THE RELIABILITY OF JUDICIAL SELECTION STANDARDS IN THE APPOINTMENT OF JUDGES TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE U.S. SUPREME COURT BY PRESIDENTS RONALD REAGAN AND GEORGE H.W. BUSH

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A thesis submitted for the degree of Doctor of Philosophy
of The Australian National University

September 2010

DECLARATION

I declare that the material presented in this thesis has not been submitted or accepted for the award of any other degree or diploma in any university. The material presented in this thesis is my own original work and, to the best of my knowledge contains no material previously published or written by another person, except where due reference is made in the text.

Murray P.E. Cranston

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ABSTRACT

The reliability of judicial selection standards is the central theme of this thesis. Of particular interest is the degree of concordance exhibited between the policy preferences of the President and the judicial ideology of his nominees, once each of them was confirmed to the bench. More specifically, this thesis examines the reliability of the judicial selection standards applied throughout the Reagan and Bush administrations. It explores why different decisions were brought down in the same types of criminal justice cases on two federal courts, even though the judges hearing them were all appointed by the same two Presidents. The empirical analysis undertaken in this work found that in criminal justice cases the judicial ideology of appointments made by Presidents Ronald Reagan and George H. W. Bush to the United States Court of Appeals for the Fourth Circuit were more 'predictable' and ideologically 'reliable' than the appointments these same two Presidents made to the Supreme Court. The 648 legal opinions from the eleven judges examined here between 1995 and 1999 found that the Fourth Circuit judges displayed a greater degree of concordance with the policy preferences of their nominating President in criminal justice cases than all of those on the Supreme Court who were appointed by these same two Presidents. The Fourth Circuit was selected for this comparison because it was closest to the 'ideal' court the Reagan and Bush administrations sought to replicate on the Supreme Court. Comparing the appointments of Presidents Reagan and Bush to the Fourth Circuit, virtually a living template in judicial selection for these two administrations, with the appointments these Presidents made to the Supreme Court highlights how unreliable judicial selection standards can be. Three potential explanations are provided to account for this result. The most significant is the profound influence of Senator Strom Thurmond of South Carolina and Senator Jesse Helms of North Carolina in insisting that nominees to the Fourth Circuit reflected their strongly held conservative values. The second explanation focuses on the historical and political context surrounding the appointment of the three Supreme Court judges in this data set with the lowest levels of concordance with the expectations of their nominating President - Justices O'Connor, Kennedy and Souter. This explanation seeks to determine whether the enforced political compromises surrounding each judge's appointment contributed to the more moderate, relatively less ideological judicial philosophy they exhibited. The final explanation focuses particularly on the strategic voting behaviour of Justices O'Connor, Kennedy and Souter within the context of the impact that Justice Antonin Scalia's character and personality may have had on their legal methodology.

Chapter One

INTRODUCTION

It is well known that the performance of some Justices of the United States Supreme Court did not conform with the political views of the President who nominated them and that some Presidents have occasionally vented their disappointment in public about those who they elevated to the highest court in the land. Little need be said at this point about President Eisenhower's regret over his nominations of Earl Warren and William Brennan, or Theodore Roosevelt's views of Oliver Wendell Holmes, or Harry Truman's dissatisfaction with his friend Tom Clark, or Richard Nixon's concern about the liberalism of Harry Blackmun. As Lee Epstein and Jeffrey Segal have noted, "anecdotally, presidents are notorious whiners about their judicial appointees, especially to the U.S Supreme Court."[1] Less often noticed in the texts is that, generally, Presidents do get what they want from their nominees to the Court to the extent that Laurence Tribe has written of "the myth of the surprised President." "For the most part," he claims, "Justices have been loyal to the ideals and perspectives of the men who nominated them."[2] In a wide-ranging survey of presidential nominations from George Washington to Lyndon Johnson, Robert Scigliano concluded that, "about three-fourths of those justices for whom an evaluation could be made conformed to the expectations of the Presidents who appointed them to the Supreme Court."[3]

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1. Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford University Press, 2005), p. 119.

2. Laurence H. Tribe, *God Save This Honourable Court: How the Choice of Supreme Court Justices Shapes Our History* (New York: Random House, 1985), p. 50.

3. Robert Scigliano, *The Supreme Court and the Presidency* (New York: The Free Press, 1971), p.146.

All of this provides ammunition for the on-going debate about whether or not Presidents have the capacity to shape the Supreme Court in their own image and, indeed, whether through their nominations to the lower courts they can clone the whole judicial system to match their own judicial philosophy. But, if Scigliano's data is even approximately correct, then it raises another question of some significance about precisely why do some, if only a minority of presidential nominees to the bench, fail to adopt the judicial ideology of the President who appointed them?

In seeking answers to these questions, this thesis focuses specifically on the judicial nominations of two Presidents, Ronald Reagan and George H. W. Bush, to two different courts, the Supreme Court and the U.S. Court of Appeals for the Fourth Circuit. Both Presidents chose Supreme Court justices who failed to conform to their vision of a conservative jurisprudence while, at the same time, nominated candidates for the Fourth Circuit who were highly predictable and loyal to the President's vision of the role of the judiciary, specifically regarding criminal justice cases. It is argued in Chapter Five that the most significant reason why the Fourth Circuit judges displayed a greater degree of concordance with the expectations of their nominating President towards criminal justice cases was the profound influence of Senators Thurmond and Helms in their nomination and appointment.

The broader problem this thesis seeks to resolve is generally influenced by two underlying and interconnected propositions. The first is that the President considers judicial nominations very carefully and uses these opportunities to attain certain legal outcomes of a political nature. Under the Reagan administration, for example, such outcomes would have included restricting abortion and limiting affirmative action.

The second factor of influence relates to previous incidences in American history where judicial nominees were favourably selected but ended up 'failing' the philosophical expectations of their nominating President. That is, the many prominent examples of judicial candidates who were thought to be safe or reliable choices but who subsequently failed to conform to the philosophical expectations of their nominating President once confirmed.

All of this can be summarised in the following way: Presidents Reagan and Bush, not unlike many of their predecessors, frequently used judicial nominees as instruments to try and shape the jurisprudence of the federal courts. To ensure a greater degree of certainty in achieving such outcomes, Presidents Reagan and Bush applied some general standards and principles to the selection of their judicial nominees. As has occurred throughout American judicial history some of these nominees failed to demonstrate the level of concordance expected of their nominating President. The ultimate question examined here, therefore, is why did certain Reagan and Bush nominees fail to adhere to the expectations of their nominating President? More specifically, why was this failure rate higher amongst those nominees to the Supreme Court than those nominees to the Fourth Circuit?

The existing literature supports the first part of the problem in this thesis. That being, that the President possesses a deliberate political interest in the type of person he nominates to the appellate levels of the federal judiciary because he wishes to influence the legal outcomes that nominee can deliver once confirmed. As John Maltese observes, "political motivations have always played a role in the Supreme Court appointment process. Presidents since George Washington have nominated

Supreme Court justices who reflect their ideological views."[4] A key reason for Maltese's observation was that, "the prime motivation for presidents (and other players in the process) is the desire to influence judicial policymaking."[5] In sum, Maltese argues, "(a) president's Supreme Court appointments are among his most important (and most contentious). As a tool for influencing judicial policy making, they are an important part of presidential power. Symbolically, they are a test of presidential strength."[6] So pronounced is executive consideration of nominees to the appellate levels of the federal judiciary that Lawrence Tribe considers it unusual when a President does not take such an interest. Tribe states:

> Although history teaches that Presidents are sometimes surprised by the Supreme Court, the surprise is almost always of their own making ... Presidents are surprised when they are less concerned with promoting their constitutional and political philosophy than with paying political debts or accommodating geographic interests.[7]

The desire of Presidents to take a personal interest in the philosophical outlook of their judicial nominees has long been a part of American presidential history. There have been many incidences in the past where Presidents have attempted to tap into the power of the judicial branch by exploiting the nominations process to attain political outcomes for themselves. Kenneth Jost reminds us of what occurred over a hundred years ago:

> ... (t)he federal judiciary became a battleground as political parties emerged after George Washington's presidency. Federalist judges appointed by President John Adams enforced the notorious Alien and Sedition Acts against the party's political opponents. Adams moved to entrench Federalist control of the judiciary by appointing a number of 'midnight judges' as he left the White House in 1801.[8]

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4. John Maltese, *The Selling of Supreme Court Nominees* (Baltimore: The Johns Hopkins University Press, 1995), p. 36 and p. 120.

5. *Ibid.*, p. 143.

6. *Ibid.*, p. 2.

7. Tribe, *op. cit.*, p. 74.

8. Kenneth Jost, "Judges and Politics," *Congressional Quarterly Researcher*, July 27, 2001, p. 586.

Political interest in judicial nominees became entrenched further as the judicial branch emerged from its infancy and assumed more extensive power. Jost continues, "(a)s the federal judiciary was expanded after the Civil War, presidents routinely filled the bench with members of their own parties, which led to long periods of Republican domination of federal courts."[9] Maltese records the significance placed on selecting the 'right' judicial nominees under President Thomas Jefferson:

> After an unsuccessful attempt to remove Federalist Supreme Court justices through impeachment, the Democratic-Republicans slowly replaced justices through natural attrition. But their first opportunity did not come until 1804. Thomas Jefferson appointed three justices during his eight years in office, but appointing the justice who would give the Democratic-Republicans a majority on the Court fell to Jefferson's successor, James Madison. 'The death of (Justice William) Cushing is opportune,' Jefferson wrote in a letter to Attorney General Caesar Rodney, 'as it gives an opening for at length getting a Republican majority on the supreme bench ... I trust the occasion will not be lost.'[10]

Tribe acknowledges the inherent political power that federal judges possess and proceeds to explain why they inevitably gain the direct interest of the President.

> Presidents succeed in selecting nominees to their liking when they perceive that the Court as an institution is likely to be a focal point of constitutional contention, and therefore choose their nominees carefully. Both Washington, with his dream of a powerful federal government, and FDR, with his plan for a pervasive regulatory state, recognised that the Justices would tend the crucible wherein the future would be forged.[11]

An important examination of ideology and judicial behaviour on the U.S. Court of Appeals completed recently by Cass Sunstein, David Schkade and Lisa Michelle Ellman reached the following emphatic conclusion:

> ... no reasonable person seriously doubts that ideology, understood as normative commitments of various sorts, helps to explain judicial votes. Presidents are entirely aware of this point, and their appointment decisions are undertaken with full appreciation of it. We have found striking evidence of a relationship between the political party of the appointing president and judicial voting patterns.[12]

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9. *Ibid.*, p. 586.

10. Maltese, *op. cit.*, p. 33.

11. Tribe, *op. cit.*, p. 75.

12. Cass Sunstein, David Schkade & Lisa Ellman, "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation," *AEI-Brookings Joint Center for Regulatory Studies*, September 2003, p.48.

Mark Silverstein found that former President Richard Nixon could provide a useful example of the discretion a President can have over judicial nominations. Silverstein reports that Nixon stated, "...but if I have the chance to appoint Justices to the Supreme Court, they will be the kind of men I want – and I want men who are strict constructionists, men that try to interpret the law and don't try to make the law."[13] Stephen Carter's analysis of a speech made by the late Chief Justice of the Supreme Court, William Rehnquist, found that even he acknowledged the political intent underlying Presidential nominations to the federal judiciary. Carter recounts:

> Consider the views of Chief Justice William Rehnquist ... "A president who sets out to pack the Court does nothing more than seek to appoint people to the Court who are sympathetic to his political and philosophical principles" ... Franklin D Roosevelt – and, later Ronald Reagan – were only doing what presidents are supposed to do. Having won the popular election, they were trying to control the courts ... Rehnquist's evaluation of court packing is succinct: "There is no reason in the world why a president should not do this."[14]

Harry Stumpf makes clear, "...the president, through his Supreme Court appointments, enjoys a unique opportunity to influence the course of judicial policy making for the nation far beyond his term of office, and few chief executives have been unmindful or careless in their use of this power."[15] Finally, Donald Songer, Reginald Sheehan and Susan Haire demonstrate how a President's interest in judicial nominations can vary according to the importance placed on specific criteria. The authors state:

> ... an administration can undertake a deliberative effort to appoint judges who will advance, through their decisions, the policy agenda of the president. Other administrations may utilise judicial appointments for partisan goals. In this respect, presidents view judicial appointments as vehicles for advancing their own political base or the stature of their parties. Some presidents, on occasion, use judicial appointments as opportunities for rewarding close friends who have been loyal throughout their political career. Selection processes also vary by

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13. Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: W.W. Norton, 1994), p. 102.

14. Stephen Carter, *The Confirmation Mess* (New York: Harper Collins, 1994), p. 86.

15. Harold Stumpf, *American Judicial Politics* (New York: Harcourt, Brace Jovanovich, 1988), p. 210.

> administration in terms of the personal involvement of the president and the attention given to input by home state senators and others interested in the staffing of the bench.[16]

The aspect of this thesis problem relating to the actual application of selection standards during the Reagan and Bush administrations is also supported widely in the existing literature. A relatively significant amount of work has accumulated showing that an actual 'litmus' test was used to ensure a greater degree of concordance between the President's philosophical outlook and that of his nominees throughout the Reagan and Bush administrations. Archibald Cox argues that the emphasis on judicial ideology in the selection of nominees under President Reagan was unprecedented. Cox contends, "...it seems fair to say that a fixed political ideology has played a larger part in President Reagan's judicial selections than either a strictly liberal or strictly conservative political ideology has ever played before."[17] An important work by Herman Schwartz outlines the process by which President Reagan's judicial selection standards were applied. Schwartz elaborates:

> ... to obtain ideological purity, the Administration systematically screened the candidates. A nine member President's Committee on Federal Judicial Selection was established, chaired by Counsel to the President, Fielding, and including then presidential counsellor Edwin Meese, Attorney General William French Smith, and other top White House and justice Department officials. A computer databank containing every available publication by a candidate was set up, and day-long interviews were held with the finalists. Many were called for the interviews, but few were chosen.[18]

One of the most significant contributors to the field of American political jurisprudence, Sheldon Goldman, said of Reagan's judicial appointments, "Not since the Roosevelt Administration have we seen such a systematic attempt to place on the bench people whose judicial and political views are compatible with those of the

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16. Donald Songer, Reginald Sheehan and Susan Haire, *Continuity and Change on the United States Courts of Appeals* (Ann Arbor: University of Michigan Press, 2000), p. 24.

17. Archibald Cox, *The Court and the Constitution* (Boston: Houghton Miffin, 1987), pp. 361-362.

18. Herman Schwartz, *Packing the Courts: The Conservative Campaign to Rewrite the Constitution* (New York: Macmillan Publishing Company, 1988), pp. 60-61.

Administration."[19] Dawn Johnsen also provides evidence to suggest that a careful form of judicial selection was applied throughout the Reagan administration. Johnsen states:

> ... once Reagan took office, he began seeking to remake the judiciary - and through it, constitutional doctrine – by appointing judges who held the views and values he desired ... What was not widely known at the time is that the Reagan Administration devised and employed extremely detailed blueprints setting forth what it believed the law should look like and also how it would go about changing the law to conform to its preferred constitutional vision.[20]

Stephen Carter concurs by arguing that both the Reagan and Bush administrations turned the process of judicial nominations from "an occasional habit to a science" and that accordingly, "litmus tests became far more important - and far more consistent - than at any time in the past."[21] Henry Abraham argues that, "the Reagan agenda demonstrably included an attempt to alter the contemporary jurisprudential approach of the federal judiciary, and the new administration quickly made known that its leader would return to traditional criteria in selecting jurists"[22] Silverstein contends that in the modern era it was not until the election of the Reagan administration that Presidential interest in judicial nominees started to be taken seriously. "Although all modern presidents have paid lip service to the importance of appointments to the federal bench, before the Reagan presidency executive scrutiny of potential nominees to lower federal courts was haphazard at best and limited by respect for senatorial patronage."[23] Jost states, "Reagan's election as president in

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19. R. E Norton, "Reagan's Imprint on the Courts," *Fortune*, November 24, 1986, p. 221 as quoted in Stephen Carter, *op. cit.*, p.218.

20. Dawn Johnsen, "Tipping the Scale," *The Washington Monthly*, July 1, 2002.

21. Carter, *op. cit.*, p.71.

22. Henry Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 1992), p.337.

23. Silverstein, *op. cit.*, p.120.

1980 culminated a conservative campaign aimed in part at reining in what he and other Republicans called judicial activism by the Supreme Court and lower federal courts. As president, Reagan sought to remake the federal judiciary."[24]

W. Gary Fowler, Donald Jackson, and James Riddlesperger add to the existing literature regarding the use of specific standards for judicial selection by concluding, " ...in their more candid moments Reagan administration officials clearly indicated that ideology was important in selecting judges."[25] Their study of Reagan appointees to the Fifth Circuit confirmed that applying such selection standards produced more conservative court rulings. "We do know that the Reagan appointees went through a rigorous ideological screening; judging by the votes cast on the Fifth Circuit, Reagan's attempts to render the federal courts more conservative was quite successful."[26] The authors quote a former Reagan administration official, Bruce Fein, who served under Reagan as an associate deputy attorney general. Fein stated that because, " ...the judiciary is a primary player in the formulation of public policy ... it would be silly for an administration not to try to affect the direction of legal policy through judicial appointments."[27] Fowler, Jackson and Riddlesperger conclude:

> Indisputably, Reagan's Justice Department effectively infused its legal-policy goals into the judicial selection process. Greater presidential control over judicial selection was necessary, in the view of Bruce Fein and others, if the department were to reverse the trend toward appointing moderate-to-liberal judges. Accordingly, Reagan's administration reformed the judicial selection process in crucial ways.[28]

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24. Jost, *op. cit.*, p. 590.

25. W. Gary Fowler, Donald Jackson and James Riddlesperger, "Reagan's Judges: A Latent Revolution?" in Eric J. Schmertz, Natalie Datlof and Alexej Ugrinsky (eds.), *Ronald Reagan's America,* Vol. I (Westport, CT: Greenwood Press, 1997), p. 335.

26. *Ibid.*, p. 355.

27. *Ibid.*, p. 380.

28. *Ibid.*, pp. 380-381.

Schwartz, however, concedes, "...the Administration's ideological screening was not, of course, foolproof, and passing the ideological litmus test was not always insisted on. Politics and other factors sometimes overrode ideology."[29] W. Gary Fowler *et al*, record Ed Meese himself, a former Attorney General in the Reagan administration, rejecting claims a 'litmus' test was ever applied to judicial nominees. Quoting from his own writings, they found that Meese believed, "the truth was the opposite ... The President was seeking to depoliticise the courts, to ensure that they played a truly judicial role, rather than usurping the authority of the elected branches of our constitutional system."[30] Nonetheless, the existing literature overwhelmingly supports the observation that specific selection standards were applied under the Reagan and Bush administrations to ensure a degree of certainty in the legal methodology of their judicial nominees.

Apart from presidential interest in judicial selection, the second aspect of this thesis problem relating to the phenomena of judges failing to conform to the philosophical expectations of their nominating President, is also well represented in the existing literature. Maltese, for example, acknowledges:

> ... there are of course, limits to a president's ability to influence policy through judicial appointments. Once on the bench, appointees can disappoint the president who named them by voting against him on important cases or by embracing an ideological approach different from the one he had expected.[31]

Carter discovered that incidences of judges failing to live up to the philosophical expectations of their nominating President had a history stretching back to the presidency of James Madison.

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29. Schwartz, *op. cit.*, p. 62.

30. Schmertz et al, *op. cit.*, p.323.

31. Maltese, *op. cit.*, pp. 143-4.

> Madison's fourth nominee, Joseph Story, who was confirmed – and who, as Professor Paul Freund reminds us, then proceeded, during his three decades on the Court, to vote against everything that Madison, who nominated him, and Madison's Senate, which confirmed him, held dear and true. All that hard work, Madison must have groaned, just to produce a traitor.[32]

Carter also makes clear that some of the most significant judicial outcomes have been delivered by judges who were acting contrary to the philosophical expectations their nominating President held of them at the time of their selection. He concludes that, "none of the great decisions that have defined the Court as the protector of our fundamental rights were handed down by Justices selected to vote the way they did."[33]

Former Reagan administration official, Douglas Kmiec, summarises this same phenomena in the following way:

> Nominee selection–as a matter of fact–is seldom sufficient to predict accurately the philosophical direction of a particular judicial candidate, once appointed to a lifetime job with no salary diminution. Eisenhower had his Earl Warren; Nixon had his Blackmun; Bush had his Souter. In each case, it is either popularly speculated or actually articulated that the nominee's service was at some considerable variance to the philosophy of the nominating president. A recent study for the LBJ Journal of Public Affairs estimates that one Justice in four disappointed his appointing president.[34]

Former Senate Judiciary Committee Chairman, Senator Orrin Hatch, also acknowledged the risk in attempting to select judicial nominees who would maintain concordance with his or her nominating President throughout the course of his or her service on the bench. The Senator states:

> ... trying to judge a person's political views is a less than accurate science. Judicial appointments are for life. You may think you know what a person believes today, but there is no guarantee that these opinions will remain intact over the course of a career of perhaps

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32. Carter, *op. cit.*, p. 205.

33. *Ibid.*, p. 115.

34. Statement of Douglas Kmiec in U.S. 107th Congress, 1st Session, Hearings Before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, *The Judicial Nomination and Confirmation Process,* June 26 and September 4, 2001, Senate Hearing 107-463, (Washington, D.C.: U.S. Government Printing Office, 2002), p.195.

several decades. David Souter, John Paul Stevens and Earl Warren, to name a few, all defied expectations.[35]

At this point it is worth reminding ourselves further of those specific examples of Presidents who were convinced they were selecting 'safe' and 'known' candidates to the nation's highest court only to be gravely disappointed as their nominee adopted an altogether different legal methodology once securely confirmed on the bench. Maltese finds:

> ... history books are full of pithy quotes of presidents spurned by their judicial nominees. Betrayed by Justice Tom Clark's vote on important cases, Harry Truman called Clark's appointment his 'biggest mistake.' Truman had first named Clark as his attorney general and then elevated him to the Supreme Court. 'I don't know what got into me,' Truman later said. 'He was no damn good as Attorney General, and on the Supreme Court ... it doesn't seem possible, but he's even worse. He hasn't made one right decision that I can think of ... It's just that he's such a dumb son of a bitch.[36]

Carter has also explored how American Presidents often miscalculated the intentions of their judicial nominees and found former President Richard Nixon to be a useful example. Carter states:

> Richard Nixon insisted on what he called 'strict constructionists' who would slow down the Warren Court's revolutions in civil rights and criminal procedure, only to look on in astonishment as three of his four appointees joined four Warren Court holdovers in voting to strike down state abortion restrictions in *Roe v Wade*.[37]

Maltese also highlights Nixon's approach as an example of how such appointments can fail, particularly with regards to the well known liberal Justice Harry Blackmun. In this case Maltese recounts:

> Appointed by President Nixon in 1970 as a conservative 'law and order' judge, Blackmun was, by 1994, the most reliable liberal voter on the Court. He wrote the controversial 1973 abortion rights decision, *Roe v Wade*, the case that extended the constitutional right of privacy to protect a woman's right to obtain an abortion ... Even on law enforcement issues, where his conservative views were the slowest to change, Blackmun moved to the left ... in his last years on the bench became the only sitting justice to disavow the death penalty, saying he would 'no longer tinker with the machinery of death.[38]

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35. Orrin Hatch, *Square Peg: Confessions of a Citizen Senator* (New York: Basic Books, 2002), p.138.

36. Maltese, *op. cit.*, pp. 143-4.

37. Carter, *op. cit.*, p. 114.

38. Maltese, *op. cit.*, p. 1.

Joseph Menez has located several examples of Supreme Court judges who failed the expectations of their nominating President. He too begins with one of the best known, Justice Harry Blackmun, before moving on to others. Menez finds:

> Justice Blackmun ... despite viewing himself as a centrist has travelled in thirteen years from the conservative to the liberal wing. Stanley Reed started out as a liberal New Dealer, became a 'swing' man and ultimately a conservative; and the Chief Justice Charles E Hughes travelled the same road but in the opposite direction. A liberal president, Woodrow Wilson appointed McReynolds who became a reactionary member of the Four Horsemen ... Thomas Jefferson urged President James Madison to appoint Joseph Story of Massachusetts, an intellectual great, to 'neutralise' Chief Justice John Marshall, only to see Story 'captured'.[39]

Another prominent example of a judicial nominee who evolved into a decidedly different judge compared to what his nominating President expected was Justice Hugo Black. Carter provides a useful illustration as to how such candidates can fall well below presidential expectations by using this judge as a specific example:

> Hugo Black took the judicial oath under a far more ominous cloud, the revelation that he had once been a member of the Ku Klux Klan, and had even received an award from that organisation. Yet Black persevered to become a great champion of civil rights and civil liberties and, in the estimates of some authorities, one of the great Justices in the Court's history.[40]

The reverse can also occur, whereby a President assumes he is appointing someone with a liberal judicial philosophy only to observe that nominee evolve into one with a conservative approach once on the bench. The most prominent example is former justice, Felix Frankfurter. Originally a liberal, Justice Frankfurter subsequently emerged as one of the Supreme Court's most prominent conservatives.[41] On a final note, Tribe reminds us of the pitfalls of undertaking a work involving the prediction of judicial outcomes. He cautions:

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39. Joseph Menez, *Decision Making in the Supreme Court of the United States* (New York: University Press of America, 1984), p. 113.

40. Carter, *op. cit.*, p. 144.

41. Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), p. 240.

> Presidents shape the court by guessing how particular candidates will vote in the future, and such predictions can only be based on the way the candidate has behaved and on the views he or she has expressed in the past. Previous actions and attitudes are of necessity an imperfect crystal ball ...[42]

As stated from the outset, the purpose of this thesis is to discover why some judges can be so 'unreliable' after their appointment to the bench has been made.

How This Thesis Contributes to the Existing Literature

There are three deficiencies in the existing literature that provide a small vacuum for this thesis to make a unique contribution. The most prominent relates to the widespread acknowledgment that there are judges originally appointed on the basis of their conservative or liberal legal methodology who subsequently evolve into something quite different once on the bench. Despite these occurrences, little work has been put forward to explain why such personal transformations happen. This thesis attempts to provide some potential explanations.

The second deficiency in the existing literature is that the focus still remains overwhelmingly on appointments to the Supreme Court, partly because Presidents make far fewer appointments to this particular court and each one of these appointments are more powerful and of a higher profile than those of the lower courts. The U.S. Court of Appeals, because of the sheer number of cases brought before it in which it is the final arbiter, becomes more powerful every year yet there remains a relative paucity of research focusing exclusively on it.

Sheldon Goldman's work is the most significant regarding lower court judicial nominees. Of particular interest to this thesis is his contribution in 1997 examining the selection of nominees to the U.S. Court of Appeals under the Reagan

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42. Tribe, *op. cit.*, p. 74.

administration and that of the administrations of eight of his predecessors.[43] Donald Songer is another prominent contributor to work that has been completed on appeals court nominees, but he and others tend to focus more on the demographic characteristics of judges and the process of judicial opinion-making rather than on the actual reliability of judicial selection.[44] David O'Brien has completed valuable work on the demographic characteristics of Reagan appointees to the U.S. Court of Appeals while W. Gary Fowler, Donald W. Jackson and James W. Riddlesperger have also made an important contribution with their study of Reagan appointees to the Fifth Circuit and the nature of its court rulings.[45] Work by Cass Sunstein, David Schkade and Lisa Michelle Ellman in 2003 examined the influence of political ideology on judicial decision-making across all twelve circuits within the U.S. Court of Appeals.[46] The vast majority of the work done on the U.S. Court of Appeals, however, tends to focus on the socio-demographic characteristics of judges appointed by Presidents Reagan and Bush and on the process by which legal decisions were reached. There is little that looks exclusively at the reliability of the judicial selection standards applied under the Reagan and Bush administrations and the impact this had on subsequent judicial outcomes on both the Supreme Court and a particular circuit within the U.S. Court of Appeals.

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43. See Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997).

44. Songer, *et al*, *op. cit.*

45. See O'Brien in Schmertz, *et al*, *op. cit.*, at pp. 364-365 and Fowler *et al*, in Schmertz, *op. cit.*, pp. 323-336.

46. Sunstein, *et al*, *op. cit.*

The third deficiency in the existing literature relates to the scarcity of work comparing the legal methodologies of the Reagan and Bush appointed judges on the Supreme Court with their colleagues on a particular U.S. Court of Appeals circuit. By comparing and assessing the different legal methodologies between judges on the Supreme Court and those on the Fourth Circuit this thesis may help to increase the prominence of the U.S. Court of Appeals in this part of the existing literature. This ensures a more complete understanding is provided as to how the appellate levels of the American federal judicial system works under the influence of Presidential or executive power.

Finally, this thesis contributes to the existing literature by assessing the effectiveness and reliability of the standards that were applied throughout the Reagan and Bush administrations for the purpose of selecting their judicial nominees. A key question of significance examined here is that if the President selected a conservative nominee how confident could the President be that this candidate would continue a conservative approach towards his or her legal methodology and deliver conservative outcomes in his or her judgements? Another important question this thesis contemplates is what critical factors can cause a judge to deviate from the Presidential expectations placed on him or her and which were implicitly made conditional upon his or her selection and support through the nomination process?

A final question of relevance relates to the power of the Senate in this whole process, in particular the influence of home-state Senators like Strom Thurmond of South Carolina and Jesse Helms of North Carolina, who both represented two key States within the region presided over by the Fourth Circuit. The Fourth Circuit was selected here because it is widely acknowledged as the leading conservative appeals

court in the United States.[47] This particular appeals court was arguably the ideal court the Reagan and Bush administrations sought to replicate on the Supreme Court through their power to fill any vacancies that arose.[48] The Fourth Circuit was essentially a living template of the type of Supreme Court the Reagan and Bush administrations wanted to reconstitute within the country's judicial structure. Goldman, for example, describes the Fourth Circuit as a 'hard, ideological right' court and the 'conservative gold standard.'[49] Had those nominated to the Supreme Court by Reagan and Bush demonstrated the same judicial philosophy as their nominations to the Fourth Circuit, an even more fundamentally conservative change in the political landscape of the United States would have already taken place. An underlying by-product of resolving this thesis problem is to discover why such a significant strategy like changing the broad legal methodology of the Supreme Court never completely succeeded during the years of the Reagan and Bush administrations.

The Structure of this Thesis

The argument of this thesis is developed over seven chapters. The first provides an overview of the problem that is being resolved. Chapter Two defines the judicial selection standards applied by Presidents Reagan and Bush to their nominees to the Fourth Circuit and the Supreme Court. This particular chapter is divided into two parts. The first locates the ideological demands within the President's selection

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47. For examples, see Neil Lewis, "An Appeals Court That Always Veers to the Right," *The New York Times,* May 24, 1999, and Warren Richey, "Two Kindred Courts Break Legal Ground," *The Christian Science Monitor*, June 19, 2000.

48. Lewis, *op. cit.*

49. Richard Hardin, "How Two Senators Molded A Court: Thurmond and Helms Left A Conservative Mark On The Fourth Circuit," *Richmond Times Despatch*, 11 July, 2004.

standards by exploring the relevant sections of the Republican Party's platforms of 1980, 1984 and 1988 and by analysing four significant speeches on the judiciary made by President Reagan and two of his Attorneys General. The second part of Chapter Two provides a greater understanding of the legal philosophy underpinning these selection standards. It does this by examining both conservative and liberal legal methodologies. This is necessary because it strengthens our understanding of the conservative nature of the selection standards that Presidents Reagan and Bush applied to their judicial nominees. In turn, it permits a greater awareness of the expectations that were placed on the eleven judges at the centre of the problem this thesis seeks to solve. To determine what was not acceptable under the philosophical requirements of these selection standards it is necessary in Chapter Two to also explore liberal legal methodologies. By exploring further these two broad schools of jurisprudence the boundaries are established by which it can be identified when a Reagan or Bush appointed judge failed the philosophical expectations of his or her nominating President. Locating these specific ideological objectives and uniting them with their philosophical contours, as defined by conservative and liberal approaches to legal methodology, ensures a more comprehensive understanding is provided of what was used to select judicial nominees.

Chapter Three explores how the standards of judicial selection were applied in a practical sense throughout the Reagan and Bush administrations. Of particular importance in this chapter is the role of the President, his advisers and staff, the White House Counsel, the Attorney General and certain agencies within the Department of Justice. This is considered within the context of a constant underlying struggle between older, moderate Republicans and younger, New Right conservative

Republicans. Exploring the role of the powerful Senate Judiciary Committee and the American Bar Association is another significant part of Chapter Three.

Chapter Four provides empirical evidence to show the extent of the phenomena this thesis seeks to explain. To begin with, it is important to extract from both courts at the centre of this analysis the respective number of people appointed by Reagan and Bush who underwent and passed the standards that applied during their selection. Of the judges examined in this thesis President Reagan appointed three to the Supreme Court and four to the Fourth Circuit.[50] President George H. W. Bush appointed two judges to the Supreme Court and four judges to the Fourth Circuit.[51] It is these five Reagan and Bush appointments to the Supreme Court and six of their eight appointments to the Fourth Circuit (as one Justice had passed away and another had retired before this period of analysis) that form the two groupings in the data set examined in this thesis.

The methodology underpinning this thesis is based heavily on work undertaken in 2002 by Kenneth Manning, Bruce Carroll and Robert Carp. These authors assessed the judicial behaviour of various U.S. Court of Appeals judges whom they considered potential candidates for future nomination to the Supreme Court.[52] The research methods applied by Jeffrey Segal, Richard Timpone and Robert Howard in 2000, when examining the degree of concordance between a President and his judicial nominees, also formed a part of the methodology used in this thesis as was similar

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50. See the Federal Judicial Centre, Judges of the United States Courts, Biographical Database, 2002 at http://air.fjc.gov/history/judges_frm.html

51. *Ibid.*

52 Kenneth Manning, Bruce Carroll and Robert Carp, "George W. Bush's Potential Supreme Court Nominees: What Impact Might They Have?" *Judicature,* Vol 85, No. 6, May-June 2002, p. 280

work in 2003 by Ashlyn Kuersten and Donald Songer.[53] It is vital to the integrity and accuracy of the results produced in Chapter Four that the legal cases analysed in this selected period of research was one that conformed to the requirements of a 'natural court.' This means that the cases examined in both the Supreme Court and the Fourth Circuit should be those brought down, "where the same Justices interact for the whole research period."[54] A 'natural court' timeframe requires, "stability in the Court's composition" and a period of analysis, "of a suitably long duration."[55] The 'natural court' timeframe for the purpose of this analysis commences in January 1995 and concludes in December 1999. Unfortunately, throughout this period there was such a paucity of abortion cases that no sufficient data existed to reliably compare the Fourth Circuit and Supreme Court's approach to this issue. This is disappointing because one's position on *Roe v Wade* may well have been a component of the selection criteria applied to these specific judicial nominees. Consequently, this thesis focuses on yet another key component of judicial selection throughout the Reagan and Bush administrations - criminal justice - and the influence of such landmark decisions as *Miranda v Arizona* in 1966.

A core set of 50 criminal justice cases from the Supreme Court and a core set of 227 criminal justice cases from the Fourth Circuit are examined in Chapter Four. As these core cases were heard by more than one judge in this data set there is a nominal

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53. Jeffrey Segal, Richard Timpone and Robert Howard, "Buyer Beware? Presidential Success Through Supreme Court Appointments," *Political Research Quarterly*; Vol.53 No.3; September 2000; Ashlyn Kuersten and Donald Songer, "Presidential Success Through Appointments to the United States Court of Appeals," *American Politics Research,* Vol 31. No 2, March 2003, p. 109.

54. Russell Smyth, "Judicial Interaction on the Latham Court: A Quantitative Study of Voting Patterns on the High Court 1935-1950," *Australian Journal of Politics and History,* Vol.47 No.3, 2001, p.334.

55. Andrew Lynch, "The Gleeson Court on Constitutional Law: An Empirical Analysis," Paper delivered at University of New South Wales Conference on Constitutional Law, 21 February, 2003.

total of 648 criminal justice cases examined here. Analysing 648 cases, 242 in the Supreme Court and 406 in the Fourth Circuit between 1995 and 1999, forms the basis by which the extent of the phenomena in this thesis can be identified. To determine whether each of these eleven judges passed the selection standards applied to them, every judge's vote was placed into two broad categories. Decisions in favour of the criminal defendant were coded as 'liberal' while those against a criminal defendant were coded as 'conservative.' This conforms with the conventional definition of these terms used by others in this field.[56] These two broad categories were then separated further into four dependent variables so that each judge's vote was coded as either 'liberal,' 'partly liberal,' 'partly conservative' or 'conservative.' Because exercising a *less* tolerant position in criminal justice cases was necessary to demonstrate concordance with the expectations of Presidents Reagan and Bush, each decision was weighted according to how strongly each judge ruled *against* a criminal defendant. Accordingly, each judge's vote was weighted against the following scale of four scores. A score of zero was given to all decisions in favour of criminal defendants (liberal). A score of 0.25 was given to all decisions that favoured the criminal defendant in part (partly liberal). A score of 0.75 was given to all decisions that found against the criminal defendant in part (partly conservative). Finally, a score of 1 was given to all decisions that found against the criminal defendant (conservative).

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56. See Nancy Scherer, "Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government?" *Law Society Review*, Vol. 35 No.1, 2001,: p197; Donald Songer and M. Humphries Ginn, "Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals," *Political Research Quarterly*, Vol. 55 No. 2, June 2002, p303; Kenneth Manning, Bruce Carroll and Robert Carp, "George W Bush's Potential Supreme Court Nominees: What Impact Might They Have?" *Judicature,* Vol 85, No. 6, May-June 2002, p280.

Once evidence was established demonstrating that a disparity in judicial ideology existed between similarly appointed judges to these two courts, Chapter Five located a potential explanation to account for the stronger degree of concordance displayed by those appointments to the Fourth Circuit. The explanation is based on the profound impact of Senator Strom Thurmond of South Carolina and Senator Jesse Helms of North Carolina in ensuring that nominees to the Fourth Circuit reflected their conservative ideological outlook. The seniority of these two men, the influential roles they played in their respective Senate committees and the wide ranging Senatorial courtesy accorded to them ensured their deeply conservative values were directly reflected in the nominees recommended to and selected by the Reagan and Bush administrations for this particular circuit. This chapter examines more closely the influence of 'home State' Senators within the process of judicial nominations and more importantly explores the personal relationship these two Senators had with the Fourth Circuit judges in this data set.

Chapter Six provides two further potential explanations but in this case it is to account for the weaker degree of concordance shown by these Reagan and Bush appointments to the Supreme Court. The first explanation focuses on the historical and political context surrounding the nomination and confirmation of the three judges who recorded the lowest concordance scores in this data set - Supreme Court judges Sandra Day O'Connor, Anthony Kennedy and David Souter. Of particular interest is how the enforced compromises both Reagan and Bush had to make with respect to these nominees may have had an influence on the more moderate, consensual approaches these three judges subsequently exhibited in their decision making process. The other potential explanation presented in this chapter focuses on the

intra-court dynamics and strategic decision making behaviour exhibited by Justices O'Connor, Kennedy and Souter in their dealings with colleagues on the Supreme Court, particularly Justice Antonin Scalia.

Chapter Seven forms the conclusion of this thesis. It restates the thesis problem and reviews the empirical evidence I have presented to prove its existence. This chapter summarises the potential explanations that have been provided and reveals what contribution its resolution makes to the increasingly significant field of American political jurisprudence.

Summary

The most important objective of this thesis is to add further to what is already known in American political jurisprudence about the reliability of judicial selection standards and the success they have had in producing judges with a judicial ideology that is in concordance with the policy preferences of their nominating President. Comparing judges on the Supreme Court with those on the Fourth Circuit adds to the relatively small but growing body of work devoted to the U.S. Court of Appeals. This will assist in overcoming a key deficiency in the existing literature and allow for a more comprehensive and thorough understanding of the judicial branch of American governance.

Chapter Two

THE IDEOLOGICAL DEMANDS AND PHILOSOPHICAL BOUNDARIES OF THE SELECTION STANDARDS APPLIED BY PRESIDENTS REAGAN AND BUSH TO THEIR JUDICIAL NOMINEES

Introduction

This chapter is divided into two broad parts. The first presents the ideological objectives in the selection criteria applied by Presidents Reagan and Bush to their judicial nominees with specific reference to their approach to criminal justice matters. The second places these ideological demands in the context of the judicial philosophy required of judges to deliver such rulings. Together these two parts provide a more complete understanding of the judicial selection standards applied and the nature of the demands it placed on those nominees subjected to it. This is important because the objective of this analysis is to determine how reliable such standards were in ensuring that concordance with the philosophical expectations of Presidents Reagan and Bush were realised in their judicial nominees.

The ideological demands of these selection standards regarding matters of criminal justice can be identified from two key sources. The first is within the text of the Republican Party platforms of 1980, 1984 and 1988. The second is within four significant speeches made by President Reagan and two of his Attorneys General, William French Smith and Edwin Meese III, and the views they expressed on the role and direction of the federal judiciary. By analysing the Republican Party platforms of this era and these four specific speeches, this thesis combines the ideological objectives expounded through these forums with the philosophical foundation from which these standards for judicial selection emerged. It will be demonstrated in this chapter that the presence of such a standard throughout the Reagan administration

can be traced back, in part, to the conservative backlash to the liberal rulings of the Supreme Court under the stewardship of the then Chief Justice, Earl Warren. The bitter struggle for political dominance between liberals and conservatives within American politics and the increasing use of the courts as the arena to settle these conflicts played a major role in the future development of specific judicial selection standards. In particular, two Supreme Court rulings and the reactions they triggered, contributed directly to the formation of this criteria and to the demands for more conservative nominees to be appointed throughout the federal judiciary. These two major rulings were the criminal justice decision *Miranda v Arizona* in 1966 and the abortion rights decision *Roe v Wade* in 1973.

As detailed later in Chapter Four, this analysis focuses on the criminal justice aspect of these judicial selection standards rather than that relating to abortion. This is because the five year 'natural court' timeframe, adopted here to ensure the highest level of accuracy in the comparison made between the Supreme Court and the Fourth Circuit's legal methodology, contains such a paucity of abortion cases that any conclusions reached would have been unreliable. As will be apparent, a conservative approach to 'law and order' generally and to criminal justice cases in particular, formed a key part of the judicial selection standards examined here. The central purpose of this thesis, therefore, is to determine why judges on the Fourth Circuit adhered more closely to the criminal justice requirements of the judicial selection standards applied to them than their similarly appointed colleagues on the Supreme Court.

