Written Opinions and Voting Behavior of Justice David Souter in Criminal Justice Cases

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INTRODUCTION

When David Souter was nominated to the U. S. Supreme Court on July 25, 1990 by President George H. W. Bush at the request of U. S. Senator Warren Rudman (R-NH) and former New Hampshire Governor John Sununu who was serving in the Bush administration, it was assumed that Souter would provide another conservative vote in a long line of appointments by Republican presidents (Johnson and Smith 1992: 239). On the New Hampshire state supreme court, Souter had a record of ruling conservatively by respecting precedent and interpreting the law in a fairly technical fashion (Jordan 1992: 492). As a trial judge, Souter also had a reputation for issuing harsh punishments during the sentencing of defendants (Yarbrough 2005: 120). However, Souter also had a reputation among both Republicans and Democrats in New Hampshire for promoting a fair trial in the interests of justice, even if this meant ruling in favor of criminal defendants who had committed horrendous crimes (Yarbrough 2005: 55-56). Although he ruled conservatively as a state judge in criminal cases, he was viewed more as a “pro-fair trial” judge as opposed to being “pro-state” (Yarbrough 2005: 55). During Senate confirmation hearings, Justice David Souter surprisingly endorsed a limited right to privacy and spoke respectfully about the liberal decisions of the Warren Court in the 1960s which had expanded the rights of criminal defendants. (Hensley, Smith, and Baugh 1997: 76). Moreover, Souter praised Justice William Brennan, the staunch liberal who he
was replacing, as one of the greatest protectors of the Bill of Rights (Greenhouse 1990: 11; Smith and Johnson 1992: 24). Prior to his appointment to the U. S. Supreme Court, Souter had not published anything about his legal views and refused to make public speeches about his own constitutional philosophy (Greenhouse 1990: A1). Hence, he was able to appear as a “stealth” candidate for the U. S. Supreme Court and was easily confirmed by a vote of 90-9 in the U. S. Senate (Yarbrough 2005: 123).

Since his appointment to the Court, Souter has proven to be anything but an ideological appointment (Yarbrough 2005: 259). While he did appear to align more often with conservative justices in his earlier years on the Court, he cannot be easily categorized according to the liberal-conservative continuum employed by contemporary scholars of the judiciary (Smith 1992: 11; Segal and Spaeth 1993). More recently, Souter has become a moderating influence on the U. S. Supreme Court (Yarbrough 2005: 168). Even in criminal justice cases, an area where Souter displayed the most conservatism 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. (Yarbrough 2005: 185). In fact, during his tenure on the Court, Souter has shown a tendency to be independent and has disappointed right wing groups frequently in criminal justice cases (Hensley, Smith, and Baugh 2005: 77). Apparently, 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 in deciding criminal justice issues (Id.).

The following chapter documents the judicial career of Justice David Souter and analyzes his behavior through his written opinions and votes in criminal justice cases.
from his time served as attorney general and state judge in New Hampshire until his more recent years on the U. S. Supreme Court. Based upon his opinions and votes, Souter clearly has evolved into a more moderate, or even liberal, jurist than ideological conservatives would have preferred in the area of criminal justice (Baum 2007: 122-127). Over the course of his judicial career, Souter has gained respect as an intellectual scholar by attempting to understand both sides of a dispute completely and apply precedent and legal rules in a flexible, albeit technical, manner in the hope of achieving justice (Yarbrough 2005: 198).

**ATTORNEY GENERAL**

Justice David Souter served as attorney general for the state of New Hampshire from 1976-1978 (Greenhouse 1990: A1). As attorney general, David Souter was authorized to issue opinions related to criminal law involving state and local law enforcement agencies (Yarbrough 2005: 29). Most of the opinions issued by Souter during this time period were not controversial and usually involved legal issues of a technical nature (Lewis 1990: I28). However, Souter did comment publicly on a controversial case in December of 1976 involving a convicted murderer from Concord, New Hampshire (Yarbrough 2005: 29). The murder conviction of Gary S. Farrow was based largely on the testimony of prosecution witnesses who had made deals with the police in exchange for their testimony (State v. Farrow 1978: 808). A New Hampshire newspaper, the *Concord Monitor*, had praised the court-appointed legal defense provided to Farrow but had criticized the deals made by police wherein criminal charges were traded for testimony (Concord Monitor, December 21, 1976). Souter responded by
writing a guest column in the newspaper in which he praised the legal defense but emphasized that prosecutors also were obligated to pursue justice by conducting “an adequate investigation into the facts and an adequate presentation of the evidence of guilt.” (See Yarbrough 2005: 30) Souter praised the work of the Concord police and prosecutors and concluded that justice had been served in the case of *State of New Hampshire v. Farrow*. Souter concluded the column by stating that he supported the prosecuting attorney’s decision to withdraw a criminal charge in exchange for witness testimony in the murder trial. This guest column highlighted what would become a trend for Souter in supporting police officers and prosecutors throughout his judicial career and served as evidence of his conservatism as a state judicial officer in criminal procedure cases (Concord Monitor, December 28, 1976).

As Attorney General, Souter also displayed conservatism in his support for the use of the death penalty in New Hampshire (Yarbrough 2005: 36). After the U. S. Supreme Court ruled in 1976 that the use of capital punishment by the states was legal and did not violate the Eighth Amendment’s right against cruel and unusual punishment, Souter testified before the New Hampshire house of representatives and argued that a lifetime sentence was not sufficient punishment for the capital crime of first-degree murder (Id.). Souter based his death penalty views largely upon the argument that capital punishment served as a deterrent. (Union Leader, April 14, 1977). Eventually, New Hampshire did reinstate the use of the death penalty but the debates over the legislation in the state house were a moot point because the state has not executed a criminal defendant since 1939 (Yarbrough 2005: 36).
STATE SUPERIOR COURT JUDGE

As Associate justice on the New Hampshire superior court from 1978-1983, Souter was renowned for being tough in the sentencing of defendants (Yarbrough 2005: 55). This was exemplified in a 1981 case where he rejected attempts by defense lawyers and prosecutors to reduce a sentence for felony conviction through plea bargaining. The plea bargain had involved granting only probation for a female defendant after she had stolen a .357 Magnum revolver. Souter scolded the prosecutors for accepting the plea bargain and ordered the defendant to serve nine months in prison (Garrow 1994: 41).

