from a telephone.<sup>52</sup> In writing for the state supreme court, Justice Souter maintained that the use of the device by police did not constitute a search within the meaning of the Fourth Amendment.<sup>53</sup>

In regard to *Miranda* rights and the privilege against self-incrimination, Justice Souter apparently was reluctant to favor criminal defendants.<sup>54</sup> In *State v. Denney*,<sup>55</sup> Justice Souter dissented when the majority held that the refusal of a defendant to submit to a blood alcohol test could not be admitted by prosecutors.<sup>56</sup> The majority reasoned that the defendant's refusal was inadmissible because police had not warned the defendant that such a refusal could be used against him at trial.<sup>57</sup> In his dissent, Justice Souter argued that the police officers had issued the *Miranda* warnings to the defendant, and that these warnings implied that the refusal to submit to the test could be used against him in court.<sup>58</sup> Interestingly, Justice Souter wrote the majority opinion in a previous case involving a prosecutor who used a refusal to submit to a blood alcohol test as evidence of the defendant's guilt.<sup>59</sup> Justice Souter maintained that the Fifth Amendment privilege against self-incrimination did not apply to physical evidence, but only to testimonial evidence.<sup>60</sup>

In *Coppola v. State*,<sup>61</sup> Justice Souter continued his conservative behavior in *Miranda* cases when he allowed a defiant statement made by a de-

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49. 499 A.2d 977 (N.H. 1985).

50. *Id.* at 983 (Souter, J., dissenting); Garrow, *supra* note 33, at 645.

51. 496 U.S. 444, 447 (1990); *see also* YARBROUGH, *supra* note 8, at 86.

52. *State v. Valenzuela*, 536 A.2d 1252, 1261–62 (N.H. 1987); YARBROUGH, *supra* note 8, at 86.

53. *Valenzuela*, 536 A.2d at 1261–62.

54. YARBROUGH, *supra* note 8, at 91.

55. 536 A.2d 1242 (N.H. 1987).

56. *Id.* at 1245 (Souter, J., dissenting).

57. *Id.* (majority opinion); Jordan, *supra* note 44, at 512.

58. YARBROUGH, *supra* note 8, at 88 (citing *State v. Denney*, 536 A.2d 1242, 1246 (N.H. 1987)).

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

60. *Id.* at 88–89.

61. 536 A.2d 1236 (N.H. 1987).

fendant to be introduced at trial.<sup>62</sup> In *Coppola*, Vincent Coppola had bragged to police that they could not get him to confess to the rape of an elderly woman.<sup>63</sup> In writing the unanimous opinion for the state supreme court, Justice Souter concluded that Coppola's statement was not within the protection of the Fifth Amendment's privilege against self-incrimination and that it could be used by the prosecution to establish Coppola's guilt.<sup>64</sup>

Finally, Justice Souter caused some controversy in a case where he decided against a rape victim based upon his respect for precedent.<sup>65</sup> In *Colbath*,<sup>66</sup> Justice Souter wrote for a unanimous court in holding that the public behavior of the rape victim prior to an alleged sexual assault should have been admitted as evidence by the trial judge because such behavior was relevant to the issue of consent.<sup>67</sup> Justice Souter noted that evidence existed of the victim engaging in public behavior where she directed "sexually provocative attention" toward a number of male patrons in a tavern, including the defendant.<sup>68</sup> Moreover, Justice Souter cited to precedent from *State v. Howard*<sup>69</sup> that allowed defendants the right to confront accusers, even though a rape-shield law appeared to ban the admission of prior sexual behavior between the victim and persons other than the defendant.<sup>70</sup> Justice Souter concluded that, while the sexual history of a rape victim generally was to be withheld from a jury, the rape-shield law was not absolute based upon precedent established in *Howard*.<sup>71</sup>

The *Coppola* and *Colbath* decisions became an issue when President George H. W. Bush nominated Justice Souter to the First Circuit Court of Appeals for a very brief stint in 1990.<sup>72</sup> In particular, Senator Edward M. Kennedy raised concerns about Justice Souter's opinions in *Coppola* and *Colbath* during the Senate confirmation hearings.<sup>73</sup> Despite Senator Kennedy's concerns, the Senate confirmed Justice Souter's appointment to the First Circuit by unanimous vote.<sup>74</sup> After serving only a few months on the

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62. *Id.* at 1239; YARBROUGH, *supra* note 8, at 90.

63. *Coppola*, 536 A.2d at 1239.

64. *Id.*

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

66. *Id.*

67. *Id.*

68. *Id.*

69. 426 A.2d 457 (N.H. 1981).

70. *Colbath*, 540 A.2d at 1216; *Howard*, 426 A.2d at 462.

71. *Greenhouse*, *supra* note 17, at A1.

72. YARBROUGH, *supra* note 8, at 96–98.

73. *Id.*

74. *Id.*

First Circuit Court of Appeals and participating in only one decision,<sup>75</sup> Justice Souter was selected by President George H. W. Bush to replace Justice William Brennan, who was retiring from the U.S. Supreme Court at the age of eighty-four.<sup>76</sup>

During Senate confirmation hearings, Justice Souter offered what was 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 of the Warren Court, which had expanded the rights of criminal defendants.<sup>77</sup> Moreover, Souter praised Justice Brennan, the ultra-liberal whom he was replacing, as one of the greatest protectors of the Bill of Rights.<sup>78</sup> Justice Souter's performance during the confirmation hearings allowed the Senators to view him as a moderate.<sup>79</sup> Justice Souter also benefited from the fact that, prior to his appointment to the Court, he had not published anything about his legal views and refused to make public speeches about his own judicial philosophy.<sup>80</sup> Hence, he was able to appear as a "stealth" candidate for the U.S. Supreme Court and was confirmed in the U.S. Senate by a vote of ninety to nine.<sup>81</sup>

## V. U.S. SUPREME COURT JUSTICE SOUTER AND CRIMINAL JUSTICE CASES

### A. *The Policy Impact of a Freshman Justice*

In the area of criminal justice, Justice David Souter immediately had an impact during his first year on the U.S. Supreme Court.<sup>82</sup> During his first term, Justice Souter provided the decisive vote in seven different five-to-four decisions where the Court established new "conservative" prece-

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75. *United States v. Waldeck*, 909 F.2d 555 (1st Cir. 1990). In *Waldeck*, Souter joined a unanimous three judge panel in upholding an indictment and conviction of the defendant on five counts of tax evasion. *Id.* at 558. Souter heard oral arguments in several other cases but did not take part in the opinions. YARBROUGH, *supra* note 8, at 96–98. Hence, the *Waldeck* decision was the only case that Souter formally ruled upon during his very brief tenure on the First Circuit. *Id.*

76. David S. Broder & Helen Dewar, *Bush Opens Drive for Court Nominee: Confirmation Hearings Set for September*, WASH. POST, July 25, 1990, at A1.

77. HENSLEY ET AL., *supra* note 2, at 76.

78. *Id.*; see also 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); Linda Greenhouse, *Filling In the Blanks*, N.Y. TIMES, Sept. 15, 1990, at 111.

79. Greenhouse, *supra* note 17, at A1.

80. *Id.* Unlike Robert Bork, Souter did not have a paper trail of legal views that could harm him during the Senate confirmation hearings. *Id.* Souter's only publication was a law review article which consisted of a tribute to Justice Laurence Ilesley Duncan, who had served on the New Hampshire Supreme Court from 1946 to 1976. See David H. Souter, *Mr. Justice Duncan*, 24 N.H.B.J. 81, 83 (1983).

81. See YARBROUGH, *supra* note 8, at 143–44.

82. See generally 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).

dents that limited the rights of criminal defendants.<sup>83</sup> Justice Brennan most likely would have voted in favor of the rights of the criminal suspects had these cases been argued the previous term.<sup>84</sup> Hence, Justice Souter's impact during the 1990–1991 term served to have broad policy implications in the area of criminal justice.<sup>85</sup>

In *Arizona v. Fulminante*,<sup>86</sup> Justice Souter cast the decisive vote to allow coerced confessions as harmless error, and, in *County of Riverside v. McLaughlin*,<sup>87</sup> Justice Souter also provided the swing vote to allow persons placed under arrest to be held for as long as forty-eight hours before probable cause had to be determined by a magistrate.<sup>88</sup>

In regard to 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.<sup>89</sup> Finally, Justice Souter voted against the rights of criminal suspects in three cases involving jury selection and jury instructions.<sup>90</sup>

It should be noted that on a few occasions Justice Souter did break with the conservative justices, such as in his majority opinion in *Yates v. Evatt*,<sup>91</sup> which held that the harmless error doctrine did not extend to jury instructions.<sup>92</sup> Hence, even in his first term, Justice Souter's behavior demonstrated the possibility that he might separate from the conservative bloc.<sup>93</sup>

Overall, Justice Souter proved to be a decisive vote for the conservative bloc, but it should be added that he did not author any "important" opinions during his first year on the Court.<sup>94</sup> In fact, he authored an ex-

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83. *Id.*

84. *Id.*

85. *Id.*

86. 499 U.S. 279 (1991).

87. 500 U.S. 44 (1991).

88. *Fulminante*, 499 U.S. at 302–03; *McLaughlin*, 500 U.S. at 58–59; *see also* Smith, *supra* note 10, at 40–41.

89. *See Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (requiring individual sentencing in capital punishment cases only); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (applying a "deliberate indifference" standard instead of a "wanton" standard to prison officials' behavior in cases relating to prison conditions).