Identifying the expectations placed on nominees also requires looking beyond the immediate ideological outcomes that were sought (ie. tougher approaches to law and

order and criminal justice matters) and towards the judicial philosophy required to bring these judgements about. A commitment to a conservative judicial philosophy was a precondition for those tasked with applying the selection benchmarks to judicial nominees throughout the Reagan and Bush administrations. The foundation of this form of jurisprudence relates primarily to the demarcation of responsibilities between a judge and a legislator within a democracy overseen by a written Constitution. Conservative jurisprudence emphasises the historical confines that limit the role of a judge to merely interpreting the law. Unlike a politician, who possesses a mandate from those who elected him or her to office, a judge lacks this critical endorsement and in accordance with democratic values is obliged to abstain from creating any new law or right when handing down his or her rulings. The judges appointed by Reagan and Bush were all adherents to various forms of conservative legal methodology. The major variant explored in this chapter is generally termed 'originalism'.

To strengthen our understanding of the philosophical boundaries of the standards of judicial selection during the Reagan and Bush eras, it is also important in this chapter to define liberal approaches to legal methodology. This will reveal what was rejected under such selection standards. The liberal variants of jurisprudence explored in this chapter are legal realism and Living Constitutionalism. By exploring both the philosophical boundaries and the specific ideological requirements of these selection standards, it will become clearer what the Reagan and Bush administrations expected from their judicial nominees when they heard criminal justice cases.

The Impact of Miranda and Roe on Judicial Selection Standards During the Reagan and Bush Eras

Two seminal Supreme Court cases in the 1960s and 1970s, *Miranda v Arizona* in 1966 and *Roe v Wade* in 1973, had a major impact on the development of the judicial selection standards that were to be later used throughout the Reagan and Bush administrations. For the methodological reasons previously stated, this analysis only pursues the criminal justice aspects within the selection standards that applied to judicial nominees. Consequently, the ramifications of *Miranda* and similar criminal justice rulings from the Supreme Court during this era assume a much greater importance here than the effects of *Roe* - the primary legal case of significance when examining the abortion aspect of these selection standards.

Before commencing with *Miranda* it is important to acknowledge that *Roe* did have a major impact on the development of the judicial selection standards that would later be used by the Reagan administration. The essential finding in *Roe* was that a woman had the right, albeit qualified, to choose an abortion because of a newly found constitutional right to privacy. At first, recalls David O'Brien, "little attention was paid on May 4, 1971, when *Roe v Wade* appeared on the Court's list. It was one of only 163 from more than 4,500 cases on the docket granted oral argument and to be heard the next term."[1] The ramifications flowing from this decision, however, largely created an environment where the perceived need for specific criteria in judicial selection gathered real significance to conservatives. Donald Grier Stephenson states:

> (a)rguably, no single judicial decision since *Dred Scott* in 1857 electrified the political system to a greater extent than *Roe v Wade*. Acting precisely as the two major parties were undergoing

1. David O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: WW Norton & Company, 1996), p. 25.

profound changes, the Court ignited the most extensive debate since the 1930s on the judiciary's role in democratic government.[2]

Stephenson continues by asserting that the escalation of political interest in the abortion issue after the decision was handed down meant, "(t)he battle between those who believed *Roe* was right and those who believed it was wrong soon would be joined in the federal courts ..."[3] Former Solicitor General, Charles Fried, places *Roe* in a broader context. He argues, "(t)his rapid growth in constitutional rights was unsettling. So when *Roe* came along – with all the fervour attached to the abortion issue – many were inclined to lump everything together into a generalised complaint against what the Supreme Court is doing to us."[4]

A significant consequence of *Roe* for this thesis was that it propelled the judiciary into the forefront of resolving new and controversial political disputes. Stephenson has previously identified this development by stating:

The Supreme Court in *Roe* occupied a position at odds with both parties, their 1972 presidential candidates, public opinion, and, the laws of forty six states. Moreover, by lodging a protection for abortion in the Constitution, the Court dramatically expanded the abortion war. Activists on both sides had been accustomed to skirmishes on a state-by-state basis. As of 1973, opponents of abortion liberalisation faced the stark reality that they had lost on a grand scale; they now had to think nationally as well as locally. Pro-abortion forces had captured the strategic high ground of constitutional law.[5]

The success of 'pro-abortion forces' at the pinnacle of the American legal system led Stephenson to claim:

... it was evident by 1980 and unmistakable by 1984 that the Court envisaged no retreat on *Roe v Wade*. Those who longed for *Roe's* demise realised that significant state legislative barriers to

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2. D. Grier Stephenson, *Campaigns and the Court: The US Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999), p. 190.

3. *Ibid.*, p. 198.

4. Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* (New York: Simon and Schuster, 1991), pp. 56-57.

5. Stephenson, *op. cit.*, p. 197.

abortion were doomed. If the existing Court would not change its mind, they would have to change the Constitution, or the Court.[6]

It was factors like these that contributed to the push for a conservative standard of judicial selection to act as an instrument to counter the success of their liberal opponents. Because of this O'Brien argues that, "the Court became ever more a symbol and instrument of political power during the Reagan-Bush era. It was subject to increasing pressure-group activity and litigation geared to reconsidering, if not reversing, *Roe*, as well as efforts to pack it with those opposed to abortion."[7]

Lewis Gould specifically points to Chief Justice Earl Warren and the ruling in *Miranda* as the sources of conservative discontent with the direction of the federal judiciary. In doing so he recounts the attempts made by President Nixon to arrest this trend through the appointment process:

A particular target for Republican complaints was the Supreme Court under Chief Justice Earl Warren. The decision in *Miranda v. Arizona* that affirmed the right of criminal suspects to remain silent during police questioning was denounced as pro-criminal and antipolice. Richard Nixon would promise in1968 to appoint judges who would favour law and order. The nation needed men in law enforcement, said Nixon, "with an awareness of the severity of the crime crisis, men with a new attitude towards crime and criminals." The Republican themes resonated with an electorate worried about social stability and he prospect of becoming a victim of crime.[8]

The *Miranda* decision had the same impact on criminal justice that *Roe* had on American society generally. Fried, for example, found that there was, "an explosion of change in the Warren Court" which caused a, "thick growth of rights and rights doctrine to grow up..."[9]

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6. *Ibid.*, p. 199.

7. O'Brien, *op. cit.*, p. 41.

8. Lewis Gould, *Grand Old Party: A History of the Republicans* (New York: Random House, 2003), p. 371.

9. Fried, *op. cit.*, p. 56.

He then draws the following vital conclusion that, "(t)he nakedly legislative nature of the *Miranda* rules was obviously inappropriate to a decision purporting to interpret and apply general constitutional requirements; in this *Miranda* resembled *Roe v Wade*."[10]

While *Miranda* was the most significant case, it was not the only criminal justice decision of the Warren Court that caused great consternation amongst conservatives. Lasser provides the following overview:

> (i)n 1961, however, the Warren Court handed down the first of several sweeping opinions upholding the constitutional rights of criminal suspects. In *Mapp v Ohio*, a six to three majority overturned a 1949 precedent and held that evidence seized illegally could not be introduced in a state criminal proceeding (the so-called "exclusionary rule" had been applied to federal proceedings since 1914) ... *Mapp* was just the beginning of a five year period during which the Court virtually restructured American criminal procedure. In 1963, the Court unanimously ruled that a state must provide an indigent defendant with an attorney at no charge. Then, in 1964 and 1965, the Court returned to the thorny problem of balancing the right of police to interrogate suspects against the Fifth Amendment's privilege against self-incrimination and the Fourth Amendment's guarantee against unreasonable searches and seizures.[11]

Epstein and Kobylka show that the decision in *Furman v Georgia*, which abolished the death penalty at that time, generated a reaction which energised conservative interest in judicial appointments. They state:

> ... the *Furman* backlash was loud, quick, and broad based. Public opinion, generally supportive of capital punishment before June 1972, became even more so in the immediate aftermath of the decision. State legislatures across the country, and not just in the South, could barely wait to reconvene and pass new laws, which, given the *Furman* majority and informed commentary on it, were of dubious constitutionality.[12]

They proceed to add that President Nixon, "seized on Burger's dissent in noting that the Court had not completely ruled out capital punishment" and, "subsequently sent to Congress a bill calling for the death penalty for certain federal crimes ..."[13]

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10. *Ibid.*, p. 45.

11. *Ibid.*, p. 189.

12. Lee Epstein and Joseph Kobyalka, *The Supreme Court and Legal Change Abortion and the Death Penalty* (Chapel Hill, The University of North Carolina Press, 1992), pp. 130-131.

13. *Ibid.*, p. 131.

Friedelbaum clearly holds *Miranda* responsible for the criticism directed at the Supreme Court. It lead him to state that, "If any case became the symbol and, more often, the target of critics of the Warren Court activism it was *Miranda v. Arizona*, the product of spirited decision making that Justice Harlan characterised as the Court's "new constitutional code of rules for confessions."[14]

Friedelbaum describes the conservative animosity shown towards the Supreme Court as a result of the *Miranda* decision:

> Yet the "Miranda warnings," as they came to be known (frequently in derision), served to fuel attacks upon the Court, generally attributed to proponents of a vigorous regimen of criminal law enforcement. Even when Miranda and the cases associated with it came to the Supreme Court and before judgement was rendered, the attorneys general of more than half the states and representatives of a national district attorneys' association had joined in the filing of briefs. Outcries against Miranda and its much feared aftermath extended well beyond the judicial system as a salient feature of the Court's fulfilled agenda – a feature said to threaten a social order premised, at least in part, on effective law enforcement.[15]

The significance of *Miranda* and the conservative hostility towards it was enhanced by the political and social climate within which the decision was brought down. William Lasser found that *Miranda* quickly ensured 'law and order' found itself as a prominent Presidential election issue. He states:

> The Kennedy assassination, combined with the murder of Martin Luther King a few weeks before and unprecedented violence at the Democratic National Convention in August in Chicago, set the stage for "law and order" to become a major issue of the 1968 presidential campaign. Candidates Richard Nixon and George Wallace played the law and order theme to the hilt ... Inevitably, the issue of *Miranda* and the other defendant's rights cases came up frequently, sometimes in veiled phraseology and sometimes directly. Ronald Reagan, then governor of California and an active Republican campaigner, linked the RFK assassination to the Court's permissiveness. "This nation," said Reagan, "can no longer tolerate the spirit of permissiveness that pervades our courts and other institutions."[16]

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14. Stanley Friedelbaum, *The Rehnquist Court: In Pursuit of Judicial Conservatism* (Westport, Connecticut: Greenwood Press, 1994), p. 128.

15. *Ibid.*, p. 128.

16 William Lasser, *The Limits of Judicial Power – The Supreme Court in American Politics* (Chapel Hill, North Carolina: University of North Carolina Press, 1988), pp. 194-95.

Stephenson illustrates why the conservative reaction to *Miranda* was so hostile and focuses particularly on the media's reaction to the implications of the ruling. With many confessions now found to be inadmissible in light of such rulings as *Miranda*, "the effect was unsettling," Stephenson states, "Across the nation self confessed criminals walked out of jail in numbers large enough to generate eye-catching headlines: "Bronx Man Who Admitted Rape Set Free Under Miranda Ruling"; "Miranda Rule Voided 72 Maryland Confessions"; "Confessed Slayer of Wife and 5 Children Freed."[17]

All this came about, according to Stephenson, because of the "due process revolution" occurring within the Warren Court. This resulted in, "a restructuring of the American system of criminal justice that made the Court for the first time the constitutional supervisor of almost every aspect of local law enforcement in each of the fifty states."[18]

In noting the ramifications of *Miranda*, Peter Irons states that, "some predicted that sharp lawyers would exploit police mistakes to return killers and rapists to the streets ... More than any other, this case illustrates the link between the politics of the Constitution and the politics of crime."[19]

Irons also makes clear how President Reagan himself felt about the ramifications of *Miranda*, quoting his assessment at a police convention in 1981 where he stated with regards to the Court's use of the exclusionary rule that it, "rests on the absurd proposition that a law enforcement error, no matter how technical, can be used to

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17. Stephenson, *op. cit.*, p. 178.

18. *Ibid.*, p. 176.

19. Peter Irons, *Brennan vs Rehnquist: The Battle for the Constitution* (New York: Alfred Knopf, 1994), p. 189.

justify throwing an entire case out of court, no matter how guilty the defendant or how heinous the crime ... and the only ones who really suffer are the people of the community."[20]

Such was conservative hostility to *Miranda* that Fried found many within the Reagan administration were actually engineering to overturn the ruling in the Supreme Court. In an eyewitness account Fried states that certain colleagues loyal to then Attorney General Edwin Meese, "had taken up the cry and now proclaimed it a Department objective to get the Supreme Court to overrule *Miranda*." Fried objected to this "frontal assault" because he was worried that it, "would offend Justices Powell and O'Connor, thereby jeopardising the progress we had made in taming and confining the Miranda rule."[21]

Fried continues his valuable insight into this extraordinary challenge to *Miranda* from within the Reagan administration:

> The rigorists finally brought matters to a head: The Attorney General called a meeting of some twenty persons from throughout the Department. One after another, the rigorists pronounced their anathemas on the Miranda rule, while the professional prosecutors sat silently by, thinking, I suppose, that this was not their show. Meese ruled from the bench: apart from some soothing and largely irrelevant qualifications, we would carry on as before.[22]

The prominence of 'law and order' issues and the growing strength of the anti-abortion movement in American society were coupled with a fundamental shift within both the Republican and Democratic parties. Stephenson acknowledges these changes and observes that, "Ideologically, the parties moved apart: fewer liberal voters called themselves Republicans, just as fewer conservatives called themselves

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20. *Ibid.*, p. 194.

21. Fried, *op. cit.*, p. 46.

22. *Ibid.*, pp. 46-47.

Democrats...This was not the Republican party of Eisenhower's day, or even of Nixon's."[23] Himmelstein traces the origins of this conservative resurgence and found that, "In the late 1950s conservatism was at a nadir. Within the Republican party, where nearly two decades of conflict had sharply distinguished conservative and moderate camps, conservatives had been reduced to fruitless railing at the Eisenhower administration, which they deemed too liberal."[24] Finally, Himmelstein concludes, "The early 1960s witnessed an explosion of conservative activity. Its more sensational, but less important, element was the fast growth of the radical Right."[25]

Martin Anderson identifies the various strands that came together to form this new conservative movement in the Republican Party and from which the architects of Reagan's judicial selection test emerged. Anderson states:

> There have been many contributors to this movement: the traditional Republicans and the old conservatives who formed its core; the libertarians who gave it consistency and sharply defined goals, at the same time widening the boundaries of intellectual debate; the neo-conservatives whose desertion from the Left seemed to confirm the validity of the movement and who infused that movement with new intellectual vigour; the New Right with their political enthusiasm and political persistence; and the Moral Majority with their large numbers and moral certitude. They were all necessary, though none by itself sufficient to have achieved the kind of intellectual and political change that occurred in so short a time.[26]

Fried has also classed the various groups that together formed Reagan's support base and defines them in the following way:

> The Reagan majority was notoriously a coalition of businesspeople who were interested in lower taxes and less government spending; free market libertarians; neo conservatives who were more interested in an assertive anticommunist foreign policy; social conservatives who were concerned to see the political and social culture take on a texture that they associated (probably somewhat romantically and inaccurately) with the style of the pre-JFK era; the

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23. Stephenson, *op. cit.*, p. 192.

24. Jerome Himmelstein, *To the Right: The Transformation of American Conservatism* (Berkeley: University of California Press, 1990), p. 65.

25 *Ibid.*, p. 66.

26 Martin Anderson, *Revolution: The Reagan Legacy* (New York: Harcourt Brace Jovanovich, 1988), pp. 7-8.

> religious right, which had a quite explicit and demanding agenda that included severely restricting the availability of abortions, allowing spoken prayer in public schools, and suppressing anything (like a tolerance of pornography) that smacked of liberal permissiveness; and finally what might be called habitual or professional Republicans, who instinctively may have been a bit more conservative than the average Democrat but whose main allegiance was to the party. It is striking that this last group, which in other times would have been the centre of any Republican administration, was often relegated to the fringes of the Reagan administration.[27]

The prominence of 'law and order' concerns, the growing strength of the anti-abortion movement and the profound philosophical shifts within the Republican and Democratic parties ensured that an environment would inevitably be created where the courts would emerge as the next battleground where ideas and policies would be contested. Consequently, a demand arose amongst conservatives for a philosophical selection test to be introduced to influence legal outcomes. The increased strength of social conservatives as a distinct political grouping and the change that occurred in the character of the Republican Party to accommodate them, set the stage for the philosophical goals of social conservatives to start being reflected within the Party's platform. A conservative philosophical selection test for judicial nominations thus became the most effective mechanism for ensuring that if political battles were to be carried into the federal judiciary, those selected to be judges would be people who could assist in achieving the legal outcomes sought by the conservative movement.

What the Republican Party Platforms of 1980, 1984 and 1988 Expected of Judicial Nominees

The existing literature supports claims that a general selection standard was applied throughout the Reagan and Bush administrations to judicial nominees based loosely on the platforms of the Republican Party. O'Brien makes clear:

> The Republican Party's 1980 and 1984 platforms called for the appointment of judges supportive of "traditional family values" and opposed to abortion and past "judicial activism." And Reagan capitalized on those promises by turning federal judgeships into campaign issues

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27. Fried, *op. cit.*, p. 19.

in his presidential elections and during the 1986 congressional elections. No less important, his administration backed up that campaign rhetoric with an ambitious agenda for legal reform and judicial selection. Simply put, federal judges were viewed as instruments of presidential power and a way to ensure Reagan's legacy.[28]

Goldman also links the Republican Party platform with the philosophical expectations that were placed on judicial candidates by pointedly stating, "Reagan and his backers made it no secret that judicial selection would be geared to carrying out these agendas. Indeed, the Republican platform of 1980 included a pledge to direct judicial positions to those sharing conservative values."[29]

A more explicit reference can be found within the 1980 Republican Party platform as to precisely what was expected of the federal judiciary regarding its approach to criminal justice cases. The platform states:

Just as vital to efforts to stem crime is the fair but firm and speedy application of criminal penalties. The existence and application of strong penalties are effective disincentive to criminal actions. Yet these disincentives will only be as strong as our court system's willingness to use them.[30]

As noted earlier, of particular importance to conservative approaches to legal methodology was the expectation that a judge would act with a degree of subservience to the law. The 1984 Republican Party platform incorporated this theme. The document states:

Our Constitution, now almost 200 years old, provides for a federal system, with a separation of powers among the three branches of the national government. In that system, judicial power must be exercised with deference towards State and local officials; it must not expand at the expense of our representative institutions. It is not a judicial function to reorder the economic, political, and social priorities of our nation. The intrusion of the courts into such areas undermines the stature of the judiciary and erodes respect for the rule of law.[31]

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28. David O'Brien, "The 'Reagan Revolution' and the Federal Judiciary" in Eric Schmertz, Natalie Datlof and Alexej Ugrinsky, *Ronald Reagan's America*, Vol.1 (Westport, CT: Greenwood Press, 1997), p. 379.

29. Goldman, *op. cit.*, p. 286.

30. See http://reagan2020.com/platforms/republican/rep.980.html for the full text of the 1980 platform.

31. See http://reagan2020.com/platforms/republican/rep.984.html for the full text of the 1984 platform.

One of the key objectives of conservative judicial ideology, known frequently throughout the Reagan era as 'judicial restraint,' continued to feature prominently in the 1984 platform. It further stated:

> If our legal institutions are to regain respect, they must respect the people's legitimate interests in a stable, orderly society. In his second term, President Reagan will continue to appoint Supreme Court and other federal judges who share our commitment to judicial restraint.[32]

This is the essence of the conservative legal methodology detailed more fully in the next half of this chapter. The 1984 platform also commended President Reagan for the progress he had made up to that point in changing the composition of the federal judiciary through the appointments process and revealed the type of judicial candidate the Republican Party demanded. The document stated, "We commend the President for appointing federal judges committed to the rights of law-abiding citizens and traditional family values."[33] As Goldman declares, "The 1984 Republican Party platform summarised the judicial selection goals and accomplishments of Reagan's administration."[34]

The approach expected of judges towards criminal justice cases in the federal judiciary was again highlighted in the 1984 Republican Party platform. It stated:

> Republicans believe that individuals are responsible for their actions. Those who commit crimes should be held strictly accountable by our system of justice. The primary objective of the criminal law is public safety; and those convicted of serious offences must be jailed swiftly, surely, and long enough to assure public safety.[35]

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32. *Ibid.*

33. *Ibid.*

34. Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997), p. 300.

35. See http://reagan2020.com/platforms/republican/rep.984.html for the full text of the 1984 Republican Party platform.

The 1988 Republican Party platform made several explicit references as to what was expected of judges in their approach to criminal justice cases. Firstly, it provided a critique of the legal methodology of the Warren Court by stating, "(i)n the 1960s and 1970s, the family bore the brunt of liberal attacks on everything the American people cherished. Our whole society paid dearly."[36] The document then proceeded to focus explicitly on the expectations placed on judicial nominees regarding criminal justice matters. It recorded the success of, "an historic reform of toughened sentencing procedures for federal courts to make the punishment fit the crime ... We appointed to the courts judges who have been sensitive to the rights of victims and law-abiding citizens."[37] The platform then clearly reiterated the type of judge the administration was seeking by stating, "We appointed judges who respect family rights, family values, and the rights of victims of crime."[38]

The extent to which conservative values and objectives were incorporated into Republican Party platforms during the 1980s and consequently into the selection standards for judicial nominees was a product of the dominance conservatives held over the process of writing the actual document. Austin Ranney noted the strength of the conservative movement's contribution by stating that, "it was widely reported that the conservatives dominated the platform writing process. Had it been otherwise, the news media would really have had a story. The Committee on Resolutions was chaired by Representative Trent Lott, a conservative from Mississippi; the seven

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36. See www.reagan2020.com/platforms/republican/rep.988.html for the full text of the 1988 Republican Party platform.

37. *Ibid.*

38. *Ibid.*

subcommittees were chaired or co-chaired by other conservative members of Congress."[39]

Elizabeth Drew provides an account of the power Christian conservatives in particular had in determining the content of the Republican Party's platform at the time. She observes:

> And there is a new element at the Republican Convention this year: the fundamentalist religious movement, which has recently got increasingly involved in politics. It is a new form of an old element in American political life. These fundamentalists constitute a kind of counter-reformation – against the growing public acceptance of such things as abortion and homosexuality, against the changing role of women ... Their strength is enhanced by their alliances, ideological and political, with the New Right.[40]

Drew continues by arguing that as the Republican party itself was shifting to the right, powerful interest groups like the Christian conservatives she identifies shifted even further to the right and this meant that it was, "... these people who head for the platform committees."[41]

The Democrats were keenly aware of the significance of the Republican Party's platform and the extent to which it could be used by a Republican administration to prepare the foundation for a screening test to determine nominations to the federal judiciary. Stephenson observes that after Reagan's first victory and his four years in office, the 1984 presidential campaign added a new level of urgency for the Democrats. Stephenson recounts:

> Those who in 1980 had stressed Reagan's probable impact on the Supreme Court knew that his first term was marked by a single judicial vacancy. Democratic campaign oratory that seemed urgent then was apocalyptic now. Constitutionally, the election seemed the most compelling since 1936. "We must win to save the Supreme Court of the United States," cried future Democratic nominee Walter Mondale in December 1983. "If that Court is replaced by Mr

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39. Austin Ranney, *The American Elections of 1984* (Washington D.C.: Duke University Press, 1985), pp. 94-95.

40. Elizabeth Drew, *Portrait of an Election: The 1980 Presidential Campaign* (New York: Simon and Schuster, 1981), p. 190.

41. *Ibid.*, p. 190.

> Reagan, it could well be that our great cause of justice will be doomed for the lifetime of everyone in this room."[42]

Stephenson also notes that the Democratic platform contained a dire warning regarding the ramifications of Reagan's first four years of attempting to reconfigure the composition of the federal judiciary. "The hard truth," warned the Democratic platform, "is that if Mr Reagan is re-elected our most vigorous defender of the rule of law – the United States Supreme Court – could be lost to the cause of equal justice for another generation."[43]

Expectations Within the Keynote Speeches of President Reagan and His Senior Officials Regarding the Role of a Federal Judge

Together with the Republican Party platforms of 1980, 1984 and 1988 another source exists that provides an insight into the expectations the Reagan and Bush administrations had of their judicial nominees. It is contained within the keynote speeches made by President Reagan and his senior officials regarding the role of the federal judiciary and their expectations of it. There are four speeches of specific interest to this thesis because they reveal in broader, more philosophical terms, what was expected from the judicial nominees who were submitted to these standards of selection. The four speeches of note in this chapter, in chronological order, are: a speech made by Reagan's first Attorney General, William French Smith, to the Federal Legal Council in Reston, Virginia, on 29 October, 1981; a speech made by President Reagan to the American Bar Association convention in Atlanta, Georgia on 1 August, 1983; a speech made by Reagan's second Attorney General, Edwin Meese III, also to the American Bar Association on 9 July, 1985; and finally, another speech

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42. Stephenson, *op. cit.*, pp. 206-207.

43. *Ibid.*, p. 208.

made by President Reagan, on this occasion to a gathering of United States Attorneys in the White House, on 21 October, 1985.

William French Smith's address to the Federal Legal Council was the first major speech in which he presented the Reagan administration's expectations of the federal judiciary and its role in American society. The importance of this particular speech was that the Attorney General linked the Republican Party's presidential campaign (of which the platform was clearly a foundation) to the types of nominees it promised to select to change the judiciary's direction. The account provided by *Facts on File* in 1981 records:

> Smith, citing the "groundswell of conservatism evidenced by the 1980 election," promised that the Justice Department would "play an active role in effecting the principles upon which Ronald Reagan campaigned." The department he said, was working "to identify those key areas in which the courts might be convinced to desist from actual policymaking."[44]

Stephenson focuses further on the warning contained in this speech regarding the Reagan administration's expectations concerning the 'proper' role of the courts in the American political structure:

> Addressing the Federal Legal Council, Smith noted "three areas of judicial policy making" that had "led to some constitutionally dubious and unwise intrusions upon the legislative domain" and were of "particular concern": "the erosion of restraint," "analysis of so-called fundamental rights," and "the extravagant use of mandatory injunctions and remedial decrees ... No one should doubt," he concluded, "that this Administration's adherence to the constitutional principle of separation of powers will exact from us the same degree of obedience and moderation that we will urge upon the courts."[45]

The significance of this speech was highlighted by the reaction it provoked. Goldman provides the following overview of this response:

> The immediate response to the Smith speech from liberal groups was, as expected, negative. But the speech also elicited the concern of the president of the American Bar Association, who told the New York Times that Smith's charges "tend to undermine public confidence in our system of justice" and to invite legislative interference with the ability of the courts to protect "the rights of all our citizens against the changing policies of a transient majority." Smith

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44 *Facts on File*, November 6, 1981, p. 811.

45 Stephenson, *op. cit.*, p. 206.

seemed to back off: for the remainder of his tenure as attorney general he refrained from publicly attacking the federal courts.[46]

In an important speech made by President Reagan himself at the annual meeting of the most significant private organisation in the country with an interest in judicial nominations at that time - the American Bar Association, the President reiterated the philosophical framework he wanted his nominees to operate within once appointed to the bench. Reagan made clear he, "sought judicial nominees who support the limited policymaking role for the Federal courts envisioned by the Constitution," and added that the, "Founding Fathers did not want our judiciary system to be first among equals. They wanted it to be one of three co-equal branches of government."[47]

The most conservative Attorney General to serve under Reagan, Edwin Meese III, delivered the third speech which revealed, in part, the content of the standards that were being applied to judicial nominees. Once again the address was made to the American Bar Association. It was this speech more than any other, delivered only six months after becoming Attorney General, that crystallised precisely the type of judicial philosophy and ideological outcomes the Reagan administration expected from the nominations it was making to the federal judiciary. The core philosophical demands of Reagan's criteria for judicial selection were revealed here. Such demands required an adherence to the 'original intention' of the Constitution's Founding Fathers. Maltese argues that "to, 'reason from constitutional premises' was shorthand language for adherence to what...Meese called 'a jurisprudence of original intent,' a controversial approach to constitutional interpretation that bound judges to the

46. Goldman, *op. cit.*, p. 298.

47. Public Papers of the Presidents of the United States, *Ronald Reagan 1983*, Book II (Washington, D.C. U.S. Government Printing Office, 1985), p. 1112.

framers' understanding of constitutional language."[48] Stephenson describes further Meese's attack on what he perceived to be 'judge-made' law.

> (i)n 1985 Edwin Meese ... revealed the momentous implications of this approach when he called for a "jurisprudence of original intention" to replace the "jurisprudence of idiosyncrasy" that had licensed judges to decide cases on what they believe "constitutes sound public policy ... A Constitution...viewed as only what the judges say it is, is no longer a constitution in the true sense." Echoing laments of Presidents Jackson and Lincoln, he denied that Supreme Court decisions are "binding on all persons and parts of the government, henceforth and forever more." The Court's decisions are not, like the Constitution itself, the "law of the land."[49]

Meese's speech immediately ignited a debate about the role of a federal judge in American politics. Sidney Blumenthal observed that the speech, "was so unprecedented, such a radical departure from settled law, that he provoked two Supreme Court justices, John Paul Stevens and William Brennan, to descend from the bench and upbraid him for his extreme misreading of American history and law."[50] Stephenson best describes Justice Brennan's reaction:

> Brennan was one of the first to respond to Meese, in a defence of the Court's role by a sitting justice that was the most striking since Chief Justice John Marshall's day. Meese's "view emphasises not the transcendent historical authority of the framers but the predominant contemporary authority of the elected branches of government," argued Brennan. Interpretivists were guilty of "facile historicism" ... For Brennan the Constitution's open ended phrases were a mandate for judges to infer rights from general principles implied by the Constitution.[51]

Fried uncovers the reasons for Meese's approach and his oratory style and how he used it to communicate directly to Reagan's conservative electoral base. He observes that, "these speeches were written for Meese by his cadre of committed young assistants ... those who were standing with or behind the Attorney General thought of themselves as revolutionaries, they did not trust the usual channels to deliver

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48. John Maltese, *The Selling of Supreme Court Nominees* (Baltimore: Johns Hopkins University Press, 1995), p. 122.

49. Stephenson, *op. cit.*, p. 211.

50. Sidney Blumenthal, *The Rise of the Counter-Establishment* (New York: Times Books, 1986), p. 297.

51. Stephenson, *op. cit.*, pp. 211-212.

results. The bureaucracy could not be trusted to implement a revolutionary program."[52]

Fried explores further how Meese used his speeches to encourage and strengthen the reactions of conservatives. He argues that Meese's, "provocative public statements served a purpose: they pushed the Attorney General so far out on a limb that he was committed. Though they attracted criticism from the general media, these speeches would make him a hero in the eyes of the hard core faithful, isolating him from the centre while binding him tighter to the fringe." Internally, Fried found that Meese's speeches were, "a way to impose a degree of conformity on subordinates in independently responsible offices, without putting the Attorney General to the trouble of explicitly overruling their decisions."[53]

In another speech on the role of judges, this time in a briefing to United States Attorneys on 21 October, 1985, President Reagan reminded his audience of what he expected from his judicial nominees, by connecting his ideological demands with the philosophical boundaries he wanted his judicial appointments to function within. Reagan stated:

> Now, during the past two Presidential elections, I've made it clear to the American public that I felt the courts had sometimes gone too far in interfering with the constitutional prerogatives of other branches of government, even while they neglected their constitutional duty of protecting society from those who prey on the innocent. Well, this is still my belief. So, I intend to go right on appointing highly qualified individuals of the highest personal integrity to the bench, individuals who understand the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism. I want judges of the highest intellectual standing who harbor the deepest regard for the Constitution and its traditions, one of which is judicial restraint.[54]

Reagan continued to provide a clear indication of what he sought from his judicial nominees:

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52. Fried, *op. cit.*, p. 51.

53. *Ibid.*, pp. 51-52.

54. Public Papers of the Presidents of the United States, *Ronald Reagan 1985*, Book II (Washington, D.C. U.S. Government Printing Office, 1988), p. 1270.

> I'm very proud of our record of finding highly qualified individuals who also adhere to a restrained and truly judicious view of the rule of the courts - or the role of the courts under our Constitution. The independence of the courts from improper political influence is a sacred principle. It must always be guarded. And let me assure you, it always will be guarded while this administration is in office.[55]

Once again the President reiterated a key theme of his administration's approach to the types of judicial nominees he sought:

> ... the Founding Fathers knew that, like any other part of the Government, the power of the judiciary could be abused. They never intended, for example, that the courts pre-empt legislative prerogatives or become vehicles for political action or social experimentation or for coercing the populace into adopting anyone's personal view of utopia. So, to make sure the courts weren't misused in this way and did not set themselves up as an institution entirely removed from the society they're intended to serve, the Founding Fathers provided for checks and balances, one of which was to place the appointive power for the judiciary in the hands of those who are in office as a result of popular election.[56]

In summary, the first part of this chapter examined the Republican Party platforms of 1980, 1984 and 1988 and briefly assessed four keynote speeches made by President Reagan and two of his Attorneys General to gain an insight into what was expected of nominees regarding the criminal justice component of the judicial selection test. From the three Republican Party platforms examined in this chapter, it is evident from these documents that a tough, hardline approach to criminal justice matters was expected. To recap, the 1980 platform called for the, "speedy application of criminal penalties" and added that, "these disincentives will only be as strong as our court system's willingness to use them."[57] The 1984 platform demanded, "Those who commit crimes should be held strictly accountable by our system of justice," and that, 'those convicted of serious offences must be jailed swiftly, surely, and long enough to assure public safety."[58] The 1988 platform proclaimed proudly that, "We

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55. *Ibid.*

56. *Ibid.*

57. See footnote 30 above.

58. See footnote 31 above.

appointed judges who respect family rights, family values, and the rights of victims of crime."[59] These three documents clearly demonstrate that a tough, conservative stance on criminal justice matters was one of the key ideological expectations contained in the process of judicial selection under the Reagan and Bush administrations.

The speeches made by Reagan and two of his Attorneys General established the philosophical boundaries by which judicial nominations were expected to adhere. The speech by former Attorney General, William French Smith, in 1981 attacked the tendency in the federal judiciary towards, "constitutionally dubious and unwise intrusions upon the legislative domain" and the consequent "erosion of restraint." Reagan made clear in his address to the ABA in 1983 that his nominees would be those, "who support the limited policymaking role for the Federal courts envisioned by the Constitution." Former Attorney General Edwin Meese, also in an address to the ABA, demanded a fundamental change in legal methodology by calling for a, "jurisprudence of original intention" to replace the "jurisprudence of idiosyncrasy." Finally, in 1985 Reagan said to a gathering of US Attorneys that he wanted nominees, "who understood the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism," and who "harbor the deepest regard for the Constitution and its traditions, one of which is judicial restraint." The demands expressed in these speeches show that a conservative legal methodology like originalism or textualism provided the relevant philosophical contours around the selection standards that applied to judicial nominees.

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59. See footnote 36 above.

Having established that a stricter approach to criminal justice matters was a key demand within the standards of judicial selection, it is now necessary to describe the judicial philosophy sought from nominees to ensure this tough approach was reflected throughout the federal judiciary. This will clarify further what was expected of judicial nominees under these two administrations and the extent to which nominees failed or exceeded the expectations placed on them by their nominating President. Lastly, to strengthen our understanding of the content of these standards the next part of this chapter explores various liberal approaches to jurisprudence. This is necessary because it places in sharper context the philosophical boundaries of these selection standards and reveals that which was rejected by those who administered it.

Conservative Legal Methodology

It is important to review the main approaches within conservative jurisprudence because it provides a greater understanding of the judicial philosophy towards criminal justice cases that nominees were expected to adhere to in order to fulfil the selection standards applied by the Reagan and Bush administrations. Reagan's former Solicitor-General, Charles Fried, best summed up the judicial philosophy the President expected. He states that the Reagan administration demanded that the, "courts should be more disciplined, less adventurous and political in interpreting the law, especially the law of the Constitution ..."[60]

The essence of conservative jurisprudence relates to the way in which the role of a judge is defined in the American political system. It means ensuring the role of the judge correlates with what was established when the American system was designed

60. Fried, *op. cit.*, pp. 17-18.

over two hundred years ago. It seeks to compel judges to conform to an underlying principle of democracy - that due to their lack of a democratic mandate from the American people, judges must abstain from consciously exercising political power. This limitation, according to Jacobsohn, can be traced back to the intentions of those who constructed and ratified the Constitution.

> In large measure, according to the founders, the rule of law means that government officials must stay within the prescribed limits established by the Constitution for the institutions of which they are a part. Applied to the courts this implies that judges transgress the rule of law whenever they set out to determine policy instead of adhering strictly to their assigned tasks – the policing of constitutional boundaries, the enforcing of constitutional rights, and the application of statutory law.[61]

Robert Bork arguably provides the best description of the role of a judge as it is accounted for in conservative jurisprudence, particularly through the definition of originalism. Bork achieved this with particular clarity in a personal letter he wrote to Reagan after his nomination to the Supreme Court had been defeated in the Senate. In that letter Bork states:

> In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter – and it is a task quite large enough for anyone's wisdom, skill and virtue – is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.[62]

According to Bork, when a judge breaches this self-imposed abstinence he or she infringes the democratic rights of the American people and, "any time he does so, he violates not only the limits to his own authority but, and for that reason, also violates the rights of the legislature and the people."[63]

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61. Gary Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* (New York: Rowman and Littlefield, 1986), p. 24.

62. Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1990), p. 318.

63. *Ibid.*, p. 147.

Stephen Macedo insists that, "any discussion of the Reagan administration's judicial philosophy (at least as it pertains to the Constitution and the Supreme Court) must begin with the intentions of the framers, or original intent."[64] Macedo also underlines the significant role Bork played in influencing the originalist underpinnings of Reagan's judicial selection standards: Judge Bork may not have convinced us, but we now all know something about judicial restraint, "original intentions," and what might be called the jurisprudence of the New Right. Even if Judge Bork had not been nominated to the Supreme Court, no discussion of the Reagan administration's judicial philosophy could neglect Bork's writings and speeches. More than any other person, he has articulated without inhibition the basic themes of this administration's vision of the Constitution. There can be no doubt that Judge Bork's writings and speeches have decisively shaped the judicial legacy of the Reagan administration.[65] Fried supports this observation stating, "originalism – the doctrine that the Constitution should be interpreted according to the intent of its framers ... almost became the motto of the Meese Justice Department."[66]

The originalist approach places great weight on a judge's deference to precedent and the original intentions of the authors of the Constitution. As Bork makes clear, "At the centre of the philosophy of original understanding, therefore, must stand some idea of when the judge is bound by prior decisions and when he is not."[67] Meese, summarises the originalist method by stating:

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64. Stephen Macedo in David Boaz (ed.), *Assessing the Reagan Years* (Washington D.C.: Cato Institute, 1988), p. 356.

65. *Ibid.*, p. 353.

66. Fried, *op. cit.*, p. 61.

67. Bork, *op. cit.*, p. 159.

> In the main a jurisprudence that seeks to be faithful to our Constitution – a jurisprudence of original intention, as I have called it – is not difficult to describe. Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed as well. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.[68]

Deference to precedent is a core part of the originalist project and Bork not only reiterates this but proceeds to criticise those who cast it aside in their own judicial ideology:

> those who adhere to a philosophy of original understanding are more likely to respect precedent than those who do not. As Justice Scalia has said, if revisionists can ignore 'the most solemnly and democratically adopted text of the Constitution and its Amendments ... on the basis of current values, what possible basis could there be for enforced adherence to a legal decision of the Supreme Court?' Indeed, it is apparent from our recent history that the Justices most inclined to rewrite the Constitution have the least patience with precedent that stands in their way.[69]

Bork also provides a concise and important summary of why he sees the originalist approach as the best method by which to interpret law and, to him, the shallowness of the liberal approach. He states:

> The interpretation of the Constitution according to the original understanding, then, is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people. Only that approach can lead to what Felix Frankfurter called the 'fulfilment of one of the greatest duties of a judge, the duty not to enlarge his authority.' That the Court is not the maker of policy but is concerned solely with questions of ultimate power, is a tenet to which all Justices have subscribed. But the extent to which they have translated faith into works probably marks the deepest cleavage among the men who have sat of the Supreme Bench ... The conception of significant achievement on the Supreme Court has been too much identified with largeness of utterance, and too little governed by inquiry into the extent to which judges have fulfilled their professed role in the American constitutional system.[70]

Earl Maltz presents what he calls the 'most plausible defence' of originalism in the following way:

> The framers of the Constitution had legitimate authority to make political decisions that would bind future governmental decision makers until superseded by judgements made through the process specified in the Constitution itself. As a corollary to this premise, federal judges are

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68. Edwin Meese in Jack Rakove (ed.), *Interpreting the Constitution: The Debate over Original Intent* (Boston: Northeastern University Press, 1990), p. 17.

69. Bork, *op. cit.*, p. 155.

70. *Ibid.*, p. 41.

> required to invalidate actions inconsistent with limitations imposed by the framers. At the same time, however, where other government actors act consistently with the original understanding, the federal courts should defer to their decisions; the same legitimate authority that established the courts themselves requires judges to respect the specific grants of power to Congress...[71]

Fried locates the essence of originalism by observing, "(t)he concept of originalism speaks to the most basic legal question: by what authority do judges impose their views on the people, even to the point of striking down laws made by the peoples elected representatives?"[72]

Supreme Court justice Antonin Scalia provides another justification for taking a conservative approach to legal methodology. In an address to the Manhattan Institute, Scalia provided a personal insight into his own methodology by stating:

> My Constitution is flexible. My Constitution, which is; I will accept the condemnation, which is a minimalist Constitution. It means what it meant when it was written. But it is a flexible Constitution. In my Constitution you want the death penalty, pass a law. You don't want the death penalty, pass a law the other way. How more flexible could you be? You want a right to an abortion? Adopt it the way most rights are adopted in a free society, pass a law. You don't want a right to an abortion? Pass a law the other way. You want a right to die? And so forth, right down the list of all of the social issues that are brought to the Supreme Court. No, no, no, no, no. A constitution is not for flexibility. A constitution is for rigidity.[73]

Scalia argues that to be an originalist judge requires conforming to a specific process rather than seeking to arrive at a particular result.