Although Souter was a tough trial judge, he consistently respected precedents that expanded the rights of criminal suspects and even showed sympathy at times for defendants (Marcus 1990: A6). For example, he once refused a plea bargain accepted by a defendant over the objections of defense counsel to serve two years in prison for stealing one dollar. (Yarbrough 2005: 54-55). Souter stated that … “it was cruel and inhumane to sentence someone to two years for stealing a dollar (Yarbrough 2005: 55).” Hence, Souter was known for treating everyone in the courtroom with respect, including the defendants.

Although Souter was viewed as conservative because he supported police and prosecutors in criminal cases, he was not averse to suppressing evidence that was illegally seized or confessions that were coerced from suspects (Marcus 1990: A6). Colleagues emphasized that Souter did not blindly support the state in such cases. Instead, he was most interested in producing a fair trial. In one particular case involving a career burglar who possessed a warehouse of stolen goods in his home, Souter ruled much of the evidence inadmissible because police had gone beyond the orders in the
search warrant in collecting evidence. Souter was also outraged that police had not only
gone beyond the search warrant but had opened up the defendant’s home to the media
which resulted in a nightly newscast praising the police department for combating crime
in the area (Yarbrough 2005: 55-56). In another case involving charges of arson and
second-degree murder against a female defendant, Souter ruled some evidence
inadmissible when it was revealed that police had tampered with the evidence and had
also coerced a confession from the defendant by threatening to take away the defendant’s
child if she refused to cooperate with police (Id).

STATE SUPREME COURT JUSTICE

Souter served as an Associate Justice of the New Hampshire Supreme Court from
1983-1990 (Greenhouse 1990: A19). As a state supreme court justice, he respected
precedent and interpreted the language of legal provisions and the intent of those who
framed the laws in a technical manner (Jordan 1992: 530; Marcus 1990: A6). While
serving on the New Hampshire Supreme Court, Souter’s opinions focused mainly upon
interpretations of state law in such areas as negligence, family law, and criminal
procedure (Greenhouse 1990: A1). In the area of criminal justice, Souter was generally
known as a conservative judge who rarely voted in favor of criminal defendants’ rights
(Devroy 1990: A13). In fact, Souter voted on behalf of criminal defendants’ rights only
nine times out of eighty-two votes, roughly 11% of the time (Yarbrough 2005: 92).
Although Souter was largely viewed a traditional conservative, he eventually developed a
flexible interpretation of constitutional law. Hence, Souter came to be respected by
Democrats in New Hampshire because, although he had a reputation as a conservative
judge, he always ruled in the interests of promoting a fair trial for defendants (Yarbrough 2005: 93).

Justice Souter participated in a number of important cases on the state supreme court involving criminal appeals. In the case of *State v. Koppel (1985)* involving sobriety checkpoints, Souter wrote a dissenting opinion in which a majority of the court had struck down such checkpoints as a violation of the Fourth Amendment’s unreasonable search and seizure clause (State v. Koppel 1985: 977; Garrow 1994: 43). Scholars have speculated that Souter was anticipating a conservative trend on the U. S. Supreme Court at this time because the Court upheld sobriety checkpoints five years later in *Michigan v. Sitz (1990)* (Michigan v. Sitz 1990: 444; Yarbrough 2005: 86). Souter also supported a state law that allowed police to employ a mechanical device that was able to detect information from a telephone. In writing for the majority, Souter maintained that the use of the device by police did not constitute a search within the meaning of the Fourth Amendment (State v. Valenzuela 1987: 1252, 1269-70; Smith v. Maryland 1979: 735).

Souter apparently was disinclined to vote in favor of criminal defendants regarding Miranda rights during his years on the state high court. In *State v. Denney (1987)*, 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 because police had not warned the defendant that such a refusal could be used against him at trial (State v. Denney 1987: 1242, 1246; Jordan 1992: 512). Souter argued that the arresting officers had issued the Miranda warnings to the defendant and the defendant should have understood that the warnings implied that the refusal to submit to the test could be used against him in court. Interestingly, Souter had prevailed in an earlier case involving a
prosecutor using a refusal to submit to a blood alcohol as evidence of guilt. Souter maintained that the Fifth Amendment privilege against self-incrimination applied only to testimonial evidence, not physical evidence (Id.). Souter continued a trend of conservative voting in Miranda cases when he allowed a defiant statement made by a defendant to be introduced at trial (State v. Coppola 1987: 1236). In Coppola v. State (1987), Vincent Coppola had boasted to police that they couldn’t get him to confess to a rape of an elderly woman. In writing the opinion for the unanimous court, Souter contended that this statement by Coppola was not within the protection of the Fifth Amendment’s right to remain silent and it could be admitted by prosecutors as evidence of guilt (State v. Coppola 1987: 1236-1237).

An example of Souter’s respect for precedent was evident in the case of State of New Hampshire v. Colbath (1988). Writing for a unanimous court, Souter held that a trial judge should have admitted evidence concerning the public behavior of the rape victim prior to an alleged sexual assault because such behavior was relevant to the issue of consent (State v. Colbath 1988: 1212). Souter noted the existence of evidence that the victim had engaged in public behavior where she directed “sexually provocative attention” toward a number of men in a tavern, including the defendant (Id.). In addition, Souter cited case precedent from a state ruling in 1981 allowing defendants the right to confront accusers, despite a rape-shield law that appeared to prohibit the admission of prior sexual behavior between the victim and other persons outside of the defendant (State v. Howard 1981: 457). Although the sexual history of a rape victim generally was to be withheld from a jury, Souter ruled that the rape shield law was not absolute based upon the 1981 precedent (Greenhouse 1990: A19).
The *Coppola* and *Colbath* decisions became an issue when Souter was nominated to the First Circuit Court of Appeals by President George H. W. Bush for a brief stint in 1990. In particular, Senator Edward M. Kennedy expressed concerns about Souter’s opinions in *Coppola* and *Colbath* during Senate confirmation hearings. Despite Senator Kennedy’s concerns, Souter was easily confirmed to the lower federal court seat by a unanimous vote in the U. S. Senate (Dowd 1990: A19). After serving only a few months on the First Circuit Court of Appeals and participating in only one decision (*U. S. v. Waldeck* 1990: 555), 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 (Broder and Dewar 1990: A1).