90. *See Peretz v. United States*, 501 U.S. 923, 933 (1991) (holding that a U.S. magistrate may conduct voir dire for felony juries when defendants consent despite an absence of statutory authority); *Schad v. Arizona*, 501 U.S. 624, 645 (1991) (finding no error where trial judge failed to instruct the jury on lesser-included offenses); *Mu'Min v. Virginia*, 500 U.S. 415, 431–32 (1991) (finding no error when judge failed to question jurors about their knowledge of news reports concerning a case).

91. 500 U.S. 393 (1991), *overruled by Estelle v. McGuire*, 502 U.S. 62, 73 n.4 (1991).

92. *Yates*, 500 U.S. at 402.

93. YARBROUGH, *supra* note 8, at 166.

94. Johnson, *supra* note 82, at 242 tbl.2.

tremely low number of opinions relative to his colleagues.<sup>95</sup> Justice Souter wrote only twelve opinions—eight majority opinions, two concurring opinions, and two dissenting opinions—during his first term.<sup>96</sup> No other justice authored fewer than twenty-one opinions during the 1990–1991 term.<sup>97</sup>

Interestingly, Justice Souter's first year saw the Court undergo severe gridlock at the end of the term.<sup>98</sup> A former clerk attributed the gridlock to a “breakdown in one chamber” and speculated 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.<sup>99</sup> In fact, after his first year, Justice Souter described the Court's workload to *The Boston Globe* by stating that it was as if he had “walk[ed] through a tidal wave.”<sup>100</sup>

#### B. *Search and Seizure Cases*

In search and seizure cases, Justice Souter joined the conservative bloc during his initial years by favoring the government's position, but, more recently, he has exhibited a pattern of voting with the liberal justices and defending the rights of criminal defendants.<sup>101</sup> An examination of Justice Souter's behavior demonstrates such 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.<sup>102</sup> In short, unlike Chief Justice William Rehnquist, Justice Antonin Scalia, and Justice Clarence Thomas, Justice Souter has been prone to place constraints on the amount of discretion given to police officers in searching for and seizing evidence.<sup>103</sup>

During the 2000–2001 term, Justice Souter authored a majority opinion in a search-and-seizure case, which proved to be one of his more controversial opinions.<sup>104</sup> In writing for the five-justice majority in *Atwater v. City of Lago Vista*, Justice Souter led a majority comprised of conservative justices—namely Chief Justice Rehnquist and Justices Scalia, Thomas, and

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95. *Id.*

96. Smith, *supra* note 10, at 21.

97. Johnson, *supra* note 82, at 241.

98. YARBROUGH, *supra* note 8, at 160.

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

100. YARBROUGH, *supra* note 8, at 160.

101. *Id.* at 234.

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

103. *Id.* at 449 tbl.9.2. Even during his initial terms on the Court from 1991 to 1994, where Souter voted more conservatively than in later terms, Souter voted conservatively in 64% 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. YARBROUGH, *supra* note 8, at 234.

Kennedy—in holding that a warrantless arrest by police for a misdemeanor seat belt violation was not prohibited by the Fourth Amendment.<sup>105</sup> 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.<sup>106</sup> Texas law prohibited passengers, particularly small children, from riding in the front seat without seat belts.<sup>107</sup> The Texas statute authorized police to arrest Atwater and charge her with a misdemeanor, although police could have simply issued her a citation instead of arresting her.<sup>108</sup>

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.<sup>109</sup> 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.<sup>110</sup> 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 position.<sup>111</sup> Justice Souter concluded that police may arrest an individual 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."<sup>112</sup>

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.<sup>113</sup> 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.<sup>114</sup> After police officers knocked on Banks's 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.<sup>115</sup> Banks contended that he was in the shower and did not hear the knock on the door or the officers

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105. 532 U.S. 318, 354 (2001).

106. *Id.* at 323–24.

107. *Id.*

108. *Id.*

109. *Id.* at 327.

110. *Id.* at 333–34.

111. YARBROUGH, *supra* note 8, at 234–35.

112. *Atwater*, 532 U.S. at 354.

113. *United States v. Banks*, 540 U.S. 31, 35 (2003).

114. *Id.* at 33.

115. *Id.*

announcing their presence.<sup>116</sup> Police officials seized crack-cocaine, weapons, and other evidence of drug dealing at Banks's residence which Banks's legal counsel sought to suppress at trial.<sup>117</sup>

Justice Souter's unanimous opinion concluded that the forcible entry by law enforcement did not violate Banks's Fourth Amendment rights.<sup>118</sup> Justice Souter's opinion concluded that law enforcement officials acted sensibly in assuming that fifteen to twenty seconds was enough time for Banks to destroy the evidence.<sup>119</sup> 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.<sup>120</sup> In *Banks*, the police officers had reasonable suspicion to believe that evidence was being destroyed, and, therefore, authorities were permitted to enter the residence forcibly without violating the search-and-seizure clause.<sup>121</sup>

Justice Souter's third majority opinion in the area of search and seizure perhaps foreshadowed his recent shift toward the liberal bloc on the Court.<sup>122</sup> In *Georgia v. Randolph*,<sup>123</sup> the justices focused on the "co-occupant consent rule," or whether police could search a home when one occupant consented to a search while another refused to consent.<sup>124</sup> When police officers arrived at the residence of Scott and Janet Randolph in Americus, Georgia, in response to a domestic altercation, Janet Randolph indicated to police that her husband, Scott, was a cocaine user and also stated that he had drugs inside the home.<sup>125</sup> While Janet Randolph did consent to the search of the home, Scott Randolph refused to provide consent to allow the police to search for evidence of drug use.<sup>126</sup> When the police officers commenced with the search and seized cocaine from the home which was subsequently provided to prosecutors, Scott Randolph moved to suppress the drug evidence based upon a violation of his Fourth Amendment rights.<sup>127</sup>

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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 reasonableness 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. 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, on file with author).

123. 547 U.S. 103 (2006).

124. *Id.* at 106.

125. *Id.* at 107.

126. *Id.*

127. *Id.*

In *Randolph*, Justice Souter wrote for the five-vote majority, which also included Justices Stevens, Ginsburg, Breyer, and Kennedy. Justice Souter's majority opinion held that even if a co-occupant consented to the search by police, the other co-occupant could refuse consent if he or she was physically present at the time of the search.<sup>128</sup> Justice Souter concluded that the search and seizure of the drug evidence by police must be considered unreasonable without a warrant where a co-occupant of a residence refused to consent to the search.<sup>129</sup> Justice Souter's majority opinion in *Randolph* appeared to contradict precedent established by the Court in *Illinois v. Rodriguez* and *United States v. Matlock*,<sup>130</sup> where the Court had held that co-occupant consent did not violate the Fourth Amendment rights of the other co-occupant of a residence; however, Justice Souter's majority opinion drew a distinction between the facts in *Randolph* and the established case precedent by asserting that the co-occupants refusing the searches in *Rodriguez* and *Matlock* were not physically present when the police were searching for evidence.<sup>131</sup>

Finally, Justice Souter's most recent search and seizure opinion was written for a unanimous Court in *Brendlin v. California*.<sup>132</sup> In *Brendlin*, police officers stopped a vehicle to check for registration without any reason to believe that the vehicle had broken any traffic laws.<sup>133</sup> One of the officers noticed that a passenger in the vehicle, Bruce Brendlin, was a parole violator, and he was subsequently arrested and searched.<sup>134</sup> The search of Brendlin produced drugs and drug paraphernalia which Brendlin later attempted to have suppressed based on the police officers' lack of probable cause or even reasonable suspicion to stop the vehicle.<sup>135</sup>

In his unanimous opinion for the Court, Justice Souter ruled that a passenger may challenge the constitutionality of a traffic stop because he was considered to be seized for Fourth Amendment purposes.<sup>136</sup> Relying upon precedent established in *Florida v. Bostick*,<sup>137</sup> 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 the police.<sup>138</sup> The passenger, similar to the driver of the vehicle, had his freedom limited by

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128. *Id.* at 107.

129. *Id.* at 104.

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

131. *Randolph*, 547 U.S. at 106.

132. 127 S. Ct. 2400 (2007).

133. *Id.* at 2404.

134. *Id.*

135. *Id.*

136. *Id.* at 2403.

137. 501 U.S. 429 (1991).

138. *Brendlin*, 127 S. Ct. at 2405–06.

police and had been seized within the meaning of the Fourth Amendment.<sup>139</sup> Therefore, the passenger did have a right to challenge the constitutionality of the search conducted by police officers.<sup>140</sup>

While the *Brendlin* opinion can be viewed as a liberal ruling, it should be recognized that all of the nine justices agreed with Justice Souter's opinion and, therefore, the decision was not ideologically divisive.<sup>141</sup> In fact, the *Brendlin* ruling was technical in nature because the justices simply held that *Brendlin*, as a passenger, could attempt to suppress the evidence gathered by the police officers.<sup>142</sup> Justice Souter's opinion deferred to the state court to decide the more controversial issue of whether the evidence actually should be suppressed.<sup>143</sup>

As with Justice Souter's authorship of Court opinions, his votes cast in important cases as well as his concurring and dissenting opinions have illustrated his flexibility and independence in judicial decisionmaking and have revealed a recent trend toward favoring criminal defendants.<sup>144</sup> Justice Souter cast two important votes during his early years on the Court that suggested he would join with ideological conservatives in search and seizure cases. First, during his freshman term, Justice Souter joined a conservative majority in *Florida v. Bostick*,<sup>145</sup> where the Court held that the Florida Supreme Court had applied an incorrect legal analysis in holding that the questioning of bus passengers by police had constituted an unreasonable search and seizure of drug evidence.<sup>146</sup> Second, in *Arizona v. Evans*,<sup>147</sup> Justice Souter also voted with the conservative majority to extend the "good faith" exception to the exclusionary rule in cases where a computer error causes an illegal search and seizure of evidence. In *Evans*, however, Justice Souter expressed concern in a separate concurrence that it might be necessary to apply the exclusionary rule against other governmental employees, rather than simply police officers, to deter false arrests and illegal seizures of evidence.<sup>148</sup>

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139. *Id.* at 2406–07.