> Originalist theory does not demand that an examination of the historical record yield a definite, uncontroversial answer to constitutional questions. Depending upon the political/social context in which they are operating and other factors, judges may reach divergent conclusions on the implications of the historical evidence. However, originalism requires only that each judge make a good faith estimate of the original understanding and that his or her decision-making process by guided by that understanding.[74]

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71. Earl Maltz, *Rethinking Constitutional Law: Originalism, Interventionism and the Politics of Judicial Review* (Wichita: University Press of Kansas, 1994), p. 21.

72. Fried, *op. cit.*, p. 62.

73. Antonin Scalia, "On Interpreting the Constitution," The Wriston Lecture, November 17, 1997 The Manhattan Institute for Policy Research, New York City. Transcript accessed at www.manhattan-institute.org/html/wl1997.htm

74. Maltz, *op. cit.*, p. 21.

Maltz simply states that originalism, "is founded on the belief that judges should be bound by the rules that the framers incorporated in the charter of government through a legitimate law making process."[75] Maltz also identifies a key distinction between originalists and their opponents relating to the strength of the Constitution over time. While conservatives believe that the document can be applied two hundred odd years later, a more liberal approach means that an evolving society and its context demands a more flexible interpretation. Maltz assesses this difference:

> The primary distinction between originalism and other theories lies in their perceptions of the mutability of constitutional meaning. Originalists view the meaning of the Constitution as having been fixed in 1789, while adherents to other interpretative strategies see it as open ended. From this perspective, it makes little difference if the body with the authority to fix the original understanding is the drafters, the ratifiers, or the people as a whole; the key point is that once settled – by whatever body – it would not evolve over time as circumstances change.[76]

This refusal by originalists to recognise that time can corrode certain parts of the Constitution and alter the mode by which it is interpreted and applied is emphasised by Dworkin. He concludes that, "originalism is flawed because it fails to identify the level of abstraction at which the framers intentions should be considered."[77]

Liberal Legal Methodology

Examining liberal approaches to jurisprudence ensures a stronger understanding of these judicial selection standards because what was rejected by the Reagan and Bush administrations is brought into sharper relief. It can safely be assumed that judicial candidates who were adherents of liberal jurisprudence were removed from consideration for nomination to the federal judiciary under the Reagan and Bush

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75. *Ibid.*, p. 64.

76. *Ibid.*, p. 27.

77. *Ibid.*, p. 21.

administrations. The specific liberal approaches reviewed in this section are generally defined as legal realism and Living Constitutionalism.

Former Supreme Court justice William Brennan best sets the scene for defining liberal approaches to jurisprudence. He observes, "our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure."[78] Whereas conservative legal methodology is characterised by its insistence on a limited and defined role for judges, liberal legal methodology emphasises context and flexibility in constitutional interpretation. Using his own experience as an example, Justice Brennan recalls:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.[79]

This continual adaptability to the demands of modern society constantly underlines Justice Brennan's approach. He states, "When Justices interpret the Constitution they speak for their community, not for themselves alone. The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought."[80] Brennan also details how constitutional interpretation must vary to ensure the progressive element of society

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78. See Justice William Brennan Jr, Speech delivered at the Text and Teaching Symposium, Georgetown University, Washington D.C. October 12, 1985. Transcript accessed at www.pbs.org/wnet/supremecourt/democracy/sources_document7.html

79. *Ibid.*

80. William Brennan Jr. in Jack Rakove, *Interpreting the Constitution: The Debate over Original Intent* (Boston: Northeastern University Press, 1990), p. 25.

remains preserved. "Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a pre-existing society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognised."[81] Tribe and Dorf, establish the basis for this approach by stating that, "(i)n the Constitution of the United States, men like Madison bequeathed to subsequent generations a framework for balancing liberty against power. However, it is only a framework; it is not a blueprint."[82] The authors use Oliver Wendell Holmes to justify the liberal emphasis on flexibility.

> Holmes had no doubt that the very meaning of the thing we call 'the Constitution' ... was a reality partly reconstructed by each generation of readers. And he had no doubt that that was as the Framers of the Constitution intended. They were, after all, framing the Constitution, not painting its details. Why else call them 'Framers?'[83]

Tribe and Dorf present conservatives with a fundamental challenge, "How then ought we to go about the task of finding concrete commandments in the Constitution's majestically vague admonitions?"[84] Erwin Chemerinsky issues a more confronting challenge. "Why should past generations, long dead, continue to govern us through a document written for an agrarian slave society?"[85] Chemerinsky continues by arguing, "it is erroneous to say that since the people ratified the Constitution, originalist review is democratic, because not a person alive today ... voted in its favour. Democracy is defined by originalists to require decisions by

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81 See Brennan, Text and Teaching Symposium, n.78 above.

82. Laurence Tribe and Michael Dorf, *On Reading the Constitution* (Cambridge: Harvard University Press, 1991), p. 6.

83. *Ibid.*, p. 9.

84. *Ibid.*, p. 7.

85. Erwin Chemerinsky, *Interpreting the Constitution* (New York: Praeger, 1987), p. 27.

current majorities; majority rule does not exist if society is governed by decisions of past majorities that cannot be overruled by a majority of the current population.[86]

The first form of liberal jurisprudence considered here is referred to as legal realism. Wilfred Rumble, arguably the most significant contributor to our understanding of legal realism, provides a fundamental motivation for its emergence. He states, "One of the 'facts of life' which impressed itself most indelibly upon the minds of the legal realists is the celerity and pervasiveness of social change."[87] It is this undercurrent of constant social change that moulds liberal jurisprudence into a flexible entity with the goal of arriving at legal outcomes based on context and relativity.

Rumble identifies and describes four key foundations for legal realism. He states:

> The four points of departure which are common but not peculiar to the realists are: an insistence upon the reality of legal change, and of judicial creation of law; the conception of law as a means for the achievement of social ends, to be evaluated in terms of its purposes and effects; an emphasis on the rapidity of social change, and the likelihood that for this reason law stands in need of constant updating; and "distrust of traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing."[88]

Other characteristics of the legal realist school, according to Rumble, include:

> ...distrust of the theory that traditional prescriptive rule formulations are the heavily operative factor in producing court decisions; ... insistence on the necessity to discover the effects of law, and to evaluate it in terms of these effects; and sustained and programmatic attack on the problems of law along any of these lines[89]

Aside from the emphasis on context and flexibility another inherent characteristic of the school of legal realism is scepticism. In this regard Rumble states the 'central links' of legal realism:

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86. *Ibid.*, p. 19.

87. Wilfrid Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, N.Y.: Cornell University Press,: 1968), p. 66.

88. *Ibid.*, pp. 27-28.

89. *Ibid.*, p. 28.

> ... are a thoroughgoing scepticism towards traditional views of the judicial process and, especially, the role of established rules; the development of new methods for the study of law and the prediction of decisions; and the formulation of a different role for the judge than found expression in even the writings of jurists such as Pound and Cardozo.[90]

Rumble also identifies how the dynamic and progressive nature of society can undermine the conservative approach to legal methodology. In quoting Frank, he recounts:

> No one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern times. New instruments of production, new modes of travel and of dwelling, new credit and ownership devices, new concentrations of capital, new social customs, habits, aims and ideals – all these factors of innovation make vain the hope that definitive legal rules can be drafted that will forever after solve all legal problems.[91]

Arguably, the most significant underlying theme liberal jurisprudence seeks to accommodate are the demands relating to the continued progression of society. In quoting Karl Llewellyn, Rumble states:

> Llewellyn wrote in 1931 that one of their common points of departure is "the conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs re-examination to determine how far it fits the society it purports to serve."[92]

Chemerinsky emphasises the significance of a legal methodology that remains in step with fundamental changes in society by stating that, "If the value embodied in the Constitution is to be upheld, it must evolve to include new technological threats."[93] Former Supreme Court justice, William Brennan, is just as emphatic. "To remain faithful to the content of the Constitution ... an approach to interpreting the

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90. *Ibid.*, p. 46.

91. *Ibid.*, p. 66.

92. *Ibid.*, p. 75.

93. Chemerinsky, *op. cit.*, p. 53.

text must account for the existence of ... substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances."[94]

Rumble eloquently summarises the key differences between legal realists and adherents of conservative jurisprudence. He states,

> The vital issue between realists and non-realists is, thus, "the contest between the force and validity of principles, precedents, reason, free will, and impartial justice on the one hand, and the impact of emotion, irrationalism, bias, environment, and juristic scepticism in the legal order."[95]

Another approach within the liberal school of jurisprudence considered here is termed 'Living Constitutionalism.' As indicated, this method perceives the Constitution as an evolving, organic document able to adapt to the demands of an ever-changing society. This is important, argues Chemerinsky, because:

> ... the meaning of values in the Constitution should not be static. The Constitution should protect values that are fundamental now, not those that were important 200 years ago. In 1787, slavery was acceptable, women were disenfranchised, notion of free speech and due process were limited. Without the possibility for evolution, the Constitution would be confined to anachronistic beliefs. If the Constitution does not evolve, it will contain values that are universally rejected by society. A document that sanctions slavery and counts a slave as only three fifths of a person for purposes of representation would be repugnant in modern society. The Constitution cannot serve as a unifying document if it contains provisions that the vast majority of society deem unacceptable ... an evolving document is preferable because it allows society to undo its mistakes, rather than be permanently governed by them.[96]

Chemerinsky continues by arguing that the generality of the Constitution was deliberate to ensure greater flexibility in the future and to enable the document to more successfully adapt to changes in society. He states that the Framers, 'undoubtedly recognised that they could not anticipate all the events and situations that might require constitutional coverage. General constitutional language allows adaptation to exigencies that could not be foreseen.'[97]

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94. See Brennan Speech at Text and Teaching Symposium.

95. Rumble, *op. cit.*, p. 89.

96. Chemerinsky, *op. cit.*, pp. 54-55.

97. *Ibid.*, p. 36.

Earl Maltz locates the genesis for 'Living Constitutionalism' by stating, "(t)he invocation of the 'Living Constitution' rests on the need for temporal flexibility – that is, the idea that legal rules should be somewhat fluid so that they can be adapted to changing circumstances."[98] Tribe and Dorf also provide an account as to the origins of the Constitution's evolutionary nature. They argue:

> ... many of those who wrote the text of the original Constitution or voted to approve it, or wrote or voted to approve some of its amendments, supposed that the meaning, at least of the more general terms being deployed, was inherently variable. They supposed that the examples likely to occur to them at the time of the creation would not be forever fixed into the meaning of the text itself. Thus, even supposing that what the Framers thought about the Constitution should be the touchstone of constitutional interpretation, it need not be the case that the Constitution's broad language would have to be interpreted in such a way that it speaks only to issues that already existed two hundred years ago.[99]

Tribe and Dorf acknowledge that one of the key problems with the Constitution's "broad language" is that it can be used to legitimise either a conservative or liberal approach to the law because, "the text itself leaves so much room for the imagination."[100]

Justice Antonin Scalia identifies 'Living Constitutionalism' as one of the more dominant forms of liberal jurisprudence and, in a speech to the Manhattan Institute in 1997, he launched a stinging attack on its methods.

> The new view of The Constitution is encapsulated in the hateful phrase, the Living Constitution. It is a document that morphs from decade to decade so as to be the embodiment of the most profoundly held beliefs of society. From decade to decade. Never mind what beliefs it recites in its text. Never mind what beliefs the people who wrote that text happened to have. What it consists of now is an empty bottle which we feel free to fill up with whatever liquid seems to us passionately desirable.[101]

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98. Maltz, *op. cit.*, p. 77.

99. Tribe and Dorf, *op. cit.*, pp. 9-10.

100. *Ibid.*, p. 15.

101. See Justice Scalia's Wriston Lecture, the Manhattan Institute for Policy Research, November 17, 1997.

Elsewhere Scalia defines 'Living Constitutionalism' as, "a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law."[102]

'Living Constitutionalism' determines that the Constitution evolves as a product of judicial interpretation because as Chemerinsky explains, "... the very process of applying the Constitution of necessity requires interpretation, and that interpretation, either of the language or of the drafters' intent, will be influenced by modern values ... Non-originalism allows constitutional interpretation to include norms and values not expressly intended by its Framers."[103]

A conservative approach only ever permits changes to the original document through the process of constitutional amendments whereby changes are voted on by the people themselves. Bork argues that the fundamental reasoning for this is that, "Statutes, we agree, may be changed by amendment or repeal. The Constitution may be changed by amendment pursuant to the procedures set our in Article V. It is a necessary implication of the proscribed procedures that neither statute nor Constitution should be changed by judges. Though that has been done often enough, it is no sense proper."[104]

Chemerinsky counters by arguing constitutional change by amendment is so cumbersome it basically leaves the document static and unable to adjust to the ever changing demands of society.

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102. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton N.J.: Princeton University Press, 1997), p. 38.

103. Chemerinsky, *op. cit.*, p. 51 and p. 58.

104. Bork, *op. cit.*, p. 143.

> Constitutional evolution requires change by interpretation; to say that the Constitution may be modified only by amendment is to say there will be virtually no evolution. The cumbersome amendment process, requiring approval by two thirds of both houses of Congress and three quarters of the state legislatures, makes it likely that few amendments will be added to the Constitution. Just 16 amendments have been added in almost 200 years. This means that the Constitution will remain virtually static, failing to evolve to meet the needs of society that is advancing technologically and morally.[105]

To Scalia the process of evolution in this approach lacks a guiding, and to an extent, unifying principle because, "Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole anti-evolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution."[106]

Scalia concludes:

> the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says the Constitution changes; that the very act which it once prohibits it now permits, and which it once permitted it now forbids; and that the key to that change in unknown and unknowable.[107]

Judicial Activism and Conservative Legal Outcomes

Deference to precedent and judicial restraint, two key principles of conservative legal methodology, by their very nature place extensive restrictions on what a conservative judge is able to do to provide the legal outcomes expected of them by their nominating President. Overturning *Miranda*, for example, would require an activist philosophy out of keeping with the fundamental tenets of the jurisprudence the Republicans sought from their nominations to the federal judiciary. Bork, for example, exposes an important inconsistency regarding the relationship between conservative legal philosophies and ideological outcomes.

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105. Chemerinsky, *op. cit.*, p. 67.

106. Scalia, *op. cit.*, p. 45.

107. Scalia, *op. cit.*, p. 46.

> When the Supreme Court was dominated by conservative activists, prior to the coming of the New Deal Court, adherence to original understanding and judicial self restraint was urged by liberals. Since the Supreme Court of the past several decades has been more likely to create constitutional rights that liberals like, those views are likely to be espoused by conservatives. Constitutional philosophy too often depends on which political view dominates the Court.[108]

Frederick Lewis provides a similar overview in the recent history of judicial activism. He states:

> The twentieth century has seen two great periods of Supreme Court activism. The first, which continued out of the last decades of the nineteenth century, involved the conservative Court's development of constitutional doctrine to protect business and property ... This period of activism came to an abrupt end and was reversed following the Court packing crisis of 1936-37 ... The second great period of activism, and one that is the object of concern here, is appropriately associated with the chief justiceship of Earl Warren ... the Warren Court is ... shorthand for the peak period of extensive liberal activism that broadened, extended, and nationalised civil liberties and civil rights in America in mid-century. This period of judicial activism dramatically altered American constitutional doctrine amid great, acrimonious, and still on-going controversy.[109]

Lewis has also observed the irony facing conservatives regarding the concept of judicial activism and the transformation in its meaning. He states:

> The New Right is impatient with the Supreme Court and the judiciary in general, yet not long ago the right wing was one of the staunchest defenders of the Court. In the 1930s, when the judiciary served to block elements of Franklin Delano Roosevelt's New Deal reforms, conservatives were the staunchest champions of judicial review. Within twenty five years, this had changed: The Court, by this time, began consistently to come down on the side of American blacks and the civil rights movement, fulfilling its constitutional function to protect the rights of unpopular minorities.[110]

Ironically, the Reagan administration needed to appoint judicial activists to engineer some of the ideological outcomes it sought. The administration would argue that because of distortions in the way the Constitution had been interpreted in the past such activism was necessary to restore the federal judiciary to the place set for it in the Constitution.

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108. Bork, *op. cit.*, p. 177.

109. Fredrick Lewis, *The Context of Judicial Activism: The Endurance of the Warren Court Legacy in a Conservative Age* (New York: Rowman and Littlefield, 1999), pp. 1-2.

110. Alan Crawford, *Thunder on the Right: The "New Right" and the Politics of Resentment* (New York: Pantheon Books, 1980), p. 318.

The ramifications of this for the judicial selection standards of the Reagan administration meant that while a conservative legal methodology was sought, it required an activist application. Bork explains the dilemma:

> ... the proper question is not what are the political results of a particular philosophy but, under that philosophy, who chooses the political results. The philosophy of original understanding means that the ratifiers of the Constitution and today's legislators make the political decisions, and the courts do their best to implement them. That is not a conservative philosophy or a liberal philosophy; it is merely the design of the American Republic. A theory of judging that allows the courts to choose political results is wrong, no matter which directions the results tend.[111]

Scalia re-states this belief even more firmly. "This is not, I caution you, a liberal versus conservative issue. Conservatives are fully as prepared to create new rights under this evolutionist theory of the Constitution, as liberals are...it's not liberal/conservative. It's modernist versus the traditional view of the Constitution."[112]

Stephenson found that the two most important principles underlying conservative legal methodology, that a judge must be guided by the 'original intent' of the Constitution and that a judge's approach to a case must fit within the parameters of 'judicial restraint,' produced a serious barrier to achieving ideologically conservative legal outcomes.

> Judicial restraint – the new order of the day – would not necessarily serve conservative values. "Fundamental structural principles of constitutional law would almost certainly be re-examined and perhaps replaced," cautioned Professor Tribe. On abortion and school prayer, for example, deference to the past would only preserve the status quo Reaganites disdained. To be effective, the new breed of judge would have to be activist, even "radical," toppling pillars of 'long settled constitutional law," wrote Floyd Abrams in a newspaper duel with Attorney General Smith.[113]

Hodding Carter elaborates on the changeable nature of judicial activism by acknowledging that, "Liberals railed against such judicial activism for decades, until

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111. Bork, *op. cit.*, p. 177.

112. Speech by Associate Justice Antonin Scalia, "A Theory of Constitutional Interpretation," delivered at The Catholic University of America, Washington DC, October 18, 1996.

113. Stephenson, *op. cit.*, p. 207.

changing tides of fortune produced the long Democratic hegemony ... The federal bench was reshaped by the power of appointment during the Roosevelt-Truman era to reflect a new philosophy ... and its activism began to act a different way."[114]

Carter summarises further the ironies in this newly evolved definition of judicial activism:

> ... the change in the frame of reference promptly, and unsurprisingly, produced a flip flop in ideological positions. Liberals became the sycophantic supporters of everything that the least democratic of the three branches of government brought forth, since it was carrying their water. Conservatives, conversely, began to preach piously about the necessity of trusting the legislative process to cure societal ills. The courts, they said without even the trace of embarrassment, should not 'make law.[115]

It is for the aforementioned reasons that placing 'judicial activism' within the school of liberal jurisprudence was deliberately avoided throughout this thesis.

Summary

The purpose of this chapter has been to unite the ideological demands specified in the judicial selection standards of the Reagan and Bush administrations with the philosophical boundaries that underpinned it. The first part of this chapter examined the ideological content of the criteria used in the process of selecting judicial nominees by examining the Republican Party platforms of 1980, 1984 and 1988. Of particular interest to this thesis was the criminal justice demands within these platforms and the expectations contained within these documents regarding the role of the federal judiciary. The platforms clearly show that a tough, hardline approach to criminal justice matters was expected of judicial nominees. The 1980 party platform called for the, "speedy application of criminal penalties," the 1984 platform demanded, "those convicted of serious offences must be jailed swiftly, surely, and

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114. Hodding Carter, *The Reagan Years* (New York: George Braziller, 1988), p. 94.

115. *Ibid.*, pp. 94-95.

long enough to assure public safety," while the 1988 platform proclaimed, "We appointed judges who respect family rights, family values, and the rights of victims of crime."[116] While a judicial nominee's approach to *Roe* was also an important part of these selection standards, the focus of this thesis is on its criminal justice component and the equivalent case, *Miranda.*

After examining four keynote speeches made by Reagan and two of his Attorneys General in the first part of this chapter it was then necessary to locate the philosophical expectations that were contained within these selection standards. Consequently, the second part of this chapter explored the school of conservative jurisprudence, which framed the ideological objectives of these standards, particularly the 'originalist' approach. The focus on this approach emanated from the repeated calls for 'judicial restraint' and the need for adherence to the 'original intention' of the Constitution that were made throughout the Reagan and Bush eras. Liberal legal philosophies were also examined in this chapter so that what was not accepted in the standards that applied to the process of judicial selection throughout these two administrations was made clear. Having established the type of judicial philosophy sought and the legal methodology demanded towards criminal justice cases, the next chapter focuses on the actual process of selecting judges as it was conducted throughout the Reagan and Bush administrations.

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116. See footnotes 30, 31 and 36 above for source of the respective Republican Party platforms.

Chapter Three

AN OVERVIEW OF THE PROCESS OF JUDICIAL SELECTION DURING THE REAGAN AND BUSH ADMINISTRATIONS

Introduction

It is now necessary to examine the practical and mechanical aspects of judicial selection. This chapter provides an overview of the route a nominee takes from the moment he or she was selected by President Reagan or Bush through to that person's vote of confirmation on the Senate floor. The main parties, agencies and individuals a nominee encounters along the way to being confirmed to a lifetime seat on the bench, particularly throughout the Reagan and Bush eras, are examined here.

The first part of this chapter concentrates on the process of nominating a person to the federal judiciary. It examines the history and structure of this procedure and outlines the role played by each of the various agencies and interests engaged in this process. The next section of this chapter examines briefly the role of White House staff and that of three critical agencies operating during the Reagan and Bush administrations - the Office of Legal Policy in the U.S. Justice Department (and its successor under George H. W. Bush, the Office of Policy Development), the President's Committee on Federal Judicial Selection and the office of the White House Counsel. It is important to elaborate on the role of these agencies, as it was here that the standards for judicial selection under Reagan and Bush were first administered formally. It was the failure of certain judges to adhere to the philosophical expectations of their nominating President, as administered in part by these agencies, that caused the problem this thesis seeks to resolve.

This chapter proceeds to explore the workings of the powerful Senate Judiciary Committee. It is in this committee that the President's nominations are considered

through the hearings process and a vote taken to approve the nomination and move it to the Senate floor for a final vote of confirmation. It is because of the importance of the Judiciary Committee, and its ability to reject or delay a nomination, that it is essential an outline is provided of its history and structure and the role it plays in the process of judicial nominations. The next section of this chapter focuses on those key staff members in the Reagan and Bush administrations who were involved in selecting people to the federal judiciary. Although many were a part of this process, particular attention is placed on the influence of three Attorneys General who served during the Reagan and Bush administrations - William French Smith, Edwin Meese III and Dick Thornburgh. The disproportionately significant role played by the most important private organisation in the judicial nominations process at the time, the American Bar Association, is the subject of the final section in this chapter.

An Overview of the Process of Judicial Nominations

Such is the size and power of the judicial branch of the American federal government that selecting suitable candidates to serve in it is one of the most significant and lasting actions a President can make. Reagan himself acknowledged this in 1981 when he announced his intention to nominate Sandra Day O'Connor to the Supreme Court. President Reagan stated:

> I have the privilege to make a certain number of nominations which have a more lasting influence on our lives, for they are the lifetime appointments of those men and women called upon to serve in the judiciary in our Federal district courts and courts of appeals ... But, without doubt, the most awesome appointment is ... an appointment to the United States Supreme Court. Those who sit in the Supreme Court interpret the laws of our land and truly do leave their footprints on the sands of time. Long after the policies of Presidents and Senators and Congressmen of any given era may have passed from public memory, they'll be remembered.[1]

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1. See Remarks Announcing the Intention To Nominate Sandra Day O'Connor To Be an Associate Justice of the Supreme Court of the United States, July 7, 1981 in Public Papers of the Presidents of the United States, *Ronald Reagan 1981* (Washington, D.C.: U.S. Government Printing Office, 1982) p. 596.

The process by which a person is nominated to the federal judiciary essentially requires the completion of roughly six stages before that person can assume his or her position on the bench. The first stage normally begins with the President and his staff, including the Attorney General, the White House Counsel and the U.S. Department of Justice, who, having eliminated candidates from a shortlist and ensured the fulfilment of all necessary expectations, produce a single name. The President derives his power to make such nominations under Article II, Section 2 of the Constitution. As Alexander Hamilton stated in *Federalist No. 66*, only the President can formally commence the process of making a judicial nomination.

> It will be the office of the President to *nominate* and with the advice and consent of the Senate to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive and oblige him to make another; but they cannot themselves *choose* - they can only ratify or reject the choice of the President.[2]

Goldman provides an intimate account of this initial stage of the judicial nomination process as it occurred under Reagan.

> For each judicial nomination, the White House counsel sent a memorandum to the president with the formal nomination papers attached for his signature. The cover memo contained the recommendation that the president nominate the individual and that he telephone to ask the prospective nominee to serve as a federal judge. Here was the president's most active personal involvement ... the president made the call, and on the bottom of (*White House Counsel*) Fielding memorandum he wrote, "He says yes," and initialled it "RR."[3]

Goldman notes the personal interest Reagan himself took in the process of selecting his judicial nominees:

> (t)he practice of the president himself making telephone calls officially asking individuals to accept judicial nominations was an innovation that the Reagan administration instituted in the late summer of 1981. Certainly the president's personal involvement in this manner underscored the importance the administration placed on judicial selection and no doubt impressed upon the appointees that they were indeed Reagan appointees.[4]

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2. See Benjamin Fletcher Wright (ed.), *The Federalist* (Cambridge, Mass.: Harvard University Press, 1966), p. 434.

3. Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997), p. 293.

4. *Ibid.*, p. 294.

After the President decides on a nominee, that person progresses to the second stage of the process where a rigorous security and background assessment is conducted by the Federal Bureau of Investigation (FBI) and the Internal Revenue Service. "The FBI examination centres around a series of interviews with local attorneys, bar figures, and judges to obtain their views on the candidate's character, professional standing and reputation."[5] Further scrutiny occurs when the candidate, having passed his or her security assessment, has their nomination made public and moved to the third stage of being sent before the Senate Judiciary Committee for consideration. Peter Schuck outlines what happens next once the nomination arrives at the Judiciary Committee:

> the process of Senate consideration [starts] by sending a "blue slip" to the senators from the state in which the vacancy arose, informing them of the nomination. This is "senatorial courtesy." In practice, however, the committee waits as long as it takes the senator to reply. The staff also sends similar letters of inquiry to the ABA and state and local bar associations. Once the slips are returned, hearings are scheduled for district and circuit court nominations.[6]

The hearings of the Senate Judiciary Committee represent the fourth, and arguably the most feared, stage of the judicial nominations process. After bearing often intense questioning from members of the Judiciary Committee regarding one's past judicial record and legal methodology, the fifth stage of this process is undertaken, which requires the nominee's name to be put before an executive business meeting of the committee. It is here a vote is taken to approve the nomination and send it to the sixth and final stage, the floor of the Senate. In the Senate Chamber any Senator can rise to debate the merit of the nominee's pending

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5. Jerome Corsi, *Judicial Politics: An Introduction* (New Jersey: Prentice Hall, 1984), pp. 119-120.

6. P. Schuck, *A Study of the House and Senate Judiciary Committees* (New York: Grossman Publishers, 1975), p. 237.

appointment before it is brought before the full Senate for a final vote of confirmation.

Throughout Reagan's two terms in office he nominated three judges to the Supreme Court, elevated one to the chief justiceship and appointed 82 judges to the U.S. Court of Appeals and 293 judges to the U.S. District Courts. In his single term in office President Bush appointed two judges to the Supreme Court, 42 judges to the U.S. Court of Appeals and 150 judges to the U.S. District Courts. In total, Reagan made 378 appointments and Bush 194 appointments to the federal judiciary.[7]

The Office of Legal Policy, the President's Committee on Federal Judicial Selection, the White House Counsel and Others Involved in Judicial Selection During the Reagan and Bush Eras

The selection standards applied to the eleven judges at the centre of this thesis at the time of their nomination were generally conducted by three key agencies. They were the Office of Legal Policy within the Department of Justice (later modified by Bush to become the Office of Policy Development), the President's Committee on Federal Judicial Selection and the office of the White House Counsel. Prior to the election of President Reagan, appointments made to the appellate levels of the federal judiciary by his predecessor, President Jimmy Carter, were conducted through independent nominating commissions. W. Gary Fowler, et al, summarise Carter's approach:

> While, admittedly, these commissions may have generally been lacking a Republican majority or even a Republican presence, the Carter emphasis was on a process that brought judicial selection out of the senator's or president's backroom and into situations where candidates applied for the position and were voted upon by a panel, which contained a broad representation. That is not to say that Democrats were not generally selected - they were, in fact - but the more open procedures subjected the selection process to more viewpoints.[8]

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7. See the Federal Judicial Center Biographical Directory at of Federal Judges at www.fjc.gov/public/home.nsf/hisj

8. W. Gary Fowler, David Jackson and James Riddlesperger "Reagan's Judges: A Latent Revolution," in Eric Schmertz, Natalie Datlof and Alexej Ugrinsky, *Ronald Reagan's America* (Westport, CT: Greenwood Press, 1997), p. 343.

This relatively unique selection process undertaken by President Carter was clearly incongruous with the outcomes the Reagan administration was seeking from the process. Not surprisingly, one of the first actions Reagan took in relation to the federal judiciary was to abandon Carter's appointment mechanism.

> When President Ronald Reagan became president in 1981, he abolished Carter's commission system and seized control of the lower federal selection process by creating the President's Committee on Federal Judicial Selection as part of WHO (the White House Office). Representatives from the White House and the Justice Department staffed the committee.[9]

William French Smith established the Office of Legal Policy (OLP) in 1981. The agency's official purpose was to, "assist the President and the Attorney General in the Administration's judicial selection process for Article III judges."[10] Tinsley Yarborough details further the purpose of the OLP:

> ... to assure close scrutiny of judicial candidates and their likely decisional patterns, the administration developed a number of significant modifications in the traditional selection process. In previous administrations, the procedure for choosing nominees had been centred in the Office of the Deputy Attorney General. During the Reagan years, this role largely shifted to the Justice Department's Office of Legal Policy. In 1984, moreover, the position of Special Counsel for Judicial Selection was established in the Office of Legal Policy to advise the Assistant Attorney General in charge of that division regarding details of the selection process.[11]

From 1981 to 1989 the OLP was one of the main, centralised bureaucratic mechanisms by which the standards of judicial selection were applied to potential nominees. While the individuals operating within the OLP varied and the input made by others to the agency may have also changed, it had a significant impact in determining the types of candidates that successfully assumed positions within the appellate levels of the federal judiciary. It was also an indication of how seriously Reagan and his staff took the process of judicial appointments and how determined

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9. John Maltese, *The Selling of Supreme Court Nominees* (Baltimore: Johns Hopkins University Press, 1995), p.121.

10. See www.usdoj.gov/olp/history.htm

11 Tinsley Yarbrough in Dilys Hill, Raymond Moore and Phil Williams (eds.), *The Reagan Presidency: An Incomplete Revolution?* (London: MacMillan, 1990), p. 85.

they were to change the composition of the federal judiciary though this process. This has prompted Stumpf to declare that, "Perhaps no president has so carefully developed and managed the judicial selection process than has Ronald Reagan. Once the province of the deputy attorney general's office, the selection of judges was shifted almost entirely to the Office of Legal Policy."[12]

Eugene Hickok and Gary McDowell provide a further insight into the purpose of the OLP. They observe:

> ... in the Reagan years the Office of Legal Policy in the Department of Justice took the lead; for Bush, the task was given over to the White House Counsel's office in the White House itself. It was as close to a scientific process of judicial selection as the country had ever seen. Through careful scrutiny of what a potential judge had written or said, it was believed, the right sort of judges would be brought to fill the federal bench, hence a proper understanding of constitutionalism would be restored to the courts. The judicial excesses associated with the Warren Court would be a thing of the distant past.[13]

In referring to the OLP, Goldman found that a key difference between the Reagan administration and its predecessors was how strongly it emphasised judicial appointments. Goldman states:

> [Reagan] formalised the judicial selection process by institutionalising interaction patterns and job tasks that, as we have seen, in previous administrations were more informal and fluid. Before Reagan, the centre of judicial selection activity had been the deputy attorney general's office ... During the Reagan administration these responsibilities shifted to the newly created Office of Legal Policy.[14]

Consequently, Goldman saw the OLP as the primary agency responsible for judicial nominations in the early stages of the process. He states that the agency:

> ... became the centre of the screening process for judicial selection at the Justice Department. The attorney general, the deputy attorney general, the assistant attorney general for legal policy, and the special counsel for judicial selection (another position established by the Reagan administration), along with some of their assistants, met regularly within the Justice Department to make specific recommendations for judgeships to the President's Federal Judicial Selection Committee, still another major Reagan administration innovation.[15]

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12. Harry Stumpf, *American Judicial Politics* (New York: Harcourt, Brace Jovanovich, 1988), p. 196.

13. Eugene Hickok and Gary McDowell, *Justice vs Law* (Sydney: Maxwell Macmillan International, 1993), p. 163.

14. Goldman, *op. cit.*, p. 291.

15. *Ibid.*, p. 292.

Fowler et al identify the difference between the OLP and the President's Committee on Federal Judicial Selection by making this simple contrast. "Reagan Justice Department's Office of Legal Policy handled the screening process, while the President's Committee on Federal Judicial Selection made the final decisions."[16]

When Reagan had completed two terms as President, the Republican commitment to reshaping the judiciary remained largely in tact, even though the structure by which nominations now took place was altered. In 1989, under Bush, the office was renamed the Office of Policy Development and, as Goldman explains, the process of judicial selection then moved back to its traditional place inside the Attorney General's office. In doing so Goldman notes that, "Bush Sr. kept the joint White House-Justice Department Committee, and under Bush Sr. the role of the White House Counsel's office expanded vis-a-vis judicial selection."[17]

Maltese observes that, as well as keeping the President's Committee on Federal Judicial Selection, Bush maintained the emphasis on screening judicial nominees so that, "under the administration of Bush a similar type of judicial candidate to Reagan's was being sought." He found that, "The profile of the typical Bush nominee to the federal bench was similar to that of the typical Reagan nominee. And the political impact of the appointments was to continue to fuse the Republican party's linkage with the New Right."[18]

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16. Fowler, *et al* in Schmertz, *et al, op. cit.,* p. 327.

17. Sheldon Goldman, "Judicial Selection is Study for Professor," *The Third Branch: Newsletter of the Federal Courts*, September, 2001.

18. As cited by Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: W.W. Norton, 1994), p. 124.

The President's Committee on Federal Judicial Selection, formed by President Reagan, was the other key agency by which the standards of judicial selection were applied to potential nominees. This powerful and centralised committee was, "composed of high ranking administration officials ... [which] ... formalised White House control of the selection process, helping to ensure that the federal bench would reflect the political ideology of Ronald Reagan for many years to come."[19]

O'Brien found that the President's Committee on Federal Judicial Selection, "concentrated power within – and institutionalised the role of – the White House in the selection of federal judges."[20] Yarborough states that the Committee was formed, "in an effort to maximise White House influence over the (selection) process" and to review, "prospective nominees screened through the Office of Legal Policy" and to also act, "as an independent source of candidates."[21] Goldman describes the Committee as having been chaired by the White House Counsel and which, "met regularly to review the names and credentials of those being considered to fill vacancies and to assess the status and progress of individual candidates. The Committee aimed to reach consensus on whom to recommend to the President."[22] Silverstein found the Committee was a useful mechanism for ensuring consistency in the type of judicial candidates selected.

> Under Reagan, however, the President's Committee on Federal Judicial Selection, consisting of key members of the White House staff and the Justice Department, was formed to screen judicial appointments and allow the administration to apply a consistent ideological measure.

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19. Stumpf, *op. cit.*, p. 196.

20. As cited by Maltese, *op. cit.*, p. 121.

21. Yarborough in Hill, et al, *op. cit.*, pp. 85-86.

22. Sheldon Goldman, "Judicial Selection is Study for Professor," *The Third Branch: Newsletter of the Federal Courts*, September, 2001.

> The selection committee conducted extensive interviews with prospective nominees to the federal bench, and the agenda of the New Right often formed the basis of the questioning.[23]

To Fowler et al, Reagan's changes meant a dilution of the Attorney General's power as new agencies were established specifically to conduct the task of judicial selection:

> (p)rimary responsibility shifted from the attorney general, and the judicial selection process became a larger staff operation, subject to greater White House supervision. The assistant attorney general for the Office of Legal Policy oversaw the screening of potential nominees. A White House Judicial Selection Committee was created to review potential judicial candidates' records and to decide whom to recommend for the president's nomination. This reorganisation concentrated power, institutionalised the role of the White House, and better positioned Reagan to combat senatorial patronage when filling lower-court vacancies.[24]

Goldman provides further details of the internal workings of the Committee on Federal Judicial Selection:

> (d)uring Reagan's first term, the committee was chaired by White House counsel Fred Fielding and included presidential counsellor Edwin Meese III, the White House chief of staff, the assistant to the president for presidential personnel, the assistant to the president for political affairs, and the assistant to the president for legislative affairs ... The highest levels of the White House staff thus played an ongoing, active role in the selection of judges. Legislative, patronage, political, and policy considerations were systematically scrutinised for each judicial nomination to an extent never before seen. This assured policy coordination between the White House and the Justice Department, as well as White House staff supervision of judicial appointments. The president was thus presented with a consensus recommendation for judicial nominations.[25]

Goldman also explains the objectives within the standards of judicial selection under Reagan and the extent of the power this Committee was given:

> (t)he committee did not merely react to the Justice Department's recommendations; it was also a source of names of potential candidates and a vehicle for the exchange of relevant information. For example, the assistant to the president for presidential personnel informally checked out each prospective candidate for a judgeship as to political acceptability to party officials in the candidate's home state. This and other background on the candidates informed the discussion. The committee, like the Justice Department, was determined to place on the bench, insofar as it was possible to do so, those compatible with the administration's overall ideological and judicial-philosophical perspective. Thus the formal mechanism of the committee permitted consistent screening of judicial candidates.[26]

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23. Silverstein, *op. cit.*, pp. 120-121.

24. G. Fowler, *et al* in Schmertz, *et al, op. cit.*, p. 382.

25. Goldman, *op. cit.*, p. 292.

26. *Ibid.*, p. 292.

Maltese quotes two other prominent officials who served under the Reagan administration to demonstrate the existence of these particular standards in judicial selection. Fred Fielding, Reagan's White House Counsel from 1981 to 1986, admitted that the reforms were designed to choose, "people of a certain judicial philosophy." Attorney General Meese was even more candid, stating that Reagan's judicial appointments were designed to, "institutionalize the Reagan revolution so it can't be set aside no matter what happens in future presidential elections."[27] Fowler et al elaborates on the process of judicial selection by revealing that it consisted of, "extended face-to-face interviews with Justice Department officials" which included questions about "both past rulings and hypothetical controversial cases. A candidate's written record of articles, speeches, and - in the instance of prior judicial experience - previous decisions were reviewed."[28] Fowler et al go on to note that, "The interviews were unprecedented and controversial ... Some who made it to the bench, and others who didn't, told of being asked their views on abortion, affirmative action, and criminal justice matters."[29] Yarborough also points to the increased use of personal interviews as a more effective means of applying the Reagan administration's standards of judicial selection:

> In an effort to assure nominees were philosophically compatible with the President's agenda, the administration supplemented written files on prospective candidates with personal interviews. Such face to face encounters gave Justice Department staffers the opportunity to probe possible nominees for ideological trouble signs, but they also gave rise to the charge that potential candidates were being subjected to a 'litmus test' of their thinking and removed from further consideration if their response to questions about abortion and other social issues important to the administration did not meet Justice Department expectations.[30]

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27. *Ibid.*, p. 123.

28 Fowler, *et al* in Schmertz, *et al, op. cit.*, p. 343.

29 *Ibid.*, p. 362.

30. Yarborough in Hill, *et al, op. cit.*, pp. 86-87.

Ethan Bonner provides a more specific account as to how judicial screening was applied throughout the Reagan administration. He examined the method by which the former White House Counsel to President Reagan and the Chairman of the President's Committee on Federal Judicial Selection, Arthur Culvahouse, approached the nomination of Robert Bork to the Supreme Court. Bronner reveals that Culvahouse met with Bork and, "pulled out of his brief-case a handwritten list of some twenty questions, referring to it as his 'skeleton' questionnaire."[31] In examining the merits of Bork's candidacy each of Culvahouse's test questions were labelled in the context of previous controversial incidences, which had affected other types of federal government nominations. Bronner continues:

> The counsel had nicknames for a couple of them, such as the Gary Hart question, named for the former Colorado Senator who had withdrawn from the 1988 race for the Democratic presidential nomination because of his sexual indiscretion: Had Bork ever had any extramarital affairs? No replied Bork. Now, Culvahouse said, the John Fedders question, after the former head of the investigative branch of the Securities and Exchange Commission whose wife had sued him for divorce: Did Bork beat his wife or children?' 'No, but don't ask them,' Bork offered, trying to inject humour. Culvahouse was stone-faced. 'Look I've led a pretty dull life,' Bork added in another attempt to loosen things up. 'That's good,' Culvahouse responded coolly.[32]

Goldman provides the testimony of a judge who formerly served on the Eleventh Circuit, Emmett Cox, who had been subjected to these standards of judicial selection. He states, "One appeals court nominee, Emmett R. Cox, nominated for the Eleventh Circuit, described his interview: 'I was asked questions about my personal background, my legal background, and my interest in the position. I was also asked general questions relative to judicial philosophy, how I as a judge would approach cases of various types ..."[33]

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31. Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: W. W. Norton, 1989), p. 95.

32. *Ibid.*, p. 96.