**JUSTICE DAVID SOUTER AND CRIMINAL JUSTICE CASES**

**Policy Impact of a Freshman Justice**

During Souter’s first year on the U. S. Supreme Court, he immediately had an impact in replacing Justice William Brennan, particularly in the area of criminal justice (Smith 1992: 40). During his first term, Souter had provided the decisive vote in seven different 5-4 decisions where the Court established new “conservative” precedents that limited the rights of criminal defendants. If these cases had been argued the previous term, Justice Brennan most likely would have voted in favor of the rights of the criminal suspects. Hence, Souter’s impact in one year on the Court served to have broad policy implications in the area of criminal justice (Johnson and Souter 1992: 239). In *Arizona v. Fulminante* (1991), Souter provided the pivotal vote to allow coerced confessions as harmless error and, in *County of Riverside v. McLaughlin* (1991), Souter also provided
the swing vote to allow persons placed under arrest to be held for up to two days before a magistrate was required to determine probable cause (Smith 1992: 40-41; Arizona v. Fulminante 1991: 279; County of Riverside v. McLaughlin 1991: 44). In regard to prisoners’ rights, Souter voted with the conservative bloc to make it more difficult for prisoners to challenge their conditions of confinement and also to provide states the power to mandate life sentences without the possibility of parole for drug convictions (Wilson v. Seiter 1991: 294; Harmelin v. Michigan 1991: 957). Finally, Souter helped to decide three cases against the rights of criminal defendants when he voted that no error had occurred when judges failed to question and instruct jurors properly during criminal trials (Mu’min v. Virginia 1991: 415; Peretz v. U. S. 1991: 923; and Schad v. Arizona 1991: 624).

It should be noted that Souter did break with the conservative bloc on a few occasions such as his opinion for the Court in Yates v. Evatt (1991) which held that the harmless error doctrine did not extend to jury instructions. Hence, he was able to separate himself at times from the conservative bloc and began to establish a streak of independence, even during his first term (Yates v. Evatt 1991: 393).

Overall, while Souter proved to be a decisive vote for the conservative members, he did not author any “important” opinions during his first year on the Court (Johnson and Smith 1992: 241). In fact, he authored an extremely low number of opinions relative to the other justices on the Court (Jordan 1992: 522). Souter wrote only eight majority opinions and two concurring and dissenting opinions each for a total of twelve during the entire 1990-91 term (Smith 1992: 21). No other justice authored fewer than twenty-one during Souter’s first year (Johnson and Smith 1992: 241). In addition, Souter’s first year
saw the Court undergo severe gridlock at the end of the term. A former clerk attributed this to a “breakdown in one chamber” and speculated that Souter’s insistence upon composing his own opinions rather than relying upon his law clerks to prepare drafts and his refusal to use a word-processor had caused the backlog (Newsweek, May 27, 1991: 4). In fact, Souter had described the workload as overwhelming during his first year on the Court and conveyed to The Boston Globe that he felt as if he had “…walk[ed] through a tidal wave” (Yarborough 2005: 160).

**Search and seizure cases**

In search and seizure cases, Souter generally has voted with the government but more recently has exhibited a trend toward defending the rights of criminal defendants. An examination of Souter’s opinions as well as his voting behavior and dissenting opinions demonstrates a conservative trend but also reveals a willingness to separate from the conservative bloc and rely upon a flexible and pragmatic approach to constitutional interpretation. In short, unlike Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas, Souter has been prone to place limits on the amount of discretion given to government officials in conducting searches and seizing evidence.

Souter’s first majority opinion in a search and seizure case was not assigned until after he had served over a decade on the Court, but it would prove to be one of his most controversial (Atwater v. City of Lago Vista 2001: 318). In writing for a five person majority in Atwater v. City of Lago Vista (2001), Souter led a majority comprised of conservative justices, namely Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy, in ruling that the Fourth Amendment does not prohibit a warrantless arrest for a
misdemeanor seat belt violation (Id.). The controversy in the Atwater case involved the arrest of a woman, Gail Atwater, by police in Lago Vista, Texas for failing to secure her two small children with seat belts in the front seat of her pickup truck. A statute in Texas prohibited passengers, particularly small children, from riding in the front seat without seat belts. While the statute authorized police to arrest Atwater and charge her with a misdemeanor, police have discretion to issue only a citation, instead of an arrest (Atwater v. City of Lago Vista 2001: 323).

Atwater’s legal counsel argued that, when the Constitution was drafted, authorities prohibited warrantless arrests under common-law for misdemeanor offenses, except where someone had disturbed the peace or committed some type of violent act (Atwater v. City of Lago Vista 2001: 326). Justice Souter’s majority opinion for the Court conceded that, although there was some substance to the argument presented by Atwater’s counsel, ultimately it failed (Atwater v. City of Lago Vista 2001: 327). Souter countered that a close examination of English common law at the drafting of the Constitution revealed that police were authorized to arrest persons for nightwalking and negligent carriage driving without a warrant (Atwater v. City of Lago Vista 2001: 333). In short, the historical evidence provided by common law rules and the subsequent development of American law did not support Atwater’s position. In sum, Souter concluded for the Court that an officer may arrest an individual without violating the Fourth Amendment if there is “probable cause to believe that an individual has committed even a very minor criminal offense in the officer's presence (Atwater v. City of Lago Vista 2001: 354).”
Two years later, in *U. S. v. Banks (2003)*, Justice Souter wrote a unanimous opinion in a Fourth Amendment case concerning whether police officers may execute a search warrant by knocking on a suspect’s door and waiting 15-20 seconds and then entering the home by way of force (*U. S. v. Banks 2003*: 31). In this case, North Las Vegas police officers and FBI agents obtained a warrant to search the apartment of Lashawn Lowell Banks for cocaine. After knocking on Banks’ apartment door loudly and shouting “police search warrant,” the law enforcement officials waited 15-20 and then broke the door down with a battering ram. Banks contended that he was in the shower and did not hear the knock on the door or the officers announce their presence with the search warrant. Banks’ legal counsel sought to suppress the crack cocaine, weapons, and other evidence of drug dealing secured by police officials at Banks’ residence (*U. S. v. Banks 2003*: 33).

Souter’s unanimous opinion held that the forcible entry by law enforcement after knocking and waiting 15-20 seconds was not a violation of the Fourth Amendment. Souter’s opinion concluded that it was reasonable for the law enforcement officials to assume that 15-20 seconds was enough time for a suspect to destroy evidence. The search and seizure of evidence by police officers must be analyzed in light of exigent circumstances. If police officers have reasonable suspicion to believe that exigent circumstances exist such as the possible destruction of evidence, then authorities are allowed to enter a residence forcibly without violating the search and seizure clause of the Fourth Amendment (*U. S. v. Banks 2003*: 37).