140. *Id.* at 2410.

141. *Id.* at 2403.

142. *Id.* at 2410.

143. *Id.*

144. See YARBROUGH, *supra* note 8, at 185–86.

145. 501 U.S. 429, 431–40 (1991).

146. *Id.* at 437. In *Bostick*, the Florida State Supreme Court relied on *Michigan v. Chesternut*, 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 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.*

147. 514 U.S. 1 (1995).

148. *Id.* at 18 (Souter, J., concurring).

More recently, Justice Souter has shown a penchant for siding with the liberal bloc in search and seizure rulings. For instance, Justice Souter dissented from the conservative majority opinion in *United States v. Drayton*,<sup>149</sup> where the Court had decided a case almost identical to *Bostick* involving the pat down of bus passengers by police.<sup>150</sup> Justice Souter argued in his dissenting opinion that the pat down by police was not a consensual exercise because the passengers were given every indication by police that they were not free to refuse the search.<sup>151</sup> In *Illinois v. Caballes*,<sup>152</sup> Justice Souter also dissented from the conservative majority which held that the search of an automobile trunk by a drug-sniffing police dog was constitutionally valid.<sup>153</sup> Finally, in *Hudson v. Michigan*,<sup>154</sup> Justice Souter voted against five conservative justices and joined a dissent written by Justice Breyer in a case very similar to *Banks*.<sup>155</sup> 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 the suppression of evidence discovered in the search.<sup>156</sup> According to the “knock and announce” rule, police are required to wait a reasonable amount of time after knocking on the door and announcing their presence before entering a home with a search warrant.<sup>157</sup> The fact that Justice Souter voted differently in the similar cases discussed above suggests that his behavior has not been driven by ideology, but rather the flexible application and interpretation of the law based upon the circumstances at hand.<sup>158</sup>

In other areas of search and seizure, Justice Souter also seemed to be applying a flexible approach in his decisionmaking process.<sup>159</sup> For example, even though Justice Souter endorsed sobriety checkpoints while serving as a justice on the New Hampshire Supreme Court, he voted to strike down a police roadblock designed to arrest drug traffickers in *City of Indianapolis v. Edmond*.<sup>160</sup> He also joined a concurring and dissenting opinion

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149. 536 U.S. 194 (2002).

150. *Id.* at 208 (Souter, J., dissenting).

151. *Id.* at 212 (Souter, J., dissenting).

152. 543 U.S. 405 (2005).

153. *Id.* at 410 (Souter, J., dissenting).

154. 547 U.S. 586 (2006).

155. *Id.* at 605 (Breyer, J., dissenting); *United States v. Banks*, 540 U.S. 31 (2003).

156. *Hudson*, 547 U.S. at 599.

157. *Id.* at 589. Since Congress passed the Espionage Act of 1917, the knock-and-announce rule has been part of federal statutory law. 18 U.S.C. § 3109 (2006). *See generally* *Sabbath v. United States*, 391 U.S. 585 (1968) (applying the Espionage Act of 1917); *Miller v. United States*, 357 U.S. 301 (1958) (discussing another application of the Espionage Act of 1917).

158. HENSLEY ET AL., *supra* note 2, at 77.

159. *Id.*

160. *See* YARBROUGH, *supra* note 8, at 86 (discussing Souter’s ruling on sobriety checkpoints); *see generally* *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

written by Justice Stevens in *Illinois v. Lidster*, where the Court had ruled in favor of police officers who had stopped motorists for the purpose of gathering information about a crime committed in the community.<sup>161</sup> Justices Stevens and Souter argued that local judges were better suited to decide the constitutionality of the roadblocks based upon the local conditions and practices of a community.<sup>162</sup> Finally, Justice Souter voted with the six-vote liberal majority in a case where the Court held that drug testing of pregnant women who sought prenatal care at a hospital was an unreasonable search, and also voted with the liberal bloc in another six-to-three decision where a conservative majority ruled that the drug testing of high school students who wanted to compete in athletics was not a violation of the search and seizure clause.<sup>163</sup>

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

Justice Souter wrote his first opinion involving the Fifth Amendment's privilege against self-incrimination in *Withrow v. Williams*.<sup>164</sup> In addition to the right to remain silent, Justice Souter's opinion in *Withrow* dealt with the question of whether to extend a conservative precedent from the Burger Court era (1969–1986) established in *Stone v. Powell*.<sup>165</sup> In *Stone*, the Burger Court denied attempts by state prisoners to challenge the legality of a search and seizure in federal habeas proceedings if the defendant had a fair chance during trial and on appeal to raise such issues.<sup>166</sup> The Court had 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 designed to prevent misconduct by police officers.<sup>167</sup>

In *Withrow*, Justice Souter wrote for a unanimous Court in deciding not to extend the rule in *Stone* to state convictions based upon confessions that may have been obtained in violation of *Miranda* warnings.<sup>168</sup> Justice Souter wrote in his opinion that the defendant did have a right to federal habeas corpus review and that his incriminating statements should have been thrown out of court because the right to remain silent under the Fifth

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161. *Illinois v. Lidster*, 540 U.S. 419, 421 (2004).

162. *Id.* at 429–30.

163. *Ferguson v. City of Charleston*, 532 U.S. 67, 85–86 (2001); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

164. 507 U.S. 680 (1993).

165. *Withrow*, 507 U.S. at 682–83; *Stone v. Powell*, 428 U.S. 465 (1976).

166. *Stone*, 428 U.S. at 494–95.

167. *Id.*

168. *Withrow*, 507 U.S. at 682–83.

Amendment had been violated.<sup>169</sup> The case involved questioning by the Michigan police of Robert Allen Williams concerning a double murder.<sup>170</sup> Williams admitted that he had provided the shooter with the weapon, but the police officers had not issued a *Miranda* warning to Williams and had threatened to “lock him up” if he refused to talk.<sup>171</sup> The trial court had refused to exclude Williams’s incriminating statements, concluding that he was given his *Miranda* warnings in a timely fashion, and Williams was found guilty of first-degree murder.<sup>172</sup> However, unlike in *Stone*, where the failure to exclude evidence based upon an illegal search and seizure was determined not to violate a fundamental trial right, Justice Souter reasoned that *Miranda* warnings needed to be recognized at the trial stage because the warnings prevent the use of unreliable confessions at trial.<sup>173</sup>

In *United States v. Balsys*,<sup>174</sup> Justice Souter issued another opinion concerning the privilege against self-incrimination in a case involving the U.S. government’s investigation into the activities of a resident alien during World War II.<sup>175</sup> Aloyzas Balsys had claimed the privilege against self-incrimination under the Fifth Amendment because he feared being prosecuted in a foreign country.<sup>176</sup> Balsys was not afraid of being prosecuted by authorities in the United States, but he was concerned that his statements about his wartime activities could subject him to prosecution in Lithuania, Germany, or Israel.<sup>177</sup> In writing for a seven-justice majority, Justice Souter held that Balsys’s refusal to provide information to the U.S. authorities due to fear of prosecution by a foreign nation was not protected by the Fifth Amendment’s privilege against self incrimination.<sup>178</sup> Justice Souter asserted that the Fifth Amendment privilege against self-incrimination currently cannot be extended beyond criminal proceedings in the United States.<sup>179</sup>

Despite the conservative opinion written by Justice Souter in *Balsys*, he has demonstrated consistent support for the liberal precedent that established the *Miranda* warnings during the Warren Court era.<sup>180</sup> In 2000, Jus-

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169. *Id.*

170. *Id.* at 683.

171. *Id.*

172. *Id.* at 684.

173. *Id.* 688–95; *Stone*, 428 U.S. at 494–95.

174. 524 U.S. 666 (1998).

175. *Id.* at 669.

176. *Id.*

177. *Id.* at 670.

178. *Id.* at 669.

179. *Id.* at 698. Souter notes that it is possible that the United States could apply the privilege against self-incrimination in cooperation with a foreign nation, but the legal argument of Balsys did not present a situation to justify such cooperation. *Id.*

180. *Dickerson v. United States*, 530 U.S. 428 (2000).

tice Souter voted with the seven-justice majority to reaffirm the basic principles of *Miranda v. Arizona*<sup>181</sup> by striking down the Omnibus Crime Control Act of 1968<sup>182</sup> that had threatened to overturn *Miranda*.<sup>183</sup> Four years later, Justice Souter continued to reaffirm his support for *Miranda* and the privilege against self-incrimination when he wrote for a liberal majority in *Missouri v. Seibert*.<sup>184</sup> In *Seibert*, Justice Souter, writing for the five-justice majority, held that a murder confession could be excluded because police had used a two-step strategy wherein officers would secure a confession from a suspect without issuing *Miranda* warnings and then *Miranda* warnings would be issued to gain the confession a second time.<sup>185</sup> Justice Souter wrote that the “midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*’s constitutional requirement.”<sup>186</sup> Furthermore, Justice Souter concluded that the purpose of the police tactic in question was “to get a confession the suspect would not make if he understood his rights at the outset.”<sup>187</sup> He reasoned that *Miranda* warnings did not function effectively given the deceptive nature of the police strategy which deprived the defendant of understanding his rights and understanding the ramifications of waiving such freedoms.<sup>188</sup> During the same term as *Seibert*, Justice Souter expressed further support for *Miranda* when he dissented from the Court’s five-person majority in *United States v. Patane*.<sup>189</sup> In *Patane*, the Court ruled that physical evidence secured by police does not necessarily have to be suppressed, even if it was discovered because of incriminating statements without the issuance of *Miranda* warnings.<sup>190</sup> Justice Souter’s dissenting opinion, joined by Justices Stevens and Ginsburg, accused the majority

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181. 384 U.S. 436 (1966).