33. Goldman, *op. cit.*, p. 304.

The White House Counsel's office was another important overseer of the criteria applied to potential judicial nominees, particularly at the appellate level. David Yalof explores this further:

> (w)ith regard to lower court nominees, the White House Counsel's Office insisted that they all share the president's view that courts should 'interpret the law, not enact new law by judicial fiat.' Fielding felt that Supreme Court appointments should meet even higher standards of ideological commitment. Accordingly, his deputy, Herbert Ellingwood, outlined a formal list of factors to be considered in 'judicial appointments to the Supreme Court.' Along with detailed considerations of 'work capacity,' 'interpersonal relationships,' 'character,' and professional background,' the outline addressed several questions to be pursued concerning each candidate, including the following: How has this person exercised judicial restraint in the past? Is there a commitment to being an interpreter, rather than a creator of the law? What does this person believe are the most important issues before the Court? Is this person strongly convinced of his/her own philosophy? Will they likely be unduly swayed by liberal, academic, media, peer or other pressures?[34]

Silverstein concludes that the Reagan administration was comfortable establishing, "the most comprehensive and effective process for recruiting and screening federal judges in the history of the American presidency" to reshape the judiciary because, "the minuscule political costs among mainstream Republicans were again more than offset by the political gains among the supporters of the New Right."[35]

In summary, Reagan was determined to change the ideological complexion of the federal judiciary like virtually no other American President. Judicial selection attained more significance than ever before. The creation of the Office of Legal Policy and the President's Committee on Federal Judicial Selection demonstrated the careful attention that was being placed on selecting judicial appointments who displayed a judicial ideology in concordance with their new, conservative nominating Presidents.

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34. David Yalof, *Pursuit of Justices* (Chicago: The University of Chicago Press, 1999), p. 15.

35. Silverstein, *op. cit.*, p. 121.

The Key Individuals Involved in the Application of the Standards for Judicial Selection During the Reagan and Bush Administrations

According to Larry Speakes, a former, long time press secretary to Reagan, the beginning of the Reagan administration saw power concentrated in the hands of three men. "During Reagan's first term, the innermost circle consisted of a troika: White House chief of staff James Baker; presidential counsellor Edwin Meese; and deputy chief of staff Michael Deaver, who functioned as a personal aide to Reagan and his wife."[36] This 'troika,' as Speakes refers to it, dissolved in 1985 when Don Regan became Reagan's new chief of staff. "After the troika was replaced by one man, Don Regan, in early 1985, Regan, the new chief of staff, was often referred to as 'the Prime Minister.' But Meese was actually the first prime minister, a role of virtually absolute authority he had carved out for himself during the transition."[37]

With specific regard to judicial nominations throughout the Reagan administration, Edwin Meese clearly did play a prominent and significant role. However, there were two other Attorneys General of importance who are examined in more detail in this chapter - William French Smith and Dick Thornburgh. Before considering Smith and Thornburgh, however, it is first necessary to place the role of these three men in the context of the interchanging dominance of two distinct groupings who determined the types of judicial nominations under the Reagan and Bush administrations – those moderate, pragmatic Republicans and the New Right, ideologically conservative Republicans.

From the outset, the relative power of these three individuals and of all the other key figures involved during this period, was set against the background of a

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36. Larry Speakes with Robert Pack, *Speaking Out: The Reagan Presidency from Inside the White House* (New York: Charles Scribner's Sons, 1988), p. 68.

37. *Ibid.*, p. 68.

persistent internal struggle between an older generation of pragmatists, many of whom had served under former Presidents Nixon and Ford, and a rapidly growing, younger generation of conservative ideologues. The impact that various staff members in the Reagan and Bush administrations had on the process of finding and preparing candidates for nomination was conducted, as Carl Brauer observed, with officials who, "fell into two categories: pragmatists and ideologues."[38] John Sloan identifies the difference between these two political groupings. He begins by tracing the origins of the pragmatists who served under Reagan:

> The Reagan pragmatists were conservatives, but they were not engaged in a crusade; they were playing an endless game whose object was to win as often and as much as they could. ...Many pragmatists had experiences in the imperilled presidencies of Richard Nixon and Gerald Ford. They were determined to avoid the mistakes that had destroyed recent chief executives and to prove that the presidency, when skilfully managed, could be successfully run.[39]

In assessing the conservative influence in the Reagan administration, Sloan found that while the conservatives were a, "tightly bound group" in their ideological commitment the key weakness they had could be found in that they, "often lacked the federal government experience and the policy knowledge of their chief adversaries, who were pragmatists" and that they were not, "as skilled as the pragmatists in the art of public relations, a fatal flaw in Reagan's highly image-conscious White House."[40]

Sloan also accounts for why pragmatists remained an entrenched grouping within the Reagan administration by arguing that, "... although Reagan always kept a cluster of conservatives around him, he frequently selected pragmatists for the most

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38. Carl Brauer, *Presidential Transitions: Eisenhower Through Reagan* (New York: Oxford University Press, 1986), p. 233.

39 See John Sloan in Schmertz *et al, op. cit.*, p. 539.

40. *Ibid.*, p. 538.

important positions – especially the White House chief of staff."[41] Hedrick Smith also details Reagan's penchant for selecting moderates in his administration.

> The first appointments signalled Reagan's inclination to turn to talent and experience rather than to ideological allies to staff his government. Even on substance, he hinted at flexibility ... All this is in keeping with Reagan's record as Governor of California. He campaigned as a missionary conservative but governed, some said, as a "closet moderate." His longtime press secretary, Lyn Nofziger, once jokingly called him 'a Fabian conservative.'[42]

O'Brien found that the generational difference between these two Republican groupings produced a younger type of conservative not only committed to opposing the legal methodology of the former Warren Court but also prepared to go a step further than their more pragmatic colleagues and oppose the legal methodology of the Burger Court.

> Young "movement conservatives," many drawn from the ranks of the Federalist Society, went into the department, particularly under the leadership of Edwin Meese ... they shared a sense of belonging to a new conservative legal movement - a movement that went well beyond moderate Republicans' and traditional conservatives' opposition to the "liberal jurisprudence" of the Warren Court (1953-1969). They defined the department's agenda largely in terms of the New Right's opposition to rulings of the Burger Court (1969-1986) on abortion, affirmative action, busing, school prayer, and the like. They also pushed for a resurrection of "states' rights," a strong unfettered presidency, renewed protection for economic liberties, and massive deregulation.[43]

David Savage concurs, emphasising this group's newly found ideological passion:

> (a)n extraordinary cadre of young, bright, and committed conservatives had been drawn to the Reagan Justice Department. Unlike in earlier administrations, where lawyers took positions in the Justice Department to fight crime, defend civil rights, or pad a resume for a later career in private practice, the Reagan administration attracted attorneys who cared deeply about legal ideology. Simply put, they believed that for a generation, the Supreme Court had abandoned its role as an arbiter of narrow legal issues and had instead become the engine of a liberal social revolution.[44]

This new generation of conservatives were very active in attempting to get their agenda past their older, more pragmatic bosses. Lincoln Caplan recalls the example

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41. *Ibid.*, p. 538.

42. Hedrick Smith *et al*, *Reagan the Man, the President* (Sydney: Permagon Press, 1980), p. 161.

43. David O'Brien in Schmertz, *et al*, *op. cit.*, p. 360.

44. David Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (New York: John Wiley and Sons, 1992), p. 6.

of one such moderate, Rex Lee, who served as Solicitor General from 1981 to 1985. Caplan explains:

> (d)uring the first year of the Reagan Administration ... [Lee] sometimes brushed aside initiatives from low and middle level political officials at various government agencies who were eager for the SG to append an idea to a government brief, even if it had little bearing on the case at hand. (Rex rarely entertained these right wing fantasies,' said one former lawyer in the SG's office).[45]

In a broad sense, conservatives were appeased by commitments from Reagan's successor, George H. W. Bush, to continue the project of moulding the federal judiciary in a more restrained, conservative likeness. Christopher Smith reveals that, "Bush's administration subsequently emulated Reagan's efforts to ensure that judicial appointees held appropriately conservative views about controversial social issues."[46] Silverstein argues that Bush's strategy, like Reagan's, was to retain support from the New Right and conservatives generally by ensuring that, 'the tangible rewards to the right wing of the party would be judicial appointments. The Reagan promise of transforming the federal courts through the appointment power would continue to be honoured.[47]

The former Democratic Senator from Illinois, Paul Simon, believed that while Bush was particularly keen to secure conservative support, the President himself was clearly not one of them:

> Unlike with Ronald Reagan, the conservative wing of the Republican Party never felt comfortable with Bush. They didn't know where he was going. With Reagan, they understood that occasional diversions in direction were necessary, but they knew he was headed in the right direction. Bush went out of his way to provide comfort and assurance to these people. He spoke about being "born again," language an Episcopalian ordinarily does not use. But the hard

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45. Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (New York: Alfred Knopf, 1987), p. 79.

46. Christopher Smith, *Justice Antonin Scalia and the Supreme Court's Conservative Movement* (Westport CT: Praeger, 1993), p. 13.

47. Silverstein, *op. cit.*, p. 124.

> core group in his party still did not trust him. They suspected that his acceptance of their causes was a marriage of convenience, not conviction.[48]

Simon continues that Bush was able to use judicial appointments as a way of retaining conservative support:

> To keep that [conservative] portion of his political base together, Bush made an often spoken but almost unwritten contract with them: he would appoint Supreme Court Justices to their liking. He gave the right wing of his party veto power over Supreme Court nominations ... The conservative wing of the Republican party saw the great gains they were already making in judicial nominations, with appointees that pleased them. They were achieving their goals in the courts, while the President had no goals there. To keep – or gain – their faith, the key for the President and his operatives was to give those with an agenda for the Court, on his right, what they wanted without stirring up political storms, without inflaming the media.[49]

Yalof also provides valuable evidence to suggest that Bush, while not an ideologue in the Reaganite sense, was still committed to maintaining the Reagan legacy in the federal judiciary and consequently the selection criteria that helped form it.

> While campaigning for president in 1988, George Bush assured voters that he planned to 'continue the Reagan legacy' in most respects. In the context of his Supreme Court nominations, however, Bush did not completely live up to that promise. In truth, Bush was never the committed ideologue Reagan had been on most social issues. But social conservatives helped elect Bush as president, and his administration's commitment to name conservative justices to the Supreme Court seemed to them a political entitlement. Like Reagan, President Bush asked his aides to draw up a list of possible Supreme Court candidates long before the first vacancy of his administration arose during the summer of 1990.[50]

Bush did however bring a reasonably more pragmatic approach to the process of judicial nominations compared to Reagan. One reason for this was that a moderate, pragmatic style was an intricate part of Bush's personality. Silverstein observes, "[as] a cautious politician by nature, Bush was uncomfortable with ideological rhetoric, and his initial years in office were marked by an attempt to avoid (at least in the realm of domestic affairs) major confrontations with the Democratic Congress."[51]

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48. Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court's Nomination Battles* (Washington D.C.: National Press Books, 1992), pp. 73-74.

49. *Ibid.*, pp. 74-75.

50. Yalof, *op. cit.*, p. 190.

51. Silverstein, *op. cit.*, p. 123.

Colin Campbell and Bert Rockman provide further evidence of Bush's preference for political moderation by arguing that, "George Bush's appointees and the appointments process he used differed in important ways from Ronald Reagan's. He looked for experienced mainstream, pragmatic people, not ideologues."[52] Campbell and Rockman continue:

> in short, Bush's administration, while outwardly maintaining the personnel office mechanism of the Reagan administration returned to a more traditional mould of making appointments. Cabinet members were primarily establishment types with reputations as pragmatists and subcabinet members were, for the most part, chosen by cabinet appointees. According to Charles Untermeyer, director of presidential personnel under Bush, the new president "wanted to make clear this was a new administration, not Ronald Reagan's third term, but George Bush's first.[53]

Yalof argues that a key difference between these two Presidents regarding judicial selection was that for the Reagan administration, "ideological conservatism had been a primary consideration in most deliberations," while for Bush, "other factors – in particular, confirmability – came to the fore."[54]

Bush's capacity to strengthen the conservative direction of the federal judiciary was tempered by the aftershocks of the Iran-Contra scandal, which forced Reagan himself to take a more pragmatic approach to avoid further conflict with Congress. Compounding this was the added political reality of having to bargain with a newly Democratic controlled Congress. As Maltese observed, while this did not seem to concern the conservatives in the U.S. Justice Department it did have a major impact on the new pragmatic majority within the White House staff.

> President Reagan's chief of staff, Howard Baker – hired just months earlier to bring order to the White House in the wake of the Iran-contra scandal – was a moderate Republican with a distinctly pragmatic outlook. Democrats had just won control of the Senate. Why provoke a fight with a controversial nominee, especially given the sour relationship with Congress

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52 Colin Campbell and Bert Rockman (eds.), *The Bush Presidency: First Appraisals* (Chatham, N.J.: Chatham House Publishers, 1991), p. 238.

53. *Ibid.*, pp. 238-239.

54. Yalof, *op. cit.*, p. 191.

brought about by Iran-contra investigations? Thus, Baker and White House Counsel Arthur B Culvahouse pushed for a consensus nominee.[55]

It is now necessary to examine further the roles played by key staff members, particularly three Attorneys General – William French Smith, Edwin Meese and Dick Thornburgh. Reagan's first Attorney General, William French Smith, served from 1981 to 1985.[56] According to Robert Dallek, Smith was, "a wealthy old family American whose ancestors came to the New World on the Mayflower and fought in the American revolution ... he has been a close personal friend and business associate of Reagan's since the early 1960s and a principal architect of the president's political career."[57] John Lees and Michael Turner identify Smith as one of just three men (Weinberger and Casey being the others) in Reagan's first Cabinet who had close connections with Reagan whilst he was Governor of California.[58] To Lou Cannon, "Reagan embraced the appointment, trusting Smith as a safe and cautious lawyer who would not engage in legal activism ... Counted on to make few waves, the cautious Smith rarely produced a ripple during his first year at Justice."[59]

The appointment of conservative ideologues to the federal judiciary was not an overriding priority for the moderate and pragmatic William French Smith. While he stated in an address to the Federal Legal Council in Reston, Virginia, that he would fight to "diminish judicial activism" and accused the judiciary of engaging in

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55. Maltese, *op. cit.*, p. 124.

56. Joseph Kane, *Facts About the Presidents* (New York: H. W. Wilson Company, 1989), p. 270.

57. Robert Dallek, *Ronald Reagan: The Politics of Symbolism* (Cambridge: Harvard University Press, 1984), p. 78.

58 John D. Lees & Michael Turner, The First Four Years in Retrospect," in John D. Lees & Michael Turner (eds.), *Reagan's First Four Years: A New Beginning?* (Manchester: Manchester University Press, 1988), p. 234.

59. Lou Cannon, *Reagan* (New York: G. P. Putnam and Sons, 1982), p. 310.

"subjective policymaking," addressing these matters was not his highest priority. When Smith resigned three years later he was asked about his most significant achievements - the appointment of judges to "diminish judicial activism" was not amongst them. Instead, he stated his key achievements had been, "the war against illegal drugs ... opposition to mandatory school busing and racial quotas ... and improvement of the collection of debts owed the federal government, including college and small business loans."[60] The 1984 *Facts on File* records that, "Smith's tenure was marked by the reversal of the department's civil rights policies, the intensified government effort against organised crime and drug trafficking ... and a tilting of the government's antitrust stance toward business, not against it."[61]

Not only were judicial nominations of less importance to William French Smith compared to other objectives like reducing drugs and crime, he has since made clear that a 'litmus' test was never applied directly to judicial nominees under his authority. Smith recalls, "(i)t has always been charged that during the Reagan administration we applied a political litmus test to judicial appointees. That was not the case during my tenure. Although we were interested in quality and judicial philosophy, we never inquired as to positions on specific issues."[62] Furthermore, the pragmatic Smith acknowledged that ideological considerations had to be sacrificed regularly to deal with the variety of ever changing issues that dominated each day.

> As I would soon discover, starting a revolution is one thing, but getting results is quite another. Did we come in each morning and say, "What steps shall we take today to advance the

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60. *Facts on File*, January, 1984, p. 45.

61. *Ibid.*, p. 45.

62. William French Smith, *Law and Justice in the Reagan Administration: The Memoirs of an Attorney General* (Stanford: Hoover Institution Press, 1991), p. 72.

conservative movement?" Of course not. We were far too deeply involved in day to day issues. This is not to say that we did not have the goals of the Reagan administration firmly in mind.[63]

Even though Smith may not have personally been keen to seek out conservative nominees to the judiciary he did promise that the Department of Justice would pursue a solution to his notion of 'activist' behaviour on the courts.

Smith cited the "groundswell of conservatism evidenced by the 1980 election," promised that the Justice Department would "play an active role in effecting the principles upon which Ronald Reagan campaigned." The department, he said, was working "to identify those key areas in which the courts might be convinced to desist from actual policy-making." In cases brought by the department itself, Smith said that judges would be discouraged from ordering extreme or sweeping remedies.[64]

Although not a priority to William French Smith, underneath him in the organisational structure emerged a rapidly growing number of young, New Right ideologues that considered judicial nominations to be of crucial significance. Lees and Turner make an important observation in relation to this dynamic. They state:

While the Cabinet itself was somewhat lacking in prior Washington experience and under-representative of the radical right, these deficiencies were more than compensated for by the political appointees selected for the broad swathe of sub-Cabinet positions in the various departments and agencies of the federal government ... many of these sub-Cabinet posts were occupied by committed radical right conservatives.[65]

So, though a pragmatic Attorney General was leading the Department of Justice at the time, the numerous positions below him in the organisational structure were quickly being filled with conservative ideologues. As Calvin Mackenzie discovered:

... it was only in the staffing of the operating levels of the sub-cabinet and the agencies that the political and administrative thrust of this administration was fully revealed ... The hostility of many of these appointees on the programs they would administer was a common characteristic of Reagan's choices for second-level positions in the departments and agencies ... There was achieved in this second round of appointments an uncommon degree of ideological consistency and intensity.[66]

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63. *Ibid.*, p. 39.

64 *Facts on File*, November, 1981, p. 811.

65. Michael Turner. "The Reagan White House, the Cabinet and the Bureaucracy," in Lees & Turner (eds.), *op. cit.*, p.55.

66. Mackenzie cited in *Ibid.*, pp. 56-57.

As Carl Brauer observes, it was in the very nature of the pragmatists to allow their more ideological colleagues increased leverage. "In the absence of counter pressure, the pragmatists, being pragmatists, accommodated to right wing pressure; after the inauguration there was a noticeable increase in the number of appointments that went to the right."[67] To Larry Speakes, the real and more controversial issues Smith had to handle during his tenure were usually the product of enthusiastic ideologues led by Meese.

> Smith certainly was a low key attorney general. Most of the controversial issues that the Justice Department got involved in, such as the Bob Jones University case, a 1982 decision to revoke a twelve year old government policy denying tax exemptions to schools that discriminate against blacks, came from Meese over at the White House. Smith was close to the President, but did not use his friendship to press for any specific issues.[68]

Of all those involved in the process of selecting judicial nominees with Reagan, Attorney General Edwin Meese III was arguably the most significant and powerful. Caplan regarded Meese as the, "the Administration's dominant legal figure..."[69] Ethan Bronner agrees:

> (f)ew administration officials were as close to Reagan as Ed Meese. The Attorney General and the president shared a past, purpose, and a style. Meese was a strong law and order type conservative who had once ridiculed the American Civil Liberties Union by labelling it as the "criminals lobby." Yalof reveals that, Meese's influence was immediately felt in the administration's approach to selecting federal judges. The highly ideological attorney general planned to take a personal hand in staffing the federal judiciary at all levels by recruiting nominees with a compatible constitutional vision, that is, those who understood the limits of their own judicial power.[70]

Meese originally came to the attention of Reagan, "while working in the Alamedea County district attorney's office in the mid 1960s, Meese personally directed the arrest of 761 Berkeley University protestors, joining the officers in their

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67. Brauer, *op. cit.*, p. 233.

68. Pack, *op. cit.*, p. 82.

69. Caplan, *op. cit.*, p. 115.

70. Yalof, *op. cit.*, p. 143.

action and later telling Congress that the demonstrators were an "aid and comfort to the enemy."[71] The then Governor of California, who had secured victory on a strong law and order campaign, quickly became close to Meese.

When William French Smith resigned, Meese was chosen to succeed him and assumed the role of Attorney General in February, 1985. The difference in personality was a key observation noted by Goldman, who characterised Meese as, "an aggressive and outspoken attorney general" while, "Smith's public face was gentlemanly, even aristocratic, in contrast to Meese's feisty and confrontational persona."[72]

Yalof provides a useful insight into the effect of Meese's promotion to Attorney General:

> William French Smith's successor as attorney general was the controversial and colourful Edwin Meese, a close friend and counsellor to the president for the past twenty years. Unlike Smith, Meese brought to the post a definite ideological bent. Throughout 1985 Meese campaigned publicly for a 'new vision of the Constitution.' Arguing that the federal judiciary needed to be restrained, he advocated pure constitutional originalism: the Constitution should be interpreted to reflect only the views of those who drafted it. Meese criticised *Roe*, targeted *Miranda* as intended to help 'guilty defendants,' and lashed out at the Supreme Court's religion decisions as 'more policy choices than articulation of constitutional principle.[73]

Yarborough also summarises the important changes that Meese introduced:

> When Edwin Meese succeeded William French Smith as Attorney General in early 1985, the selection process continued much as it had during Reagan's first term, but with the new Attorney General's significant influence increasingly evident. Before, the Assistant Attorney General in charge of the Office of Legal Policy had reported to the Deputy Attorney General on matters relating to judicial selection; now, that official reported directly to Meese. The position of Special Counsel for Judicial Selection in the Office of Legal Policy was also abolished and that official's responsibilities largely transferred to a Meese assistant. The President's Counsel continued to chair the Committee on Federal Judicial Selection in the White House, but Meese became the most influential figure on that Committee as well.[74]

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71. Bronner, *op. cit.*, p. 33.

72. Goldman, *op. cit.*, p. 300.

73. Yalof, *op. cit.*, p. 142.

74. Yarborough in Hill, et al, *op. cit.*, p. 86.

Despite his own age, Meese firmly supported the younger, conservative ideologues in the Reagan administration. Caplan observes, "instead of speaking in the measured tones of authority, of a powerful figure who felt accountable for the actions of a government which had held sway for a number of years, Meese addressed his audiences with the vigour of a young Turk challenging the old order."[75] As a favourite of the President, Meese had greater power than other Attorneys General in the Reagan and Bush administrations and therefore demanded that the conservative criteria for judicial selection be applied more vigorously to potential nominees. As Blumenthal declares, "In the movement conservatives' siege of the judicial citadel, Meese unfurled an unadorned ideology, exposing it to an examination from which Reagan mostly protected it."[76] Speakes observes from his experience inside the Reagan administration that "Meese packed the Justice ranks with right wingers, and I often found myself putting distance between the White House and some of their ideas."[77]

In 1992, Meese himself outlined his involvement in the process of judicial selection:

> In selecting judges, the administration established a rigorous process of interviews and background checking. Both in the White House and at the Department of Justice I was intimately involved in the process and can attest that it was not only exhaustive, but that it established and adhered to the highest standards of professionalism and integrity. In large measure, this continued and expanded upon the policy Reagan had followed in Sacramento."[78]

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75 Caplan, *op. cit.*, p. 119.

76 Sidney Blumenthal, *The Rise of the Counter-Establishment* (New York: Times Books, 1986), p. 301.

77. Pack, *op. cit.*, p. 83.

78. Edwin Meese, *With Reagan: The Inside Story* (New York: Regnery Publishing, 1992), p. 317.

Meese also revealed that continues his personal insight by revealing that "the president instructed us to consider [a candidate's] judicial philosophy" which required someone, "who would look at the Constitution and statute law and expound their evident meaning, rather than using loopholes or convoluted logic to reach some preconceived conclusion."[79] Finally, Meese acknowledged that, "the selection of judicial personnel and reform of the judiciary became and remained important priorities of the administration" which Reagan, "battled for ... during his entire presidency."[80]

Despite this, Meese, like his immediate predecessor, also claimed that a 'litmus test' was not applied to judicial nominees. "The truth was just the opposite," Meese wrote. "The President was seeking to depoliticize the courts, to ensure that they played a truly judicial role, rather than usurping the authority of the elected branches of our constitutional system."[81] Fowler et al also point to work completed by one of America's leading specialists in judicial nominations, Sheldon Goldman. "Goldman's assessment of Reagan's 'judicial legacy' partly confirms Schwartz's suggestion that second-term Reagan appointees were more conservative. Goldman describes the 'Meese effect,' which is to say that the 1985-86 Reagan circuit appointees stand out relative to previous and later ones."[82] In terms of the characteristics of these particular Reagan appointees, Goldman's research found that, "they had less professional experience, lower ABA ratings, the highest level of partisan activity,

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79. *Ibid.*, pp. 317-8.

80. *Ibid.*, p. 316.

81. Meese, *op.cit.*, p.318.

82. Fowler *et al,* in Schmertz, *op. cit.*, p. 326.

were less well off, and were the youngest group of appellate judges ever appointed to "modern appellate courts."[83] Schmertz, *et al,* argue that the political cycle at that time also accounted for the ideological variance in Reagan appointees during the Meese era. "The Democrats' regaining control of the Senate after the 1986 election in part accounts for the fact that judges nominated in 1987-88 were more like those appointed by Reagan before 1985."[84]

At the beginning of Reagan's first term under the stewardship of the pragmatic, moderate Attorney General William French Smith, the US Department of Justice, "basically sought to establish what it was *against:* It wanted to cut back on the Court's expansive protection of the rights of the accused, especially its enforcement of the exclusionary rule..."[85] Under Meese, however, the approach changed markedly with O'Brien observing that, "the department aimed to broadly establish what the 'Reagan Revolution' stood *for*. Nothing epitomized the effort more than Meese's call for a "return to a jurisprudence of original intention."[86] It became a rallying point for the New Right as well as a kind of litmus test for judicial nominees."[87]

The severity of the Iran-Contra scandal that quickly enveloped the Reagan administration and the fall out from the bitter nomination process of Robert Bork weakened Meese's position. Of further, and in the end, fatal concern to Meese was an

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83. *Ibid.,* p. 326.

84. *Ibid.,* pp. 326-327.

85. O"Brien in Schmertz *et al, op.cit.,* p. 361.

86. See Edwin Meese, "The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention," *Public Administration Review*, Vol.45, November 1985, p.701.

87. O'Brien in Schmertz *et al, op.cit.,* p. 361.

investigation by Independent Counsel, James McKay, who had found that Meese, "wilfully" filed a false tax return and "probably" violated conflict of interest laws.'[88] While Meese maintained his innocence, he was compelled to stand down as Attorney General in August 1988 and was replaced by the pragmatic former Governor of Pennsylvania, Richard (Dick) Thornburgh. The Iran-Contra and Bork controversies, coupled with the pressures of a presidential election year, meant that Reagan had no choice but to select a safer, more moderate and broadly acceptable person as his next Attorney General.

Dick Thornburgh became the nation's seventy sixth Attorney General on August 12, 1988 and continued to serve in that position throughout most of the succeeding Bush administration. The 1988 *Facts on File* records that :

> Reagan reached outside the administration to replace Meese ... the choice of Thornburgh, a former prosecutor with a reputation for integrity, drew praise from all sides except some conservatives, who differed with him on the abortion issue. Democrats even, were receptive to the appointment. He was elected governor in 1978 and served two terms, gaining credit for capable handling of the Three Mile Island nuclear power plant accident near Harrisburg in 1979. He maintained his strong ties to the moderate wing of the Republican Party.[89]

After being confirmed in the Senate by a vote of 85 to 0, Senator Edward Kennedy, then acting chair of the Judiciary Committee, told the Senate that Thornburgh, "will do as much as he can to repair the damage of the Meese regime ... He'll be an attorney general of a different and better mould."[90] In highlighting the difference between Meese and Thornburgh, Senator Kennedy claimed, "The state of

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88. Ed Magnuson, "A Mixed Verdict for Meese," *TIME*, August 1, 1988, p. 24.

89. *Facts on File,* July, 1988, p. 513.

90. *Facts on File,* August, 1988, p. 616.

justice in America would be very different today if Dick Thornburgh had been attorney general for the past three and a half years instead of Ed Meese."[91]

A closer insight into Thornburgh's management style can be gained from former Meese staffer, Douglas Kmiec, who recounts:

> Meese had left in August and Thornburgh's management approach was, charitably, mysterious. Like any sizeable organisation, and certainly like most major law firms, Meese had daily management meetings with the heads of divisions. This kept the Attorney General abreast of the ongoing work in the Department and gave him a chance to direct it at an early stage. It also kept the Department aware of important developments in overlapping subject areas. As Fried himself would often point out to reporters who rumoured that one person or another dominated litigation strategy, Justice under Meese was "collegial." Under Thornburgh, Justice was imperial. Access to the Attorney General ... was minimal. No one met to coordinate efforts, or, importantly, to make sure that one part of the vast Department was not working at cross purposes with another. Virtually all communications to the Attorney General were filtered through one of three staff members Thornburgh had brought with him from Pennsylvania.[92]

Kmiec continues his account, focusing on the motives underpinning Thornburgh's approach.

> In the first days of his tenure, when the guarding Pennsylvanians had not yet arrived, Thornburgh seemed relaxed, open and anxious to get on with the business of the Department ... He (Thornburgh) said unequivocally that he wanted "no surprises," and Thornburgh made it clear that he was not fond of any of us talking with the press in ways that undermined the work of the Department ... With the arrival of the Pennsylvanians, Thornburgh became distant.[93]

Finally, Kmiec makes a further revealing observation. "We assumed that Bush would automatically keep Thornburgh. Both were politically moderate. Except for an over reliance on his Pennsylvania buddies, Thornburgh had served his interim function of steadying the ship and keeping Justice out of the news during the campaign."[94]

On August 15, 1991, Thornburgh resigned as Attorney General to run as a Senator for Pennsylvania. According to the 1988 *Facts on File* he left the role of

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91. *Ibid.*, p. 616.

92. Douglas Kmiec, *The Attorney General's Lawyer: Inside the Meese Justice Department* (New York: Praeger, 1992), pp. 80-1.

93. *Ibid.*, pp. 201-202.

94. *Ibid.*, p. 207.

Attorney General reluctantly, "but political analysts said he had been pressured to run because Republicans were anxious to regain the seat (held since Heinz's death by an appointed Democrat, Senator Harris Wofford), and they regarded Thornburgh, a former governor, as their strongest candidate."[95]

In summary, the process of judicial selection during the Reagan and Bush administrations needs to be analysed in the context of the competition that existed between one group of older, experienced moderates (some of the most prominent of whom had served in the Ford and Nixon administrations) and another group of younger, ideological conservatives (many of whom were associated with the newly formed Federalist Society and with particular universities).

An Outline of the History, Structure and Role of the Senate Judiciary Committee

The Senate Judiciary Committee plays a small part in finding a resolution to the problem in this thesis because one of the Committee's primary roles is to consider the President's judicial nominations. Such nominations are made to vacancies on the Supreme Court; vacancies on the 13 federal circuit courts of appeals; vacancies on the nation's 94 federal district courts and to any vacancy on the U.S. Court of Federal Claims and the International Trade Court. Nominations are also considered for all vacancies for positions as United States Attorneys, United States marshals and very senior positions within the U.S. Department of Justice.[96] It was in 1816, more than a quarter of a century after the Senate had been established, that the standing committee system came into existence. The Judiciary Committee was one of these

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95. *Facts on File,* August, 1988, p. 608.

96. See the Senate Judiciary Committee website at www.senate.gov/~judiciary/

original standing committees and was authorised on December 10, 1816.[97] It has always possessed one of the broadest jurisdictions in the Senate, with oversight ranging from the federal courts and immigration laws to the revision and codification of statutes and civil liberties laws.[98]

The power of the Judiciary Committee in determining the success of a judicial nomination is significant. Carp and Stidham summarise the Committee's role:

> Acting as a sort of watchdog of the Senate, the committee can affect the selection process in several ways. 'First, it can delay Senate action on confirmation in the hope of embarrassing the president or to test his determination to make a particular appointment ... Second, the committee can simply recommend against Senate confirmation. Finally, committee opponents of the nomination might engage in an extensive Senate floor debate, which 'affords still another opportunity for Senators to seek to embarrass the administration by questioning the wisdom of a particular appointment.[99]

The role of the chair of the Judiciary Committee is also prominent and influential and has a direct bearing on the nature of the Committee's workings. Throughout its recent history, the Judiciary Committee appears to have adjusted to the personality of its chairman. Steven Smith and Christopher Deering noted that:

> James Eastland, Edward Kennedy and Strom Thurmond all brought different styles and political philosophies to the Judiciary Committee. Eastland opposed civil rights legislation and ran a fairly centralised committee ... Kennedy attempted to restructure and to restrict subcommittees, but he ... settled for a larger full committee staff and closer scrutiny of subcommittee activities. Thurmond ... reduced staff overall but has continued to allow considerable subcommittee independence while pushing for his own personal policy interests such as the death penalty and limits on abortion. Each of these chairs has been successful, in part, because they have not stifled debate on the committee even if they actively pushed for policies not favoured by all of their colleagues.[100]

The longest sitting chairman, before limits were established, was Senator James Eastland of Mississippi who served for 22 years, from 1956 to 1978. From 1956 to

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97. See the History and Arts of the Senate at www.senate.gov

98. See the Senate Judiciary Committee website at www.senate.gov/~judiciary/

99. Robert Carp and Ronald Stidham, *Judicial Process in America* (Washington D. C.: CQ Press, 1990), p. 222.

100. Steven Smith and Christopher Deering, *Committees in Congress* (Washington D.C.: CQ Press, 1984), p. 190.

1987, two Southern conservatives, a Democrat from Mississippi, Senator Eastland and a Republican from South Carolina, Senator Thurmond, steered the workings of the Senate Judiciary Committee. The only exception was when the liberal Democrat Senator from Massachusetts, Edward Kennedy, briefly took control of the Committee from 1979 to 1981. During the period in which the five Reagan and Bush appointees to the Supreme Court and the eight appointees to the Fourth Circuit were made, the Judiciary Committee had only two chairmen. From 1981 to 1987 Senator Thurmond served as the chairman of the Senate Judiciary Committee. When the Democrats secured a majority in the Senate in 1986, Senator Joseph Biden, a Democrat from Delaware, replaced Thurmond as chair of the Committee and the Democrats subsequently maintained control of the Committee until 1995.[101]

The complexity and controversy associated with the process of judicial nominations is a relatively recent phenomenon. The whole notion of judicial nominees actually having to appear personally in front of members of the Judiciary Committee is also a relatively recent development. Ronald Rotunda traces this progression:

> For most of our history, it was considered inappropriate for a judicial nominee to appear in person and testify. The Senate had the duty to advise and consent, but the senators should not directly question nominees about their philosophies. Typically the nominee might be staying at a hotel near the Capitol, where he could respond to questions by sending telegrams or letters to the committee, but he would not personally attend and would not be subject to direct and follow-up questioning.[102]

Carter argues that the hearings process broadened as a consequence of the political reaction to the Supreme Court's decision on desegregation in 1954. This

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101. See the Senate Judiciary Committee website at www.senate.gov/~judiciary/

102. Statement of Ronald Rotunda in U.S. 107th Congress, 1st Session, Hearings Before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, *The Judicial Nomination and Confirmation Process,* June 26 and September 4, 2001, Senate Hearing 107-463, (Washington, D.C.: U.S. Government Printing Office, 2002), p.175.

quickly sparked considerable interest in the types of nominations being made to the federal judiciary. Carter elaborates:

> The modern tradition of routinely requiring the nominee to appear began after the signal constitutional event of this century, the Supreme Court's courageous 1954 decision in *Brown vs Board of Education*, which began the direct judicial assault on the Southern racial caste system. Furious at what they described as unwarranted judicial interference with state authority, the Southern segregationist senators who dominated the Judiciary Committee demanded that the very next nominee – John Marshall Harlan in 1955 – appear before the committee to explain his views on desegregation ... For the next twelve years, every nominee appeared and every nominee was grilled about the segregation decisions. As the era of the Warren Court continued, the questioning broadened, and potential Justices found themselves asked about their views on everything from communism to defendants' rights to prayer in public schools.[103]

Prior to the nomination hearing of Supreme Court nominee Robert Bork in 1987, the outcome of Judiciary Committee hearings was generally regarded as a *fait accompli*. As recently as 1984 Corsi observed that, "(t)he candidate is questioned by committee members and both proponents and opponents present their positions. Often these hearings are perfunctory, the matter having been largely resolved by agreement of the parties prior to the hearing stage."[104] Rotunda observed in 2001 that, "(t)his relatively recent tradition now has become so expected that it would be unheard of for a nominee to refuse to speak before a public session of the Senate Judiciary Committee."[105] Kmiec places this development in the following context:

> (h)istory reveals that the Senate up until the 1980s largely confined its inquiries to integrity, demeanour, competence and subscription to the rule of law. "There will, of course, be no exercise of choice on the part of the Senate," wrote Hamilton in Federalist 66. In observing this precept over time, the Senate was observing the designed independence of the judiciary, respecting the democratic will of the people, and abiding by the separation of powers. Ever since the nomination of Robert Bork the hearings process has become dramatically more partisan, no longer conducted in the discreet and collegial manner to which it was widely known.[106]

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103. Stephen Carter, *The Confirmation Mess* (New York: Harper Collins, 1994), pp. 66-67.

104. Corsi, *op. cit.*, p. 119.

105. Rotunda, *op. cit.*, September 4, 2001.

106. Kmiec, *op. cit.*, September 4, 2001.

The Judiciary Committee has contributed to the defeat of several of President Reagan's judicial nominees. O'Brien provides a summary of these setbacks:

> The nomination of Jefferson B. Sessions III to a district court in Alabama was narrowly defeated by the Senate Judiciary Committee; such a defeat had happened only once before in the preceding 50 years. The administration was also forced to withdraw the nomination of conservative law professor Bernard Siegan. Reagan was forced as well to reconsider the possible nominations of others, like law school professors William Harvey and Lino Graglia, because of unfavourable ABA reports and strong political opposition. Other nominees - Sidney Fitzwater, Alex Kozinski, former Senator James Buckley, and former Louisiana governor David Treen, for example - ran into trouble but won Senate confirmation. Still, considering the unrivalled number of appointments, Reagan achieved remarkable success in securing Senate confirmation for his nominees and suffered (besides Sessions and Siegan) only one major defeat: his ill-fated 1987 nomination of Judge Robert H. Bork to the Supreme Court.[107]

The next section of this thesis examines the role of individual Senators, especially those outside the Senate Judiciary Committee's membership, in the selection of potential judicial nominees. It is here that the beginnings of my potential explanation for the results found on the Fourth Circuit first emerge.

The Role of Senators in the Process of Judicial Nominations

Throughout American judicial history, Senators have consistently played an important role in determining the success or failure of judicial nominations. This largely remained the case during the Reagan and Bush administrations. Two Senators in particular, Senator Strom Thurmond of South Carolina and Senator Jesse Helms of North Carolina, had a major impact on the selection of many of the Fourth Circuit judges in the data set examined in this thesis. In fact, it was to such an extent that they both provide one of the key potential explanations put forward in Chapter Five explaining how the results of the empirical analysis presented in the next chapter were arrived at. These two men exercised a degree of power most Senators only realise over nominations to the lowest positions in the federal judiciary – the U.S. District Courts.

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107. O'Brien in Schmertz *et al, op. cit.*, pp. 363-364.

In relation to a Senator's power over nominees to the U.S. District Court, if the State from which a judicial candidate for the District Court was selected by a Republican President had a Republican Senator, that Senator almost certainly had the right, through a long established tradition, to be heavily involved in the selection of the nominee or to veto that person's appointment to that court. This same protocol applied to Democrats who held both positions. Maltese elaborates:

> (b)y tradition, judges for these district courts come from the state in which the district falls. Starting with George Washington, presidents have turned to senators of their political party from the state in which the district court vacancy occurred to suggest a nominee. This practice assumed that home state senators were better able to select qualified individuals than the president. It also accorded these home state senators a virtual veto power over nominations they disapproved. By the practice of senatorial courtesy, fellow senators would reject a nominee opposed by a home state senator. Thus, presidents were bound to clear their district court nominees with these senators.[108]

William French Smith personally recalls that, under the Reagan administration, "we agreed that each senator would submit three to five acceptable names for each district court vacancy, and the president would choose a name from that list. This became the basis for the selection of federal district court judges for the duration of that term."[109] Senators continue to play a dominant role in the process of nominating people to vacancies on the District Courts within their respective States.

Utah Senator and former chair of the Judiciary Committee, Orrin Hatch, observed first hand the role of Senators in this part of the appointment process:

> Today, when an individual is nominated to be a district court judge in a particular state, the two senators from that state are sent a blue slip of paper notifying them of the nomination. If either one objects, the Judiciary Committee traditionally will give that objection considerable weight when determining how to proceed. If both object, that nomination is dead no matter how good the nominee may be.[110]

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108. Maltese, *op. cit.*, p. 121.

109. Smith, *op. cit.*, p. 59.

110. Orrin Hatch, *Square Peg: Confessions of a Citizen Senator* (New York: Basic Books, 2002), p. 125.

Hatch then contrasts this with appointments to the U.S. Court of Appeals, "With appellate court nominees, individual senators may be consulted or make recommendations, but the view of any one member will not be dispositive. Presidents, both Republican and Democrat, have always jealously guarded their right to appoint appellate court nominees."[111]

Throughout the Reagan and Bush administrations a Senator's power over a nomination to the next level of the federal judiciary, the U.S. Court of Appeals, was weaker yet still significant. Maltese found that, "(s)enatorial courtesy ... applied to appointments to U.S. courts of appeals but in a more diluted fashion, since judicial circuits (in which the federal appeals courts fall) cross state lines (thereby weakening the influence of any one home state senator)."[112] Stumpf also found that Senatorial power declined when vacancies to the U.S. Court of Appeals were being considered.

> ... The important, substantive difference (is) that since appellate court appointments involve several states, senatorial courtesy is less efficacious, the preferences of the president thereby having relatively more weight ... However, any veto power of the relevant senators ... is much less than that which could be said to exist in the case of federal district court appointments.[113]

The Reagan administration had more leverage over Appeals Court nominees, according to William French Smith, because, "with each circuit encompassing several states, no senator would have a specific claim to a vacancy," but, "as had always been the case, the senators – being politicians – had an interest in every significant appointment."[114]

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111. *Ibid.*, p. 126.