Finally, and most recently, Justice Souter’s third majority opinion in the area of search and seizure highlighted his lack of consistency in aligning with either the
conservative or liberal blocs on the Court. In *Georgia v. Randolph* (2006), the justices ruled on the constitutionality of the “co-occupant consent rule,” or whether police could search a residence when one occupant consented to a search while another refused to consent. When police officers arrived at the home of Scott and Janet Randolph in Americus, Georgia in response to a domestic dispute, Janet Randolph complained to police that her husband, Scott, was a cocaine user and also indicated that he had drugs inside the home. Scott Randolph refused to provide consent to allow the police to search for evidence of drug use, but Janet Randolph did consent and police confiscated a powdery substance believed to be cocaine. The cocaine evidence was turned over to prosecutors by police and Scott Randolph moved to suppress the drug evidence based upon a violation of his Fourth Amendment rights under the U. S. Constitution (*Georgia v. Randolph* 2006: __).

In *Randolph*, Justice Souter wrote for a five person majority comprised of Justices Stevens, Ginsburg, Breyer, and Kennedy. Souter’s majority opinion held that, even if a co-occupant consented to the search by police, the other co-occupant who was physically present at the home could refuse to consent to a search. Any subsequent search and seizure of evidence by police must be considered unreasonable without a warrant (*Georgia v. Randolph* 2006: __). The Court’s ruling in *Georgia v. Randolph* (2006) appeared to contradict precedent established by the Court in *Illinois v. Rodriguez* (1990) and *U. S. v. Matlock* (1974) where the Court 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 justified the decision in *Randolph* by maintaining that the co-occupants claiming a violation of the Fourth Amendment in *Rodriguez* and *Matlock* were

As with Souter’s authorship of Court opinions, his voting record and concurring and dissenting opinions also have illustrated his flexibility and independence in his judicial decision making as well as a recent trend toward favoring criminal defendants. For example, during his first term, Souter joined a conservative majority in *Florida v. Bostick* (1991) in rejecting the argument that the questioning of bus passengers by police was a search and, therefore, a violation of the Fourth Amendment (Florida v. Bostick 1991: 429). In 1995, Souter also voted conservatively to extend the “good faith” exception to the exclusionary rule in cases where a computer error caused an illegal search and seizure of evidence, although he expressed concern in a separate concurrence that it might be necessary to apply the exclusionary rule as a deterrent against other governmental employees, not simply police officers, to keep false arrests and the illegal seizures of evidence to a minimum (Arizona v. Evans 1995: 1, 18). However, more recently, Souter dissented against a conservative majority in *U. S. v. Drayton* (2002) where the Court had decided a case similar to *Bostick* involving the pat down of bus passengers by police. Souter argued in his dissenting opinion that the pat down by police was not a consensual exercise and the passengers were given every indication by police that they did not have a free choice to refuse the search (U. S. v. Drayton 2002: 212-13). In 2005, Souter also dissented from the conservative majority in a search and seizure case where a drug-sniffing police dog was used as the constitutional basis to search the trunk of an automobile (Illinois v. Caballes 2005: 410).
In other areas of search and seizure, Souter also appears to be employing a flexible approach in his decision making. For example, even though Souter endorsed sobriety checkpoints as a state supreme court justice, he voted to strike down a police roadblock designed to arrest drug traffickers in *Indianapolis v. Edmond (2000)* and also joined a concurring/dissenting opinion written by Justice Stevens in *Illinois v. Lidster (2004)* where the Court had ruled conservatively that police could stop motorists for the purpose of obtaining information about a past crime committed in the community (Indianapolis v. Edmond 2000: 32; Illinois v. Lidster 2004: 426). Stevens and Souter maintained that local judges would have been more capable of deciding the constitutionality of the roadblocks based upon the local conditions and practices of a community. Finally, Souter voted against the conservative bloc in drug testing cases involving high school students participating in athletics and pregnant women suspected of drug use (Veronica v. Acton 1995: 646 and Ferguson v. City of Charleston 2001: 67).

While Souter has remained moderately conservative in the area of search and seizure, he has deviated from the conservative bloc more frequently in recent years. In short, Souter’s flexibility in search and seizure cases has made him one of the more unpredictable justices on the Court.

**The privilege against self-incrimination and Miranda warnings**

*In Withrow v. Williams (1993)*, Justice Souter wrote his first opinion involving Miranda warnings, specifically the Fifth Amendment’s privilege against self-incrimination, or right to remain silent (Withrow v. Williams 1993: 680). Souter’s opinion in *Withrow* also dealt with the question of whether to extend a conservative
precedent from the Burger Court era established in Stone v. Powell (1976). In Stone, the Burger Court refused to allow state prisoners to challenge search and seizure claims in federal habeas proceedings if the defendant had a fair chance during trial and on appeal to raise such issues. The Court concluded that any attempt during federal proceedings to exclude evidence based upon an illegal search and seizure would not serve to enhance the intended purpose of the exclusionary rule, which was designed to prevent misconduct by police officers (Stone v. Powell 1976: 465).

In Withrow, Souter wrote for a unanimous Court in deciding whether to extend the Stone precedent to state convictions based upon confessions that may have been obtained in violation of the Miranda warnings. Souter wrote in his opinion that the defendant did have a right to federal habeas corpus review and his incriminating statements should have been thrown out of court because his right to remain silent under the Fifth Amendment had been violated (Withrow v. Williams 1993: 680, 686). This case involved the questioning of Robert Allen Williams by the Michigan police about a double murder case (Withrow v. Williams 1993: 683). Williams implicated himself by admitting that he had furnished the weapon for the shooter. Police officers had not issued a Miranda warning to Williams and had threatened to “lock him up’ if he refused to talk (Id.). The trial court had refused to exclude his statements and Williams was convicted of first degree murder (Withrow v. Williams 1993: 684). Prosecutors had argued that Williams’ claim of a violation of Miranda rights was not reviewable in federal court based upon the precedent established in Stone v. Powell. However, Souter reasoned that Miranda warnings were a fundamental right during the trial stage of the criminal justice process that prevented the use of unreliable confessions at trial, while claims to exclude evidence
based upon an illegal search and seizure were not a fundamental trial right (Withrow v. Williams 1993: 688-695).