182. 18 U.S.C. § 3501, *invalidated by Dickerson*, 530 U.S. at 443–44. Congress designed the legislation, which was officially titled The Omnibus Crime Control and Safe Streets Act of 1968, to overturn the precedent established in *Miranda*. *Dickerson*, 530 U.S. at 432. The Act co-existed with *Miranda* for thirty-four years until 2000, when the U.S. Supreme Court struck it down as unconstitutional. *Id.*

183. *Dickerson*, 530 U.S. at 432.

184. 542 U.S. 600 (2004).

185. *Id.* at 605. Souter was joined in his majority opinion by Justices Stevens, Ginsburg, and Breyer. *Id.* at 603. 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). Kennedy argued that, while he agreed with a large part of Souter’s opinion, the admission of the statements was appropriate if 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. *Id.* at 618.

186. *Seibert*, 542 U.S. at 604.

187. *Id.* at 613.

188. *Id.* at 613–14.

189. 542 U.S. 630, 645 (2004) (Souter, J., dissenting).

190. *Id.* at 644 (majority opinion). The opinion of the Court, by Justice Thomas, indicates that a failure to issue *Miranda* warnings to a suspect does not by itself constitute a violation of a suspect’s constitutional rights. *Id.* The Court remanded the case for further consideration based upon the proper interpretation of the *Miranda* rule. *Id.*

justices of “closing their eyes to the consequences of giving an evidentiary advantage to those who ignore *Miranda* . . . .”<sup>191</sup> He added that the decision would provide an incentive for police officers to simply disregard *Miranda*.<sup>192</sup>

#### D. “Fair Trial” Rights

By Justice Souter’s second term on the Court, from 1991 to 1992, he had already begun to exhibit a liberal trend regarding criminal justice cases.<sup>193</sup> Justice Souter’s first significant opinion regarding Sixth Amendment trial rights involved a five-to-four decision in *Doggett v. United States*.<sup>194</sup> In this case, the Court held that a convicted defendant had been denied his right to a speedy trial.<sup>195</sup> Federal drug charges were brought against Marc Doggett in 1980, but before federal agents could arrest him, he left the United States for Panama.<sup>196</sup> After leaving Panama for 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 he was apprehended by the U.S. Marshal Service.<sup>197</sup>

In *Doggett*, the Justices split five-to-four along ideological lines.<sup>198</sup> Justices Souter, White, Stevens, Kennedy, and Blackmun formed a liberal bloc ruling in favor of Doggett’s Sixth Amendment rights, while Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas formed a conservative bloc in favor of the U.S. government’s position.<sup>199</sup>

In Justice Souter’s majority opinion, he concluded that the eight-year lag between the indictment and arrest of Doggett was sufficient to raise the issue of whether Doggett had received a speedy trial under the Sixth Amendment.<sup>200</sup> Justice Souter found that the U.S. government was negligent in pursuing Doggett and the negligent delay between indictment and arrest hindered Doggett in preparing his legal defense.<sup>201</sup> Justice Souter noted a lengthy delay before a trial might cause a number of unidentifiable

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191. *Id.* at 645 (Souter, J., dissenting).

192. *Id.*

193. YARBROUGH, *supra* note 8, at 168.

194. *Doggett v. United States*, 505 U.S. 647, 648 (1992).

195. *Id.*

196. *Id.* at 649.

197. *Id.* at 650.

198. *Id.* at 648.

199. *Id.*

200. *Id.* at 652.

201. *Id.* at 653.

problems for a defendant in his attempt to secure a fair trial and that the delay itself caused a presumption of prejudice against the defendant.<sup>202</sup>

Ten years after the *Doggett* ruling, Justice Souter wrote the first of two opinions in right-to-counsel cases that involved the interpretation of a federal rule.<sup>203</sup> The cases considered Federal Rule of Criminal Procedure 11, which details the process to be followed by a judge in ensuring that a guilty plea was understood and voluntarily accepted by a criminal defendant.<sup>204</sup> If the judge departs from this procedure, a guilty plea still might be upheld if the judge's actions did not violate any substantial rights of the defendant.<sup>205</sup> This type of judicial error is commonly known as "harmless error."<sup>206</sup> In *Vonn*, Alphonso Vonn had been charged with armed robbery and informed by a magistrate judge that he had a right to counsel under the Sixth Amendment.<sup>207</sup> 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.<sup>208</sup> Justice Souter's opinion held that Vonn could not benefit from the error because he raised the issue of Rule 11 in a negligent manner, after the trial court phase.<sup>209</sup> Under the Federal Rules of Criminal Procedure, if a defendant was negligent in raising a Rule 11 objection, the burden shifts from the government to the defendant, who must then establish that the error violated a substantial right.<sup>210</sup>

Two years later Justice Souter relied upon the precedent established in *Vonn* to decide a similar case involving the application of Rule 11 in *United States v. Dominguez Benitez*.<sup>211</sup> In this case, Justice Souter again wrote a unanimous opinion for the Court. Carlos Dominguez Benitez pled guilty to conspiracy.<sup>212</sup> Because the defendant had three prior convictions, the court rejected his plea agreement and he was sentenced to a mandatory ten-year prison term and prevented from withdrawing his guilty plea.<sup>213</sup> Benitez raised a Rule 11 claim because he had not been informed by the court in advance of his plea that he would be prevented from withdrawing it in the

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202. *Id.* at 654. A lengthy period of time between indictment and 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. *Id.*

203. *United States v. Vonn*, 535 U.S. 55, 57 (2002).

204. FED. R. CRIM. P. 11.

205. *Vonn*, 535 U.S. at 62.

206. *Id.*

207. *Id.* at 60.

208. *Id.* at 60.

209. *Id.* at 63.

210. *Id.* at 73.

211. *United States v. Dominguez Benitez*, 542 U.S. 74, 75 (2004).

212. *Id.* at 74.

213. *Id.* at 78.

event the court rejected the sentencing agreement.<sup>214</sup> Relying upon the *Vonn* precedent, Justice Souter asserted in his opinion that, because the Rule 11 claim was not filed in a timely fashion, the defendant must demonstrate that a different outcome in the trial would have occurred, if not for the error committed by the court.<sup>215</sup>

In 2005, Justice Souter wrote the majority opinion in *Rompilla v. Beard*, which continued the Court's trend (since 2000) of ruling in favor of defendants in Sixth Amendment cases.<sup>216</sup> In *Rompilla*, the majority opinion written by Justice Souter for a divided Court focused upon the right to counsel for a criminal defendant who had been sentenced to death by the state of Pennsylvania for murder based upon a number of aggravating circumstances.<sup>217</sup> One of the aggravating circumstances presented by prosecutors to justify the death sentence was Rompilla's history of felony convictions.<sup>218</sup> Justice Souter held for the five-person majority that Rompilla's defense attorneys should have introduced mitigating factors concerning his various personal problems.<sup>219</sup> For example, Rompilla had limited mental capacity, was a victim of child abuse, and also was diagnosed with fetal alcohol syndrome and schizophrenia.<sup>220</sup> This mitigating evidence was not introduced by his legal counsel even though it had been introduced when Rompilla was convicted of felony rape almost a decade and a half earlier.<sup>221</sup> Because Rompilla's counsel had not met the standard of reasonable competence established by the American Bar Association (ABA), Justice Souter concluded that Rompilla had received inadequate counsel.<sup>222</sup> In overturning Rompilla's death sentence, Justice Souter quoted directly from the ABA standards when he wrote:

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

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214. *Id.* at 79.

215. *Id.* at 85.

216. *Rompilla v. Beard*, 545 U.S. 374, 377 (2005). Since 2000, the Supreme Court has voted in favor of defendants' Sixth Amendment rights in the following cases: *Rothgery v. Gillespie County, Tex.*, 128 S. Ct. 2578 (2008); *Indiana v. Edwards*, 128 S. Ct. 2379 (2008); *Rita v. United States*, 127 S. Ct. 2456 (2007); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *United States v. Booker*, 543 U.S. 220 (2005); *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); *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).

217. *Rompilla*, 545 U.S. at 378.

218. *Id.* at 378.

219. *Id.* at 389.

220. *Id.* at 391.

221. *Id.* at 390.

222. *Id.* at 383.