112 Maltese, *op. cit.*, p. 121.

113. Stumpf, *op. cit.*, p. 193.

114. Smith, *op. cit.*, p. 72.

O'Brien argues that the position of Senators was weakened because of the determination of the Department of Justice to pursue a certain type of judicial candidate.

> The rifts that developed between the Reagan administration and moderate Republicans, like Pennsylvania's Senator Arlen Specter, are perhaps another measure of the extent to which the DoJ placed legal-policy goals above rewarding party faithful. Prior administrations tended to defer to senators in their own party when filling lower court vacancies. That meant occasionally bargaining and sacrificing their legal-policy goals. But Reagan's Justice Department was far less willing to do so ... [115]

O'Brien adds that "the Reagan administration's meticulous screening of judicial nominees and hard-line positions with moderate Republicans challenged the norms of senatorial patronage. At the same time, presidential control over judicial selection was strengthened."[116] Silverstein notes that, despite a relative decline in certain Senate traditions regarding judicial nominations, the weight of each Senator's confirmation vote has grown significantly. He states:

> The fact that politically powerful groups are willing to invest substantial time and resources in the battle to control the judiciary, coupled with the erosion of the old Senate norms and the appearance of a new Senate style, has altered the political calculus for every senator confronting a vote on a nominee to the federal bench ... In the contemporary Senate, however, to be counted for or against a particular nominee is often a decision of immense electoral significance, and each senator is keenly conscious of the potential consequences of such highly visible activities.[117]

Lawrence Baum, however, maintains that Senators continued to exercise considerable power in the nomination process.

> Since the late 1970s senatorial courtesy has become a bit less automatic, but home state senators retain considerable veto power. This power gives the Department of Justice a strong incentive to consult with the relevant senators before making a recommendation for the president's nomination. In practice, many senators play a very active role at the nomination stage, not only indicating their disapproval of potential nominees but suggesting and sometimes insisting upon particular candidates. Although the administration officials also hold considerable power in the process, the ultimate veto power held by particular senators ensures that they will take a meaningful part in the nomination decision if they wish to do so.[118]

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115 O'Brien, *et al*, Schmertz, *et al*, *op. cit.*, p. 383.

116. *Ibid.*, p. 383.

117 .Silverstein, *op. cit.*, p. 154.

118 Lawrence Baum, *The Supreme Court* (Washington D.C.: CQ Press, 1985), p. 45.

The Role of the American Bar Association

The American Bar Association (ABA) has played an important role in the process of judicial nominations since the organisation was founded in 1878. For most of its history the ABA was characterised by its conservatism. Herman Schwartz reveals that the ABA was originally established to, "oppose what it considered liberal decisions by the Supreme Court" and "tried from the first to share in the judicial selection process in order to fight the 'socialist menace,' the "subversion of the judiciary," and the "downgrading of property rights."[119] Further evidence of the ABA's conservative origins is provided by Maltese who records that, "... the ABA did not lift its formal vestiges of racial discrimination until 1956."[120] It is somewhat ironic that the ABA, which had such a conservative past and had been dominated by Republican sympathising, large law firms saw its influence in the nominations process both grow and later almost cease under Republican administrations.

The ABA's key connection to the process of judicial nominations relates to its Standing Committee on the Federal Judiciary, which the organisation established in 1946. The Committee's key function is to examine the President's nominees and allocate each of them with one of its four specialised ratings. They are Exceptionally Well Qualified (a rating discontinued since 1989 at the commencement of President George H. W. Bush's administration); Well Qualified; Qualified; or a Not Qualified classification. As Peter Schuck observes, failing a nominee was not decided lightly.

> Where the committee says a man is not qualified ... there is no more unpleasant task than for a group of lawyers to pronounce as not qualified another lawyer who has probably aspired to the position all of his life and suddenly has the support which at least makes him get serious

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119 Herman Schwartz, *Packing the Courts: The Conservative Campaign to Rewrite the Constitution* (New York: Macmillan, 1988), p. 61.

120. Maltese, *op. cit.*, p. 127.

> consideration and perhaps, absent this decision, would be appointed. So that no one is called "not qualified" except after a vast amount of soul-searching by the committee.[121]

This Standing Committee distinguishes the ABA from any of the other private organisations with an interest in judicial nominations.

Republican sympathies within the ABA were particularly prominent under the administration of President Dwight Eisenhower. Corsi recalls that, "(i)n the last two years of the Eisenhower administration the ABA committee had "virtual veto power," and President Eisenhower himself, "openly supported the efforts of the organised bar, and especially the ABA, to be involved in the process of selecting federal judges."[122] Maltese provides even more detailed evidence of the ABA's power under Eisenhower by stating:

> ... Eisenhower formalised a relationship between the ABA and the Justice Department during his presidency. Starting in 1956, the administration gave the names of potential Supreme Court nominees to the ABA at the same time that the FBI began its background check ... Democratic presidents after Eisenhower de-emphasised the role of the ABA in judicial selection, but by the 1980s, as membership expanded, the ideological makeup of the ABA was changing. Thus, Republicans Ronald Reagan and George Bush had their own run-ins with the ABA and its rating system.[123]

Under the Kennedy administration Corsi noted that, "the influence of the ABA committee was reduced, reinforcing the impression that the committee had more sway with Republican than with Democratic administrations."[124] Corsi also observes that, even before the Reagan administration had come into being, the ABA's influence had started to wane. "With Carter's push toward nominating panels and Kennedy's control over the Senate Judiciary Committee, the influence of the ABA

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121. Schuck, *op. cit.*, p. 237.

122 Corsi, *op. cit.*, p. 123.

123 Maltese, *op. cit.*, pp. 127-128.

124. *Ibid.*, p. 123.

Committee on Federal Judiciary reached its lowest point since the committee's inception in 1946."[125] While officials within the Reagan administration adhered to the courtesy of seeking the ABA's assessments of their judicial candidates the ABA's opinion never carried much weight. According to former Reagan official Bruce Fein, "we didn't think one second about ABA ratings."[126] The organisation's long and, for a private organisation, relatively exclusive involvement in the history of judicial nominations began to decline as a by-product of the controversy surrounding the Bork nomination in 1987.

Summary

This chapter commenced with a brief overview of the process by which a person is nominated to the federal judiciary. The process started with the President's formal announcement of the nomination and ended with that person's vote of confirmation on the floor of the Senate. The role played by the three key agencies responsible for applying the standards for selection to judicial nominees during the Reagan and Bush administrations - the Office of Legal Policy, the President's Committee on Federal Judicial Selection and the White House Counsel were then explored. This section of the chapter also detailed the types of questions pursued with judicial nominees and the ideological expectations placed on those who were subjected to it. This is crucial because the problem in this thesis focuses on the reliability of judicial selection standards. As these three agencies played such a vital part in applying such standards to all the judges in this data set, it was necessary to explore their role more deeply.

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125. Corsi, *op. cit.*, p. 119.

126. Schmertz, *et al, op. cit.*, p. 362.

While many individuals were involved in the process of judicial selection, this chapter focussed on just three of them - the Attorneys General, William French Smith, Edwin Meese III and Dick Thornburgh. The reason these particular men were selected was because they each represented the success or failure of two key groupings competing with each other over the types of judicial candidates that were to be selected to the federal judiciary. One of these two groups was characterised by the prevalence of older, moderate and more pragmatic individuals, many of whom had previously served in Republican administrations. The other group was marked by the predominance of younger, New Right ideologues whose numbers quickly expanded upon the election of the Reagan administration. Once again this is of relevance to the problem this thesis seeks to resolve because it provides several clues as to why such selection standards did not always produce the judicial candidates expected.

This chapter then examined briefly the role of the powerful Senate Judiciary Committee and the constitutional power it possesses to reject the President's judicial nominees. The role of individual Senators in the process of selecting judicial nominees was also explored here with particular reference as to how the involvement of Senators changed once the Reagan administration came to power. It is essential the role of individual Senators is considered in this thesis because two Senators, Strom Thurmond and Jesse Helms, had a significant influence over both the nomination and successful confirmation of many judges in the data set examined in this thesis.

Finally, this chapter examined briefly the role played by the most significant private organisation in the judicial nominations process during the period of interest to this thesis – the ABA. A history was provided of its conservative origins and the

organisation's former closeness to Republican administrations. While the ABA was never close to Democratic Presidents, its increasingly liberal direction brought it into direct conflict with the Reagan and Bush administrations, concluding in a dramatic reduction in its influence over judicial nominations. As noted in this section the ABA only ever appeared comfortable with old, moderate Republican administrations.

Three stages have now been accomplished in this thesis. The first was the goal of Chapter One - to show where in the existing literature this thesis problem was located and what contribution its solution could make to furthering our understanding of the President's interaction with the judicial branch of American governance. The second was the purpose of Chapter Two - to provide a more complete understanding of exactly what was required of those judicial candidates nominated by Presidents Reagan and Bush. Uniting the ideological objectives and philosophical boundaries of their selection standards was crucial because the overall contribution this thesis makes to the existing literature relates to the reliability of such standards in ensuring greater concordance between judicial nominees and the expectations of their nominating President. The third accomplishment was to provide greater awareness of the key agencies and individuals responsible for administering the judicial selection process throughout the Reagan and Bush administrations. By establishing these three core parts, the analysis can now progress to the next chapter where empirical evidence is presented to prove the existence of the problem this thesis seeks to resolve.

Chapter Four

AN EMPIRICAL COMPARISON OF THE JUDICIAL BEHAVIOUR OF CERTAIN JUDGES ON THE US SUPREME COURT AND THE US COURT OF APPEALS FOR THE FOURTH CIRCUIT

Introduction

This chapter presents empirical evidence to support the central argument in this thesis - that judges appointed to the Fourth Circuit by Presidents Reagan and Bush met the philosophical expectations of their nominating President at a rate significantly higher than the appointments these two Presidents made to the Supreme Court. The results in this chapter show that judges appointed to the Supreme Court by Presidents Reagan and Bush failed to adopt the judicial philosophy expected of them in relation to criminal justice cases compared to the judges these two Presidents appointed to the Fourth Circuit.

From the outset, this is a comparison between the US Supreme Court and an individual circuit court. It is an altogether different project to the more ambitious task of comparing the US Supreme Court with the US Court of Appeals more broadly. With two separate sets of reliable and consistent data from each of these two single courts a very plausible, albeit sharply qualified, comparison between these two *individual* courts, as opposed to these two *types* of courts, can be made. Because of both its function and the process by which cases come before it, an underlying conservative bias can be embedded into the scores of US Court of Appeals judges when deciding criminal justice cases. In acknowledging this, however, one can remain confident that a sufficiently substantive degree of variance exists in the results attributed to the Fourth Circuit to distinguish between liberal, moderate and conservative judicial outcomes over and above this conservative bias. It was for this

reason that the Fourth Circuit was originally selected for this thesis. Of the thirteen appeals court circuits the Fourth Circuit was, until quite recently, widely regarded in the existing literature as the nation's most conservative. It acquired this reputation because despite the inevitable conservative bias at the appeals court level, the Fourth Circuit distinguished itself from its sister circuits by routinely going over and beyond this inherent bias to persistently deliver ideologically consistent votes against defendants.

This chapter commences with a biographical introduction to each of the five Supreme Court judges and six Fourth Circuit judges whose legal judgements and judicial philosophy are analysed here. It then provides an account of the methodology that has been applied by building on recent studies that have been undertaken regarding Presidential nominations to the federal judiciary. The analysis here is specifically modelled on the work by Jeffrey Segal, Richard Timpone and Robert Howard in 2000 that examined the degree of concordance between a President's ideology and that of his judicial nominees. It is from this particular study I am able to define the extent to which a judge in this data set conformed to the philosophical expectations of his or her nominating President. Consequently, Segal et al's use of the term 'concordance' is applied here to determine the degree to which a judicial nominee adhered to the preferences of his or her nominating President. Concordance is defined as, "the relative agreement between judicial behaviour and presidential policy preferences."[1] The work of Ashlyn Kuersten and Donald Songer in 2003 is

1. Jeffrey Segal, Richard Timpone and Robert Howard, "Buyer Beware? Presidential Success Through Supreme Court Appointments," *Political Research Quarterly*; Vol.53, No.3; September 2000, p. 557.

also useful in defining the extent of concordance between judicial behaviour and Presidential expectations.[2]

The next part of the methodology section in this chapter builds on the work of Russell Smyth in 2001 and Andrew Lynch in 2002 and relates to the timeframe by which the data analysis in this thesis is conducted. The time period selected confines the eleven judges in this data set to a simultaneous period in time extending over five years, commencing in January 1995 and concluding in December 1999. This is a 'natural court' time measurement. Smyth defines a natural court as, 'the situation where the same Justices interact for the whole research period.'[3] Lynch demands that two main preconditions must be met before a 'natural court' can exist. They are, "stability in the Court's composition" and a period of analysis, "which is of a suitably long duration."[4] There are two Reagan appointed Fourth Circuit judges, Justice Emery Sneeden and Justice Robert Chapman, whose judicial philosophy and voting behaviour are not examined in this analysis. This is because the 'natural court' timeframe used here is essentially a 'snapshot' in time whereby a sample of judges voting behaviour is analysed together. Because the 'snapshot' used here commences in January 1995 and, as Justices Sneedon and Chapman retired in 1986 and 1991 respectively, their judicial behaviour could not be included.

The method used by Kenneth Manning, Bruce Carroll and Robert Carp to assess potential Supreme Court nominees in 2002 forms another key component of the

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2. Ashlyn Kuersten and Donald Songer, "Presidential Success through Appointments to the United States Court of Appeals," *American Politics Research* Vol 31. No 2, March 2003, p. 109.

3. Russell Smyth, "Judicial Interaction on the Latham Court: A Quantitative Study of Voting Patterns on the High Court 1935-1950," *Australian Journal of Politics and History* Vol.47, No.3, September2001 p. 334.

4. Andrew Lynch, "The Gleeson Court on Constitutional Law: An Empirical Analysis," Paper delivered at University of New South Wales Conference on Constitutional Law, 21 February, 2003, Sydney.

methodology used here to analyse each judge's voting behaviour. In providing an overview of their methodology Manning, Carroll and Carp stated that they:

> ...analysed jurists' votes in cases selected from Westlaw, with preference given to the most recent cases decided by each jurist. We computed votes for each of the judges in a minimum of 140 cases in three general cases type areas: criminal justice, civil rights and liberties, and economic and labor regulation. We set a goal of selecting 50 cases for each judge in each case type area, with a minimum of 35 cases for any case type for any individual judge ... Cases that did not reveal a clear liberal/conservative dimension or outcome were excluded from analysis.[5]

A core set of 50 criminal justice cases from the Supreme Court were examined in this chapter, each case obtained from the FindLaw Internet Legal Resources site.[6] A core set of 227 criminal justice cases from the U.S. Court of Appeals for the Fourth Circuit were also examined, each case obtained from the database located in the Hugh F. Macmillan Law Library at the Emory University Law School in cooperation with the United States Court of Appeals for the Fourth Circuit.[7] As these core cases were heard by more than one judge in this data set there were a total of 624 cases examined here. The analysis of these 624 cases, 242 in the Supreme Court and 382 in the Fourth Circuit between 1995 and 1999, forms the basis by which I have been able to determine the extent of the problem this analysis seeks to resolve.

The last section in this chapter contains the results. It shows that the Fourth Circuit judges adopted a more conservative approach towards criminal justice cases and thus adhered more closely to the requirements of the selection test they were broadly subjected to than their similarly appointed colleagues to the Supreme Court.

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5. Kenneth Manning, Bruce Carroll and Robert Carp, "George W Bush's Potential Supreme Court Nominees: What Impact Might They Have?" *Judicature* Vol 85, No. 6, May-June, 2002, p. 280.

6. For the full list of Supreme Court cases that were analysed in each of the five years see http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&navby=year&friend=oyez

7. See www.law.emory.edu/4circuit/

Biographies of the Eleven Judges in the Data Set

Excluding Justice William Rehnquist's elevation to the chief justiceship, Reagan made three original appointments to the Supreme Court during his term of office, receiving his first opportunity in 1981. The President used this occasion to realise an election promise and to shore up electoral support from an important voter base from which he had been losing electoral support. Consequently, he nominated the first woman to the Supreme Court, a lawyer from Arizona, Sandra Day O'Connor. Reagan himself states that, "During the campaign, I pledged that 'one of my first' nominations to the court would be a woman ... We started looking for her during my first month in the White House, long before there was a vacancy to fill."[8]

Justice O'Connor was born in El Paso, Texas, in 1930. After graduating in law from Stanford University, she served as the Deputy County Attorney of San Mateo County, California from 1952 to 1953. From 1958 to 1960, she practiced law in Maryvale, Arizona, and served as Assistant Attorney General of Arizona from 1965 until 1969. In 1969, she was appointed to the Arizona State Senate and subsequently re-elected as a Republican to two two-year terms. In 1975, O'Connor was elected Judge of the Maricopa County Superior Court and served there until 1979, before being appointed to the Arizona Court of Appeals. After being nominated by President Reagan to become an Associate justice of the Supreme Court, she took her seat on the bench on September 25, 1981. Justice O'Connor was the only person of those nominated by Reagan and Bush who had not previously served on the U.S. Court of Appeals before being elevated to the Supreme Court.[9] The nomination of Sandra Day O'Connor appeared to have transcended political differences. Robert Dallek records:

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8. Ronald Reagan, *An American Life* (New York: Simon and Schuster, 1990), p. 279.

> Reagan's greatest triumph in melding conservative and liberal symbols was his appointment of Sandra Day O'Connor to the US Supreme Court ... liberals found it difficult to object to someone with a reputation as a fair minded legislator and jurist who would become the first woman to serve on the Supreme Court ... Senator Edward Kennedy said: "Every American can take pride in the president's commitment to select such a woman for this critical office." Her appointment received unanimous approval in the Senate.[10]

Justice O'Connor officially retired on January 31, 2006 after twenty four years of service on the nation's highest court.

The next nomination made by Reagan was the first Italian American appointed to the Supreme Court, Antonin Scalia. Justice Scalia took his seat in 1986 and filled a vacancy created by Justice Rehnquist's elevation to the Chief Justiceship. Scalia was born in Trenton, New Jersey in 1936. He graduated in law from the Harvard Law School and commenced work in private practice in Cleveland, Ohio from 1961 to 1967 and then entered academia teaching as a Professor of Law at the University of Virginia from 1967 until 1971, and as a Professor of Law at the University of Chicago from 1977 to 1982. He was also a Visiting Professor of Law at Georgetown University and Stanford University. From 1974 to 1977 Justice Scalia served in the Federal government as Assistant Attorney General for the Office of Legal Counsel. In 1982 Reagan nominated Scalia to a position on the US Court of Appeals for the D.C. Circuit, widely regarded as the second most important court in the country.[11] Reagan then nominated Scalia to the Supreme Court in 1986 where he was approved by the Senate by a vote of 98 to zero.[12]

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9. See U.S. Supreme Court website, Biographies of Current Members of the Court; Entry for Associate Justice Sandra Day O'Connor; at www.supremecourtus.gov/about/about.html

10. Robert Dallek, *Ronald Reagan: The Politics of Symbolism* (Cambridge: Harvard University Press, 1984), pp. 82-83.

11. See U.S. Supreme Court website, Biographies of Current Members of the Court; Entry for Associate Justice Antonin Scalia; at www.supremecourtus.gov/about/about.html

12. See the biographical entry for Antonin Scalia at the Federal Judicial Center at http://air.fjc.gov/public/home.nsf/hisj

In 1988 Reagan was given another opportunity to fill a vacancy on the Supreme Court following the retirement of Justice Lewis Powell. After the dramatic and controversial nomination of Justice Bork collapsed and when Reagan's alternative, Justice Douglas Ginsburg, was also forced to withdraw in controversial circumstances, Reagan settled for a compromise candidate with Justice Anthony Kennedy. Justice Kennedy was born in Sacramento, California in 1936. He received a B.A. from Stanford University and the London School of Economics, and an LL.B. from Harvard Law School. He commenced work in private practice in San Francisco, California from 1961 to 1963, and in Sacramento, California from 1963 to 1975. From 1965 to 1988, he taught as a Professor of Constitutional Law at the McGeorge School of Law, University of the Pacific. Justice Kennedy was appointed to the U.S. Court of Appeals for the Ninth Circuit in 1975. Reagan then nominated him to a seat on the Supreme Court, which he took on February 18, 1988.[13] At the time of Kennedy's selection, the New York Times reported:

> President Reagan, stung by the failure of two nominations to the Supreme Court in the last three weeks, today nominated Judge Anthony M. Kennedy and expressed hope that he could be confirmed quickly in a spirit of bipartisan cooperation ... Mr Reagan emphasized that Judge Kennedy "seems to be popular with many senators of varying political persuasions ... The experience of the last several months had made all of us a bit wiser."[14]

George H. W. Bush made two appointments to the Supreme Court. In 1990 he nominated former New Hampshire Supreme Court justice and U.S. Court of Appeals for the First Circuit judge, David Souter, to replace leading liberal, Justice William Brennan. David Souter was born in Melrose, Massachusetts in 1939. He graduated from Harvard College and after two years as a Rhodes scholar at Magdalen College,

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13. See U.S. Supreme Court website, Biographies of Current Members of the Court; Entry for Associate Justice Anthony Kennedy; www.supremecourtus.gov/about/about.html

14. Linda Greenhouse, "Reagan Nominates Anthony Kennedy to Supreme Court," *The New York Times*, November 12, 1987, p. A. 1.

Oxford, in 1963 he received an M.A. After graduating with an LL.B. from Harvard Law School he rose to become the Attorney General of New Hampshire in 1976. In 1978, he was named an Associate Justice of the Superior Court of New Hampshire, and was appointed to the Supreme Court of New Hampshire as an Associate Justice in 1983. He became a Judge of the U.S. Court of Appeals for the First Circuit on May 25, 1990. Bush then nominated him as an Associate Justice of the Supreme Court and he took his seat on October 9, 1990.[15]

The saga of the Bork nomination had a strong influence on the selection of David Souter to the Supreme Court. Henry Abraham argues that the underlying objective of the Bush administration was to find a conservative jurist whose record would not come back to haunt him like Justice Bork's did during his nomination hearings. Abraham states, "The president's decision to select Judge Souter – a judge he had never met or spoken with until then – was based predominantly on the chief executive's desire to finger a conservative judge with no controversial written opinions (especially on the emotional abortion issue) that would trigger sustained ideological conflict on the eve of the 1990 midterm elections."[16]

The following year the Supreme Court's first black judge, Justice Thurgood Marshall, retired enabling Bush to fill yet another vacancy. The President nominated a black judge who had been serving on the D.C. Circuit Court of Appeals, Clarence Thomas. Thomas was born in 1948 in the Pin Point community, near Savannah, Georgia. He attended Conception Seminary and received an A.B., cum laude, from

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15. See U.S. Supreme Court website, Biographies of Current Members of the Court; Entry for Associate Justice David Souter; www.supremecourtus.gov/about/about.html

16. Henry Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 1992), p. 366.

Holy Cross College, and a Doctor of Jurisprudence from Yale Law School in 1974. He was admitted to law practice in Missouri in 1974, and served as an Assistant Attorney General of Missouri from 1974 to 1977, worked as an attorney with the Monsanto Company from 1977 to 1979, and as a staffer to Senator John Danforth from 1979 to 1981. From 1981 to 1982, he served in the Reagan administration as an Assistant Secretary for Civil Rights in the US Department of Education, and as Chairman of the US Equal Employment Opportunity Commission from 1982 till 1990. He became a Judge of the U.S. Court of Appeals for the D.C. Circuit in 1990. Shortly after, Bush nominated him as an Associate Justice of the Supreme Court and he took his seat on October 23, 1991.[17]

The Thomas nomination was particularly bitter with ideology, race and gender all assuming prominence at various points. Regarding the racial aspect of the nomination, David Brock provides a valuable insight into the political nature of the attempt to secure this nomination.

> The Thomas nomination itself was widely portrayed as a cold-blooded, cynical ploy by the Bush White House to replace a black liberal with a black conservative ... The truth of the matter was that George Bush had wanted to nominate Clarence Thomas to the Supreme Court before it became known that the open seat would be Thurgood Marshall's ... Indeed, the fact that Marshall and Thomas were both black worked against, not for, Thomas's nomination prospects. "We were praying it wouldn't be Marshall's seat," one Thomas supporter in the administration said. Locked in a struggle with Congressional Democrats over racial quotas in the 1991 Civil Rights Act, Bush worried that nominating Thomas would ignite the charge of a quota appointment, as it later did.[18]

In total, President Reagan appointed four people to the Fourth Circuit, none of whom were female, black or Hispanic. The average age of Reagan's lifetime nominees to this court was 49 years.

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17. U.S. Supreme Court, Biographies of Current Members of the Court; Entry for Associate Justice Clarence Thomas; at www.supremecourtus.gov/about/about.html

18. David Brock, *The Real Anita Hill: The Untold Story* (New York: The Free Press (Macmillan), 1994), pp. 27-28.

The first Reagan nomination to the Fourth Circuit examined in this analysis was William Wilkins. He was born in 1942 in Anderson, South Carolina and graduated a Doctor of Jurisprudence from the University of South Carolina Law Centre in 1967. Wilkins then served as a Captain in the US Army until 1969 and a Lieutenant Colonel in the US Army Reserve until 1983. From 1970 to 1971 he served as a staffer to Senator Strom Thurmond, before entering private practice in Greenville, South Carolina from 1971 to 1978. Justice Wilkins had been working as a solicitor on the Thirteenth Judicial Circuit in South Carolina since 1974 when he was nominated by Reagan to the U.S. District Court for the District of South Carolina in 1981. In 1986 Reagan again nominated Wilkins for judicial office, this time to a seat on the Fourth Circuit.[19] Wilkins is currently the Chief Justice of the Fourth Circuit, a position he has been serving in since 2003.

Reagan's next nomination to the Fourth Circuit, specifically included in this analysis, was James Harvie Wilkinson. After serving in the US Army in 1968 and running unsuccessfully as a Republican candidate for the House of Representatives from Virginia in 1970, Wilkinson graduated a Doctor of Jurisprudence from the University of Virginia School of Law in 1972. The following year he clerked for family friend and Supreme Court justice, Lewis Powell, and from 1973 to 1978 taught as an Associate Professor at the University of Virginia Law School. After leaving the legal profession in 1978 to work as the editorial page editor at the Norfolk Virginia Pilot, Judge Wilkinson then commenced work in the Reagan administration serving as a Deputy assistant US attorney general in the Civil Rights

19. Federal Judicial Centre, The Federal Judges Biographical Database: Entry for Judge William Wilkins -http://air.fjc.gov/history/judges_frm.html

Division of the US Department of Justice from 1982 to 1983. In 1983 he was made a Professor at the University of Virginia Law School. On January 30, 1984 Reagan nominated Wilkinson to a seat on the Fourth Circuit from which he has now served since August 13, 1984. From 1996 to 2003 Judge Wilkinson served as the Chief Justice of the Fourth Circuit.[20]

President George H. W. Bush also nominated four people to the Fourth Circuit. Of his four nominees, only one was female and none were black or Hispanic. The average age of Bush's lifetime nominees to this court was just 46 years.

Clyde Hamilton was Bush's first nominee to the Fourth Circuit. He was born in 1934 in Senator Strom Thurmond's hometown of Edgefield in South Carolina and graduated from George Washington University Law School. Hamilton commenced work in private practice in Edgefield, South Carolina and Spartanburg, South Carolina from 1961 until his nomination by Reagan to a seat on the US District Court for the District of South Carolina in 1981. On June 12, 1992 Bush nominated him to a newly created seat created on the Fourth Circuit.[21]

Bush's second nomination to the Fourth Circuit was Michael Luttig, born in Tyler, Texas in 1954. After graduating a Doctor of Jurisprudence from the University of Virginia in 1981 he clerked for Antonin Scalia when Scalia was a judge on the U.S. Court of Appeals for the D.C. Circuit. From 1983 to 1984 Luttig clerked for the then Chief Justice of the Supreme Court, Warren Burger. Luttig then served as Justice Burger's Special assistant from 1984 to 1985. Luttig commenced work in

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20. Federal Judicial Centre, The Federal Judges Biographical Database: Entry for Judge James Harvie Wilkinson at http://air.fjc.gov/history/judges_frm.html

21. Federal Judicial Centre, The Federal Judges Biographical Database: Entry for Judge Clyde Hamilton at http://air.fjc.gov/history/judges_frm.html

private practice in Washington DC from 1985 to 1989 before serving in the Bush administration from 1990 to 1991 as an Assistant attorney general in the Office of Legal Counsel and later as a Counsellor to the attorney general at the US Department of Justice. In 1991 Justice Luttig was nominated by Bush to a seat on the Fourth Circuit and has served there since August 2, 1991.[22] In May, 2006 Justice Luttig resigned from the Fourth Circuit to serve as General Counsel for Boeing.[23]

The next Bush nominee to the Fourth Circuit was Paul Niemeyer, born in 1941 in Princeton, New Jersey.[24] He worked in private practice in Baltimore, Maryland from 1966 until his appointment by Reagan to the US District Court for the District of Maryland in 1987. On May 11, 1990 Bush nominated him to a seat on the Fourth Circuit where he has served since August 7, 1990.

The last person to be nominated by Bush to the Fourth Circuit was the only woman amongst the Fourth Circuit judges in this data set - Karen Williams. Justice Williams was born in 1951 in Orangeburg, South Carolina. On completion of a Doctor of Jurisprudence at the University of South Carolina Law Centre in 1980 she entered private practice in Orangeburg, South Carolina until her appointment to the Fourth Circuit by Bush in March, 1992.[25] Like several of the other Reagan and Bush nominees to the Fourth Circuit, Justice Williams and her family were close to Senator Strom Thurmond. Deborah Sontag notes, "She was appointed by President Bush in

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22. Federal Judicial Centre, The Federal Judges Biographical Database: Entry for Judge Michael Luttig at http://air.fjc.gov/history/judges_frm.html

23. See the entry for Michael Luttig at the Boeing Company's website at www.boeing.com/companyoffices/aboutus/execprofiles/luttig.html

24. Federal Judicial Centre, The Federal Judges Biographical Database: Entry for Judge Paul Niemeyer at http://air.fjc.gov/history/judges_frm.html

25. Federal Judicial Centre, The Federal Judges Biographical Database: Entry for Judge Karen Williams -http://air.fjc.gov/history/judges_frm.html

1992 on the recommendation of Strom Thurmond, a friend of her father-in-laws, then the president of the South Carolina State Senate."[26]

The Methodology

Before detailing how each judge's decisions were analysed in this chapter it is necessary to define the extent to which they can be classed as having conformed to the preferences of their nominating President. As outlined in the introduction to this chapter it is the 'concordance' of a judge's approach to the policy preferences of his or her nominating President, as defined in the work of Segal et al, that explains what is being sought in each judge's ruling in criminal justice cases. Ashlyn Kuersten and Donald Songer, having built on the work of Segal et al, summarise the difference between concordance and responsiveness. In quoting Segal et al they observe that, "(r)esponsiveness suggests that presidential preferences directly influence justice's decisions. Concordance only requires that the justices act in agreement with the presidential preferences."[27] Kuersten and Songer continue, "Although concordance might result from direct presidential influence, 'it could also be due to an indirect influence through the appointment of justices with shared values."[28] This analysis, therefore, seeks to determine why judges on the Fourth Circuit displayed a greater degree of concordance with the policy preferences of their nominating President regarding criminal justice matters than their similarly appointed colleagues on the Supreme Court.

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26. Deborah Sontag, "The Power of the Fourth," *New York Times Magazine*, March 9, 2003, p. 38.

27. Ashlyn Kuersten and Donald Songer, "Presidential Success Through Appointments to the United States Court of Appeals," *American Politics Research* Vol 31. No 2, March 2003, p. 109.

28. *Ibid.*, p. 109.

Another aspect of the methodology used in this chapter, regarding the collation of judicial voting data is borrowed from the Harvard Law Review tradition. The Harvard Law Review's analysis of Supreme Court cases originated nearly ninety years ago through the work of a former Supreme Court justice, Felix Frankfurter. The Review states:

> ... interest in the work of the Supreme Court first assumed statistical form in 1925 in a series of articles co-authored by then Professor Felix Frankfurter. Devoted to an analysis of the 'business of the Court,' the articles introduced a number of charts tabulating some of the more significant features of the Court's activity. These charts subsequently became models for the statistical tables which have accompanied the Supreme Court Note every year since the Note was institutionalised in its present form in 1949.[29]

One proponent of this tradition, Andrew Lynch, argues in relation to his work on the judicial behaviour of the Australian High Court that in, "preparing statistics on the Gleeson Court's work pertaining to constitutional law over the last five years, essentially one is rarely called upon to do anything more complicated than tally as one goes through the relevant reports."[30] The Harvard Law Review tradition itself modestly acknowledges that its data on judicial voting behaviour has been, "accomplished primarily through tabulations as mechanical and simple as counting."[31]

The dependent variables in this analysis are the individual decisions in criminal justice cases of the eleven judges in this data set. This variable is defined in accordance with the methodology of Donald Songer and Martha Humphries Ginn who simply acknowledge that, "Traditionally, the dependent variable is simply a

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29. "The Supreme Court, 1967 Term" *Harvard Law Review* Vol.82 No.63, 1968, pp. 301-302.)

30. Andrew Lynch, "The Gleeson Court on Constitutional Law: An Empirical Analysis," Paper delivered at UNSW Conference on Constitutional Law, 21 February, 2003, Sydney.

31. "The Supreme Court, 1967 Term" *Harvard Law Review* Vol.82 No.63, November 1968, p. 302

series of votes categorised as either liberal or conservative."[32] More specifically this way of defining the dependent variable is similar to that employed by Nancy Scherer who states:

> The dependent variable is the vote of each individual judge, either agreeing or disagreeing with the criminal defendant that, by virtue of the government's violation of his or her Fourth Amendment rights, incriminating evidence of the defendant's guilt must be suppressed.[33]

In determining more specifically the extent to which each of these eleven judges passed the judicial selection standards applied to them, I placed every judge's decision into two broad categories. Decisions in favour of the criminal defendant were coded as 'liberal' while those against a criminal defendant were coded as 'conservative.' This is broadly similar to the methodology employed by Manning, Carroll and Carp in 2002. The authors elaborate on their empirical approach:

> We utilised established coding methodologies employing contemporary American understandings of ideology in determining judges' votes in each of three broad case type categories. For example, in the area of criminal justice, judges' votes in favour of a criminal defendant were coded as 'liberal,' while decisions supporting the state and/or prosecutors were coded as 'conservative ... Other scholars who have studied judicial decision making have used this well established coding methodology.[34]

In further defining the political character of the dependent variable used here, Songer and Ginn's approach is most useful. In their 2002 work examining the influence of home state senators on judicial nominations they stated, "We define liberal in the conventional manner ... where liberal votes include ... votes in favour of the position of the defendant in criminal cases."[35] Scherer provides further guidance in

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32. Donald Songer and M. Humphries Ginn, "Assessing the Impact of Presidential and Home State Influences on Judicial Decision-making in the United States Courts of Appeals," *Political Research Quarterly*, Vol. 55, No. 2, June 2002, p. 303.

33. Nancy Scherer, Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government?" *Law Society Review*, Vol. 35, No.1, 2001, p. 197.

34. Manning, Carroll and Carp, *op cit.*, p. 280.

35. Songer and Ginn, *op cit.*, p. 307.

developing the methodology used within this thesis by stating, "The dependent variable is coded one for a 'conservative' vote (ie. against the criminal defendant's Fourth Amendment rights; against the minority plaintiff's civil rights; and against the supremacy of the federal government's rights) and zero for a 'liberal' vote.[36]

To assess the degree of concordance exhibited by these eleven judges with the policy preferences of their nominating President, each decision was weighted according to how strongly each judge ruled against a criminal defendant. As a consequence, these two broad categories of 'conservative' and 'liberal' were separated further in this chapter into four new dependent variables, each coded as 'liberal,' 'partly liberal,' 'partly conservative' and 'conservative.' Each court decision was therefore weighted according to the following scale of four scores. A score of 0 was given to all decisions in favour of criminal defendants (classified as liberal). A score of 0.25 was given to all decisions that favoured the criminal defendant in part (classified as partly liberal). An example of such a decision would be a case like *United States v Spruill*, 118 F.3d 221 (4th Cir. 1997) where Spruill argued that he could only be convicted under the relevant section of the federal criminal code if the over 200 phone threats he had made to law enforcement agencies concerned the use of fire or explosives. The Fourth Circuit panel agreed with him and vacated those two counts but rejected his argument that there was not a 'true' threat made. As two of the three charges brought against Spruill were vacated it falls within the definition of a 'partly liberal' result. A score of 0.75 was given to all decisions that found against the criminal defendant in part (classified as partly conservative). An example would be a case like *United States v Van Metre*, 150 F.3d 339 (4th Cir.

36. Scherer, *op cit*, pp. 196-197.

1998) where Van Metre appealed his life sentence for kidnapping and twenty years for solicitation. The Fourth Circuit panel affirmed his conviction and his sentence for kidnapping however it vacated his sentence for solicitation. Given the defendant's life sentence was upheld despite his solicitation charge being vacated this case falls within the definition of a 'partly conservative' result. Finally, a score of 1 was given to all decisions that found against the criminal defendant (classified as conservative).

The full list of the Supreme Court cases analysed here is contained in Appendices A to E. The full list of Fourth Circuit cases analysed here is contained in Appendices F to K. A core set of 50 cases from the U.S. Supreme Court were examined, with each case obtained from the FindLaw Internet Legal Resources site.[37] A core set of 227 cases from the U.S. Court of Appeals for the Fourth Circuit were also examined. As more than one judge in this data set heard each of these core cases, the total nominal number examined in this thesis was 242 Supreme Court cases across the five Supreme Court judges in this data set and 382 Fourth Circuit cases across the six judges from this circuit in this data set. Each of the 624 criminal justice cases in total that featured in this analysis was catalogued into five sub-sections. They were: the name of the case; the date the decision was brought down; a concise summary of the overall result in the case; the specific verdict delivered by the relevant judge in the case and the score allocated to that judge as a consequence of his or her verdict. Certain types of criminal cases were excluded from this analysis, particularly cases involving what is commonly known as 'white collar' crime. This meant, for example, that cases involving mail, wire and securities fraud, tax evasion, embezzlement and

37. For the full list of Supreme Court cases for each of the five years that I analysed see http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&navby=year&friend=oyez

illegal gambling were not subjected to my analysis. This is because such cases belong in a different political context. 'White collar' criminal cases do not carry the same level of political significance and controversy as the capital murder and illicit drug crimes examined here.

The 1995 to 1999 timeframe was selected because it enabled this analysis to fulfil the requirements of a 'natural court' thus ensuring greater accuracy in making comparisons between these two courts and also because it was the only timeframe in which it was possible to access all 624 legal cases in an electronic format. The legal database at the Emory University School of Law, in cooperation with the Fourth Circuit, only archives all of those cases heard by the Fourth Circuit between January, 1995 and July, 2001. The Fourth Circuit's own website only archives its opinions from 1 January, 1996.

The Results

A minimum of 48 decisions in criminal cases between 1995 and 1999 heard by each of the Reagan and Bush appointed judges to the Supreme Court were examined here. Each judge's decisions were coded according to whether they ruled in favour, partly in favour, partly against or against a criminal defendant. As described earlier, scores of 0, 0.25, 0.75 and 1 were allocated respectively. The breakdown of the scores allocated to each judge is displayed in Table 4.1. After adding each of these various weighted scores together an accumulated total was arrived at for each judge. That figure was then weighted by dividing it by the total number of criminal cases examined here. The final average weighted scores for each of these Supreme Court judges is recorded in Table 4.2.

In commencing with those appointments made to the Supreme Court by President Reagan, Table 4.1 shows a total of 48 decisions brought down by Justice Sandra Day O'Connor in criminal justice cases examined between 1995 and 1999. The results show that in close to half the number of cases examined here Justice O'Connor ruled in favour of the criminal defendant reflecting her widely regarded tendency to act as a 'swing' vote on the Supreme Court. In Table 4.2 her weighted scores were added together to provide an accumulated total for Justice O'Connor of 28. This specific figure was then divided by the total number of criminal cases heard by Justice O'Connor. Consequently, 28 was divided by 48 to produce a final average score in Table 4.2 for Justice O'Connor of .583.

Table 4.1 - Weighted Scores of Sample Opinions in Criminal Justice Cases by Reagan and Bush Appointed Judges to the Supreme Court (1995-1999)

Judge	In favour (Score: 0)	Partly in favour (Score: 0.25)	Partly against (Score: 0.75)	Against (Score: 1.0)
Sandra Day O'Connor	20	0	0	28
Antonin Scalia	12	1	1	36
Anthony Kennedy	20	0	1	27
David Souter	29	0	1	18
Clarence Thomas	11	0	1	36

Next, 50 decisions in criminal justice cases were examined from Justice Antonin Scalia, the next Reagan appointment to the Supreme Court. With only a quarter of his decisions favouring the defendant the results appear to confirm Justice Scalia's well known conservatism regarding these and other matters that have come before him on the Supreme Court. In Table 4.2 Justice Scalia's weighted scores were added together for a total of 37. This score was then divided by the total number of criminal cases

examined which Justice Scalia had heard. As a consequence 37 was divided by 50 to produce a final average score for Justice Scalia in Table 4.2 of .740.

The third row in Table 4.1 shows the scores for the 48 criminal justice decisions heard by Justice Anthony Kennedy. The results show a similar result to that of Justice O'Connor thus confirming Justice Kennedy's position as part of the 'moderate centre' on the Rehnquist Court. Justice Kennedy's weighted scores were added together in Table 4.2. The accumulated total of 28 for Justice Kennedy was then divided by the total number of criminal cases examined which Justice Kennedy had heard. Consequently, 28 was divided by 48 producing a final average score for Justice Kennedy in Table 4.2 of .583.

The remaining two rows of Table 4.1 show the results for the Bush appointed judges on the Supreme Court. Table 4.1 shows the relevant scores for the 48 decisions examined in criminal cases heard by Justice David Souter. As the only one of the five Reagan and Bush appointed judges on the Supreme Court to rule in favour of the criminal defendant more frequently than against, the results clearly confirm Justice Souter's position as the most liberal of these judges on the Court. Justice Souter's weighted scores were added together in Table 4.2 and show that the accumulated total for Justice Souter was 18.75. This figure was divided by the total number of criminal cases Justice Souter had heard in this data set to produce a final average score in Table 4.2 of .390.