In *U. S. v. Balsys (1998)*, Souter issued another opinion for the Court on the privilege against self-incrimination in a case involving the federal government’s investigation of the wartime activities of a resident alien during World War II (U. S. v. Balsys 1998: 666). Aloyzas Balsys had claimed a Fifth Amendment privilege against self-incrimination because he was afraid of being prosecuted by a foreign nation. While Balsys did not fear prosecution by the United States, he was afraid that his statements about his wartime activities could subject him to prosecution in Lithuania, Germany, or Israel. In writing for a seven person majority composed of Chief Justice Rehnquist and Justices Scalia, Thomas, O’Connor, Stevens, and Kennedy, Souter held that the Balsys’ refusal to provide information in the U. S. because he feared prosecution by a foreign nation was beyond the scope of the Fifth Amendment’s privilege against self-incrimination clause. Souter asserted that there was no precedent to support the idea that the Fifth Amendment might apply beyond criminal proceedings in the United States (U. S. v. Balsys 1998: 669).

In 2000, Souter voted with a seven person majority to reaffirm the basic principles of *Miranda v. Arizona (1966)* by striking down the Omnibus Crime Control Act of 1968 that had threatened to overturn the Court’s decision in *Miranda* (Miranda v. Arizona 1966: 436; Dickerson v. United States 2000: 428). Four years later, Souter continued to demonstrate support for the Miranda precedent and the privilege against self-incrimination when he wrote for a liberal 5-4 majority in *Missouri v. Seibert (2004)*. Here, Souter and the Court’s majority held that a confession to murder was inadmissible
because police used a two-step tactic where officers would secure a confession from a suspect without Miranda warnings and then Miranda warnings would be issued to gain the confession a second time. Souter wrote that the “midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement (Missouri v. Seibert 2004: 604).” Souter furthered maintained that the purpose of police tactic in question was “to get a confession the suspect would not make if he understood his rights at the outset (Missouri v. Seibert 2004: 613).” Souter argued that Miranda warnings cannot function effectively in such a scenario and it deprives the defendant of understanding his rights and the ramifications of waiving such freedoms (Id.).

Finally, Souter expressed further support for Miranda and the privilege against self-incrimination when he dissented from the Court majority in U. S. v. Patane (2004). In Patane, the Court upheld the conviction of a defendant for illegal firearms possession, even though the firearm was found by police as a result of incriminating statements made without the issuance of a Miranda warning (U. S. v. Patane 2004: 630). Souter’s dissenting opinion, joined by Justices Stevens and Ginsburg, accused the majority of “closing their eyes to the consequences of giving an evidentiary advantage to those who ignore Miranda (U. S. v. Patane 2004: 630).” Moreover, he added that the decision would provide an incentive for interrogators to ignore Miranda.

“Fair Trial” Rights

During Souter’s second term on the Court (1991-92), he had begun to illustrate a liberal trend in criminal justice cases. Souter’s first significant opinion in the area of
Sixth Amendment trial rights involved a 5-4 decision overturning the conviction of a defendant who had been denied a right to a speedy trial. In the case of *Doggett v. United States (1992)*, Marc Doggett had been indicted on federal drug charges in 1980 but he left the United States for Panama before federal agents could arrest him. After leaving Panama for Columbia, Doggett returned to the United States in 1982 where he lived for six years before the U. S. Marshal Service discovered him when a credit check revealed an outstanding warrant for his arrest (*Doggett v. United States 1992: 647*).

In *Doggett*, the five- person majority and the four dissenters divided along ideological lines. Souter and Justices White, Stevens, Kennedy, and Blackmun formed a liberal bloc ruling in favor of criminal defendants’ rights, while Chief Justice Rehnquist, and Justices O’Connor, Scalia, and Thomas established a conservative bloc in favor of the U. S. government’s position (Id.).

In Souter’s majority opinion, he concluded that the eight year lag between the indictment and arrest was sufficient to raise the Sixth Amendment question (*Doggett v. United States 1992: 652*). Souter asserted that the U. S. government was negligent in pursuing Doggett and, in fact, Doggett did not know of his indictment in 1980 and the negligent delay between indictment and arrest hindered Doggett in preparing his legal defense (*Doggett v. United States 1992: 653*). Souter noted that a lengthy delay in a trial can cause a number of unidentifiable problems for a defendant in his attempt to secure a fair trial and it is irrelevant that Doggett failed to cite specifics concerning how his trial would be prejudiced by the excessive delay. In short, the delay itself caused a presumption of prejudice against the defendant (*Doggett v. United States 1992: 654*).
In a dissenting opinion, Justice Sandra Day O’Connor argued that Doggett should have been required to show that specific prejudice had occurred because of the delay (Doggett v. United States 1992: 658-59). O’Connor maintained that the lag between indictment and trial did not limit Doggett’s freedom in any way. In a separate dissent joined by Chief Justice Rehnquist and Justice Scalia, Justice Clarence Thomas argued that the purpose of Sixth Amendment’s right to speedy trial was to prevent a person from being unnecessarily incarcerated for a long period of time and to avoid the anxiety of disrupting a person’s life by having an unresolved criminal charge hanging over a defendant for an extended period of time. In addition, a lengthy period of time between indictment and a trial may cause problems for the defense because evidence might be lost, the memory of witnesses may fade, and persons associated with the case could disappear or die. Thomas concluded that Doggett could not claim that any of these issues related to his right to a speedy trial. In short, Doggett suffered none of the harms that this freedom was intended to protect (Doggett v. United States 1992: 659; 661-71).

Ten years later, Souter wrote for the majority in a right to counsel case that involved the interpretation of a federal rule. Federal Rule of Criminal Procedure 11, also referred to as Rule 11, outlines the process that must be followed by a judge in ensuring that a guilty plea is understood and voluntarily accepted by a defendant. If the judge deviates from this procedure, a guilty plea still may be upheld if the actions by the judge did not violate any substantial rights of the defendant. This type of error by the court is commonly known as “harmless error.” In the case of U. S. v. Vonn (2002), Alphonso Vonn had been charged with armed robbery and informed by a magistrate that he had a right to counsel (U. S. v. Vonn 2002: 55). However, at later stages of the criminal
proceedings where Vonn entered a plea of guilty, the court informed him of his basic rights but failed to indicate that he had a right to counsel. Souter’s opinion for the unanimous Court held that Vonn could not benefit from the error by the court because he had raised the issue of Rule 11 after the trial court phase, hence, the burden of proving that the error affected substantial rights had shifted from the government to the defendant. Under federal rules, if a defendant is negligent in raising a Rule 11 objection, then the burden shifts to the defendant who must then establish that the error was plain (U. S. v. Vonn 2002: 73-74).