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.<sup>223</sup>

In short, Rompilla's legal counsel failed because the introduction of the mitigating evidence from his prior rape conviction during the sentencing phase could have produced a different outcome.<sup>224</sup> Because of the Court's decision in *Rompilla*, Pennsylvania was required to provide Rompilla with either a new capital sentencing hearing or a life sentence for the murder conviction.<sup>225</sup>

In 2005, Justice Souter also wrote a majority opinion concerning the right to a fair trial and the issue of racial discrimination.<sup>226</sup> Relying upon precedent from *Batson v. Kentucky*<sup>227</sup>—where the Court ruled that prosecutors could not use peremptory challenges in a racially discriminatory manner—Justice Souter wrote the Court's opinion in *Miller-El v. Dretke*.<sup>228</sup> In *Miller-El*, the justices split by a six-to-three vote in ruling that the Dallas County District Attorney's Office had committed racial discrimination in issuing peremptory challenges of jurors in a capital murder case.<sup>229</sup> 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.<sup>230</sup> Justice Souter wrote that “[t]he prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . . Happenstance is unlikely to produce this disparity.”<sup>231</sup> In *Miller-El*, Justice Souter aligned himself against Justices Rehnquist, Scalia, and Thomas, and 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.<sup>232</sup>

Justice Souter's most recent opinion dealing with the Sixth Amendment was written in *Rothgery v. Gillespie County*,<sup>233</sup> which involved the legal question of whether a defendant should be guaranteed the right to

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223. *Id.* at 387.

224. *Id.* at 393.

225. *Id.*

226. *Miller-El v. Dretke*, 545 U.S. 231, 235 (2005).

227. 476 U.S. 79 (1986).

228. *Miller-El*, 545 U.S. at 252.

229. *Id.* at 235.

230. *Id.* at 266.

231. *Id.* at 241 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2002)).

232. *Id.* at 235.

233. 128 S. Ct. 2578, 2581 (2008).

counsel at his initial proceeding before a magistrate judge.<sup>234</sup> Rothgery had been denied appointed counsel at his initial proceeding where he learned that he would be charged—erroneously—as a felon in possession of a firearm.<sup>235</sup> After the initial hearing, Rothgery posted bond but was repeatedly denied appointed counsel because Gillespie County had an unwritten rule of denying free counsel to indigents out on bond until a prosecutor entered an indictment.<sup>236</sup> When Rothgery was finally indicted by prosecutors and re-arrested, he was unable to post the increased bond amount and was required to spend three weeks in prison until, finally, appointed counsel was able to file the necessary paperwork to dismiss the indictment based upon the erroneous information used by police officers.<sup>237</sup> Rothgery brought federal action against Gillespie County arguing that, if counsel had been appointed at the initial proceeding, a lawyer would have been able to prove that Rothgery was not a felon and his false arrest would have been dismissed earlier.<sup>238</sup> Instead, because Rothgery was denied counsel until the indictment, he lost his freedom for three weeks.<sup>239</sup>

Justice Souter's opinion for the eight-person majority held that Rothgery's initial appearance before a magistrate judge marked the onset of the adversarial process, and Gillespie County must respect the Sixth Amendment right to counsel if a prosecutor attended the initial proceedings.<sup>240</sup> While Gillespie County had justified the denial of counsel based upon prosecutors not having been involved in the initial proceeding, Justice Souter stated that defendants were to be provided counsel even if prosecutors were not required to be made aware of or even involved with the initial proceeding.<sup>241</sup> Citing case precedent from *Michigan v. Jackson* and *Brewer v. Williams*, Justice Souter noted that the Supreme Court has consistently recognized that "the right to counsel attaches at the initial appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty."<sup>242</sup>

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234. *Id.* at 2581–82.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 2591. 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 2581–82. The hearing is commonly referred to as an "article 15.17 hearing." *Id.* at 2582.

242. *Id.* at 2579; see also *Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (holding six-to-three 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) (holding five-to-four that a defendant's conviction for murder must

### E. *The Eighth Amendment and Capital Punishment*

As noted above, Justice Souter supported the use of the death penalty as Attorney General and as a state judge in New Hampshire.<sup>243</sup> The first case for Justice Souter on the Supreme Court involving the death penalty was *Payne v. Tennessee*.<sup>244</sup> In *Payne*, Justice Souter joined a conservative majority in a six-to-three vote that upheld the use of victim impact statements during the sentencing phase of a death penalty case.<sup>245</sup> Justice Souter authored a concurring opinion in *Payne* in which he argued that withholding victim impact statements would be unfair and provide an advantage to the defendant.<sup>246</sup> He further stated that “[i]ndeed, given a defendant’s option to introduce relevant evidence in mitigation, sentencing without such evidence of victim impact may be seen as a significantly imbalanced process.”<sup>247</sup>

Justice Souter, however, did part 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.”<sup>248</sup> Whereas Justice Rehnquist’s majority opinion and Justice Scalia’s separate concurrence declined to emphasize the significance of precedent, Justice Souter’s concurrence discussed the “fundamental importance” of stare decisis and the necessity of “some ‘special justification’” supporting a departure from precedent.<sup>249</sup> Hence, even in his first term on the Court, Justice Souter began to demonstrate a streak of independence from his conservative brethren that would grow even stronger in the coming years.<sup>250</sup>

Justice Souter was assigned his initial opinion for the Court in the area of the death penalty in *Sochor v. Florida*.<sup>251</sup> *Sochor* involved a death sentence recommended by a jury that had been instructed to decide upon four aggravating factors, including such vague factors as heinousness and coldness.<sup>252</sup> While the jury recommendation did not indicate which aggravating factors existed, the judge found that all of the aggravating factors ex-

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be overturned where the defendant led officers to the victim’s body without the presence of defense counsel).

243. YARBROUGH, *supra* note 8, at 36.

244. *Payne v. Tennessee*, 501 U.S. 808, 810 (1991).

245. *Id.* at 810.

246. *Id.* at 839.

247. *Id.* (citations omitted).

248. YARBROUGH, *supra* note 8, at 164. The two precedents overturned by the Court in *Payne* were *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987).

249. *Payne*, 501 U.S. at 842 (citations omitted).

250. YARBROUGH, *supra* note 8, at 162.

251. *Sochor v. Florida*, 504 U.S. 527, 531 (1992).

252. *Id.* at 529–30.

isted and found no mitigating factors in handing down a death sentence.<sup>253</sup> Justice Souter's complex opinion for the Court held that the Supreme Court did not have jurisdiction to rule on Florida's "heinousness" factor.<sup>254</sup> But Justice Souter's opinion did hold that the Florida Supreme Court committed an Eighth Amendment error because it did not possess enough evidence to uphold the "coldness" factor and should have reviewed the judge's decision regarding the aggravating and mitigating factors in an independent fashion.<sup>255</sup> Justice Souter's opinion for the Court resulted in a unanimous ruling on the jurisdictional issue related to the "heinousness" factor, while the ruling on the "coldness" factor was split in a non-ideological fashion.<sup>256</sup>

Three years later, in *Kyles v. Whitley*, Justice Souter sided with the liberal bloc in drafting a majority opinion ordering a new trial for a defendant who had been sentenced to death in Louisiana for first-degree murder.<sup>257</sup> 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 the state of Louisiana had withheld evidence that could have produced a favorable result for the defendant.<sup>258</sup>

Justice Souter's most recent majority opinion in a capital punishment case was written in *Kelly v. South Carolina*.<sup>259</sup> Again, Justice Souter sided with the same liberal bloc of justices from the *Kyles* decision in holding that the 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.<sup>260</sup> Instead of a life sentence without the possibility of parole, the jury decided upon a death sentence for the defendant in the absence of such jury instruction.<sup>261</sup> 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.<sup>262</sup>

In the recent—and more publicized—cases involving the death penalty, Justice Souter has consistently sided with the liberal bloc on the Court.<sup>263</sup> In *Atkins v. Virginia*, Justice Souter voted with a liberal majority to prohibit the use of death penalty for the mentally challenged and, in *Ro-*

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253. *Id.* at 529.

254. *Id.* at 534.

255. *Id.* at 540.

256. *See generally id.* at 529–51.

257. 514 U.S. 419, 421–22 (1995).

258. *Id.* at 454.

259. 534 U.S. 246, 247 (2002).

260. *Id.* at 248.

261. *Id.* at 251.

262. *Id.* at 256–57.

263. Robert Barnes, *High Court Rejects Death For Child Rape: Penalty Reserved for Murder and Crimes Against State*, WASH. POST, June 26, 2008, at A1.

*per v. Simmons*, he voted to raise the minimum age for executions from sixteen to eighteen.<sup>264</sup> As in the *Kelly* decision, Justice Souter opposed a conservative bloc of justices, namely Chief Justice Rehnquist and Justices Scalia and Thomas, as the Court overturned precedents from the 1980s based on a growing national trend against such executions.<sup>265</sup> Most recently, in *Kennedy v. Louisiana*, Justice Souter voted with the liberal bloc in banning the execution of defendants who committed child rape.<sup>266</sup>

Justice Souter established a liberal voting record in terms of capital punishment during his early years on the Court.<sup>267</sup> More recently, Justice Souter has consistently voted to limit the application of the death penalty where due process rights have been violated, and to abolish the use of the death penalty in cases involving the mentally challenged, defendants under the age of eighteen,<sup>268</sup> and defendants convicted of child rape.<sup>269</sup> Hence, for the better part of his service on the Court, Justice Souter has voted against the conservative bloc of justices in cases involving the death penalty.<sup>270</sup>

#### F. *The Eighth Amendment and Prisoners' Rights*

Justice Souter's opinions in terms of prisoners' rights and the Eighth Amendment also demonstrate an independent streak, although he has written only four opinions in this area of law.<sup>271</sup> Early in Justice Souter's career on the Court, he wrote for a conservative majority in *Rowland v. California Men's Colony*.<sup>272</sup> 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 the filing of *in forma pauperis* petitions.<sup>273</sup> The California Men's Colony was a representative association which served as an advisory council for the prison warden.<sup>274</sup> The organization, comprised of prisoners, tried to file an *in forma pauperis*

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

265. Editorial, *Death Penalty in Review: Capital Punishment Loses Ground, for Good Reasons*, WASH. POST, Dec. 23, 2007, at B6. The Court precedents 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 16 years old or older, but not under 16 years old.

266. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2645 (2008).

267. HENSLEY ET AL., *supra* note 2, at 586 tbl.12.2. Souter voted in the liberal direction in ten of the eighteen capital punishment cases from 1991 to 1994. *Id.*

268. *Kennedy*, 128 S. Ct. at 2646; *Roper*, 543 U.S. at 577; *Atkins*, 536 U.S. at 321.

269. Barnes, *supra* note 263, at A1.

270. HENSLEY ET AL., *supra* note 2, at 586.

271. *Id.* at 162.

272. 506 U.S. 194, 196 (1993).

273. *Id.* at 194.

274. *Id.* at 196.

petition in federal court claiming that the California Department of Corrections violated its right against cruel and unusual punishment.<sup>275</sup> In deciding against the California Men's Colony, Justice Souter held that only natural 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.<sup>276</sup>

In the following term, Justice Souter wrote another opinion on the topic of prisoners' rights in *Farmer v. Brennan*.<sup>277</sup> This opinion is a significant ruling because it has become controlling precedent in the area of inmate-on-inmate rape as well as sexual misconduct by prison officials against inmates.<sup>278</sup> In *Farmer*, Justice Souter wrote an opinion for the Court where he created a two-part test to determine whether a prisoner's right against cruel and unusual punishment had been violated.<sup>279</sup> The first part of the test requires that a prisoner show that an injury was objectively serious; the second part requires proof that prison officials are culpable based on deliberate indifference to an inmate's safety.<sup>280</sup> The circumstances surrounding this case involved a transvestite prisoner who was transferred to a more violent prison and placed in the general population where a sexual assault of the prisoner occurred.<sup>281</sup> The prisoner claimed that prison officials deliberately ordered the transfer with knowledge that such an assault would take place.<sup>282</sup> In light of the two-part test created by Justice Souter, the district court was ordered to reconsider its denial of the discovery motion requested by the prisoner as well as the allegations against the prison officials.<sup>283</sup>

In *Booth v. Churner*, Justice Souter again wrote for a unanimous Court.<sup>284</sup> The opinion held that under the Prisoner Litigation Reform Act of 1995, a prisoner was required to exhaust the administrative remedies available before filing a civil lawsuit in federal court over prison conditions.<sup>285</sup> In other words, the administrative process must be completed before a prisoner can sue for monetary damages in federal court.<sup>286</sup> Justice

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275. *Id.* at 196–97.

276. *Id.* at 211–12.

277. 511 U.S. 825, 828 (1994).

278. *Id.*

279. *Id.* at 834.

280. *Id.*

281. *Id.* at 830.

282. *Id.* at 831.

283. *Id.* at 850.

284. 532 U.S. 731, 733 (2001).

285. *Id.* at 734.

286. *Id.*

Souter's technical opinion centered upon the broad statutory intent of Congress in defining the words "administrative remedies" and "available."<sup>287</sup>

Justice Souter's most recent opinion dealing with prisoners' rights and the Eighth Amendment was *Roell v. Withrow*.<sup>288</sup> In *Roell*, Justice Souter wrote for a five-person majority in favor of a prisoner who filed a federal lawsuit maintaining that prison officials had ignored his medical needs in violation of his right against cruel and unusual punishment.<sup>289</sup> The main issue concerned whether prison officials consented to have the case heard before a federal magistrate instead of a district court judge.<sup>290</sup> After the federal magistrate ruled in favor of the prisoner, prison officials objected and argued that the dispute should have been heard by a federal district court judge.<sup>291</sup> Justice Souter's opinion held that because the prison officials had participated in the entire litigation process without objecting, it could be inferred that the prison officials had consented to the case being heard by the federal magistrate.<sup>292</sup>

## VI. IDEOLOGICAL VOTING BEHAVIOR (1991–2008)

As with Justice Souter's written opinions discussed above, an empirical analysis of individual votes cast by Justice Souter from 1991 to 2008 also reveals a shift toward liberalism on issues related to criminal justice, namely in Fourth, Fifth, Sixth, and Eighth Amendment cases.<sup>293</sup> In the first column of Table 1 below, Justice Souter's ideological voting behavior during his early years on the Court (1991–1997) has been displayed, while the second column of Table 1 has documented Justice Souter's shift toward liberal voting over the last decade (1998–2008).<sup>294</sup> Finally, the third column in Table 1 provides a comprehensive summary of Justice Souter's ideological voting from 1991 to 2008.<sup>295</sup>

While Justice Souter began as a conservative in Fourth Amendment search and seizure cases, he has deviated from the conservative bloc frequently in recent years.<sup>296</sup> According to Table 1, Justice Souter's voting

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287. *Id.* at 736; *see also* Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (1996).

288. 538 U.S. 580, 582 (2003).

289. *Id.* at 582.

290. *Id.*

291. *Id.* at 583.

292. *Id.* at 591.

293. *See* HENSLEY ET AL., *supra* note 2, at 449–51, 496–99, 538–43, 586–88 (showing the individual votes of Justice David Souter); *see generally* HAROLD J. SPAETH, MICHIGAN STATE UNIV., U.S. SUPREME COURT JUDICIAL DATABASE, 1953–1997 TERMS (1998).

294. HENSLEY ET AL., *supra* note 2, at 449–51, 496–99, 538–43, 586–88.

295. *Id.*

296. YARBROUGH, *supra* note 8, at 234; *see also* Johnson, *supra* note 122.

behavior was solidly conservative in search and seizure cases from 1991 to 1997.<sup>297</sup> During these initial years on the Court, Justice Souter voted 62% in the conservative direction—or against the rights of criminal defendants—and sided with the liberal position only 38% of the time.<sup>298</sup> However, from 1998 to 2008, a complete reversal occurred as Justice Souter voted 61% for the liberal position while voting conservatively only 39% in search and seizure cases.<sup>299</sup> According to Table 1, in search and seizure cases from 1991 to 2008, Justice Souter cast slightly more than half of his overall votes for the liberal position.<sup>300</sup> In sum, Justice Souter can best be characterized as moderately liberal in search and seizure cases; his flexibility in this area has made him one of the more unpredictable swing votes on the Court.<sup>301</sup>

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297. HENSLEY ET AL., *supra* note 2, at 449–51.

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

In the following six cases, Justice Souter voted in favor of the Fourth Amendment rights of criminal defendants: *Richards v. Wisconsin*, 520 U.S. 385 (1997); *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Wilson v. Arkansas*, 514 U.S. 927 (1995); *Minnesota v. Dickerson*, 508 U.S. 366 (1993); and *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992).

299. Justice Souter cast thirty-nine votes from 1998 to 2008 in search and seizure cases. In the following twenty-four cases, Justice Souter voted in favor of the Fourth Amendment rights of criminal defendants: *Brendlin v. California*, 127 S. Ct. 2400 (2007); *Samson v. California*, 547 U.S. 843 (2006); *Hudson v. Michigan*, 547 U.S. 586 (2006); *Georgia v. Randolph*, 547 U.S. 103 (2006); *Illinois v. Caballes*, 543 U.S. 405 (2005); *Thornton v. United States*, 541 U.S. 615 (2004); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Illinois v. Lidster*, 540 U.S. 419 (2004); *Kaupp v. Texas*, 538 U.S. 626 (2003); *Bd. of Educ. of Indep. School Dist. No. 92 v. Earls*, 536 U.S. 822 (2002); *United States v. Drayton*, 536 U.S. 194 (2002); *Kyllo v. United States*, 533 U.S. 27 (2001); *Ferguson v. Charleston*, 532 U.S. 67 (2001); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Bond v. United States*, 529 U.S. 334 (2000); *Florida v. JL*, 529 U.S. 266 (2000); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Wilson v. Layne*, 526 U.S. 603 (1999); *Florida v. White*, 526 U.S. 559 (1999); *Wyoming v. Houghton*, 526 U.S. 295 (1999); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Minnesota v. Carter*, 525 U.S. 83 (1998); *Pennsylvania v. Scott*, 524 U.S. 357 (1998); and *Campbell v. Louisiana*, 523 U.S. 392 (1998).

In the following fifteen cases, Justice Souter voted against the Fourth Amendment rights of criminal suspects: *Virginia v. Moore*, 128 S. Ct. 1598 (2008); *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006); *United States v. Grubbs*, 547 U.S. 90 (2006); *Muehler v. Mena*, 544 U.S. 93 (2005); *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); *Maryland v. Pringle*, 540 U.S. 366 (2003); *United States v. Banks*, 540 U.S. 31 (2003); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Knights*, 534 U.S. 112 (2001); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Illinois v. McArthur*, 531 U.S. 326 (2001); *Hanlon v. Berger*, 526 U.S. 808 (1999); and *United States v. Ramirez*, 523 U.S. 65 (1998).

300. *See supra* note 299.