The 48 decisions in criminal cases heard by Justice Clarence Thomas can be found in the final row of Table 4.1. The results are remarkably similar to those of Justice Scalia's and confirm Justice Thomas's position as the other significant member of the conservative bloc on the then Rehnquist Court. Justice Thomas's

weighted scores were added together in Table 4.2 and then divided by the total number of criminal cases I examined which Justice Thomas had heard. As a consequence, 36.75 was divided by 48 producing a final average score in Table 4.2 for Justice Thomas of .765.

I turn now to the findings of my analysis of criminal justice cases in the Fourth Circuit according to each judge in this data set, in order of seniority. For these Reagan and Bush appointed judges the same process was followed except that I examined a minimum of 55 decisions in criminal cases during the same timeframe. The breakdown of the scores allocated to each of these judges is displayed in Table 4.3. After adding each of these various weighted scores together I arrived at an accumulated total for each judge. That figure was then divided by the total number of criminal cases examined. The final average weighted scores for each of these Fourth Circuit judges is recorded in Table 4.4.

Table 4.2 - Final Average Scores for Reagan and Bush Appointed Judges to the Supreme Court (1995-1999)

Judge	Final average score
Clarence Thomas	.765
Antonin Scalia	.740
Sandra Day O'Connor	.583
Anthony Kennedy	.583
David Souter	.390

Commencing with those judges appointed to the Fourth Circuit by President Reagan, Table 4.3 shows that 64 decisions in criminal cases heard by Justice William Wilkins were examined between 1995 and 1999. The results show a very significant number, more than 85 per cent of Justice Wilkins's decisions, came down against the

criminal defendant. These weighted scores were added together in Table 4.4. The accumulated total for Justice Wilkins was 57.25 which was then divided by the total number of criminal cases I examined that Justice Wilkins had heard. As a consequence 57.25 was divided by 64 producing a final average score in Table 4.4 for Justice Wilkins of .894.

The results of analysing 61 decisions in criminal cases heard by Justice James Harvie Wilkinson are shown in the second row of Table 4.3. The results show that of all the decisions brought down in this analysis's 'natural court' timeframe, Justice Wilkinson ruled in favour of the criminal defendant just once. Justice Wilkinson's weighted scores were added together in Table 4.4 and were then divided by the total number of criminal cases I examined. As a consequence 58.25 was divided by 61 producing a final average score for Justice Wilkinson in Table 4.4 of .954.

Table 4.3 -Weighted Scores of Sample Opinions in Criminal Justice Cases by Reagan and Bush Appointed Judges to the Fourth Circuit (1995-1999)

Judge	In favour (Score: 0)	Partly in favour (Score: 0.25)	Partly against (Score: 0.75)	Against (Score: 1.0)
William Wilkins	5	1	4	54
James H. Wilkinson	1	0	7	53
Clyde Hamilton	6	1	8	45
Michael Luttig	4	0	8	58
Paul Niemeyer	2	0	7	67
Karen Williams	2	0	5	45

The third row in Table 4.3 contains the results of my analysis of 60 decisions in criminal cases heard by Justice Clyde Hamilton. Of all the Fourth Circuit judges examined here, Justice Hamilton ruled in favour of the criminal defendant the most frequently. Despite this Justice Hamilton only did this on seven occasions. Justice Hamilton's weighted scores were added together in Table 4.4 and were then divided

by the total number of criminal cases examined which he had heard. As a consequence 51.25 was divided by 60 producing a final average score for Justice Hamilton in Table 4.4 of .854.

The next section of Table 4.3 shows the results of Bush appointed judges to the Fourth Circuit. A total of 70 decisions were examined in criminal cases heard by Justice Michael Luttig. The results show Justice Luttig ruled in favour of the criminal defendant on just four occasions. Justice Luttig's weighted scores were added together in Table 4.4 and were then divided by the total number of criminal cases I examined which he had heard. As a consequence 64 was divided by 70 producing a final average score for Justice Luttig in Table 4.4 of .914.

The second last row in Table 4.3 shows the results of the examination of 76 decisions in criminal cases heard by Justice Paul Neimeyer. Of all the Fourth Circuit judges in this analysis the results show that Justice Neimeyer ruled against the criminal defendant the most. In the 76 decisions examined here Justice Neimeyer ruled in favour of the criminal defendant just once. Justice Neimeyer's weighted scores were added together in Table 4.4 and were then divided by the total number of criminal cases I examined which he had heard. As a consequence 72.25 was divided by 76 producing a final average score for Justice Neimeyer in Table 4.4 of .950.

Finally, I examined 52 decisions in criminal cases heard by Justice Karen Williams. The results show that Justice Williams was also a strong "law and order" style judge having ruled in favour of the criminal defendant just twice in the 52 decisions she brought down which have been examined here. In Table 4.4 the weighted scores from Justice Williams's rulings were added together and then divided by the total number of criminal cases examined which she had heard. As a

consequence 48.75 was divided by 52 producing a final average score for Justice Williams in Table 4.4 of .937.

Table 4.4 - Final Average Scores for Reagan and Bush Appointed judges to the Fourth Circuit (1995-1999)

Judge	Final average score
James H. Wilkinson	.954
Paul Niemeyer	.950
Karen Williams	.937
Michael Luttig	.914
William Wilkins	.894
Clyde Hamilton	.854

Discussion

The calculations in this chapter show the range of concordance that existed between the eleven judges in this data set and their nominating Presidents in the context of these two courts. The methodology that has been used here dictates that the higher the score these judges achieved, the more conservative that judge was in his or her approach to criminal justice cases. It also means that those with the highest scores showed the greatest degree of concordance with one of the key parts of the selection standards applied by their nominating President - a firm and hardline approach to cases involving criminal justice matters.

While higher final average scores meant a more conservative approach to criminal justice cases and a stronger degree of concordance with the expectations of that judge's nominating President, the converse meant the lower the score, the more liberal the approach taken to such cases and thus a greater tendency to support claims made by criminal defendants. In ranking these eleven judges according to the toughest approach adopted towards the claims of criminal defendants and consequently the strongest degree of concordance with the preferences of their

nominating President, these judges can be ranked in the following way according to their final average scores.

The results clearly show a considerable divergence between judges appointed to the Fourth Circuit and those appointed to the Supreme Court regarding their rulings on criminal justice cases and their level of concordance with the expectations of their nominating President. All of the Fourth Circuit judges in this data set conformed to the criminal justice requirements of the selection standards applied to them by their nominating President. This was done at a greater rate than their similarly appointed colleagues to the Supreme Court. The results show that the average of the final scores achieved by the Supreme Court judges was .612 whereas the average of the final scores achieved by the Fourth Circuit judges was .917. These results clearly indicate that the Fourth Circuit judges in this data set exhibited a greater degree of concordance with the philosophical expectations and preferences of their nominating Presidents than all of the similarly appointed Supreme Court judges in this same data set. The divergence of scores between the Fourth Circuit judges and those from the Supreme Court shows that the Fourth Circuit judges overwhelmingly conformed to the expectations of their nominating President whereas the Supreme Court judges did not.

Table 4.5 - Final Average Scores of Reagan and Bush Appointed Judges to the Supreme Court and the Fourth Circuit 1995-1999 by Level of Concordance

Supreme Court judges	Score	Fourth Circuit judges	Score
Clarence Thomas	.765	James H. Wilkinson	.954
Antonin Scalia	.740	Paul Niemeyer	.950
Sandra Day O'Connor	.583	Karen Williams	.937
Anthony Kennedy	.583	Michael Luttig	.914

David Souter	.390	William Wilkins	.894
		Clyde Hamilton	.854
Total weighted score	.612		.917

The results of this analysis support what has been found elsewhere in the existing literature regarding the fundamental change that occurred in the judicial philosophy of Justice David Souter. As has been widely acknowledged elsewhere, Justice Souter proved to be the most liberal of all the judges in this analysis. The results also confirm the position of Justices O'Connor and Kennedy and their relatively conservative yet more moderate approach to such cases. In particular, the results of this analysis partly confirms what has been identified by Segal, Timpone and Howard in 2000 when they stated, "... the appointment of O'Connor was more to fulfil a campaign pledge to place a woman on the Court than to achieve conservative policy goals."[38]

The analysis in this chapter also confirms what has been found in the existing literature regarding the conservatism of Justices Scalia and Thomas. The results here show clearly that these two judges are the most conservative of the five appointed to the Supreme Court by Presidents Reagan and Bush. Regarding Justice Thomas the analysis here compliments the observation previously made by Stephen Carter when he stated, "As a member of the Court, Thomas has, if anything, made the data stronger: his consistency in voting with Antonin Scalia is the stuff of legend, and is also empirically validated."[39]

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38. Jeffrey Segal, Richard Timpone and Robert Howard, "Buyer Beware? Presidential Success Through Supreme Court Appointments," *Political Research Quarterly*; Vol.53 No.3, September 2000; p. 557.

39. Stephen Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (New

Finally, this analysis shows that the average score of all the Fourth Circuit judges in this data set shows that on average between 1995 and 1999 in over nine in every ten cases the criminal defendant would have lost his or her claim.

Summary

This chapter provides empirical evidence to show that judges appointed by Presidents Reagan and Bush to the Fourth Circuit showed a greater degree of concordance with the philosophical expectations and preferences of their nominating President than the appointments these two Presidents made to the Supreme Court. As revealed in Chapter Two, a conservative, hardline approach to criminal justice cases was an essential part of what was expected of the judicial nominations made by these two Presidents. The analysis of criminal justice cases involved 50 individual Supreme Court cases and 227 individual Fourth Circuit cases – 277 cases in total. Because nearly all of the 50 Supreme Court cases in this analysis were heard by every one of the Supreme Court judges in my data set, the total number of Supreme Court cases examined in this thesis was 242. Furthermore, because the vast majority of the 277 core cases in the Fourth Circuit were heard by more than one judge in my data set for this particular circuit, the total number of such cases examined in this thesis was 382. Consequently, a total of 624 legal cases were analysed to determine the extent of the phenomena identified in this thesis.

Having examined the judicial philosophy of the five judges appointed to the Supreme Court by Presidents Reagan and Bush and their six similarly appointed colleagues to the Fourth Circuit with specific regard to a total of 624 criminal justice cases over a five year timeframe, it is clear a distinct difference existed in how these

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York: Basic Books, 1994), p. 81.

two sets of judges approached the criminal justice component of the selection standards applied to them. The analysis in this chapter confirms the existence of the problem in this thesis because it demonstrates that those judges appointed to the Fourth Circuit by Presidents Reagan and Bush adhered more closely to the criminal justice aspect of these two Presidents' philosophical expectations than their similarly appointed colleagues on the Supreme Court. The next chapter provides potential explanations as to why a more conservative approach to criminal justice cases was found on the Fourth Circuit and not on the Supreme Court, particularly when all of the judges analysed here were appointed by the same two Presidents and subject to the same philosophical expectations.

Chapter Five

A POTENTIAL EXPLANATION WHY REAGAN AND BUSH APPOINTED JUDGES ON THE FOURTH CIRCUIT WERE MORE CONSERVATIVE ON CRIMINAL JUSTICE MATTERS THAN THEIR COLLEAGUES ON THE SUPREME COURT

Introduction

This chapter provides a potential explanation as to why the Reagan and Bush appointed judges on the Fourth Circuit displayed a more conservative approach to criminal justice cases than their similarly appointed colleagues on the Supreme Court. It can be articulated in the following way: The Reagan and Bush appointees displayed a greater degree of concordance with the expectations of their nominating President in criminal justice cases compared to their colleagues on the Supreme Court because of the influence of both Senator Strom Thurmond of South Carolina and Senator Jesse Helms of North Carolina in ensuring their own strongly conservative values had weight in each judge's selection and confirmation. The seniority of these two men, the influential roles they played in their respective Senate committees, their well established friendship with Presidents Reagan and Bush and with many of the individual nominees themselves, as well as the wide ranging Senatorial courtesy accorded to them, ensured they had a crucial input into shaping the pool of prospective judicial candidates.

The power of these two Senators was reinforced further by the 'blue slip' convention. This is defined by the Department of Justice as, "the traditional method of allowing the home state senators of a judicial nominee to express their approval or disapproval ... The process dates back several decades and is grounded in the

tradition of 'senatorial courtesy,' which traces its roots back to the presidency of George Washington."[1]

The current chairman of the Senate Judiciary Committee, Senator Patrick Leahy, described the significance of the 'blue slip' in the context of the Senate's constitutional role by stating, "These pieces of blue paper are what the Chairman [of the Senate Judiciary Committee] uses to solicit the opinion of home-state Senators about the President's nominees. Simply stated, the blue slip practice is the enforcement mechanism for the consultation that the Constitution calls for."[2]

In assessing the influence and impact of these two Senators this chapter details the conservative, 'law and order' approach they demanded towards criminal justice matters generally and examines their reaction to several significant criminal justice cases. This is necessary to locate precisely what these two Senators expected from those judicial nominees who would hear such cases. Establishing the strongly conservative approach of these two men towards criminal justice assists in explaining how their influence resulted in the selection of nominees with similar approaches being appointed to the Fourth Circuit by Presidents Reagan and Bush.

The Influence of Senators Thurmond and Helms

The potential explanation provided in this chapter, which emphasises the role of two individual Senators, borrows from elements of the neo-institutional model of American political jurisprudence. Such an approach places significance on the impact

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1. See the Department of Justice's Office of Legal Policy's definition of the 'blue slip' at www.usdoj.gov/olp/judicialnominations.htm

2. Opening Statement of Senator Leahy in U.S. 108th Congress, 1st Session, Hearings Before the Committee on the Judiciary, *Confirmation Hearings on Federal Appointments,* June 22, July 30, September 3, September 17 and October 1, 2003, Senate Hearing 108-135 Part 4, (Washington, D.C.: U.S. Government Printing Office, 2004), p.591.

of variables like Congress, the interests of Congressmen and Senators, the voters and even the media as determinants of judicial voting behaviour.[3] While not focusing specifically on judicial voting this explanation borrows neo-institutional elements and applies them to judicial selection. In this context Senators like Thurmond and Helms are institutional actors representing the impact Congress can have on judicial selection. This chapter, however, explores the institutional influences on judicial selection, as opposed to judicial voting, at a level involving just two Senators rather than Congress as a whole. Furthermore, it focuses only on the initial nominating stages of the judicial selection process and is not applied throughout the full span of a judge's career. Applying aspects of the neo-institutional model to the initial stages of judicial selection is necessary because it was at this point that the power and influence of Senators Thurmond and Helms had its greatest impact.

In the context of the problem this thesis seeks to resolve, a key institutional influence in the initial stages of selecting the Fourth Circuit judges examined in this data set were these two members of the Senate. It was established in Chapter Three that Senators generally have a significant role in the process of selecting and confirming judicial nominees. While it was noted more specifically that the power of a Senator was stronger over nominees to the District Courts within each State, it was also found that Senators continued to retain varying degrees of influence over nominations to that specific circuit of the U.S. Court of Appeals presiding over each Senator's home state. This power was strengthened through the use of the 'blue slip' policy which required the approval of both home state Senators before a nomination

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3. See, for example. Charles Cameron, Albert Cover and Jeffrey Segal, "Senate Voting on Supreme Court Nominees: A Neoinstitutionalist Model," *The American Political Science Review*, Vol.84: No.2, June, 1990.

could be processed by the Senate Judiciary Committee. As Senator Leahy from Vermont emphasises, "The blue slip policy is the enforcement tool to ensure consultation by the Executive Branch with home-state senators about judicial appointments to their states."[4] But aside from this and their extensive political connections and well maintained power bases, Senators Thurmond and Helms were able to strengthen further their influence over nominations to the Fourth Circuit throughout the 1980s and early 1990s, partly because their terms in office coincided with that of two Republican presidents. As Songer and Ginn found, Senators become particularly influential in determining the type of judicial nominee selected if they belong to the same political party as the nominating President. They elaborate:

> ... while Presidents appear to be "successful" in securing the selection of appeals court judges who share the President's preferences to some degree, they are constrained by home state political forces. Senatorial courtesy appears to be particularly important. The association between judge's votes and the preferences of home state senators of the President's party is statistically significant even when one controls for changing presidential preferences and the ideology of home state actors. In sum, the dominant political values within a state at the time of selection appear to constrain presidential selection of Appeals Court judges. This constraint is most effective when at least one of the senators is of the President's party.[5]

Notwithstanding Thurmond's key role as chair of the Senate Judiciary Committee the fact that both Senators Thurmond and Helms belonged to the same party as the President increased the weight of their views on the suitability of specific judicial candidates during the selection process. Songer and Ginn again make the following observation of vital importance when explaining the input Senators like Thurmond and Helms had in the initial stages of judicial selection:

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4. Opening Statement of Senator Leahy in U.S. 108th Congress, Hearing before the Judiciary Committee on the Nomination of Claude Allen, October 28, 2003 accessed at http://judiciary.senate.gov/member_statement.cfm?id=972&wit_id=2629

5. Donald Songer and M. Humphries Ginn, "Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals," *Political Research Quarterly*, Vol. 55, No. 2 June 2002, p. 321.

> ... the most important external factor in the judicial appointments process which can 'severely constrain' a president's ability to choose a nominee is the power of home state senators. 'The most important ... constraint(s) comes from the political forces in the judge's home state. An unwritten rule requires that a president clear judicial nominees with senators who both share the president's party and the nominee's home state ... In sum, although a president may have some latitude when deciding which state receives a position on the circuit court, he is always constrained by the home state senator who shares his party.[6]

There is further evidence in the existing literature to allow one to conclude that home state Senators, particularly those with the political connections of Senators Thurmond and Helms, wielded considerable power over the selection of judicial nominees. Kuersten and Songer note, 'Anecdotal accounts and case studies have long suggested that home state senators of an appointing president's party play an important role in the process of appointments to the courts of appeals.'[7] More specifically the authors found that, ' ... even during the Reagan administration, when the president was strongly committed to securing nominees who shared his policy preferences, Republican home state senators had virtual veto power over unacceptable nominees from their states.'[8] Songer and Ginn also examined this particular aspect of judicial selection and made the following observation that applies directly to Thurmond and Helms in the context of their extensive power bases:

> The extent of the influence of home state senators of the President's party appears to vary depending on the power base of the senator, and the senators' concern with the selection of like-minded judges. Whether the home state senator's success is the result of pushing his or her own candidates, or in vetoing unacceptable candidates initially proposed by the President, the more influence a policy minded home state senator has in the process, the closer the policies supported by the judge should be to the senator's preferences.[9]

As will be seen later in this chapter, the considerable political influence of these two Senators strengthened the institutional constraints that generally applied to a

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6. Ashlyn Kuersten and Donald Songer, "Presidential Success through Appointments to the United States Courts of Appeals," *American Politics Research*, Vol.31 No. 2, March 2003, pp. 119-120.

7. *Ibid.*, pp. 107-137.

8. *Ibid.*, p. 119.

9. Songer and Ginn, *op cit*, p. 302.

President's capacity to choose judicial nominees for vacancies like those on the Fourth Circuit.

The Political Ideology of Senators Thurmond and Helms

The ideological conservatism of Senators Thurmond and Helms is widely acknowledged in the existing literature. It is necessary to briefly recount this here because of the link it has with a similar ideological approach exhibited by those nominated by Presidents Reagan and Bush to be judges on the Fourth Circuit. A particularly useful illustration of the respective ideologies of these two Senators is the well established method used to measure the general ideological outlook of all American Senators conducted by the influential political journal *Congressional Quarterly* (CQ). Each year this publication provides a list of ratings based on each Senator's voting record in the Senate. The ratings are allocated by two conservative and two liberal interest groups of long standing national prominence. The two liberal interest groups used in CQ's analysis are the Americans for Democratic Action (ADA) and the American Federation of Labor-Congress of Industrial Organisations (AFL-CIO). CQ defines the ADA as an organisation, "founded by a group of liberal Democrats that included Senator Hubert H. Humphrey and Eleanor Roosevelt."[10] The AFL-CIO is defined as an organisation, "formed when the American Federation of Labor and the Congress of Industrial Organisations merged in 1955. With affiliates claiming more than 13 million members, the AFL-CIO accounts for approximately three quarters of national union membership."[11] From the conservative perspective,

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10. Congressional Quarterly, *Politics in America 1992 – The 102nd Congress,* (Washington, D.C.: CQ Press, 1991) p. xix.

11 *Ibid.,* p. xix.

the CQ analysis utilises the Chamber of Commerce of the United States (CCUS) and the American Conservative Union (ACU). The CCUS is defined as an organisation that, 'represents local, regional and state chambers of commerce as well as trade and professional organisations. It was founded in 1912 to be "a voice for organised business."[12] CQ identifies the ACU as an organisation, 'founded in 1964 "to mobilise resources of responsible conservative thought across the country and further the general cause of conservatism."[13]

The ratings from each of these organisations are allocated within a range of one to 100. A score of one being the most disapproving of each Senator's vote and a score of 100 the most approving. By firstly measuring the *lack of support* these two Senators gained from these two liberal groups a clearer indication of the ideological conservatism of these two men can be measured.

As shown in Table 5.1, the ADA's rating for Senator Thurmond in 1981, when he first became involved in the selection of Reagan's judicial candidates for the Fourth Circuit, was zero out of 100. The following year his score increased to five out of one hundred where it remained in 1983. In 1984 it dropped to zero where it remained in 1985. In 1986 Senator Thurmond's score increased to five. In 1987 it climbed to 15 before falling back to zero in the year President George. H. W. Bush won the presidency. In 1989 Senator Thurmond's ranking out of one hundred was five and in 1990 it increased marginally to six. In 1991, 1992 and 1993 Senator Thurmond's score from the ADA remained level on ten out of one hundred.

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12. *Ibid.*, p. xix.

13. *Ibid.*, p. xix.

Table 5.1 also displays the ratings allocated by the AFL-CIO. In 1981 Senator Thurmond received a score of five out of one hundred from the AFL-CIO for his voting record. The following year his approval climbed to twelve out of one hundred. In 1983 it fell back to six before climbing to nine and then 14 in 1984 and 1985 respectively. In 1986 the AFL-CIO expressed its complete disapproval with Thurmond by not allocating him a score. In 1987 his approval jumped to 30 out of 100 before slipping back to 21 in 1988. In 1989 Senator Thurmond once again received no score from the AFL-CIO. In 1990 Thurmond received his highest rating from the organisation during the entire period of the Reagan and Bush administrations - a score of 33. In 1991 and 1992 the Senator scored 25 before finishing on ten in 1993.

Table 5.1 - Senator Thurmond's Ratings Score Out of 100 From the Americans for Democratic Action and the American Federation of Labor-Congress of Industrial Organisations (AFL-CIO) 1981-1993

Year	Americans for Democratic Action	American Federation of Labor-Congress of Industrial Organisations
1993	10	10
1992	10	25
1991	10	25
1990	6	33
1989	5	0
1988	0	21
1987	15	30
1986	5	0
1985	0	14
1984	0	9
1983	5	6
1982	5	12
1981	0	5

Source: Congressional Quarterly, *Politics in America 1992 – The 102nd Congress* (Washington D.C.: CQ Press, 1991), p.1344 and Congressional Quarterly, *Politics in America 1998 – The 105th Congress* (Washington D.C.: CQ Press, 1997), p. 1296.

Table 5.2 presents the scores allocated by these same two key liberal interest groups to Senator Helms. From 1981 to 1986 Senator Helms did not receive a single score from the ADA. In 1987 he scored ten out of one hundred. Helms scored just five in 1988 and 1989 before increasing his approval marginally to six in 1990. In 1991 and 1992 the Senator remained on five before doubling that score to ten in 1993.

Table 5.2 - Senator Helm's Ratings Score out of 100 From the Americans for Democratic Action and the American Federation of Labor-Congress of Industrial Organisations (AFL-CIO) 1981-1993

Year	Americans for Democratic Action	American Federation of Labor-Congress of Industrial Organisations
1993	10	18
1992	5	13
1991	5	20
1990	6	22
1989	5	20
1988	5	23
1987	10	20
1986	0	0
1985	0	5
1984	0	0
1983	0	0
1982	0	8
1981	0	5

Source: Congressional Quarterly, *Politics in America 1992 – The 102nd Congress* (Washington D.C.: CQ Press, 1991), p.1088 and Congressional Quarterly, *Politics in America 1998 – The 105th Congress* (Washington D.C.: CQ Press, 1997), p. 1059.

Also shown in Table 5.2 are the scores Senator Helms received from the AFL-CIO. In 1981 he gained a score of five out of one hundred. This increased to eight in 1982. In both 1983 and 1984 Helms did not receive any score before eventually gaining a score of five in 1985. Senator Helms score from the AFL-CIO then

declined from 22 to 20 to 13 in 1990, 1991 and 1992 respectively before finishing in 1993 with an approval rating of 18.

The low results shown in Tables 5.1 and 5.2 reflect the strong disapproval shown towards the voting records of these two Senators by two of America's most established liberal organisations. This reflects the extent of Thurmond and Helms's conservatism and also the consistency with which they brought their ideological perspectives to bear on matters that came before them in the Senate.

Having observed the conservatism of these two Senators, as reflected by the low ratings they received from two significant liberal organisations, it is now necessary to observe the *strength of support* these two men gained from two of the country's leading conservative groups.

Predictably, Table 5.3 shows that from the perspective of these two conservative organisations Senator Thurmond's approval ratings were precisely the opposite of those allocated by the ADA and the AFL-CIO. In 1981 Senator Thurmond received a perfect score of 100 from the CCUS. In 1982 his score slipped to 86 before declining further to 79 in 1983. In 1984 Thurmond's score rose to 84 and then increased further to 97 in 1985. In 1986 his score from the CCUS fell to 78 and again to 71 in 1987. In 1988 the Senator recorded a score of 93. In 1989, 1990 and 1991 his approval scores declined from 88 to 75 to 70 respectively. In 1992 Senator Thurmond again received a perfect score of one hundred before falling back to 82 in 1993.

The scores allocated to Senator Thurmond from the ACU are also presented in Table 5.3. They show that in 1981 Thurmond received a score of 93 out of one hundred. In 1982 and 1983 his approval rating declined from 75 to 70. In 1984 the ACU awarded the Senator his only perfect score during the period of the Reagan and

Bush administrations. In 1985 and 1986 Thurmond scored 91, and then increased it to 96 in 1987. In 1988 his score fell to 92 before rising again to 96 in 1989. In 1990 Thurmond's score declined sharply to 83 before rising to 90 in the following year. In 1992 the Senator scored 89 before settling on 83 in 1993.

Table 5.4 reveals the scores Senator Helms received from these two key conservative organisations. In 1981 Helms received a perfect score from the CCUS. In 1982 it fell to 95. In 1983 and 1984 it remained on 89. In 1985 and 1986 it increased to 93 and 95 respectively. Senator Helms score then fell to 89 in 1987 before falling further to remain on 75 in both 1988 and 1989. In 1990 his score increased to 92 before slipping in 1991 to 88. In 1992 the Senator received another perfect score before declining to 80 in 1993.

Table 5.3 - Senator Thurmond's Rating Score out of 100 from the Chamber of Commerce of the United States and the American Conservative Union 1981-1993

Year	Chamber of Commerce of the United States	American Conservative Union
1993	82	83
1992	100	89
1991	70	90
1990	75	83
1989	88	96
1988	93	92
1987	71	96
1986	78	91
1985	97	91
1984	84	100
1983	79	70
1982	86	75
1981	100	93

Source: Congressional Quarterly, *Politics in America 1992 – The 102nd Congress* (Washington D.C.: CQ Press, 1991), p.1344 and Congressional Quarterly, *Politics in America 1998 – The 105th Congress* (Washington D.C.: CQ Press, 1997), p. 1296.

The scores allocated to Senator Helms from the ACU are also displayed in Table 5.4. They simply show that throughout the entire Reagan and Bush administrations Helms received a resounding endorsement from the ACU and was consistently awarded perfect scores.

Table 5.4 - Senator Helms's Rating Score out of 100 from the Chamber of Commerce of the United States and the American Conservative Union 1981-1993

Year	Chamber of Commerce of the United States	American Conservative Union
1993	80	100
1992	100	100
1991	88	100
1990	92	100
1989	75	100
1988	75	100
1987	89	100
1986	95	100
1985	93	100
1984	89	100
1983	89	100
1982	95	100
1981	100`	100

Source: Congressional Quarterly, *Politics in America 1992 – The 102nd Congress* (Washington D.C.: CQ Press, 1991), p.1088 and Congressional Quarterly, *Politics in America 1998 – The 105th Congress* (Washington D.C.: CQ Press, 1997), p. 1059.

The long and controversial careers of Senators Thurmond and Helms show a consistently conservative record. The results of the annual analysis by CQ show strong disapproval from the AFL-CIO and the ADA but an equally strong endorsement by the ACU and the CCUS, confirming their strongly conservative political ideology. It is crucial to this thesis to illustrate the strongly conservative approach Senators Thurmond and Helms had towards criminal justice matters. This is necessary because this thesis focuses on the relationship between these two Senators

and the political complexion of nominees to the Fourth Circuit when it came to adjudicating on criminal justice cases.

The Reactions of Senators Thurmond and Helms towards Significant Criminal Justice Decisions

Before considering the reactions of these two Senators towards some of the landmark criminal justice decisions in the recent history of the United States, it first necessary to record their views on capital punishment and criminal justice generally. Once again this is necessary because it reveals from the outset that a Reagan or Bush nominee to the Fourth Circuit who opposed using capital punishment would not have been accepted by these two Senators. Both Senators Thurmond and Helms were tireless advocates of capital punishment and harsher approaches towards criminal justice cases. The results in Chapter Four showed that the Reagan and Bush judges on the Fourth Circuit also exhibited a strongly conservative approach to criminal justice matters, including capital punishment, which largely conformed with the expectations of Senators Thurmond and Helms. It is therefore necessary to reveal further the attitudes of these two men towards criminal justice matters generally so that it is clearer what they demanded of nominees sought for the Fourth Circuit.

Stuart Banner provides a very personal insight into Senator Thurmond's approach to capital punishment and quotes the Senator directly: "I have been a member of the bar for 51 years. I was a circuit judge for eight years," noted Strom Thurmond, chair of the Senate Judiciary Committee, in 1981. "I am convinced the death penalty does deter crime."[14] Aside from being a lifelong advocate of capital punishment, Thurmond had an even more intimate connection with this issue. Prior to entering

14. Stuart Banner, *The Death Penalty: An American History* (Cambridge MA: Harvard University Press, 2002), p. 281.

politics, Senator Thurmond had actually handed down death sentences on four occasions while a judge in South Carolina. The following extract is from the 1984 *Congressional Quarterly Almanac*:

> Senate Judiciary Chairman Strom Thurmond, R-S.C., who sent four men to their executions as a South Carolina judge four decades earlier, contended that "society demands the death penalty for the most aggravated murders to send a signal that innocent life is precious indeed and cannot be violated without like consequences to the killer." People who commit heinous crimes, he said, "have forfeited their own right to life ... I am convinced that the death penalty is a deterrent for the crimes for which it is consistently imposed."[15]

Congressional Quarterly makes clear where Senator Thurmond stood on capital punishment. The journal records:

> ... [Thurmond was] a leading Senate proponent of the death penalty. In 1984 Thurmond sparked the first Senate debate on the issue in a decade when he offered legislation to re-establish the federal death penalty. Thurmond asserted that convicted murderers were not people but "more like animals," and "when you have individuals in society more like animals than humans they have to be dealt with in the most severe manner." The Senate passed the bill but it died in the House.[16]

Congressional Quarterly continued with its assessment of Thurmond's strong interest in 'law and order' issues, focusing on his attempt to toughen crime laws which would have included permitting, "the death penalty for 30 federal crimes, allowed the death sentence for those as young as 16 and for mentally retarded people, except those unable to tell right from wrong."[17]

Another insight into Senator Thurmond's rigid advocacy of capital punishment can be seen from the attempt by Senator Edward Kennedy of Massachusetts to include a 'racial justice' provision in Thurmond's legislative proposal. The provision was meant to ensure that sentencing in capital cases would not be vulnerable to racial

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15. Congressional Quarterly, *Congressional Quarterly Almanac, 1984* (Washington, D.C.: CQ Press, 1985), p. xx.

16. Congressional Quarterly, *Politics in America 1992: The 102nd Congress* (Washington, D.C.: CQ Press, 1991), p. 1342.

17. *Ibid.*, p. 1342.

discrimination. In a reflection of the strength of his views, Senator Thurmond referred to his colleague's proposal as a 'killer amendment.'[18]

A final observation on Senator Thurmond's strong convictions on criminal justice, in particular his personal support for law enforcement, can be found when he was involved in the Senate Judiciary Committee hearings on the confirmation of Justice Anthony Kennedy to the U.S. Supreme Court. The Senator stated:

> I just attended a funeral this afternoon of J. P. Strom, a cousin of mine, who was the chief of the South Carolina Law Enforcement Division, the top law enforcement in our State, and I know the good work you all do. I am in touch with our State highway patrol, and State officers, and others, and there is no group of people I have more respect for than law enforcement people. Just as our soldiers protect us against external enemies, you all protect us against the internal enemy, the criminal, and it would be a terrible situation in which to live, if it were not for the able, dedicated efforts of the law enforcement officers.[19]

Senator Helms too was an equally passionate advocate of capital punishment to the extent that he may have inadvertently sabotaged Thurmond's proposed legislation with his own amendments. Snider provides the following account:

> ... Helms became engaged in bitter combat with other members of Congress on such issues as busing, voting rights, anti-abortion, a tobacco tax hike, gun control, school prayer, and the death penalty. Helms even clashed with his fellow conservative Senator Strom Thurmond (R-S.C.), chairman of the Senate Judiciary Committee, when he attached a gun control and death penalty amendment to Thurmond's carefully nurtured legislation to streamline criminal laws and ultimately contributed to its defeat.[20]

Another example of Senator Helms's strong advocacy of the death penalty can be found in his role on the Senate Foreign Relations Committee, particularly his defence of capital punishment in the United States against the perceived threat of United Nations treaties seeking to outlaw the practice. When speaking in the Senate in June,

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18. *Ibid.*, p. 1342.

19. Questions from Senator Strom Thurmond in US 100th Congress, 1st Session, Hearings before the Committee of the Judiciary, United States Senate, *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States,* December 14, 15 and 16, 1987, Senate Hearing 100-1037 (Washington, D.C.: U.S. Government Printing Office, 1989), p. 700.

20. William Snider, *Helms and Hunt: The North Carolina Senate Race, 1984* (Chapel Hill: University of North Carolina Press, 1985), p. 84.

1995, on the possible threat to the continued use of the death penalty posed by the United Nations Convention on the Rights of the Child, Senator Helms argued:

> The United Nations, not the U.S. Senate, claims to know what is best for Americans. To which the majority of Americans will reply, and I say again: `Bullfeathers' ... any Senate reservation to the U.N. Convention on the Rights of the Child regarding, say, the death penalty, or routine protections of the constitutional liberties, very well could unilaterally be discarded by the United Nations, leaving the United States open to attack for failing to `comply' with the treaty. This treaty must be rejected on its merits, or lack thereof. The United Nations' absurd posture regarding the Senate reservations to treaties is enough to dismiss any possibility of U.S. ratification of any United Nations human rights treaty.[21]

At a fund raising dinner for Senator Helms in 1990 President George W. H. Bush made clear to those present where the Senator stood in relation to criminal justice matters. The President observed:

> You know where Jesse stands: for a safer, more secure, and stable world ... finally, there's the issue of fighting crime. And last May I outlined our Violent Crime Act. And at its heart is the belief that for anyone killing a law enforcement officer, no legal penalty is too tough. Liberals oppose the death penalty. And where does Jesse stand? Where I do: We want to eliminate loopholes that allow these, the worst criminals, to escape just punishment. And what's more, we want to expand its coverage to include major drug traffickers.[22]

There have been several criminal justices cases before the Supreme Court over the past forty years that have attracted the considerable ire of both Senators Thurmond and Helms and which have reinforced their desire to see a more conservative, 'hard line' approach towards such matters instituted within the federal judiciary. The emphasis these two Senators placed on such an approach to these cases was reflected in the types of nominees they demanded from Reagan and Bush when vacancies arose on the Fourth Circuit. It is important to examine here how these two Senators reacted to the verdicts in such cases because it provides an insight into what they demanded in particular from judicial candidates to the Fourth Circuit. The

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21. Statement of Senator Helms in U.S. 104th Congress, *Senate Resolution 133 – Relative to the United Nations Convention on the Rights of the Child*, June 14, Volume 141, (Washington, D.C.: U.S. Government Printing Office, 1995), p. S 8400.

22. Remarks at a Fundraising Dinner for Senator Jesse Helms in Charlotte, North Carolina, June 20th, 1990, Public Papers of the Presidents of the United States, *George Bush 1990* (Washington, D.C.: U.S. Government Printing Office, 1991, p.855.

success of these two Senators within the judicial selection and confirmation process explains why a greater level of concordance was recorded amongst judges on the Fourth Circuit than on the Supreme Court.

The criminal justice rulings of significance in this thesis are *Mallory v United States* in 1957, *Mapp v Ohio* in 1961, *Escobedo v Illinois* in 1964 and *Miranda v Arizona* in 1966. Stanley Friedelbaum summarises the general ramifications of these rulings:

> Among the controversial legacies of the Warren years was a plethora of cases touching upon the criminal law of the states, eventually transforming constitutionally derived safeguards into what was, in effect, a judicially prescribed code of criminal procedure. This dramatic conversion substantially altered traditional norms in a federal system that had previously posited a major, if not an exclusive, role for the states in the elucidation and application of criminal law.[23]

A key legal development from these rulings, as identified by Friedelbaum, was the enforced incorporation of the nation's Bill of Rights into the legal systems of each of the country's States. Friedelbaum continues:

> In large measure, the alterations introduced paralleled more broadly based developments stemming from the "nationalisation" of the Bill of Rights. A persistent centripetal course prevailed – one hitherto unknown in the annals of the criminal law or, more generally, in relation to a Bill of Rights historically intended to prevent national not state intrusions upon individual liberties. The operative catalyst lay in the Fourteenth Amendment's Due Process Clause, a conduit for the absorption or incorporation of segments of the Bill of Rights that facilitated their applicability to state proceedings.[24]

Mark Tushnet concurs with this analysis by stating that the Warren Court, 'did significantly expand the Bill of Rights guarantees applicable to the states under the due process clause' and points to such key decisions as, *Mapp v. Ohio* (1961), *Escobedo v. Illinois (*1964), and *Miranda v. Arizona* (1966) which "declared that the Fourth Amendment's proscription of unwarranted search and seizures, the Sixth

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23. Stanley Friedelbaum, *The Rehnquist Court: In Pursuit of Judicial Conservatism* (Westport CT: Greenwood Press, 1994), p. 127.

24. *Ibid.*, p. 127.

Amendment's right to counsel, and the Fifth Amendment's provisions against self incrimination all controlled state trials and police conduct."[25]

Finally, Tushnet locates the genesis of these rulings in, "the doctrine of selective incorporation, under which the Court applied to state criminal trials under the Fourteenth Amendment's due process clause the protections of the first eight amendments to the Constitution that were deemed "fundamental."[26]

John Galloway also provides an account of the methodology the Warren Court applied to bring about these criminal justice rulings and the impact that had within the legal systems of each of the individual States:

> ... the Warren Court applied the Bill of Rights to the state level in rendering the Bill of Rights a constitutional reality, in theory at least, in the local courthouse and police precinct. Previously, most provisions of the Bill of Rights concerning the rights of the accused had been interpreted to apply only on the federal level. In a series of decisions, the Warren Court interpreted the post-Civil War Fourteenth Amendment requirement that the states not deny anyone the "due process of law" as prohibiting the states from violating provisions in the Bill of Rights relating the rights of the accused.[27]

In his own writings Thurmond himself was explicit in his condemnation of the judgements that were brought down:

> This is where the leniency of the court is shockingly apparent. Only about 1 lawbreaker in 8 is tried and convicted. Of all persons arrested in 1966, seventy six percent were repeat offenders. The lower courts themselves are to blame for much of this situation, but many good judges are hamstrung by the Supreme Court rulings, chiefly in the famous cases of *Mallory*, *Escobedo*, *Miranda* – names that will live in infamy.[28]

Regarding the decision in the rape case *Mallory*, Senator Thurmond provided a personal assessment of the decision, arguably the one decision of the Warren Court that provoked his strongest ire:

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25. Mark Tushnet (ed), *The Warren Court in Historical and Political Perspective* (Charlottesville: University Press of Virginia, 1993), p. 103.

26. *Ibid.*, p. 111.

27. John Galloway (ed), *Criminal Justice and The Burger Court* (New York: Facts on File, 1978), p. 1.

28. Strom Thurmond, *The Faith We Have Not Kept* (San Diego: Viewpoint Books, 1968), p. 30.

> There are many instances where convictions of hardened criminals have been reversed as a result of these rulings. In 1965, the manslaughter conviction of Tom E. Alston, Jr., was reversed by the United States Court of Appeals in the District of Columbia, based on the *Mallory* rule. He was arrested at 5am, brought to police headquarters at 5.30am and questioned for five minutes. He denied knowledge of the crime. He then was allowed to speak briefly with his wife and thereafter confessed to the crime. His confession was ruled inadmissible because he was not taken before a committing magistrate "as quickly as possible"[29]

Nadine Cohodas also records the outrage Senator Thurmond expressed at the verdict in *Mallory* and describes how the Senator appeared to use the verdict as a form of litmus test when questioning the suitability of the Supreme Court nominee, Abe Fortas, during his confirmation hearings. Cohodas recounts:

> Thurmond pressed him [Fortas] about a 1967 decision, *Mallory v United States*, in which a confessed rapist's conviction had been overturned because his arraignment was delayed to permit an interrogation. "Mallory!" the senator shouted. "I want that word to ring in your ears. Mallory! ... Mallory! A man who raped a woman, admitted his guilt and the Supreme Court turned him loose on a technicality free to commit other crimes ... As a justice of the Supreme Court, can you condone this?"[30]

Bernard Schwartz provides another account of Senator Thurmond's use of *Mallory* as a test during the confirmation hearings for Abe Fortas. He records:

> For hours, Senator Sam J. Ervin of North Carolina and Senator Strom Thurmond of South Carolina berated decisions of the Supreme Court not to their liking. Thurmond harped on *Mallory v. United States*, in which the Court (in a unanimous 1957 opinion read by Frankfurter) reversed a rape conviction because the accused had not been arraigned promptly as required by the Constitution. That was about eight years before Fortas had joined the Court. But Thurmond, in increasingly disrespectful terms, demanded an answer from Fortas on the justice's opinion of the case.[31]

Schwartz also outlines the political reaction to another significant Warren Court criminal justice case *Mapp v. Ohio*, brought down in 1961. The ruling essentially compelled the States to accept that illegally obtained evidence was subject to the exclusionary rule and thus inadmissible in court. Schwartz describes the general reaction by arguing that it, "marked the beginning of what would become a political

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29. *Ibid.*, pp. 30-31.

30. Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* (New York: Simon and Schuster, 1993), p. 394.

31 Bernard Schwartz and Stephen Lesher, *Inside the Warren Court* (New York: Doubleday, 1983), pp. 265-266.

and public phobia – a belief that 'crime in the streets' was out of control and that the courts were at least partly responsible..."[32]

In relation to the other significant decisions, like the rights acquired during police arrest in the cases *Escobedo* and *Miranda*, Senator Thurmond made a number of damning conclusions about the Supreme Court itself. He concluded that, "Such decisions cannot be called justice. They are licenses to criminals to continue to thumb their noses at society. They are destroying the basic concept of right and wrong,"[33] Senator Thurmond stated further that these decisions, "...not only freed these criminals, but opened the gates to freedom for countless thousands of other vicious men ...What are the fruits of these landmark decisions of the Supreme Court?"[34] Senator Thurmond even went so far as to accuse the Supreme Court of contributing to rising rates of criminal activity.

> The assault upon the Constitution today is being led by the Supreme Court. In the name of "interpretation," the Court has rearranged the original meaning and intent of the Framers of the Constitution. The direct effect of the Court's actions in criminal procedure has been to enable criminals and subversives more freedom to destroy our civil order.'[35]

Senator Thurmond continued his attack on the Supreme Court, providing an insight into the tough 'law and order' position he demanded the judiciary take on such matters. It can be reliably assumed that this is what he also expected of nominees to the Fourth Circuit. Senator Thurmond candidly revealed his thoughts on the issue:

> But crime, too, is an attack on freedom. Crime diminishes the freedom of the law abiding citizen to walk on the streets and to be safe in his home ... The entire revolution in criminal law reflects a growing philosophical viewpoint which is based upon the welfare of the person

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32. *Ibid.*, p. 175.

33. Thurmond, *op cit*, p. 31.

34. *Ibid.*, p. 30.

35. *Ibid.*, p. 13.

> charged with crime, to an almost complete exclusion of a consideration of the welfare of society.[36]

He also stated forcefully what he perceived to be the consequences of liberal judicial philosophy in criminal justice decisions:

> ... these decisions have produced much disarray and confusion in law enforcement and criminal justice procedures, overruling long established judicial precedents and shackling law enforcement officials. By invoking technicalities and exaggerating civil liberties, the court has permitted many self confessed and confirmed criminals to be released to prey again upon society.[37]

In pursuing this blistering accusation, Senator Thurmond blamed the Supreme Court for changing the law, "from something absolute to something relative" ensuring the law had become, "whimsical." All this led Thurmond to grandly accuse the Supreme Court of being "the chief foundation of lawlessness in this country."[38]

Finally, the Senator makes even more controversial claims against the judicial philosophy of the Supreme Court at the time, emphasising the deep interest he held in this sphere of American political power. He exclaims:

> Crime in the streets, a free rein for communism, riots, agitation, collectivism and the breakdown of moral codes, are the fruits of the Supreme Court's assault on the Constitution ... The most devastating and relentless assault on the Constitution is coming from the Supreme Court itself. Under the name of humanity, equality, social welfare or various other pretexts, the Court has been amending the Constitution by its decisions.[39]

The Expectations Senators Thurmond and Helms Held of Judicial Nominees

To appreciate further what was expected of Fourth Circuit judges in criminal justice matters it is necessary to locate what these two Senators demanded from other

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36. *Ibid.*, p. 158.

37. *Ibid.*, p. 29.

38. *Ibid.*, p. 25.

39. *Ibid.*, p. 14.

judicial nominees outside this circuit and their approaches to this issue. For example, while not a candidate advocated by Senator Thurmond it is useful to note the Senator's statements about Justice Anthony Kennedy during his confirmation hearing and the expectations Thurmond had of him prior to being confirmed. Regarding adherence to the notion of judicial restraint, the Senator approved of Justice Kennedy's approach and stated: "His opinions clearly show that he is an advocate of judicial restraint. Judge Kennedy has clearly had a major impact on American jurisprudence."[40] Specifically regarding criminal justice, Thurmond made the following observation of Justice Kennedy:

> In a 1983 dissent, in the case of *U.S. v. Leon*, Judge Kennedy argued that a court should admit evidence seized by law enforcement officers under a search warrant, that they believed to be proper. The Supreme Court ultimately reversed a majority opinion, and adopted a good-faith exception to the exclusionary rule.[41]

Maintaining the emphasis on criminal justice, Senator Thurmond summarised his endorsement of Justice Kennedy in the following, approving manner:

> Generally, the opinions written by Judge Kennedy take a law and order position. However, Judge Kennedy has made it clear that if law enforcement officers overstep legal bounds, he will not hesitate to limit overreaching. While the constitutional rights of criminal defendants must be protected, Judge Kennedy will not ignore the rights of victims or law abiding citizens.'[42]

Finally, Senator Thurmond concluded, "I am confident that he will take a practical, common sense approach to criminal cases, protecting the constitutional rights of criminal defendants, but upholding the right of society to be protected from those who commit criminal wrongdoings."[43]

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40. Opening Statement from Senator Strom Thurmond, in U.S. Congress, 100th Cong. 1st Session, Hearings Before the Committee on the Judiciary, United States Senate, *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States,* December 14, 15 and 16, 1987 Senate Hearing 100-1037, (Washington, D.C.: U.S. Government Printing Office, 1989), p. 31.

41. *Ibid.,* p. 31.

42. *Ibid.,* p. 31.

43. *Ibid.,* p. 31.

A further example of Thurmond's judicial expectations can be found in his interaction with another Supreme Court nominee at the time, Justice David Souter. The former Senator for New Hampshire, Warren Rudman, one of the most significant supporters of Justice Souter, personally recounts his meeting with Thurmond.

> He [Thurmond] was in his eighties, but he greeted David with the enthusiasm and firm handshake of a man in his twenties. "How are ya, Jedge?" he demanded in his thick South Carolina accent. His office was filled with pictures and plaques and flags. David talked a little about his life, then Strom reached impatiently into his desk and pulled out a bound volume of the Constitution. "Jedge," he declared, "you're gonna be confirmed and you're gonna serve on the Supreme Court, and just make sure that whatever you do is in this book!" David still has that copy of the Constitution in his office at the Supreme Court.[44]

Going back further in America's recent judicial history the next example of interest is Senator Thurmond's hostility towards Justice Abe Fortas, who had been nominated by President Lyndon Johnson in 1968 to replace Earl Warren as Chief Justice of the Supreme Court. Cahodas locates a key reason why Senator Thurmond opposed this nomination and links it to a perception that Justice Fortas would adopt a more liberal approach when deciding criminal justice cases.

> ... [US President] Johnson moved to promote his friend and advisor, Associate Justice Abe Fortas. This was not a popular choice among southerners, who were not happy to have him on the bench, let alone as chief justice ... [Fortas] had aligned himself with the Warren forces and in 1966 had been part of the five justice majority in the controversial *Miranda* decision requiring that criminal defendants be notified of their rights ...[45]

Evidence from the former Democrat Senator for Illinois, Paul Simon, confirms that Justice Fortas's approach to criminal justice was a key factor in Senator Thurmond's opposition to his confirmation. Senator Simon recounts:

> ... Fortas found himself defending the decisions of the Warren Court, decisions looked upon favourably by historians but not by some Senators, particularly southern Senators who resented the desegregation decisions ... Over and over, he [Fortas] faced questions such as Senator Thurmond's: "Would the proper thing to do [be] to let the Congress legislate on [that] rather than the Supreme Court? ... The Warren Court decisions on race and criminal rights played a significant role in the mounting opposition ...[46]

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44. Warren Rudman, *Combat: Twelve Years in the U.S. Senate* (New York: Random House, 1996), p. 172.

45. Cohodas, *op cit*, p. 392.

Cohodas continues to establish the link between Senator Thurmond's opposition to the Fortas nomination and the implications of a judge's judicial philosophy on criminal justice matters. She observes:

> Late in June, Thurmond wove all of these issues together in the opening volley of his opposition. Fortas was unacceptable for three reasons, the senator said: "his long reputation as a fixer and his involvement with many questionable figures," his alignment with "the radical wing of the Court," and finally, decisions he supported that have "extended the power of the federal government and invaded the rights of the states, turned criminals loose on technicalities," and aided communists.[47]

In contrast to the attitude taken towards Justice Fortas, Cohodas notes the approval Senator Thurmond displayed towards Warren Burger's nomination, due in part to his strong 'law and order' position, but more importantly his generally conservative judicial philosophy. Cohodas states:

> Striking themes that were going to be played out repeatedly over the next twenty years, the senator said the committee had been pleased to find that Burger was a strict constructionist of the Constitution, interpreting the law but not writing it. Thurmond praised Burger for his belief in "strong enforcement of the law, and in equal treatment – with favouritism towards none. It is a long time since such qualities have been evident in a sitting Chief Justice."[48]

When focusing more specifically on Senator Thurmond's reactions to Justice Burger's approach to criminal justice Cohodas observes:

> The senator was particularly impressed with Burger's hard line on criminal defendants, citing the nominee's observation that "the seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances" gave rise to "myriad rules, sub rules, variations and exceptions which even the most able and sophisticated lawyers and judges are taxed to follow ... Thurmond found such positions to be "like a fresh breeze rustling across the courtroom. They indicate an expansive mind of wise and true humanity." Others would come to have a harsher view of Burger, finding in those same passages evidence of a crabbed and sterile view of the law.'[49]

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46 Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court's Nomination Battles* (Washington, D.C: National Press Books, 1992), pp. 282-283.

47. Cohodas, *op cit*, pp. 392-93.

48. *Ibid.*, p. 404.

49. *Ibid.*, p. 404.

Lastly, Cohodas provides an important overview of Senator Thurmond's impression of the Warren Court generally, the source of so much of the Senator's angst concerning the judiciary's interpretation of criminal justice cases.

> The Warren court finally came to an end June 23 ... Thurmond could not let the occasion pass without comment, and as before, his remarks were clearly those of someone whose world had been involuntarily rearranged by the forces of change. Where many had seen welcome – if turbulent – movement, Thurmond saw "growing social disintegration and chaos." If many liberals hailed Warren's reign as a model of progress, the senator argued that "one only has to look at the social reality to see that the court decisions over which he presided are milestones on the retreat from civilised order. Great civilisations are marked by reverence towards God, respect for learning, public decency, social harmony, a high regard for the safety of life and property, solidarity in the face of the common enemy, and a fine restraint in the overturning of traditions and precedent. Any civilisation, however it is constituted, cannot ignore such goals without clouding its future.[50]

Senator Thurmond's glowing approval of Burger's more 'hard line' approach may have been the same determinant for success when the Senator was involved in the selection of nominees for vacancies on the Fourth Circuit.

Finally, the definitive account of what Senator Thurmond generally sought in the selection of federal court judges can be found in a paragraph within a book he wrote himself in 1968, entitled *The Faith We Have Not Kept*. In it, he states:

> An appellate judge is not at liberty to tamper with the facts surrounding the approval of a law or constitutional provision, any more than he is at liberty to tamper with the facts established at the trial court level. The notion that a written body of laws undergoes a metamorphosis with time is a notion which leads to the destruction of the basic principle of our government: Ours is a government by law, rather than by man.[51]

The Relationship between Senators Thurmond and Helms and Presidents Reagan and Bush

Both Senators clearly had extensive and well maintained power bases and long established friendships with both Presidents Reagan and Bush. Commencing with Senator Helms, Saloma found that the Senator, "used his Senate office to build an

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50. *Ibid.*, p. 392.

51. Thurmond, *op cit*, pp. 22-23.

extra-congressional organisation without equal in American politics."[52] Saloma cites a special report from the *Congressional Quarterly* in March 1982 which concluded:

> Like no other senator in history, Helms and his lieutenants have used modern technology and expert knowledge of federal election and tax law to erect a network of political organisations bent on influencing politics and policy." With a personal following on the political right second in size only to that of Ronald Reagan, and more ideologically committed, Helms and his personal and institutional history are inevitably part of the story of the conservative labyrinth.[53]

Crawford summarises the extensive power Senator Helms had within the overwhelmingly Democratic state of North Carolina by observing:

> He is a force within right wing politics. As a former Democrat in a state where Democrats outnumber Republicans three to one, Helms is seen as a key figure in forging a New Right alliance between Southern Democrats and GOP Reaganites. Under his leadership, the state Republican party registration increased more than 20 percent ... In fact, Helms's Democratic supporters are so numerous that the North Carolina press have given them a special name – 'Jessecrats.'[54]

Rob Christensen, Carol Byrne Hall and James Rosen, reporting in the *News and Observer*, found that, "When Reagan did run in 1980, Helms' organization spent $4.6 million in an independent campaign to help him win the White House. In the view of some neutral observers, rescuing Reagan's career may turn out to be Helms' most important legacy."[55]

In 1990 President George H.W. Bush recalled the following personal anecdote about his friendship with Senator Helms at a fundraising dinner for the Senator's re-election in Charlotte, North Carolina:

> Two years ago, after an operation, Jesse - typical of him - disobeyed the doctor's order by leaving his sickbed early to hit the campaign trail for me and Dan Quayle. And I'll never forget how he literally stood up to support me. And tonight, I came down here to pledge him my support. You know where Jesse stands: for a safe, strong, and moral America. And I need him

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52. John Saloma, *Ominous Politics: The New Conservative Labyrinth* (New York: Hill and Wang, 1984), p. 88

53. *Ibid.*, p. 88.

54. Alan Crawford, *Thunder on the Right: The "New Right" and the Politics of Resentment* (New York: Pantheon Books, 1980), pp. 132.

55. Rob Christensen, Carol Byrne Hall and James Rosen, "Jesse Helms: To Mold a Nation (Three Decades of Political Soul)," *The News and Observer*, August 26, 2001.

in the United States Senate, so let's keep him there - for your sake, for North Carolina's sake, and for America's sake ... let's re-elect Jesse Helms.[56]

At another fundraising dinner for his own re-election in Charlotte, North Carolina, President George H. W. Bush outlined the depth of his relationship with Senator Thurmond in the following glowing terms:

> And my respects to your neighbour to the south, the incomparable, outstanding Senator Strom Thurmond. My heavens, what a great joy it is to have him and work with him in the United States Senate. He is a superb leader.[57]

With respect to the influence these two Senators could have on the types of judicial nominees they demanded from a Republican President, Senator Thurmond's endorsement of President Richard Nixon in the presidential primary of 1968 is a highly instructive example. Richard Scher provides the following context:

> Nixon had openly courted southerners for the nomination. He understood fully the implications of the 1964 election, both for the South and the nation. In perhaps his most famous move, he reached an agreement with Senator Strom Thurmond of South Carolina, under which he would receive southern Republican support for the nomination in exchange for ... appointing "strict constructionists" to the Supreme Court ...[58]

Michael Miles details how the success of Nixon's electoral strategy was almost dependent on the involvement and support of Senator Thurmond. Miles argues:

> Nixon moved to head off that challenge by meeting, like Rockefeller and Reagan, with Southern Republican state chairmen in Atlanta and impressing them with his views on race and national defence. "Southern Strategy," which amounted to protection of his right flank, was imperative both to Nixon's nomination and election. The support of Senator Strom Thurmond of South Carolina, former Dixiecrat candidate for President in 1948, stood him in good stead in both campaigns.[59]

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56. Remarks at a Fundraising Dinner for Senator Jesse Helms, Public Papers of the Presidents of the United States, *George Bush 1990* (Washington, D.C.: U.S. Government Printing Office, 1991), p.855.

57. Remarks at a Bush-Quayle Fundraising Dinner in Charlotte in North Carolina, April 27, 1992, Public Papers of the Presidents of the United States, *George Bush 1992*, Book I (Washington, D.C.: U.S. Government Printing Office, 1993), p.650.

58. Richard Scher, *Politics in the New South: Republicanism, Race, and Leadership in the Twentieth Century* (New York: Paragon House, 1992), p. 122.

59. Michael Miles, *The Odyssey of the American Right* (New York: Oxford University Press, 1980), p. 304.

Paul Gottfried observes that Senator Thurmond's endorsement of Nixon in 1968 was necessary to make the Presidential candidate more appealing to the growing conservative constituency within the Republican Party.

> Another factor that contributed to Nixon's conservative support was the established relationship of conservatives to the Republican Party. For better or for worse, conservative activists and spokesmen were wedded to that party that they had partly taken over in 1964. This marriage continued in 1968, though it required conservatives to affect enthusiasm for a protean politician who in his second term disgraced them and his party. The endorsements of Nixon, which came from Goldwater, from Strom Thurmond (the former Dixiecrat who turned Republican), and from Ronald Reagan, undoubtedly helped make Nixon more palatable to the political Right.[60]

David Reinhard also argues that one of Senator Thurmond's key roles was to assist in transforming a pragmatic politician like Nixon into a candidate that could genuinely appeal to the increasingly conservative membership of the Republican Party. Reinhard states:

> In any case, most Right Wing Republicans, all too familiar with Nixonian pragmatism, believed that he would always respond to popular political pressures and that these were now mainly conservative and would remain so. Moreover, a successful Nixon candidacy would keep the Republican nomination from a liberal Republican such as Romney or Rockefeller. Nixon thus became the "conservative" candidate. Former Goldwater backers such as John Ashbrook, William F. Buckley, and senators Strom Thurmond and John Tower followed Goldwater's example and backed Nixon.[61]

Jerome Himmelstein concurs with the argument that Nixon's strategy to succeed in becoming the party's presidential candidate relied on appealing to the party's conservatives like Thurmond. He states that a key reason for Nixon's success in winning the nomination was, "because prominent conservative senators like... Strom Thurmond...honoured long standing commitments to him" leading Nixon himself to remark, that "if a Republican could not win with the party's right wing alone, neither could he win without it."[62]

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60. Paul Gottfried, *The Conservative Movement* (New York: Twayne Publishers, 1993), p. 47.

61. David Reinhard, *The Republican Right Since 1945* (Lexington: The University Press of Kentucky, 1983), p. 219.

62. Jerome Himmelstein, *To the Right: The Transformation of American Conservatism* (Berkeley: University of California Press, 1990), p. 70.

Key Reagan staffer, Lyn Nofziger, provides the following intimate account of Senator Thurmond's active support of Nixon during the 1968 Presidential primary. He recounts:

> Perhaps the most memorable meeting Reagan had was in South Carolina with Sen. Strom Thurmond, then in his late sixties. "Young man," Thurmond said prophetically to the fifty seven year old Reagan, "you'll be president someday but not this year." Thurmond, like Goldwater, was solidly in Nixon's camp and worked hard and successfully to keep Southern delegates with Nixon even though in their hearts they wanted Reagan.[63]

Mark Hatfield concludes, "Who knows if Richard Nixon made a mistake. Strom delivered those southern delegates and undoubtedly tipped the balance in Nixon's favour."[64] Importantly, Nixon sought to return the favour by seeking to appoint justices with a conservative approach to criminal justice cases. As Silverstein recounts President Nixon's now well-known promise, "Nixon stated, 'if I have the chance to appoint Justices to the Supreme Court, they will be the kind of men I want – and I want men who are strict constructionists, men that try to interpret the law and don't try to make the law.'"[65]

Senator Helms was also very familiar with the presidential primary contest, especially as a means by which to exert influence over the Republican Party's choice of candidate and to ensure, amongst other things, that a tougher approach to criminal justice would be undertaken by the party and therefore to the selection of judicial nominees should it win the Presidency. Reinhard states:

> Pledged to a balanced budget, tough law and order policies, and a strong national defence, Ronald Reagan ultimately decided on a second bid for the republican presidential nomination. He would run as an outsider – outside the "Washington buddy system" that he claimed was insensitive to the American taxpayer. He enlisted the aid of less established Capitol Hill figures

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63. Lyn Nofziger, *Nofziger* (Washington D.C: Regnery Gateway, 1992), p. 72.

64 Mark Hatfield, *Against the Grain: Reflections of A Rebel Republican* (Ashland, OR: White Cloud Press, 2001), p. 131.

65 Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: W.W. Norton, 1994), p. 102.

such as Idaho senator James McClure, Jesse Helms of North Carolina, and Illinois congressman Phillip Crane.[66]

In the context of the nomination of President Gerald Ford, Reinhard makes the following observation regarding the significance of the role played by Senator Helms:

> The subsequent and unsurprising nomination of Gerald Ford proved to be no more than a minor defeat for those conservative Republicans who had lined up with Ronald Reagan. First, Reagan had clearly made his point by coming so close to denying Ford the GOP nomination. Conservative backers of both Ford and Reagan had reason to be pleased at the conclusion of the convention. Reagan conservatives, led by Jesse Helms, has redrafted much of the original White House platform draft ...[67]

Both Senators Thurmond and Helms had strong political and personal relationships with Reagan that strengthened further the influence these home state Senators already possessed over appeals court nominees to the circuit presiding over their respective States. A further part of the success of Senators Thurmond and Helms in the judicial nomination process was the support they provided Reagan before he was elected President. William Snider records:

> Senator Helms's chief lieutenant, the affable and shrewd Raleigh attorney Tom Ellis, felt even more strongly that Republican moderation should be vigorously opposed. But in 1975 Ellis said that Ronald Reagan (whom both he and Helms had supported) should bide his time until the prospects for challenging President Ford were brighter. Senator Helms was one of Reagan's earliest backers. Soon after his election to the Senate in 1972 Helms visited Reagan at the governor's mansion in Sacramento.[68]

Nofziger reveals how heavily Reagan relied on Helms's support whilst a Presidential nominee by arguing that, "if Reagan had lost North Carolina in 1976 his campaign for President would have been all but over, not only then, but probably in 1980 as well."[69]

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66. Reinhard, *op cit.*, p. 231.

67. *Ibid.*, p. 233.

68. Snider, *op cit.*, p. 40.

69. Nofziger, *op cit.*, p. 218.

Snider records the significance Helms himself attached to his role in securing a Reagan victory by quoting the Senator directly, "I shall always be pleased that North Carolina kept the Reagan candidacy alive in 1976," he said. "Had it not been for North Carolina then, Ronald Reagan would not be the president-elect tonight. But I don't have to remind him of that. He's not that kind of fellow and he knows what we did for him."[70]

Susan Tifft also acknowledges the key role Helms played in Reagan's ascent to power and the Senator's significance as a conservative leader:

> Next to Ronald Reagan, whom he helped bring to power, Helms is the most important conservative of the past quarter century ... His formula for success is simple: He holds fast to a set of bedrock beliefs, and he acts on them, which makes him both the most maddeningly consistent ideologue in American politics and the most polarising. To his friends he is a man of unshakeable principle.[71]

Snider provides a key detail regarding Senator Helms's relationship and influence with Reagan by noting that Helms had told the media that, "when he needed something, it would be just a telephone call away" and that he would go directly to Reagan and not through Bush. "I figure Bush will need me as much as I need him."[72]

Senator Helms and his supporters were careful to avoid creating any instability in the development of the Republican Party's 1984 platform in deference to the President and to assist his chances of re-election. Snider states:

> Like most of the delegates who came to honour the Great Communicator and certify him for another four years in the White House, neither the Old Guard not the Young Turk conservatives sought to mar Reagan's celebration with a platform kicking contest. From the start the draft platform reflected the President's stamp. The final platform touched all the conservative bases, from a reiterated stand against tax increases in 1985 and support for school prayer to demands that the President appoint Supreme Court justices opposed to abortion. ... Senator Helms found the convention in Dallas thoroughly satisfying.'[73]

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70. Snider, *op cit.*, p. 59.

71 Susan E. Tifft, "Facing up to Jesse Helms," *Talk*, November, 2001 accessed at http://findarticles.com/p/articles/mi_m0KNK/is_3_3/ai_80206456

72. Snider, *op cit*, p. 62.

73. *Ibid.*, p. 146.

Most explicitly, Snider recounts the role played by Reagan during the Senator's 1984 re-election race. It reveals the deep mutual respect in their political relationship and is an indication of the influence Helms could have on the President. Snider observes:

> Senator Helms obviously had plenty of big guns for the crucial moments of the 1984 campaign. Among them was President Reagan himself, whose thirty second television commercials began airing across North Carolina immediately after the Republican National Convention. "I cherish my friendship with Jesse," the President said, "and I need his honesty and his outspoken patriotism back in the United States Senate ... Jesse's courage on the tough issues is an inspiration to all Americans."[74]

Saloma concurs with the argument that Senator Helms support for President Reagan was invaluable and states, "Helms and [senior staffer] Ellis effectively saved Ronald Reagan's political career in 1976 by staging a Reagan upset victory in the North Carolina Republican primary, just when President Gerald Ford seemed to be on the verge of a political knockout."[75] Up to that point Ford had defeated Reagan in each of the preceding five primaries.

Finally, Saloma notes the influence Helms brought to bear on formulating the Republican Party platforms, particularly in the 1976 and 1980 Presidential election years. He states, "Helms has used the Steering Committee and two vice-presidential campaigns to push the Republican Party platforms of 1976 and 1980 farther right."[76] In placing this in a more historical context James Roberts concurs by observing:

> In the 1948 Democratic Convention, Bell notes, Humphrey was the driving force behind the liberalisation of the Party's platform in the guise of a strong plank of civil rights. Similarly, in 1976, Helms was the point man for conservatives at the Republican Convention, and his efforts resulted in the party's adoption of the most resolutely conservative platform in many years.[77]

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74. *Ibid.*, p. 155.

75. *Ibid.*, p. 92.

76. *Ibid.*, p. 92.

77. James C. Roberts, *The Conservative Decade: Emerging Leaders of the 1980s* (Westport, CT: Arlington House Publishers, 1980), p. 316.

Senator Helms's role was not limited to the design of the Republican Party's platform. He also had no hesitation in putting forth his views on appointments even when the Reagan presidency was barely a day old. Snider records:

> To the extent that President Reagan departs from the Scriptures, he, too, can expect thunderbolts ... He [Helms] let no more than four hours of the Reagan Administration go by before attacking some initial appointments in order to make his case against any ideological backsliding by the new team.[78]

President George W. H. Bush summed up his view of both Senators during his re-election campaign by simply stating, "If we had more Senators like Strom and Jesse Helms, we'd be in great shape in that Senate."[79]

Senator Thurmond's Role on the Senate Judiciary Committee

Senator Thurmond served as Chairman of the Senate Judiciary Committee from 1981 to 1987. He was a crucial collaborator in the Reagan administration's efforts to bring about a conservative shift in the federal judiciary and moved quickly to ensure this was realised. Cohodas noted the urgency of Thurmond's approach and argued that he, "was a big help in achieving this goal" by moving Reagan nominees through the Judiciary Committee, "with dispatch, helping Reagan put 167 new judges on the bench by the end of 1984."[80]

In fact, Senator Thurmond's enthusiasm to get Reagan's nominees through the Senate Judiciary Committee quickly invited criticism from his political opponents. They argued that the rush to have them confirmed may well have compromised a

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78. Snider, *op cit.*, p. 70.

79 Remarks to the Community in Kannapolis, North Carolina, October 21, 1992, Public Papers of the Presidents of the United States, *George Bush 1992*, Book II (Washington, D.C.: U.S. Government Printing Office, 1993), p.???.

80. Cohodas, *op cit.*, p. 486.

degree of accountability. An important analysis by *Congressional Quarterly* at the time revealed:

> Democrats had complained that Republicans were trying to move too many judgeships through the committee too fast – "ramrodding" them through, Biden charged. The Democrats said their staffs did not have enough time to investigate nominees for the lifetime appointments ... Thurmond denied any intent to ramrod nominations through, but agreed to slow the process down somewhat. According to the Congressional Research Service, Thurmond had moved judicial nominees through the hearing process faster than any committee chairman in the past twenty years, with an average of 18.5 days elapsing between the time the panel received a nomination and the hearing on the nominee.[81]

Cohodas reveals how determined Thurmond remained to push Reagan's judicial nominees through the confirmation process:

> Thurmond would demonstrate his loyalty to the president by playing hardball politics to get Reagan's nominees on the bench. He would also demonstrate the power that comes with controlling the committee schedule, forcing Democrats onto his timetable for processing nominations and short circuiting what he believed were obstructionist delays – a tactic he knew well.[82]

Regarding the actual changes Senator Thurmond made to the structure of the Senator Judiciary Committee, Cohodas found that one of the first moves the Senator made was to add new, more conservative Republican Senators to the Committee's membership:

> But Thurmond was first and foremost a conservative. When the new Senate convened in January, he made good on his promise to move the Judiciary Committee to the right of centre by recruiting three new conservative Republicans. Two of them were southerners like himself: John East of North Carolina, who with Helm's backing had come from nowhere to knock off one term senator Robert Morgan; and Alabama's Jeremiah Denton, a Vietnam hero who had been a longtime prisoner of war. The other conservative Republican was Charles Grassley of Iowa, a former state legislator. Neither Denton nor Grassley was a lawyer – a break with committee tradition – but their conservative credentials were good.[83]

Senator Thurmond also reshaped the Judiciary Committee at an administrative level by adding conservative voices to the committee, rearranging the subcommittee

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81. *Congressional Quarterly Almanac,* 99th Congress, 1985, (Washington D.C.: CQ Press, 1986) p. 246.

82. Cohodas, *op cit.*, p. 460.

83. *Ibid.*, pp. 458-59.

structure, cutting about one million dollars from the committee budget and reducing staff resulting.[84]

More particularly, Senator Thurmond had an intimate and decisive influence in the selection of many of the nominations to judicial positions throughout South Carolina and beyond that to the District Courts and even the appeals court within the Fourth Circuit. As articulated in *The Washington Monthly*:

> Few reporters have noted what is perhaps the most lasting legacy of Senator Strom Thurmond, now retired: The unusually large number of family members, former aides, and even neighbours he's managed to appoint to federal judicial offices during the past two decades.[85]

Richard Hardin, writing in the prominent South Carolinian newspaper *The Richmond Times Despatch*, makes clear that Senator's power over the types of nominees considered for selection to the Fourth Circuit was strengthened further when he assumed the chairmanship of the Judiciary Committee:

> Thurmond took the helm of the Judiciary Committee from Sen. Edward M. Kennedy ... when factors converged to bring Thurmond extra clout. Ronald Reagan won the White House in 1980 after pledging to name conservative federal judges. The Republican Party platform had supported selection of judges who believed in "decentralization of the federal government." And the Senate, which confirms judges, was in Republican hands for the first time in 25 years. With federal courts resembling "a ship listing to the left," Thurmond "was trying to rebalance the court from an ideological direction he didn't agree with," said Mark Goodin, a former Thurmond senior aide.[86]

Another key reason for Senator Thurmond's success, according to Hardin, was the interdependence that existed between the White House and Thurmond's ability to use his role as chair of a key Senate Committee to extract benefits for his extensive power base. Hardin states:

> Thurmond always looked out for his state. A story circulated in Washington that he often would come up with a name of a possible nominee from South Carolina even before a newly deceased judge was buried. And the White House needed him. Because of the array of bills

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84. *Ibid.*, p. 459.

85. See www.washingtonmonthly.com/features/2003/0301.whoswho.html

86. Richard Hardin, "How Two Senators Molded A Court: Thurmond and Helms Left A Conservative Mark On The Fourth Circuit," *Richmond Times Despatch*, 11 July, 2004, p. A-1.

before Thurmond's committee, it helped Reagan's White House to help the South Carolina senator, Goodin said. When Reagan took office, the 4th Circuit had six judges appointed by Democratic presidents and four by Republicans. By late 1984, the majority had shifted. Thurmond was a former judge. He recommended to Reagan and to his successors judicial candidates whom he knew and had sized up for ideology and character, not always heeding party lines.[87]

Senator Thurmond's power in determining the type of nominees to the Fourth Circuit was evident as recently as 2002 when he retired from the Senate at the age of 99 after serving eight, six year terms. A former staffer and District Court judge, Dennis Shedd, had his nomination approved by the then Democratic controlled Senate Judiciary Committee, almost in deference to Thurmond's retirement. As noted in the *Washington Monthly*:

Shedd has some company: He joins two other former Thurmond aides now sitting on the Fourth Circuit, William Wilkins and Emory Sneeden, plus one Clyde Hamilton, another Edgefield (Strom's hometown) native and, like Shedd, a former judge on the South Carolina District Court.[88]

Finally, Savage observed that Thurmond's influence, in his role as chair of the Judiciary Committee, extended well beyond nominations to the Fourth Circuit.

Through the first six years of the Reagan Administration, hundreds of Republican court appointees came before Thurmond's panel for confirmation. Old Strom took them under his wing as if they were sweet, young debutantes who could be flustered by tough talking Democrats, and he guided them through the sometimes treacherous confirmation process.[89]

A key figure who served on the Senate Judiciary Committee, Senator Orrin Hatch from Utah, provides the following anecdote of Thurmond's power in relation to his lobbying on behalf of Supreme Court justice, Stephen Breyer, to a position on the U.S. Court of Appeals for the D.C. Circuit:

He [Stephen Breyer] was nominated to the appellate court by President Carter in 1980, but his nomination got bogged down as the Senate prepared for the coming presidential election. After Ronald Reagan was elected, but before he was sworn in, Kennedy asked if I could intervene on

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87. *Ibid.*

88 See www.washingtonmonthly.com/features/2003/0301.whoswho.html

89 David Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (New York: John Wiley and Sons, 1992), p. 20.

behalf of Breyer. He told me that Strom Thurmond, who was scheduled to become Chairman of the Judiciary Committee when the Senate reconvened in 1981, was blocking a vote. I went to Strom and reminded him that Breyer had been a good chief counsel of the committee. He had been honest and decent. "Strom," I continued, "we shouldn't treat him like this." Strom looked at me and asked if I really thought that was the case. I said I did. Strom relented and said he would let Breyer's nomination move. Judge Breyer went on to have an excellent career as an appellate judge ...[90]

The Personal Relationship Between Senators Thurmond and Helms and the Reagan and Bush Nominees to the Fourth Circuit

The following can now be established regarding Senators Thurmond and Helms and their disposition towards the judiciary: they both held strongly conservative views on criminal justice matters; they were frequent critics of the courts for not exercising similar approaches and they had a close interest in ensuring future judicial nominees shared their outlook. With this in mind it is therefore necessary to examine more closely how the expectations of these two men were transferred on to those selected to join the Fourth Circuit. A key avenue was the close, personal friendships these Senators, particularly Thurmond, had with many of those nominated. While both Senators played influential roles throughout the selection of the six Reagan and Bush appointed judges to the Fourth Circuit analysed here, Senator Thurmond's involvement was clearly the more significant. This was due mainly to his greater seniority in the Senate and the extensive involvement he had with the powerful Senate Judiciary Committee, six years of which he served as that Committee's chairman.[91] This was compounded further by Senator Thurmond's extensive political network and the many personal relationships he developed, particularly throughout South Carolina.

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90 Orrin Hatch, *Square Peg: Confessions of a Citizen Senator* (New York: Basic Books, 2002), p. 262n.

91 See a complete list of the tenures of all of the Senate Judiciary Committee's chairmen at http://judiciary.senate.gov/chairman.cfm

John Monk, writing in *The Charlotte Observer*, provides the following insight into how Senator Thurmond took meticulous care developing his political alliances and friendships. Monk observes:

> Attention to personal networks, including constituents, played a vital role in Thurmond's climb from state senator to judge to governor to U.S. senator ... Thurmond's networks are among his most significant achievements ... From his earliest days in public life, Thurmond connected with thousands of people, stroking their egos, doing them favors, helping them get scholarships and jobs. His networks proved so strong that in 1996, Thurmond, slowed by age, won re-election again to the U.S. Senate at age 93. No well-known candidate challenged him, largely because he had shaped the careers of virtually every top Republican in South Carolina and done favors for many Democrats. Over the next 68 years, Thurmond would write thousands of letters congratulating people from the high and the mighty to the low and obscure on their birthdays and other special occasions.[92]

Upon Senator Thurmond's death in 2003, Richard Hardin, wrote that it had been largely overlooked that the Senator had made a, "giant impact on the Fourth Circuit, despite his representing a small state."[93] Hardin elaborates on Thurmond's impact on the composition in the Fourth Circuit under both Republican and Democratic Presidents:

> Between 1981, when Thurmond became Judiciary chairman, and his retirement in 2003, he championed to the White House seven - or fully half - of the 14 judges seated on the court in that period, according to interviews by *The Times-Dispatch* and a review of Senate records and local news reports. He helped increase the number of South Carolina judges from two to four as Congress expanded the court's size. The Palmetto State today has 31 percent of the court's active judges, compared with 15 percent of the circuit's population.[94]

Susan Threadgill, writing in the *Washington Monthly*, has also recorded the profound impact Thurmond has had on the selection of judges to the Fourth Circuit and other courts. She states:

> Few reporters have noted what is perhaps the most lasting legacy of Senator Strom Thurmond, now retired: The unusually large number of family members, former aides, and even neighbors he's managed to appoint to federal judicial offices during the past two decades. Four members of the South Carolina District Court owe their jobs to Thurmond, including former aides Terry Wooten, Henry Herlong, and Dennis Shedd--recently promoted to the Fourth Circuit Court of

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92. John Monk, "Thurmond Freely Gave Favors, But Kept Tabs; Letters Show Late Senator's Vast Networking Strategy," *The Charlotte Observer*, 19 December, 2004.

93. Hardin, *op cit.*, p. A-1.

94. *Ibid.*

> Appeals--as well as Joseph Anderson, who hails from Strom's hometown of Edgefield. Shedd has some company: He joins two other former Thurmond aides now sitting on the Fourth Circuit, William Wilkins and Emory Sneeden, plus one Clyde Hamilton, another Edgefield native and, like Shedd, a former judge on the South Carolina District Court.[95]

A further account of Senator Thurmond's influence throughout the States within the jurisdiction of the Fourth Circuit comes from Chris Weston, writing in South Carolina's *Greenville News*. He states that the Senator, "seeded federal judges on the 4th U.S. Circuit Court of Appeals and in the circuit's district courts in South Carolina, North Carolina, Maryland, Virginia and West Virginia. He often chose young judges to enhance the longevity of his strict constructionist philosophy.'[96] Importantly, Weston quotes the former Chief Justice of the Fourth Circuit, Judge William W. Wilkins Jr, noting that Wilkins, "... a long-time Thurmond aide, protege and friend, said every living federal judge in the five states carries Thurmond's stamp of approval."[97]

William 'Billy' Wilkins, is himself a prominent example of the success Senator Thurmond attained in the process of selecting nominees for the Fourth Circuit. A former political aide to the Senator and a U.S. District Court judge, Wilkins was Reagan's third appointment to the Fourth Circuit. David Yalof explores further the relationship between Thurmond and Wilkins:

> Judge William Wilkins ... benefited from the critical backing of Senator Strom Thurmond, the ranking Republican on the Senate Judiciary Committee. Twice before Thurmond had backed Wilkins for judicial appointments, first for a federal district judgeship in 1981, and later for a seat on the Court of Appeals for the Fourth Circuit in 1986. Thurmond's support for Wilkins did not stop at judicial appointments. At the senator's urging in 1985, President Reagan had appointed Wilkins to chair the US Sentencing Commission. Two years later, Thurmond strongly recommended his friend as FBI director, an effort that proved unsuccessful.[98]

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95. Susan Threadgill, "Who's Who," *Washington Monthly*, January-February, 2003, p. 33.

96. See Chris Weston, "Genetics, Exercise and Passion for Politics the Keys to His Longevity," *The Greenville News*, December 5, 2002.

97. Weston, *op cit.*

98. David Yalof, *Pursuit of Justices* (Chicago: The University of Chicago Press, 1999), p. 157.

Yalof also found that Thurmond had gone even further in his patronage of Wilkins by advocating him as a nominee to the Supreme Court. "Not surprisingly, Thurmond was ... enthusiastically pushing Wilkins as the logical successor to Lewis Powell's southern seat." The White House entertained Thurmond's pleas for the time being, including Wilkins among the dozen or so finalists for the Supreme Court."[99] Hardin concurs, "Thurmond had 'almost paternal affection' for Wilkins, according to Goodin (a former Thurmond aide). The senator supported him successfully for the chairmanship of the U.S. Sentencing Commission. He also backed Wilkins for nomination to the U.S. Supreme Court without success.'[100]

Joseph Stroud best summarises the personal relationship between Justice Wilkins and Senator Thurmond. He begins at the point where the two first met:

> In the spring of 1969, Billy Wilkins Jr. was working in the Greenville office of Judge Clement F. Haynsworth Jr., chief judge of the 4th Circuit U.S. Court of Appeals, when U.S. Sen. Strom Thurmond walked in. Wilkins didn't realize it at first, but Thurmond was looking for a young lawyer to come to work in Washington. After an hour of conversation, the senator offered him a job on the spot. Their association lasted 34 years. Wilkins, now chief judge of the 4th Circuit U.S. Court of Appeals in Richmond, holds Thurmond in the highest regard - personally and professionally. "The most privileged part of my life has been to be a part of his," Wilkins, 61, said Monday. "Besides my mother and father, I was closest to him of anyone."[101]

Siobhan Roth, writing in the *Legal Times* found that Thurmond's, "long-time chief of staff, Duke Short, notes that the former senator [Thurmond] considers Judge Billy Wilkins to be one of the finest judges he's ever known."[102]

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99. *Ibid.*, p. 157-58

100. Hardin, *op cit.*, p. A-1.

101. Joseph Stroud, "The Eulogists," *The State.com*, 1 July, 2003 at www.thestate.com/mld/thestate/news/special_packages/strom/6208206.htm

102. Siobhan Roth, "4th Circuit's Chief a Courtly Conservative," *Legal Times*, 3 March, 2003.

When Senator Thurmond passed away on June 26, 2003 his funeral was a display of the influence he had brought to bear on the Fourth Circuit. Once again Hardin best encapsulates Senator Thurmond's influence:

> When mourners gathered to bury Strom Thurmond, William W. Wilkins was one of five people invited to eulogize the South Carolina Republican and longest-serving U.S. senator in history. Billy Wilkins, a former Thurmond aide ... The court's three other full-time judges from South Carolina attended the funeral last year ... [including] ... Karen J. Williams, the court's first female judge, whose father-in-law, a state senator, was close friends with Thurmond. These judges reflect part of the huge personal stamp Thurmond applied to the 4th Circuit, in part because of his powerful role as Senate Judiciary Committee chairman between 1981 and 1987.[103]

Lawson Bowling argues that Senator Thurmond had become, "a South Carolina, as well as a U.S. Senate institution" and that his funeral, "was said to be the grandest state ceremony in the Palmetto State since the passing in 1850 of John C. Calhoun."[104]

Justice Clyde Hamilton was President Bush's first nominee to the Fourth Circuit and, of all the judges appointed by both Reagan and Bush to this particular circuit, was Senator Thurmond's longest standing friend. Hamilton was born in 1934 in Thurmond's hometown of Edgefield in South Carolina and graduated from George Washington University Law School. He then commenced work in private practice in Edgefield and Spartanburg in South Carolina from 1961 until his nomination by President Reagan to a seat on the U.S. District Court for the District of South Carolina in 1981. On June 12 1992, President Bush nominated Hamilton to a newly created seat created on the Fourth Circuit.[105] Hardin provides the following insight:

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103. Hardin, *op cit.*, p. A-1.