Two years later, Souter relied upon the precedent that he had established in Vonn in a similar case involving the application of Rule 11. In U. S. v. Dominguez Benitez (2004), Souter again wrote for a unanimous Court in a case involving a defendant who had pled guilty to conspiracy (U. S. v. Dominguez Benitez 2004: 74). When the court rejected the plea offered by the government because Dominguez had three prior convictions, he was sentenced to a mandatory 10 year prison term and instructed that he could not withdraw the guilty plea. Dominguez maintained that he was not informed by the court that he was prevented from withdrawing the plea and raised a Rule 11 claim. Relying upon precedent established in the Vonn case, Souter asserted in the Court’s opinion that, because the Rule 11 claim was not filed in a timely fashion, the defendant encountered the burden of proving a plain error by the court (U. S. v. Dominguez Benitez 2002: 85).

In Rompilla v. Beard (2005), Justice Souter’s majority opinion continued a trend by the Court since 2000 of ruling in favor of defendants who had received inadequate representation by legal counsel (Rompilla v. Beard 2005: 374). Souter’s majority opinion
focused upon the right to counsel for Ronald Rompilla, a criminal defendant who had been issued a death sentence for murder based upon a number of aggravating circumstances. One of the aggravating circumstances presented by prosecutors to justify a sentence of death was the fact that Rompilla had a history of felony convictions (Rompilla v. Beard 2005: 378). Souter held for the five person majority that Rompilla’s defense attorneys should have introduced evidence that he had a limited mental capacity, was a victim of child abuse, and was diagnosed with fetal alcohol syndrome and schizophrenia. Such evidence was readily available to his legal counsel and had been introduced when Rompilla was convicted of felony rape almost a decade and a half earlier (Rompilla v. Beard 2005: 390-91). Hence, Souter concluded that Rompilla had received inadequate counsel based upon standards set by the American Bar Association (ABA). In overturning the death sentence for Rompilla, Souter quoted 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 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 (Rompilla v. Beard 2005: 387)."

In short, Rompilla’s legal counsel should have provided evidence from his prior rape conviction as mitigating factors in the capital sentencing phase. Because of the
Supreme Court’s decision in Rompilla, the state of Pennsylvania was required to provide Rompilla with a new capital sentencing hearing or a life sentence for the murder conviction (Rompilla v. Beard 2005: 393).

Justice Souter also wrote a majority opinion in 2005 concerning the Sixth Amendment and the issue of racial discrimination. Relying upon precedent from *Batson v. Kentucky* where the Court ruled that prosecutors could not issue peremptory challenges in a racially discriminatory manner, Souter wrote the opinion in *Miller-El v. Dretke* (2005) where the Court held by a 6-3 vote that the Dallas County District’s Attorney’s Office had discriminated by race in issuing peremptory challenges of jurors in a capital murder case (Batson v. Kentucky 1986: 79; Miller-El v. Dretke 2005: 231). Souter led a majority of six justices in holding that the Dallas D. A. had violated the Equal Protection Clause of the Fourteenth Amendment and Miller’s right to fair trial by an impartial jury found in the Sixth Amendment. Souter wrote that “…prosecutors used peremptory strikes to exclude 91% of the eligible black venire panelists, a disparity unlikely to have been produced by happenstance (Miller-El v. Dretke 2005: 241).” In *Dretke*, Souter clearly aligned himself with the liberal bloc of justices concerned about the fair trial rights of a defendant amidst serious concerns about the racial composition of a jury.

**Sentencing**

At the final stage of the criminal justice process, Souter has shown a penchant for siding with criminal defendants during the sentencing phase. Souter’s majority opinions in sentencing cases have involved technical applications of federal law to disputes involving the authority of the federal district courts, the sentencing of juveniles for
serious offenses, carjacking, and firearm possession. In each of these four opinions, Souter has provided support for the rights of criminal defendants.

In *Wade v. U. S. (1992)*, Souter wrote for a unanimous Court in holding that the district courts can reduce a sentence beyond the minimum sentence established by the federal government through the U. S. Sentencing Commission but only if the federal government filed a motion requesting such a reduction (*Wade v. U. S. 1992*: 181). During this same term, Souter also wrote for the Court in *U. S. v. R. L. C. (1992)* which involved a juvenile sentenced to three years detention for involuntary manslaughter where the law would appear to have sentenced an adult to a shorter prison sentence for the same act. Souter held that, after applying federal sentencing guidelines, the federal law prohibited the sentencing of a juvenile to a longer sentence than an adult (*U. S. v. R. L. C. 1992*: 291).

Souter again ruled in favor of a defendant during the sentencing phase in *Jones v. U. S. (1999)* which concerned a federal law that provided serious penalties for the crime of carjacking. The federal law increased the number of years in prison based upon the seriousness of the act. For example, the sentence for carjacking would be enhanced if bodily injury occurred to a victim and enhanced further if the death of a victim resulted from the carjacking. The U. S. district court sentenced Nathaniel Jones to 25 years in prison based upon the fact that serious bodily injury had occurred to a victim. However, the district court did not note serious bodily injury in the indictment nor did the district court prove serious bodily injury before the jury. Souter’s opinion for the 6-3 majority held that the district court must introduce separate elements that affect the sentencing
within the indictment, the element must be proven beyond a reasonable doubt, and it must be submitted to the jury for a verdict (Jones v. U. S. 1999: 227).

During the 2005 term, Souter issued two majority opinions in favor of defendants raising claims during their sentencing stages. In one majority opinion, Souter argued that a defendant could challenge his sentencing under U. S. Sentencing Commission Guidelines if a prior state conviction used to enhance his federal sentence had been vacated (Johnson v. U. S., 2005: 295). In another majority opinion, Souter held that a sentencing court could not examine police reports or other information to determine whether a prior guilty plea constituted a generic burglary for the purpose of mandating a 15-year minimum sentence for possessing a firearm after three prior convictions (Shepard v. U. S., 2005: 13).

Finally, in one of the more publicized cases involving sentencing in recent times, Souter voted with the majority in Kimbrough v. U. S. (2007). Here, the Court ruled 7-2 that federal judges are permitted to lessen the punishment for crack cocaine crimes below the guidelines established by the U. S. Sentencing Commission. The Court reasoned that this decision will allow judges to retain flexibility in drug cases, particularly where penalties are viewed as too harsh because of the significant difference between sentences for crimes involving crack cocaine as opposed to powder cocaine (Kimbrough v. U. S. 2007: ___).