301. HENSLEY ET AL., *supra* note 2, at 77; YARBROUGH, *supra* note 8, at 234.

In Fifth Amendment cases, Justice Souter demonstrated a pattern of voting conservatively during his early years on the Court.<sup>302</sup> From 1991 to 1997, Justice Souter voted 55% in the conservative direction and 45% for the liberal side in cases pertaining to the privilege against self-incrimination, double jeopardy, and due process claims.<sup>303</sup> However, between 1998 and 2008, Justice Souter dramatically reversed this earlier pattern by increasing his liberal voting percentage for the rights of criminal suspects to 72%—thus decreasing his conservative percentage to 28%—in Fifth Amendment disputes.<sup>304</sup> Overall, Justice Souter's entire record between 1991 and 2008 in Fifth Amendment cases includes 65% of votes cast in favor of the rights of criminal defendants with an increasing liberal trend over time.<sup>305</sup>

In Sixth Amendment cases involving the trial rights of criminal defendants, Justice Souter again exhibited the same pattern he has shown in Fourth and Fifth Amendment cases.<sup>306</sup> Between 1991 and 1997, Justice Souter voted nearly two-thirds of the time in the conservative direction in

302. HENSLEY ET AL., *supra* note 2, at 496. Hensley reported that Justice Souter voted conservatively in 71% of Fifth Amendment cases from 1991 to 1994. *Id.* Justice Souter participated in seven cases involving the Fifth Amendment during this time period. *Id.*

303. Justice Souter cast eleven votes from 1991 to 1997, of which the following six were conservative: *Hudson v. United States*, 522 U.S. 93 (1997); *United States v. Ursery*, 518 U.S. 267 (1996); *United States v. Davis*, 512 U.S. 452 (1994); *Schiro v. Farley*, 510 U.S. 222 (1994); *United States v. Felix*, 503 U.S. 378 (1992); and *Arizona v. Fulminante*, 499 U.S. 279 (1991).

In the following five cases, from 1991 to 1997, Justice Souter voted liberal: *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Bennis v. Michigan*, 517 U.S. 1163 (1996); *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994); *United States v. Dixon*, 509 U.S. 688 (1993); and *Withrow v. Williams*, 507 U.S. 680 (1993).

304. Justice Souter voted in twenty-nine cases involving Fifth Amendment rights from 1998 to 2008. He voted liberal in the following twenty-one cases: *Deck v. Missouri*, 544 U.S. 622 (2005); *Smith v. Massachusetts*, 543 U.S. 462 (2005); *United States v. Patane*, 542 U.S. 630 (2004); *Missouri v. Seibert*, 542 U.S. 600 (2004); *Yarbrough v. Alavardo*, 541 U.S. 652 (2004); *United States v. Lara*, 541 U.S. 193 (2004); *Stogner v. California*, 539 U.S. 607 (2003); *Sell v. United States*, 539 U.S. 166 (2003); *DeMore v. Kim*, 538 U.S. 510 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003); *McKune v. Illinois*, 536 U.S. 24 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Dickerson v. United States*, 530 U.S. 428 (2000); *United States v. Hubbell*, 530 U.S. 27 (2000); *Nelson v. Adams USA*, 529 U.S. 460 (2000); *Portuondo v. Agard*, 529 U.S. 61 (2000); *Mitchell v. United States*, 526 U.S. 314 (1999); *Monge v. California*, 524 U.S. 721 (1998); *E. Enterprises v. Apfel*, 524 U.S. 498 (1998); and *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

In the following eight cases, between 1998 and 2008, Justice Souter voted conservatively: *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007); *Price v. Vincent*, 538 U.S. 634 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Seling v. Young*, 531 U.S. 250 (2001); *Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999); *United States v. Balsys*, 524 U.S. 666 (1998); and *Ohio v. Woodward*, 523 U.S. 272 (1998).

305. *See supra* note 304.

306. 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 of criminal defendants to subpoena witnesses, and the right to be informed of charges. *See generally* FRANCIS HELLER, THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION (1951); *see also* ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN JURISPRUDENCE (1992).

Sixth Amendment cases, while registering a liberal percentage of only 36% during the same timeframe.<sup>307</sup> But Justice Souter's voting record again changed significantly between 1998 and 2008, when he recorded a liberal rating of 70%, with only 30% of his votes cast in favor of the government's position.<sup>308</sup> Overall, Justice Souter can be categorized as a fairly liberal justice in Sixth Amendment cases, having voted for the trial rights of defendants in 60% of the cases in which he participated from 1991 to 2008.<sup>309</sup>

In criminal justice cases, Justice Souter's voting record is at its most liberal in Eighth Amendment cases concerning the death penalty and prisoners' rights.<sup>310</sup> Unlike the earlier stages of the criminal justice process involving the Fourth, Fifth, and Sixth Amendments, Table 1 depicts Justice Souter as consistently liberal through time in Eighth Amendment cases.<sup>311</sup> Even in his earlier years on the Court, Justice Souter voted a majority of the time with the liberal bloc,<sup>312</sup> and, in the last decade, he voted in favor of

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

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

308. Justice Souter voted in thirty-three Sixth Amendment cases from 1998 to 2008. Justice Souter voted in the liberal direction in the following twenty-three decisions: *Rothgery v. Gillespie County, Tex.*, 128 S. Ct. 2578 (2008); *Indiana v. Edwards*, 128 S. Ct. 2379 (2008); *Rita v. United States*, 127 S. Ct. 2456 (2007); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Rompilla v. Beard*, 545 U.S. 374 (2005); *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. 519 (2004); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Massaro v. United States*, 538 U.S. 500 (2003); *Woodford v. Garceau*, 538 U.S. 202 (2003); *Ring v. Arizona*, 536 U.S. 584 (2002); *Alabama v. Shelton*, 535 U.S. 654 (2002); *Mickens v. Taylor*, 535 U.S. 162 (2002); *Texas v. Cobb*, 536 U.S. 162 (2001); *Glover v. United States*, 531 U.S. 198 (2001); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickler v. Greene*, 527 U.S. 263 (1999); *Lilly v. Virginia*, 527 U.S. 116 (1999); *Neder v. United States*, 527 U.S. 1 (1999); and *Gray v. Maryland*, 523 U.S. 185 (1998).

In the following nine cases, Justice Souter voted in favor of the conservative side: *Wright v. Van Patten*, 128 S. Ct. 743 (2008); *Davis v. Washington*, 547 U.S. 813 (2006); *Florida v. Nixon*, 543 U.S. 175 (2004); *Holland v. Jackson*, 542 U.S. 649 (2004); *United States v. Dominguez Benitez*, 542 U.S. 74 (2004); *Iowa v. Tovar*, 541 U.S. 77 (2004); *United States v. Vonn*, 535 U.S. 55 (2002); *United States v. Martinez-Salazar*, 528 U.S. 304 (2000); *Martinez v. California*, 528 U.S. 152 (2000); and *United States v. Scheffer*, 523 U.S. 303 (1998).

309. *See supra* note 308.

310. YARBROUGH, *supra* note 8, at 238.

311. *Id.* at 255–56 (noting that Souter voted more conservatively in Fourth, Fifth, and Sixth Amendment cases than in Eighth Amendment cases from 1991 to 2005); *see also* Johnson, *supra* note 122 (providing a descriptive analysis of Souter's voting record in criminal cases from 1991 to 2007).

312. From 1991 to 1997, Justice Souter participated in twenty cases that dealt with the Eighth Amendment. Justice Souter cast a liberal vote in the following eleven cases: *Kyles v. Whitley*, 514 U.S. 419 (1995); *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Romano v. Oklahoma*, 512 U.S. 1

criminal defendants in three out of every four cases involving Eighth Amendment protections.<sup>313</sup>

**Table 1: Ideological Voting Record of Justice Souter in Criminal Justice Cases, 1991–2008**

	Conservative–Liberal Votes (% Conservative)			
Amendment:	<u>4th</u>	<u>5th</u>	<u>6th</u>	<u>8th</u>
1991–1997:	10–6 (63%)	6–5 (55%)	9–5 (64%)	9–11 (45%)
1998–2008:	15–24 (38%)	8–21 (28%)	10–23 (30%)	8–24 (25%)
Total:	25–30 (45%)	14–26 (35%)	19–28 (40%)	17–35 (33%)

## VII. DISCUSSION AND CONCLUSION

Justice David Souter's written opinions and voting behavior in criminal justice cases have highlighted two trends.<sup>314</sup> Justice Souter has evolved

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(1994); *Austin v. United States*, 509 U.S. 602 (1993); *Johnson v. Texas*, 509 U.S. 350 (1993); *Helling v. McKinney*, 509 U.S. 25 (1993); *Richmond v. Lewis*, 506 U.S. 56 (1992); *Morgan v. Illinois*, 504 U.S. 719 (1992); *Sochor v. Florida*, 504 U.S. 527 (1992); *Hudson v. McMillian*, 503 U.S. 1 (1992); and *Parker v. Dugger*, 498 U.S. 308 (1991).

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

313. From 1998 to 2008, Justice Souter participated in thirty-two cases involving Eighth Amendment issues. In the following twenty-four cases, Justice Souter voted in the liberal direction: *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); *Baze v. Rees*, 128 S. Ct. 1520 (2008); *Medellin v. Texas*, 128 S. Ct. 1346 (2008); *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008); *Gall v. United States*, 128 S. Ct. 586 (2007); *Panetti v. Quatermann*, 127 S. Ct. 2842 (2007); *Erikson v. Pardus*, 127 S. Ct. 2197 (2007); *Abdul-Kabir v. Quartermann*, 550 U.S. 233 (2007); *Brown v. Sanders*, 546 U.S. 212 (2006); *Brown v. Payton*, 544 U.S. 133 (2005); *Roper v. Simmons*, 543 U.S. 551 (2005); *Smith v. Texas*, 543 U.S. 27 (2004); *Schiro v. Summerlin*, 542 U.S. 348 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Nelson v. Campbell*, 541 U.S. 637 (2004); *Rowell v. Withrow*, 538 U.S. 580 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Porter v. Nussle*, 534 U.S. 516 (2002); *Kelly v. South Carolina*, 534 U.S. 246 (2002); *Penry v. Johnson*, 532 U.S. 782 (2001); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Weeks v. Angelone*, 528 U.S. 225 (2000); and *United States v. Bajakajian*, 524 U.S. 321 (1998).