**EIGHTH AMENDMENT**

**Death penalty cases**
As noted above, Souter has been a staunch supporter of the death penalty from his days as Attorney General and state judge in New Hampshire (Yarbrough, 2005: 36). The first significant case for Souter on the U. S. Supreme Court involving the death penalty was *Payne v. Tennessee* (1991) (Payne v. Tennessee 1991: 808). In *Payne*, Souter joined a conservative majority in a 6-3 vote that upheld the admission of victim impact statements during the sentencing stage of a death penalty case. Souter authored a concurring opinion in *Payne* where he argued that withholding victim impact statements would be unfair and provide an advantage to the defendant. Souter wrote: “Indeed, 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.” (Payne v. Tennessee 1991: 839).

Souter, however, did depart from the majority in his concurrence when he expressed concern that the *Payne* decision had overturned two precedents established only a few years earlier (Booth v. Maryland 1987: 496 ; South Carolina v. Gathers 1989: 805). Souter discussed the “fundamental importance” of stare decisis to the rule of law in his concurring opinion whereas Rehnquist’s majority opinion and Scalia’s separate concurrence gave far less weight to the importance of precedent (Payne v. Tennessee 1991: 842). Hence, even in his early years on the Court, Souter began to demonstrate a streak of independence from his colleagues that would grow even stronger during his later years on the Court (Yarbrough, 2005: 162).

Souter’s initial opinion for the Court in the area of the death penalty occurred in *Sochor v. Florida* (Sochor v. Florida 1992: 527). *Sochor* involved a death sentence recommended by a jury that was instructed to decide upon four aggravating factors,
including such vague factors as “heinousness” and “coldness (Sochor v. Florida 1992: 529-30).” While the jury recommendation did not specify which aggravating factors existed, the judge found all of the aggravating factors to have existed and found no mitigating factors in issuing the death sentence. Souter’s complex opinion for the Court held that the U. S. Supreme Court did not have the jurisdiction to rule on the state of Florida’s “heinous” factor (Sochor v. Florida 1992: 534). But, the justices did find 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 (Sochor v. Florida 1992: 540). Souter’s opinion for the Court resulted in a unanimous ruling on the “heinousness” factor, while the ruling on the “coldness” factor was extremely divided in a non-ideological manner.

In Kyles v. Whitley (514 U. S. 419, 1995), Souter wrote for a five person majority in ordering a new trial for a defendant who had been sentenced to death in Louisiana for first-degree murder (Kyles v. Whitley 1995: 419). Souter’s opinion, joined by Justices Ginsburg, Breyer, Stevens, and O’Connor, concluded that the defendant was entitled to a new trial after it was revealed that the state of Louisiana had withheld evidence favorable to the defense that may have produced a different result (Kyles v. Whitley 1995: 454).

Souter’s most recent majority opinion in a capital punishment case was written in Kelly v. South Carolina (2002). Here, Souter wrote for a six-person majority holding that a defendant was entitled to have the judge or legal counsel instruct the jury that he would be ineligible for parole if he received a life sentence. Instead of a life sentence without the possibility of parole, the defendant was given a death sentence by the jury in the
absence of such jury instruction. Souter argued in his opinion that due process required the jurors to be informed through jury instructions or through arguments presented by legal counsel (Kelly v. South Carolina 2002: 236).

In the more recent and publicized cases involving the death penalty, Souter has sided with the liberal bloc on the Court. In Atkins v. Virginia (2002), Souter voted with a liberal majority to prohibit the use of death penalty for the mentally challenged and he also voted with a liberal majority in Roper v. Simmons (2005) to raise the minimum age for executions from sixteen to eighteen (Atkins v. Virginia 2002: 304; Roper v. Simmons 2005: 551). As in the Kelly decision, Souter opposed the conservative bloc of Chief Justice Rehnquist and Justices Scalia and Thomas as the Court overturned fairly recent precedents because of a growing national trend against such executions (Washington Post Dec. 23, 2007: B06).

It should also be noted that Souter wrote for a liberal majority in Rompilla v. Beard (2005) where he held that a defendant had received inadequate legal counsel in a death penalty case (see “Fair Trial” Rights section). The Rompilla case dealt more directly with the Sixth Amendment right to counsel, however, it also involved the death penalty issue.

Even though Souter has traditionally been supportive of the death penalty since his early years as a state judicial officer, he has established a liberal voting record in this area. 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 and defendants under the age of eighteen (Yarbrough,
2005: p. 238). With the exception of his initial vote on the Court in *Payne*, Souter has voted in favor of defendants in nearly every case involving the death penalty.

**Prisoners’ rights and cruel and unusual punishment**

Souter’s opinions in terms of prisoners’ rights and the Eighth Amendment also demonstrate an independent trend, although Souter has written only four opinions in this area of law. Early in Souter’s career on the Court, he wrote for a conservative majority in *Rowland v. California Men’s Colony* (1993). Here, 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 (*Rowland v. California Men’s Colony* 1993: 194). This case dealt with a representative association known as the California Men’s Colony which served as an advisory council for the warden of a prison. The organization, comprised of prisoners, tried to file an in forma pauperis petition in federal court claiming that the California Department of Corrections violated its Eighth Amendment right against cruel and unusual punishment. However, Souter held that only individual persons as defined by the plain meaning of a federal law could file suit in federal court as indigents and the organization itself did not constitute a person under federal law (*Rowland v. California Men’s Colony* 1993: 211).

Souter’s next opinion on the topic of prisoners’ rights was significant as it has become controlling precedent in the area of inmate on inmate rape as well as sexual misconduct by prison officials against inmates. In *Farmer v. Brennan* (1994), Souter wrote a unanimous opinion for the Court where a two part test was established to determine a violation of the Eighth Amendment’s cruel and unusual punishment clause.
(Farmer v. Brennan 1994: 825). The first part of the test required that a prisoner objectively demonstrate that an injury was sufficiently serious and the second part required a showing that prison officials were sufficiently culpable and deliberately indifferent to the safety of an inmate. If the two part test was satisfied, then prison officials could be held liable in civil court. The circumstances surrounding this case involved a transvestite prisoner who was transferred to a more violent prison and placed in the general population where the prisoner was sexually assaulted. The prisoner claimed that prison officials deliberately ordered the transfer with knowledge that such an assault would occur. Souter ordered the District Court to reconsider both the discovery motion that had been denied to the prisoner and the allegations against the prison officials in light of the two part test (Farmer v. Brennan 1994: 850-51).

In Booth v. Churner (2001), Souter also wrote for a unanimous Court in holding that the Prisoner Litigation Reform Act of 1995 required a prisoner to exhaust the administrative remedies available in order to attempt a resolution about a complaint over prison conditions (Booth v. Churner 2001: 731). This process must be completed before a prisoner can sue for monetary damages in federal court. Souter’s opinion centered upon the statutory intent of Congress in defining their understanding of the words “administrative remedies” and “available (Booth v. Churner 2001: 736).” Hence, Souter’s opinion was written in a fairly technical manner with regard to the broad interpretation of a congressional statute.

Souter’s most recent opinion dealing with prisoners’ rights and the Eighth Amendment was Roell v. Withrow (2003). In Roell, Souter wrote for a five-person majority in favor of a prisoner who had sued based upon an allegation that prison
officials ignored his medical needs in violation of his right against cruel and unusual punishment (Roell v. Withrow 2003: 580). The main issue was technical in sense that it concerned whether the prison officials consented to have the case heard before a federal magistrate, instead of a district court judge (Roell v. Withrow 2003: 582-83). Prison officials did not object until after the magistrate ruled in favor of the prisoner. Souter’s opinion held that consent could be inferred based upon the behavior of the prison officials who had participated in the entire litigation process without objection (Roell v. Withrow 2003: 590-91).

DISCUSSION AND CONCLUSION

Justice David Souter’s written opinions and voting behavior in criminal justice cases have highlighted two trends. Firstly, Souter has evolved from a conservative state judge and U. S. Supreme Court justice, who initially voted with Chief Justice Rehnquist and Justices Scalia and Thomas during his early years, into a jurist who currently aligns more frequently with the liberal bloc comprised of Justices Stevens, Ginsburg, and Breyer (Hensley, Smith and Baugh 1997: 449, 496, 538; Baum 2007: 122-127). Interestingly, 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 revolution (Hensley, Smith, and Baugh 1997: 7). In fact, right-wing observers of the Court were told by John Sununu that Souter would be a “homerun” for conservatives (Garrow 1994, 64). However, legal scholars have recognized that Souter has practiced moderate pragmatism on the Court and has directly challenged conservative justices, such as Scalia, in intellectual debate (Id.). Secondly, Justice David Souter
appears to have followed a historical approach demonstrated by the Court throughout the twentieth century of providing more protection for defendants at the later stages of the criminal justice process (See Hensley, Smith, and Baugh 1997: 417). Evidently, Souter is sensitive to the fact that the Court has historically expressed serious concerns about the power of government brought to bear upon one individual who moves closer to punishment in the form of a loss of liberty or the death penalty (Id.).

In sum, the two trends displayed by Souter suggest a moderate to liberal justice who favors a measured and balanced approach in his opinion writing and voting behavior in criminal justice cases (Garrow 1994: 55). The following sections below provide a review of Souter’s written opinions and voting behavior which clearly provide evidence of these two trends.

**Search and seizure cases**

In search and seizure cases, Souter’s opinions for the Court in *Atwater v. City of Lago Vista* (2001) and *U. S. v. Banks* (2003) as well as his votes in *Florida v. Bostick* (1991) and *Arizona v. Evans* (1995) illustrated his conservatism in siding with the interests of law enforcement. Souter clearly has been more conservative in search and seizure cases than in any other area of criminal justice which highlights the trend of limiting criminal defendants’ rights earlier in the criminal justice process. However, Souter recently has developed an independent streak, particularly with his written opinion in *Georgia v. Randolph* (2006) and liberal votes in such landmark cases as *Indianapolis v. Edmond* (2000), *Illinois v. Lidster* (2004), as well as the drug testing cases (*Veronica v. Acton* 1995: 646 and *Ferguson v. City of Charleston* 2001: 67). Hence, Souter’s behavior can best be characterized as moderate in the area of search and seizure with a more liberal
pattern of siding with the rights of criminal defendants during his later years on the Court (Hensley, Smith, and Baugh 1997, 419-612).

**Fifth, Sixth, and Eighth Amendment rights**

In contrast to Souter’s behavior in search and seizure cases, Souter recently has demonstrated a more liberal pattern of behavior by providing more protection for the rights of criminal defendants’ during the latter stages of the criminal justice process. In regard to Fifth Amendment rights, Souter has shown strong support for the privilege against self-incrimination in his opinions in *Withrow v. Williams* (1993) and *Missouri v. Seibert* (2004) and has wholeheartedly supported the *Miranda* precedent with his votes in such cases as *Dickerson v. U. S.* (2000) and *U. S. v. Patane* (2004).

In terms of trial rights for defendants, Souter has lived up to his reputation as a “pro-fair trial” judge during his years as a state court judge. Souter’s opinions for the Court in *Doggett v. U. S.* (1992), *Rompilla v. Beard* (2005), and *Miller-el v. Dretke* (2005) caused sharp ideological divisions as Souter wrote for liberal majorities in each case. Although Souter did write two opinions with conservative outcomes involving trial rights in *U. S. Vonn* (2002) and *U. S. v. Dominguez Benitez* (2004), these cases were less controversial as all of the justices joined together to form unanimous verdicts.

Finally, Souter reserved his strongest support for defendants at the final stage of the criminal justice process. With the exception of a few cases such as *Payne v. Tennessee* (1991) and *Rowland v. California Men’s Colony* (1993), handed down during Souter’s earlier terms on the Court, his written opinions and votes have favored the rights of convicted criminals in the sentencing of defendants, death penalty cases, and
prisoners’ rights. In fact, Souter voted more often in favor of criminal defendants in Eighth Amendment cases even during his initial terms on the Court (1991-1994), a period which saw him side more frequently with the conservative bloc in all other areas of criminal justice (Hensley, Smith, and Baugh 1997: 586). While Souter had supported tough sentences for criminal defendants as well as 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 Antonin Scalia and Clarence Thomas and has sought out a middle ground in these areas. While Scalia and Thomas have consistently sided with the government in criminal justice cases, Souter has continued a streak of independence that began during his years as a state judge and which garnered him praise from Republicans and Democrats in his home state (Hensley, Smith, and Baugh 1997: 76, 586). In the area of criminal 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 and has disappointed right-wing groups that had hoped for another vote to solidify the conservative bloc of justices appointed by Republican presidents during the last four decades (Garrow 1994: 64). 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 Souter’s evolution toward the liberal end of the ideological spectrum “is probably as responsible as any single factor for the failure of the conservative revolution” (Id.)

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