From 1998 to 2008, Justice Souter cast eight conservative votes in the following Eighth Amendment cases: *Kansas v. Marsh*, 548 U.S. 163 (2006); *Oregon v. Guzek*, 546 U.S. 517 (2006); *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Bell v. Cone*, 535 U.S. 685 (2002); *Booth v. Churner*, 532 U.S. 731 (2001); *Jones v. United States*, 526 U.S. 227 (1999); *Hopkins v. Reeves*, 524 U.S. 88 (1998); and *Buchanan v. Angelone*, 522 U.S. 269 (1998).

314. See HENSLEY ET AL., *supra* note 2, at 417 (discussing the Court's historical trend of providing for protection for defendants at the latter stages of the criminal justice process); Ramesh Ponnuru, *Empty Souter—Supreme Court Justice David Souter*, NAT'L REV., Sept. 11, 1995, available at

from a conservative state judge and Supreme Court justice—who initially voted with Chief Justice Rehnquist and Justices Scalia and Thomas—into a jurist who currently aligns more frequently with the liberal bloc comprised of Justices Stevens, Ginsburg, and Breyer.<sup>315</sup> Interestingly, Justice Souter was nominated by President George H. W. Bush with the expectation that he would provide another conservative vote on a Court in the midst of a conservative counterrevolution.<sup>316</sup> In fact, right-wing observers of the Court were told by John Sununu, White House Chief of Staff for George H. W. Bush between 1989 and 1991, that Justice Souter would be a “home-run” for conservatives.<sup>317</sup> However, legal scholars have recognized that Justice Souter has practiced moderate pragmatism on the Court and has directly challenged conservative justices, such as Justice Scalia, in intellectual debate.<sup>318</sup> Secondly, Justice David Souter appears to have followed the approach demonstrated by the Court throughout the twentieth century of providing more protection for defendants at the later stages of the criminal justice process.<sup>319</sup> Justice Souter apparently has been more concerned about the power of government brought to bear upon a defendant as he or she moves closer to punishment in the form of a loss of liberty or the death penalty.<sup>320</sup>

In sum, the two trends displayed by Justice Souter suggest a moderately liberal justice who has favored a measured and balanced approach in his opinion writing and voting behavior in criminal justice cases.<sup>321</sup> The following sections provide a review of Justice Souter’s written opinions and voting behavior which clearly evidence the two trends discussed above.<sup>322</sup>

#### A. Fourth Amendment Search and Seizure Cases

In search and seizure cases, Justice Souter’s opinions for the Court in *Atwater* and *Banks*, as well as his overall voting record, illustrate his conservatism in siding with law enforcement, particularly during his initial years on the Court.<sup>323</sup> Justice Souter has been more conservative in search and seizure cases than in any other area of criminal justice, which high-

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[http://findarticles.com/p/articles/mi\\_m1282/is\\_n17\\_v47/ai\\_17374429](http://findarticles.com/p/articles/mi_m1282/is_n17_v47/ai_17374429) (discussing Justice Souter’s shift from the conservative end toward the liberal end of the ideological spectrum).

315. HENSLEY ET AL., *supra* note 2, at 449, 496, 538.

316. *Id.* at 12.

317. *See* Garrow, *supra* note 33, at 64.

318. *Id.*

319. *See* HENSLEY ET AL., *supra* note 2, at 417.

320. *Id.*

321. *See* Johnson, *supra* note 122.

322. HENSLEY ET AL., *supra* note 2, at 417.

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

lights the historical trend of limiting the rights of individuals during the earlier stages of the criminal justice process.<sup>324</sup> However, Justice Souter has recently developed an independent streak, particularly with his written opinion in *Randolph* and liberal votes in such landmark cases as *Edmond* and *Lidster* as well as the drug testing cases.<sup>325</sup> Hence, Justice Souter's behavior can best be characterized as moderately liberal in the area of search and seizure with a more liberal pattern of siding with the rights of criminal defendants during his last ten years on the Court.<sup>326</sup>

### B. Fifth, Sixth, and Eighth Amendment Rights

In contrast to Justice Souter's behavior in search and seizure cases, he has demonstrated a stronger pattern of liberalism by providing more protection for the rights of defendants during the latter stages of the criminal justice process.<sup>327</sup> In regard to Fifth Amendment rights, Justice Souter has expressed strong support for the privilege against self-incrimination with his opinions in *Withrow* and *Seibert* and has wholeheartedly supported the *Miranda* precedent with his votes in such cases as *Patane* and *Dickerson*.<sup>328</sup> As displayed in Table 1, Justice Souter's overall voting record in Fifth Amendment cases (65% in favor of criminal defendants) has been clearly more liberal than his liberal percentage (55%) in search and seizure cases.<sup>329</sup>

In terms of trial rights for defendants, Justice Souter has lived up to his reputation as a "pro-fair-trial" judge developed during his years as a state court judge in New Hampshire.<sup>330</sup> Justice Souter's opinions for the Court in *Doggett*, *Rompilla*, and *Miller-el* caused sharp ideological divisions as he represented liberal majorities in each case.<sup>331</sup> These opinions are consistent with Justice Souter's recent shift toward liberalism in Sixth Amendment cases as he voted 70% of the time in favor of defendants' rights from 1998 to 2008.<sup>332</sup> This contrasts sharply with the fact that Jus-

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324. HENSLEY ET AL., *supra* note 2, at 417.

325. *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).

326. *See generally* YARBROUGH, *supra* note 8.

327. Johnson, *supra* note 122.

328. *Withrow v. Williams*, 507 U.S. 680 (1993); *Dickerson v. United States*, 530 U.S. 428 (2000); *Missouri v. Seibert*, 542 U.S. 600 (2004); *United States v. Patane*, 542 U.S. 630, 645 (2004).

329. *See supra* notes 303, 304, 307, 308 (listing all of the Fifth and Sixth Amendment cases participated in by Justice Souter).

330. YARBROUGH, *supra* note 8, at 55.

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

332. *See* Table 1 *supra*.

tice Souter voted as a solid conservative between 1991 and 1997.<sup>333</sup> Although Justice Souter did author two opinions with conservative outcomes involving trial rights (in *Vonn* and *Dominguez Benitez*), these cases were less controversial because the opinions were unanimous.<sup>334</sup>

Finally, Justice Souter has reserved his strongest support for defendants for the final stage of the criminal justice process.<sup>335</sup> With the exception of a few cases handed down during his earlier terms on the Court—such as *Payne* and *Rowland*—Justice Souter's written opinions and voting record have consistently favored the rights of convicted criminals in Eighth Amendment cases involving capital punishment and prisoners' rights.<sup>336</sup> In fact, Justice Souter sided with criminal defendants in Eighth Amendment cases even during his early terms on the Court, from 1991 to 1997—a period which saw him vote more frequently with the conservative bloc in all other areas of criminal justice.<sup>337</sup> 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 has rejected the ultra-conservative behavior demonstrated by such Court members as Justices Scalia and Thomas.<sup>338</sup>

In the end, Justice Souter has not behaved as an ideological conservative.<sup>339</sup> Instead, he has continued a 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.<sup>340</sup> In the area of criminal justice, Justice Souter's behavior of distributing justice based upon a more practical and flexible interpretation of the law has earned him the respect of legal scholars, but has disappointed right-wing groups that had hoped for another conservative vote in the tradition of Justices Rehnquist, Scalia, and

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333. See HENSLEY ET AL., *supra* note 2, at 538.

334. *United States v. Vonn*, 535 U.S. 55, 57 (2002); *United States v. Dominguez Benitez*, 542 U.S. 74, 75 (2004).

335. HENSLEY ET AL., *supra* note 2, at 586. Hensley's book documented ten of eighteen votes (56%) by Justice Souter in the liberal direction in Eighth Amendment and Capital Punishment cases between 1991 and 1994. *Id.* at 586 tbl.12.2.

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

337. See HENSLEY ET AL., *supra* note 2, at 586; Table 1 *supra*.

338. See YARBROUGH, *supra* note 8, at 55–59; see also CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY* (2000); Christopher E. Smith & Scott Patrick Johnson, *The First-term Performance of Justice Clarence Thomas*, 76 JUDICATURE 172, 172–78 (1993) (offering evidence of Justice Clarence Thomas's conservatism); Richard A. Brisbin, *The Conservatism of Antonin Scalia*, 115 POL. SCI. Q. 1 (1990) (offering evidence of Justice Antonin Scalia's conservative behavior).

339. See generally Garrow, *supra* note 33.

340. HENSLEY ET AL., *supra* note 2, at 76.

Thomas.<sup>341</sup> Justice Souter's impact in the area of criminal justice cannot be understated and can be summed up best by Linda Greenhouse, a Pulitzer-Prize-winning reporter for *The New York Times*, who was quoted as saying that Justice Souter's evolution toward the liberal end of the ideological spectrum "[i]s probably as responsible as any single factor for the failure of the conservative revolution."<sup>342</sup>

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341. *See generally* Garrow, *supra* note 33.

342. *Id.* at 64.