104. Lawson Bowling, *Shapers of the Great Debate on the Great Society* (Westport CT: Greenwood Press, 2005), p. 191.

105. Federal Judicial Centre, The Federal Judges Biographical Database: Entry for Judge Clyde Hamilton -http://air.fjc.gov/history/judges_frm.html

> Going back the longest with Thurmond is Senior Judge Clyde H. Hamilton ... He recalls dancing at then-Governor Thurmond's 1947 inaugural ball and regarding Thurmond as a "striking and accomplished horseman" in their hometown of Edgefield. Hamilton, who is semi-retired, worked for Thurmond in 1955 and helped raise money for three re-election campaigns. He was grateful to Thurmond. "In my legal career, no one has done more for me and is more directly responsible for my being here today than Senator Thurmond," Hamilton said at his swearing-in as a district judge.[106]

In speaking to Justice Hamilton's nomination on the floor of the Senate, Senator Thurmond himself stated:

> On this occasion, I have the rare opportunity of having known this nominee, Judge Hamilton, all of his life ... during his undergraduate studies, Judge Hamilton worked for me as a summer clerk in 1955 ... [Hamilton was] a person of integrity, keen intellect, and ability, who would be, 'an outstanding addition to the fourth circuit.[107]

President George H. Bush's last nominee to the Fourth Circuit was Karen Williams, who recently retired as the Chief Justice of the Fourth Circuit. Justice Williams was born in 1951 in Orangeburg, South Carolina. On completion of her studies at the University of South Carolina Law Centre in 1980 she entered private practice in her home town until her appointment to the Fourth Circuit in March, 1992.[108] Like several of Reagan and Bush's nominees to the Fourth Circuit, Justice Williams and her family were close to Senator Thurmond. Deborah Sontag states that Williams "was appointed by President Bush in 1992 on the recommendation of Strom Thurmond, a friend of her father-in-law's, then the president of the South Carolina State Senate."[109] Hardin describes Williams as:

> ... a schoolteacher and a trial lawyer before Thurmond recommended her in 1991. Williams also was the daughter-in-law of Marshall B. Williams, a Democrat and close Thurmond friend

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106. Hardin, *op cit.*, p. A-1.

107. See Senator Thurmond's Statement on the Nomination of Clyde H. Hamilton in the Senate's Executive Calender, July 18, 1991 at http://thomas.loc.gov/cgi-bin/query/z?r102:S18JY1-1145

108. Federal Judicial Centre, The Federal Judges Biographical Database: Entry for Judge Karen Williams -http://air.fjc.gov/history/judges_frm.html

109. Deborah Sontag, "The Power of the Fourth," *New York Times Magazine*, March 9, 2003, p. 38.

who was then the president pro tempore of the South Carolina Senate. The two men had double-dated when they were younger.[110]

In speaking to her nomination on the Senate floor, Senator Thurmond himself remarked that Williams was:

> ... a woman of ability, integrity, and independence,' [who had], 'the experience and temperament to become an outstanding judge on the fourth circuit ... It was with considerable pride that I recommended Mrs. Williams to President Bush for this very important position, and it is with an equal amount of pride that I recommend her confirmation today. I strongly support her nomination and urge my colleagues to do the same.[111]

While Senator Thurmond played a significant role in the selection and promotion of conservative candidates to Fourth Circuit judgeships, the impact of Senator Helms came from another direction in that he focused on blocking those more liberal nominations (made under the Clinton administration) to ensure the conservatism of the Fourth Circuit was maintained. Helen Dewar and Dan Balz found that many of Helms colleagues' believed that, "Throughout his Senate career, Helms left more of a mark by blocking legislation, appointments and treaties than he did by winning passage of anything ..."[112] Hardin expands on the approach that Helms took:

> Another Southerner who recently left the Senate exerted strong influence in the opposite way: by obstructing nominees. Jesse Helms ... teamed with GOP allies to block President Bill Clinton's four nominees from Helms' home state. The two senators took great interest in the appeals court, which is one step below the U.S. Supreme Court, and helped shape its predominantly conservative lineup, scholars say.[113]

Helms's obstruction was aided by the aggressive enforcement of the 'blue slip' policy by the Republican controlled Senate Judiciary Committee. One of the leading

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110. Hardin, *op cit.*, p. A-1.

111. See Senator Thurmond's Statement on the Nomination of Karen Williams in the Senate's Executive Calender, February 27, 1992 at http://thomas.loc.gov/cgi-bin/query/F?r102:3:./temp/~r102zdmfoa:e3071:

112. Helen Dewar and Dan Balz, "Ultimate Conservative Leaves Senate Without an Heir," *Washington Post*, August 23, 2001.

113. Hardin, *op cit.*, p. A-1.

liberal organisations committed to judicial selection in the United States, People for the American Way, make the following assessment:

> After he assumed control of the Senate Judiciary Committee in the mid-1990s, Senator Hatch began to rigorously enforce a blue slip policy under which nominations could not move forward without the consent of both home state Senators. In 1998, this policy was made explicit on the blue slips themselves, which stated that "[n]o further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators." Suddenly, a policy that had helped to force consultation and consensus was transformed into a vehicle for partisan obstruction.[114]

Hardin goes on to note the relationship between these two men and describes the strategies they employed:

> ... Helms collaborated in the Senate with Thurmond and became godfather of a Thurmond daughter. Helms didn't shy from a battle, and his 4th Circuit fight was no exception. He was angry that a protege tapped by President George H.W. Bush in 1991, U.S. District Judge Terrence W. Boyle, never got a hearing from the Democrat-controlled Judiciary Committee. Playing payback politics, he stood up for Boyle when Republicans ran the Senate later in the Clinton years. Helms also sided with then-Chief Judge J. Harvie Wilkinson III of Virginia in advocating a 4th Circuit smaller than its 15 authorized seats. He sponsored a bill to eliminate two vacant seats; observers had expected both to be filled by North Carolinians.[115]

Snider provides the following insight into Helms's more obstructionist approach to judicial nominations.

> Helms kept a close eye on [junior Senator Robert] Morgan's activities in the Senate and blocked him wherever possible. He led the fight in defeating one of Morgan's choices for a federal judgeship, Charles Winberry, and held up another, a black state court of appeals judge, Richard Erwin.[116]

Steve Ford provides as an example the more recent nomination of a former political aide to Helms, Terrence Boyle, to illustrate the motivation behind Helms's keen interest and influence over judicial nominees to the Fourth Circuit. Ford found that Boyle:

> ... not only ... carried a conservative Republican pedigree, but that he was linked to a senator who could have been the Ty Cobb of judicial confirmation hardball. Way back in 1973, Boyle had put in a short stint as a legislative assistant to now-retired Sen. Jesse Helms. He then even

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114. See People for the American Way, "The Senate, The Courts and the Blue Slip: The Ground Rules During the 1990s," at www.pfaw.org/pfaw/general/default.aspx?oid=7623

115. Hardin, *op cit.*, p. A-1.

116. Snider, *op cit*, p. 59.

went and married a daughter of Raleigh attorney Tom Ellis, who was Helms' top strategist ... With the nomination languishing, Helms both got mad and set out to get even. He put the clamps on a string of Democratic nominees during the Clinton years, to the point where the 4th Circuit eventually had no North Carolinians serving.[117]

Like Ford, Peter Wallsten has also concluded that the Senator's veto power during the Clinton administration led to his home state of North Carolina lacking any judicial representation on the Fourth Circuit and that even though a quarter of the Fourth Circuit's population was black it was only to gain its first black judge in 2001.[118] Hardin states that the Fourth Circuit would:

... probably ... be more moderate and would have had its first black judge well before 2001 had Clinton's nominees been approved, according to court watchers. And the blocking of Clinton's choices left openings for Republican President Bush to fill. Presidents have the primary power to appoint federal judges. Yet the influence of Thurmond and Helms shows the interplay of personal politics and power in Washington's shaping a court affecting millions of people.[119]

Dewar and Balz discovered a key difference between Helms and Thurmond that explains the contrasting influence these two men had over nominations to the Fourth Circuit. The authors state, "...many contend that Helms, unlike many Southern politicians, never fully adapted to changes in his region. He continued to use a racial appeal in his campaigns as recently as 1990. On civil rights issues ... Thurmond ... 'was far more adaptive than Helms,' said Emory University's [Merle] Black."[120]

Finally, Deborah Sontag provides the following revealing insight into Helm's attitude to the whole process of selecting to nominees to the Fourth Circuit. She recounts that Helms:

... once told a North Carolina newspaper that the furore in Washington over judicial nominations was out of whack with the sentiments of the public: "You go out on the street of

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117. Steve Ford, "Cleared To Land in Richmond?," *The News and Observer*, 2 January, 2005.

118. Peter Wallsten, "Helms Softens Stance on Judges: Ends Longtime Block on N.C. Appointment," *The Charlotte Observer*, 2 May 2001.

119. Hardin, *op cit.*, p.A-1.

120. Dewar and Balz, *op cit.*

> Raleigh, North Carolina, and ask 100 people, 'Do you give a damn who is on the Fourth Circuit Court of Appeals?' They'll say, "What's that?"[121]

Summary

This thesis explores why the nominations made by Presidents Bush and Reagan to the Fourth Circuit had more conservative approaches to criminal justice than their similarly appointed colleagues on the Supreme Court. Because the key explanation provided here relates directly to the influence of Senators Thurmond and Helms during the selection of these judges, it was necessary to demonstrate that these two Senators held hardline conservative views on criminal justice which they sought from nominees to the Fourth Circuit. Locating the conservative views of these two Senators was conducted in three ways. Firstly, by reproducing the results of the *CQ* analyses. Secondly, by recording the reactions of both Senators towards the landmark criminal justice decisions brought down during the Warren Court era and finally the Senators expectations of judicial nominees generally. The remaining section of this chapter highlighted the strong personal relationships these two Senators had with many of the nominees to the Fourth Circuit. All of this added together points to a correlation between the explicit demands of Senators Thurmond and Helms and the subsequent selection of conservative, hard line, 'law and order' types of judges selected by Reagan and Bush to join the Fourth Circuit. In essence the choice of nominee to the Fourth Circuit by Reagan and Bush strongly reflected the persistent demands made by these two Senators regarding the types of judges they sought to adjudicate in criminal justice matters.

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121. Sontag, *op cit.*, p. 38.

Chapter Six

TWO EXPLANATIONS WHY JUDGES APPOINTED BY PRESIDENTS REAGAN AND BUSH TO THE U.S. SUPREME COURT WERE LESS CONSERVATIVE ON CRIMINAL JUSTICE MATTERS THAN THEIR COLLEAGUES ON THE FOURTH CIRCUIT

Introduction

Two potential explanations are provided in this chapter to account for the less conservative approach taken by the Reagan and Bush appointed judges on the Supreme Court towards criminal justice cases when compared to their similarly appointed colleagues on the Fourth Circuit. The first explanation is a function of the political context surrounding the process of nominating and confirming three particular judges, Sandra Day O'Connor, Anthony Kennedy and David Souter and how this contributed to the development of their relatively more consensual and moderate judicial philosophy once on the bench. This explanation seeks to determine whether the enforced political compromises Presidents Reagan and Bush had to make to ensure their nominees would be confirmed resulted in a lesser degree of concordance by these three judges in fulfilling the conservative expectations of their nominating Presidents regarding criminal justice cases.

The second potential explanation provided here examines the intra-court dynamics of the Supreme Court and the likely impact of Justice Scalia's character and personality. This is especially within the context of Scalia's reaction to the varying degrees of more moderate judicial philosophy displayed by Justices O'Connor, Kennedy and Souter. This explanation explores how their individual interactions, particularly with Scalia, may have impacted on the ability of these three judges to adhere to the more conservative expectations of their nominating President

to the same degree their colleagues did on the Fourth Circuit. In the existing literature this explanation builds on the seminal work of Walter Murphy's *Elements of Judicial Strategy* (1964), Christopher Smith's *Justice Antonin Scalia and the Supreme Court's Conservative Movement* (1993) and Jeffrey Rosen's *Personalities and its Impact on the Supreme Court* (2006).

The Political Context Surrounding the Nomination and Confirmation of Justices O'Connor, Kennedy and Souter and the Impact It Had on Their Judicial Philosophy

Justices Sandra Day O'Connor, Anthony Kennedy and David Souter were the products of significant political and ideological compromises in their selection and confirmation to the Supreme Court. Such compromises may have been a factor in the development of the more malleable judicial philosophy these three nominees have since exhibited compared to their similarly appointed colleagues on the Fourth Circuit. In the case of Justice O'Connor, ideology was compromised to ensure an election promise was fulfilled to appoint the first woman to the Supreme Court.[1] With the nomination of Justice Kennedy, ideology was compromised because of the intense controversy surrounding the failure of the two nominees who preceded him - Justices Robert Bork and Douglas Ginsburg.[2] Finally, in the case of Justice Souter's nomination ideology was again compromised because the President sought to avoid a repeat of the political fallout from the Bork saga by putting forward a 'stealth candidate' whose ideology could not be explicitly classified during the confirmation

1. Lee Epstein and Jeffrey Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford University Press, 2005), p. 48.

2. Robert Katzmann, *Courts and Congress* (Washington D.C.: Brookings Institution Press, 1997), p. 30.

process.[3] It is now necessary to explore in greater detail the political compromises surrounding the appointment of each of these three judges, beginning with Justice Sandra Day O'Connor.

In the existing literature it is acknowledged that the appointment of Sandra Day O'Connor to the Supreme Court was more the product of political and electoral expediency than any real determination to seek a judge who would demonstrate strong concordance with the Reagan administration's ideological agenda. Well known Reagan biographer, Lou Cannon, provides the following overview of the political expediency surrounding O'Connor's appointment:

> Though he had promised on October 14, 1980, to name a woman to "one of the first Supreme Court vacancies in my administration," both the wording and the timing of this commitment were suspect. The idea had originated as a political proposal in a discussion with Stu Spencer during a low point in the Reagan campaign. Its timing reflected the obstacles Reagan then faced with women voters both on the peace issue and ERA. The political nature of the promise was underscored by Reagan's record as Governor of California, where all three of his appointments to the state Supreme Court had been male.[4]

Henry Abraham concurs and also links the O'Connor nomination to a politically expedient decision based on gender. He states emphatically that, "gender was the primary concern of the Reagan administration in choosing Judge O'Connor," because Reagan, "had run relatively poorly among women voters and the so-called gender gap surfaced."[5]

Lee Epstein and Jeffrey Segal also provide evidence to support the view that O'Connor's nomination was based on gender rather than the necessity of seeking a judge who would represent the President's philosophy and perspectives on the bench. They state:

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3. Henry Abraham, *Justice and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 1992), p. 366.

4. Lou Cannon, *Reagan* (New York: G. P. Putnam's and Sons, 1982), p. 313.

5. Abraham, *op cit.*, p. 341.

> When Ronald Reagan nominated Sandra Day O'Connor to the Supreme Court in 1981, he was not appointing a crony; he had met her only once, and that was six days before he nominated her. Rather, Reagan was seeking to fulfil a campaign promise to appoint a woman to the Court - a promise he no doubt felt would further his and his party's chances of attracting female voters.[6]

Cannon recalls the more bi-partisan, less ideological approach taken by Congress towards the O'Connor appointment due to her reputation as a political moderate and a balanced interpreter of the law:

> Democrats and Republicans alike considered her a fair minded, conciliatory legislator of moderately conservative views ... "The appointment of O'Connor is a master stroke ..." wrote liberal Democratic congressman Morris Udall in the Washington Post. "It shows a flexibility, a bigness that the Ronald Reagan stereotype doesn't recognise. It shows a political savvy on the part of the President that I had assumed was not there."[7]

Even before her nomination got to the confirmation process Jeffrey Rosen, in his 2006 work, *The Supreme Court: The Personalities and Rivalries that Defined America*, argues Justice O'Connor was a moderate from the outset. Rosen traces this back to O'Connor's previous life as a Republican politician in Arizona's state legislature.

> O'Connor's legislative service was one of the central experiences of her life, and it is remarkable how much her performance as majority leader anticipated the role that she would come to play on the Supreme Court ... O'Connor's approach to her job reflected her background as an Arizona state legislator in the 1970s, where she mediated between Democrats and Republicans with moderation and aplomb.[8]

Abraham also notes the support O'Connor's nomination received from the more liberal sections of American political power:

> Women's rights groups and prominent liberals, such as Senator Edward M. Kennedy (D. Mass.) and Congressman Morris K. Udall (D. Ariz.), were quick to announce their support for the first woman formally to be nominated to the highest court in the land. Udall commented of his fellow Arizonian, "She's about as moderate a Republican you'll ever find being appointed by Reagan."[9]

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6. Epstein and Segal, *op cit.*, p. 48.

7. Cannon, *op cit.*, p. 314.

8. Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America* (New York: Henry Holt and Company, 2006), p. 206.

9. Abraham, *op cit.*, p. 340.

In emphasising liberal support for O'Connor, Abraham also described the negative reaction the nomination ignited from quarters of the ideological right. He states:

> Although members of the Old Right (most significantly its guru, Senator Goldwater) professed their support for Judge O'Connor, leaders of the New Right, who had backed President Reagan so fervently in his 1980 campaign, unleashed a wave of protests against his first Supreme Court nominee.[10]

The nomination of a judge from the U.S Court of Appeals for the Ninth Circuit, Anthony Kennedy, to the Supreme Court was also the product of ideological compromise. On this occasion it was not for more immediate electoral gains but to avoid further political embarrassment which the Reagan administration had been suffering from the process of judicial selection at that time. The failed nominations of D.C. Circuit judges Robert Bork and Douglas Ginsburg acted as a pressing political constraint when yet a third nominee was needed to replace them in filling this vacancy.

Massaro describes Reagan's view of Kennedy's nomination and identifies the judge's moderate, yet conservative judicial philosophy and his bi-partisan appeal as his key selling points:

> He [Reagan] also expressed the hope that Kennedy would be confirmed "in the spirit of cooperation and bipartisanship." And rather than emphasizing the nominee's generally conservative ideology, the president noted that Kennedy "seems to be popular with many senators of varying political persuasions." In selecting Kennedy, the president also conveyed a willingness to compromise in regard to ideology.[11]

Robert Katzmann also argues that Kennedy's nomination succeeded largely because of his more moderate judicial philosophy.

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10. *Ibid.*, p. 340.

11. John Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* (Albany NY: State University of New York Press, 1990), p. 195.

> Kennedy may have escaped intense questioning partly because his writings were less sweeping and provocative than Bork's. That he accepted a right to privacy no doubt facilitated his confirmation. Kennedy was aided by the conciliatory tone in which the White House advanced his nomination and by the disinclination of a weary Senate to take on another time consuming confirmation battle.[12]

In examining more specifically the judicial philosophy of Justice Kennedy, David Savage focuses on a particular case Kennedy heard as a Ninth Circuit judge involving the rights of homosexuals in the armed forces. He outlines Kennedy's legal methodology in this case and the ramification it had during his confirmation hearing:

> In 1980, Kennedy was confronted with a lawsuit by gay navy personnel challenging the constitutionality of the Pentagon's regulation demanding the discharge of known homosexuals. Unlike Judge Robert Bork, who in a similar case grandly questioned whether anyone has a constitutional right to privacy, Kennedy wrote a hesitant opinion. "We recognise that to many persons the regulations may seem unwise," he said in his opening paragraph ... In a footnote, the opinion cited the constitutional law treatise authored by Harvard law professor Lawrence H. Tribe. Though he ruled for the Defence Department, Kennedy's few hesitant comments would almost cost him a seat on the Supreme Court.[13]

Savage proceeds to describe the general conservative reaction to Kennedy's nomination and in particular the initial response of Senator Helms:

> ... there was that troublesome footnote in the gay sailor's case. Anyone who cited Larry Tribe as a constitutional authority became suspect in conservative circles. Plus, the opinion itself read as if its author could not decide. "No way, Jose," Senator Jesse Helms (R, North Carolina) responded famously when told about Kennedy and his opinion in the Navy case.[14]

Finally, in an indication of its more bi-partisan underpinnings, Savage reveals that both Democrats and the prominent liberal academic, Professor Lawrence Tribe, supported Kennedy's nomination.

> Professor Tribe, an official advisor to the committee, gave Kennedy his stamp of approval as a thoughtful judge. Committee chair Jospeh Biden wondered aloud whether Kennedy might not be cut from the mould of Lewis Powell. At least the Democrats wanted to believe that ... Kennedy had to be better, the Democrats reasoned. Kennedy "seems to possess the truly judicious qualities that Justice Lewis Powell embodied," they said in the committee report on the nomination. "Open minded, fair and independent [he] will assure continuity on the Supreme Court at this moment of historical transition," they said.[15]

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12. Katzmann, *op. cit.*, p. 30

13. David Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (New York: John Wiley and Sons, 1992), p. 174.

14. *Ibid.*, p. 175.

15. *Ibid.*, p. 182.

To gain such endorsements clearly indicates that Justice Kennedy was perceived, or was understood to possess, a comparatively moderate judicial ideology. Epstein and Segal argue that Kennedy's nomination was essentially the result of a compromise emerging out of the contentious selections that had been made immediately before him. They state:

> Conservative appeals court judge Anthony Kennedy, appointed to the Supreme Court in 1988, did not originally pass muster, as a close reading of his record by the Justice Department revealed a "distressing" acceptance of privacy rights. Only after the failure of two more-conservative candidates, Robert Bork and Douglas Ginsburg, did Reagan appoint Kennedy to the Supreme Court.[16]

The aftermath of the Bork saga also played a significant role in the emergence of David Souter as a nominee to the Supreme Court and the emerging trend of nominating 'stealth' candidates. Former Senator Paul Simon, provides the following account of Souter's nomination and places a particular emphasis on the nominee's lack of a contentious judicial record:

> ... he [Souter] had shown little inclination to put ideas on paper ... As a New Hampshire Supreme Court Justice seven years, and then on the U.S. Court of Appeals, he had not defined himself clearly and had written remarkably few opinions ... The only article he ever wrote was a tribute to another New Hampshire Supreme Court Justice. He probably represented as blank a slate as anyone ever offered by a President for a seat on the Court. That was his strength and his weakness, and Senators of all political philosophies felt some unease as we proceeded to vote.'[17]

Simon also found that one of the keys to the successful confirmation of Souter was the advocacy and protection offered by New Hampshire Senator, Warren Rudman. Simon recalls:

> To replace Brennan, Bush nominated Judge David Souter, a former Rhodes Scholar and a judge on the U.S. Court of Appeals for three months. He had one major asset: a close friendship with Senator Warren Rudman of New Hampshire. Souter had written little and avoided controversy ... Conservatives found him acceptable, and liberals felt he was about as

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16. Epstein and Segal, *op. cit.*, p. 62.

17. Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court's Nomination Battles* (Washington D.C.: National Press Books, 1992), pp. 75-76.

> good as they would get from Bush ... Senator Rudman reduced the possible negative votes by coming around to each of us with the reassuring words, "Take my word for it. He'll be okay."[18]

Silverstein best describes the political dynamics that underpinned Justice Souter's successful nomination.

> Everyone was equally in the dark regarding Judge Souter. Liberals, however, were quietly assured by Senator Warren Rudman, the respected Republican of New Hampshire and a close friend of the nominee, that Souter was as good as they could possibly hope to get from the Bush administration. Conservatives were eventually forced to trust the promises of the president and the judgement of the Department of Justice. Armed with a quiet, restrained style and doggedly refusing to engage members of the Senate Judiciary Committee in a substantive discussion of his judicial philosophy, Souter (quickly dubbed the 'stealth nominee') was easily confirmed.[19]

Finally, Abraham also argues that Souter's nomination was not based on philosophical expectations but the lack of anything politically contentious in his record. He states:

> The President's decision to select Judge Souter - a judge he had never met or spoken with until then - was based predominantly on the chief executive's desire to finger a conservative judge with no controversial written opinions (especially on the emotional abortion issue) that would trigger sustained ideological conflict on the eve of the 1990 midterm elections.[20]

It can be concluded, therefore, that even before commencing their respective terms on the Supreme Court, each of these three particular judges had been selected on the basis of varying degrees of political expediency and their capacity to assist these two respective Administrations to avoid the bitter, partisan confirmation process that could have quickly erupted again in the post-Bork era of judicial selection. Even before these three particular judges were confirmed to the Supreme Court they had become compromise candidates. To both nominating Presidents at the time, political circumstances dictated that the strength of each nominee's judicial philosophy was not as important as each nominee's political saleability and

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18. *Ibid.*, pp. 75-76.

19. Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: W.W. Norton, 1994), p. 98.

20. Abraham, *op cit*, p. 366.

acceptance. The judicial behaviour of these three judges since has not been one of committed conservative judicial ideology but of varying degrees of moderation, compromise and concession.

As the political context surrounding the selection and confirmation process for each of these three judges filtered out the more ideologically conservative nominees on the shortlist from the outset, it is necessary to follow the progress of each judge as they moved onto the Supreme Court bench and began participating in its decision making process. It is here in this second potential explanation that the strategic model of judicial behaviour provides the greatest assistance.

The Intra-Court Dynamics of the Rehnquist Court and its Impact on the Judicial Philosophy of Justices O'Connor, Kennedy and Souter

This type of explanation is one generally shrouded in secrecy and controversy. It relates specifically to what may have occurred behind the closed doors of the Supreme Court. More particularly, it focuses on the dynamics of what transpires amongst the judges themselves when deciding particular cases in conference. It is an explanation built on how the personalities of each of these justices relates to one another and the influence this may have had on the levels of concordance exhibited by Justices O'Connor, Kennedy and Souter with the expectations of their nominating President towards criminal justice cases. As Rosen outlines it:

> The ideal of the justices as impersonal oracles, of course, is something of a myth. Like any small group, the Court is a deeply human institution, where quirks of personality and temperament can mean as much as ideology in shaping the law.[21]

Furthermore, as Friedelbaum observes, "To the surprise of many and the consternation of some, an unexpected community of interest seems to have

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21. Rosen, *op cit*, p. 6.

developed, within a pivotal cadre consisting of Justices Kennedy, O'Connor, and Souter, that may control the outcome of critical decisions."[22] In understanding the role of this 'pivotal cadre' it is necessary to further explore this explanation within the context of the strategic model of American political jurisprudence. It is an explanation which Lee Epstein and Jack Knight describe in the following way:

> This [strategic] account rests on a few simple propositions: justices may be primarily seekers of legal policy, but they are not unsophisticated actors who make decisions based merely on their own ideological attitudes; instead, justices are strategic actors who realise that their ability to achieve their goals depends on a consideration of the preferences of the actors, of the choices they expect others to make, and of the institutional context in which they act.[23]

Epstein and Knight define this approach further: "by 'strategic,' we mean that judicial decision-making is interdependent. That is, a justice acts strategically when she realises that her fate depends on the preferences of other actors and the actions she expects them to take (not just on her own preferences and actions)."[24]

The foundation of the strategic approach is generally considered to be Walter Murphy's 1964 work *Elements of Judicial Strategy*. Maltzman, Spriggs and Wahlbeck provide the following background to Murphy's work:

> Among judicial scholars, the intellectual origins of a model of strategic interaction were offered by Murphy in his path breaking *Elements of Judicial Strategy* (1964). According to Murphy, a strategic justice is constrained by the actions and preferences of his or her brethren, as well as by actors and influences outside of the Court. Murphy did not see each justice acting independently. Nor did he see outcomes as the aggregation of individual preferences. Instead, Murphy argued, justices' behaviour was shaped by the actions taken by the other justices and the potential for action by Congress, the President, and the general public.[25]

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22. Stanley Friedelbaum, *The Rehnquist Court: In Pursuit of Judicial Conservatism* (Westport CT: Greenwood Press, 1994), p. 146.

23. Lee Epstein and Jack Knight in Cornell Clayton and Howard Gillman (eds.), *Supreme Court Decision Making* (Chicago: University of Chicago Press, 1999), p. 216.

24. *Ibid.*, p. 216.

25 Forrest Maltzman, James Spriggs and Paul Wahlbeck in Clayton and Gillman,(eds.), *Supreme Court Decision Making*, p. 48.

In opening his analysis of the strategic considerations calculated by Supreme Court judges, Murphy introduces his reader to the psychological processes a judge undergoes when he or she first moves on to the bench. He states:

> ... the freshman Justice, even if he has been a state or lower federal court judge, moves into a strange and shadowy world. An occasional helping hand – a word of advice about procedure and protocol, a warning about personal idiosyncrasies of colleagues or the trustworthiness of counsel – can be helpful and appreciated ... The new Justice may also feel it necessary to establish warm social relations with his brethren.[26]

Murphy delves further into the psyche of the Supreme Court judge and the influence of personality and character during the decision making process. He articulates this in the following way:

> In every part of the individual and group decisional processes, each judge's choices would be heavily affected not only by his understanding of existing legal rules and his intellectual acumen but also by such factors as his emotional biases, policy predilections, personal values, and even his strength of character. Particularly in the group consensus phase, his choice probably would also be affected by similar characteristics of his colleagues.[27]

With regards to the interpersonal relationship amongst judges when deciding the outcome of a particular case, Murphy again makes an important observation:

> ... in disposing an actor to respond positively to the attempts at influence by another actor, personal esteem may merge with professional esteem – respect for judgement, knowledge, or skills – in that we might see those whom we like as having somewhat more of these qualities than they perhaps possess ... such respect, no matter how generated, can lead to influence insofar as it operates as an economising device. An actor might conclude that "A is an expert in this field, and I am not. The cost of becoming an expert is so high that I find it more efficient to follow A than to become an expert myself."[28]

Rosen also argues that a judge's colleagues can have a material impact on the way he or she approaches the development of their legal decisions:

> Although most of the justices have strongly held views and pre-conceptions when they join the Court, most are changed in important ways by their interactions with their colleagues. And some prove more successful than others, not only because of their judicial philosophies but also because of their judicial temperaments.[29]

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26. Walter Murphy, *Elements of Judicial Strategy* (Chicago: The University of Chicago Press, 1964), p. 50.

27. *Ibid.*, p. 34.

28. *Ibid.*, pp. 38-39.

29. Rosen, *op cit*, p. 6.

Exploring further the relationship between individual judges, Murphy pursues his analysis of a judge's character and personality and, importantly, the influence it can have on how his or her colleagues approach the same decision that is brought down.

> Since the Justices are largely equal in authority, an appeal by one Justice to his position on the Court is not likely to be an effective means of increasing influence with his associates, except perhaps in those few fields in which tradition has given the Chief Justice certain prerogatives. The Justices, however, are not equal in intellectual ability, in perspicacity, learning, legal craftsmanship, persuasive talents, energy, determination, ambition or social skills; nor do they hold each other in equal personal or professional esteem.[30]

The underlying theme of this explanation relates very much to the reactions of Justices O'Connor, Kennedy and Souter to Justice Scalia's personality and character while they developed their own approach to the decisions arrived at. It relates to what Rosen classifies as 'judicial temperament.' In defining this phrase further Rosen states:

> Temperament conforms to no political litmus test and crosses ideological lines: there are liberal and conservative loners who are more interested in attracting attention to themselves than in persuading their colleagues; and there are liberal and conservative institutionalists who are more concerned about the long term legitimacy of the Court than about pursuing their own ideological agendas.[31]

As this more strategic explanation can be relatively contentious due to the protocol and secrecy surrounding such deliberations in the Court, it is necessary to strengthen the foundation of this explanation by locating previous examples of how the personalities of Supreme Court judges had an impact on the legal methodology of their colleagues when arriving at their decision. Throughout the history of this Court several incidences have been recorded showing how personal relationships between justices impacted on the decisions they brought down. It is necessary to refer back to these historical examples before venturing into the intra-court dynamics of the Rehnquist Court.

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30. *Ibid.*, p. 3.

31. *Ibid.*, p. 8.

In his work, *Elements of Judicial Strategy*, Murphy illustrates how the personality of former Supreme Court judge, James McReynolds, impacted on or at least influenced the judicial decisions of his colleagues during the Taft Court. Regarding a then newcomer to the Court, Justice Harlan Stone, Murphy recounts the following example of a situation where personalities can influence a judge's shift into the 'conservative' or 'liberal' camps of judicial philosophy. The following example may well resonate when thinking about a similar jurisprudential shift by Justice Souter:

> When Stone first came to the Court, he was, as Taft thought, fundamentally a conservative. Within a very few years, however, Stone had joined Holmes and Brandeis in what the Chief Justice considered 'radical' constitutional opinions. In part this change reflected Stone's capacity for intellectual growth, but the warm and stimulating companionship of Holmes and to a lesser extent Brandeis may also have been a decisive factor. As Thomas Reed Powell, a long time confidant of Stone, commented, it was "respect and liking for Holmes and Brandeis that turned him from his earlier attitudes." On the other hand, Stone probably had slight intellectual respect for Taft. This fact, coupled with McReynolds' bigoted attitude toward Brandeis as well as his continual carping at Stone's opinions, did little to keep the new Justice in the conservative camp.[32]

Murphy explores further the intra court dynamics of the Taft Court and in particular the impact of Justice McReynolds's personality. In some distant, yet similar ways the McReynolds character in Murphy's account replicates the Scalia character in Christopher Smith's work. Murphy observes:

> McReynolds expressed his displeasure over Justice Clarke's votes and opinions in a more systematically unpleasant fashion. When he was Attorney General, McReynolds had been instrumental in getting Clarke appointed to the district bench; and when Clarke was promoted to the Supreme Court, McReynolds thought the new Justice should follow his benefactor's ultra-conservative constitutional philosophy. Clarke, however, went his own individual and sometimes erratic way; but, in his first few years on the Court, he tended to side more with Holmes and Brandeis than with McReynolds on constitutional cases. As a result, McReynolds cut off all pleasant social relations with Clarke, meting out only curt sarcasm to him.[33]

Again, Murphy illustrates the candid nature of McReynolds's attitude towards his colleagues with even the Chief Justice not being spared:

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32. Murphy, *op cit*, pp. 53-54.

33. *Ibid.*, p. 55.

> McReynolds's barbs, usually aimed at Brandeis and Clarke, occasionally hit the Chief Justice. "I do not like your opinion in #206," McReynolds commented bluntly. "I think ... you can put the case in a much more condensed and lucid way. The opinion is hard for me to follow and is almost sure to produce confusion and add to our difficulty." "Of course," he added reassuringly, "I have no purpose to make even a mild row in public."[34]

In moving away from the McReynolds case study, Bernard Schwartz provides another example of how conflicting personalities within the Supreme Court can influence judicial opinion making. On this occasion Schwartz examines the Warren Court and focuses on the sometimes tumultuous relationship that existed between Justice Felix Frankfurter and that of both Chief Justice Earl Warren and Justice Hugo Black.

> ... the supposed studied civility among justices of the Supreme Court frequently came unglued in the face of deep-seated animosities that erupted among several of the prima donnas of the Warren Court. Robert Jackson was convinced that Black's dislike for him had prevented the appointment of Jackson as Chief Justice; Black believed that Frankfurter intervened to stop Black's appointment as Chief Justice. Warren forbade his clerks from 'leaking' information to Frankfurter; Frankfurter sometimes thought Warren's far-reaching opinions bordered on ignorance.[35]

In focusing more specifically on the relationship between Justice Black and Chief Justice Warren, Schwartz found:

> Black resented public acclaim of Warren for legal principles Black maintained he had formulated before Warren's appointment to the Bench. Warren explained away Black's late-career anti-civil rights positions by suggesting, cattily, that his southern colleague "wants to be buried in Alabama.[36]

Schwartz highlights further how intra-court personalities can influence legal methodology. In this example, Schwartz focuses on an exchange between Justice Felix Frankfurter and Chief Justice Earl Warren.

> Now that Warren had become an activist devotee, Brennan was not far behind – and now there were four. But it was a solid four ... and it was a foursome that, as it grew more successful in controlling the Court, grew even more damnable in Frankfurter's eyes. He was once overheard

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34. *Ibid.*, p.55.

35. Bernard Schwartz and Stephen Lesher, *Inside the Warren Court* (New York: Doubleday, 1983), p. 5.

36. *Ibid.*, p. 5.

at a conference screeching – literally, for Frankfurter became high pitched and loud during arguments – at Warren: "Be a judge, goddamnit, be a judge!"[37]

One final illustration of Frankfurter's relationship with his colleagues comes from Rosen who provides the following dramatic account, "The intellectually arrogant Justice Felix Frankfurter openly belittled him [Chief Justice Vinson] as a mediocrity, prompting Vinson at one conference to threaten to punch Frankfurter in the nose."[38]

Such examples within the Warren and Taft Courts showing how personalities within the Supreme Court can function are important in setting the scene by which the impact of Scalia's personality on the Rehnquist Court is analysed. It is now necessary to complete this potential explanation by returning to Christopher Smith's work on Scalia's character and its impact in thwarting conservative dominance on the Supreme Court. From the outset, Smith was keen to note that inter-personal relationships on the bench of the Supreme Court were not something generally well known outside the institution. Smith therefore makes the following qualification of great importance when considering the second explanation provided here in this chapter:

> Strategic interactions between justices are not visible to scholars because the justices keep the Supreme Court shrouded in a cloak of secrecy. The justices seek to protect the high court's image and legitimacy by discussing and voting on their decisions in secret conferences attended only by the justices themselves ... Because the justices believe, perhaps with good reason, that their effectiveness depends on the public's faith in the legal basis of their decisions, they traditionally attempt to hide from public view the political interactions that shape many case outcomes. Despite the Court's inaccessibility to scholars, strategic behaviour by justices is often discernable in the justices published opinions. By seeing the formation and changes in Court majorities concerning specific issues as well as the reasoning in opinions associated with those changes, the justices strategic behaviours are detectable.[39]

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37. *Ibid.*, p. 130.

38. Rosen, *op cit*, p. 9.

39. Christopher Smith, *Justice Antonin Scalia and the Supreme Court's Conservative Movement* (New York: Praeger, 1993), pp. 57-58.

There is much in the existing literature that focuses on the strategic behaviour of judges when they come together to arrive at a decision. Smith, in his overview of the literature regarding this particular determinant of judicial behaviour, recounts that, "Walter Murphy's classic study, for example, showed how justices attempt to persuade, flatter, bargain, and otherwise engage in strategic behaviour to influence their colleagues decisions."[40] Smith further states:

> Scholars have also studied chief justices leadership styles, the impact of interpersonal conflict between individual justices, and other factors that shape the formation of majority coalitions within the Court concerning specific issues. Because no two justices share precisely the same views on all issues, the effectiveness of justices in advancing their preferred principles and outcomes depends not only on the number of like minded colleagues they have on the Court but also on their strategic behaviour in persuading colleagues to join their opinions.[41]

Maltzman *et al* provide the following background on the importance of intra-court dynamics to support this potential explanation. They state:

> Perhaps the most important institutional feature of the Court is its collegial character. Contrary to a portrait of the Court as nine separate laws firms that have little interaction with one another ... the strategic approach recognises that the behaviour of individual justices is shaped in part by the actions and preferences of their brethren. As a result, a justice's choices during the selection and consideration of cases will depend in large part on the choices made by the other justices.[42]

Menez concurs with the observation that judges on the same court can have an impact on each other, "Switching is not unusual and it has not infrequently occurred that Justices, on the basis of dissents, have changed sides. The Court is a collegial body and, of course, the justices influence one another. No Justice starts out from an absolutely fixed position."[43] Rosen also describes the Court in similar but more dramatic terms:

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40. Smith, *op cit*, p. 57.

41. *Ibid.*, p. 57.

42. Maltzman, et al, in Clayton and Gillman (eds.), *op cit*, p. 51.

43. Joseph Menez, *Decision Making in the Supreme Court of the United States: A Political and Behavioral View* (Lanham MD: University Press of America, 1984), p. 79.

> Justice Oliver Wendell Holmes Jr famously described his colleagues as 'nine scorpions in a bottle'; they might also be compared to nine prima donnas in a long running soap opera, where the backstage dramas - the rivalries, courtships, flings and breakups - can be as important as what takes place in front of the spotlights.[44]

Importantly, Clayton has found that engaging in strategic behaviour often compels judges to decide cases in ways they previously would not have considered. In this explanation the strategic calculations made by O'Connor and Kennedy and to a much lesser extent Souter, may have contributed to more consensual opinions based on compromise and moderation. Clayton states:

> Judges who wished to see their policy preferences realised had to make strategic calculations about the views of other colleagues on the bench ... This consideration forced judges to behave or vote in ways they otherwise would not if left unconstrained by their institutional environments.[45]

Yet another insight provided by Murphy could well be applied to the impact of Scalia's personality on the decision making process utilised by O'Connor, Kennedy and Souter. Murphy states:

> ... a Justice might plan to endear himself to the other Justices that they would be reluctant to vote against him in matters considered to be vital. Conversely, he might try to capitalise on fear rather than affection and try to bludgeon his colleagues into agreement by threatening them with the use of sanctions available to him.[46]

Murphy again provides another valuable insight that could easily be applied to Justice Scalia, particularly regarding the almost intimidating nature of his intellectual prowess:

> The peculiar formal rules and informal norms of the Court would allow a Justice to operate under one or more of several simple strategies to exploit each of these possible appeals. First, he might try by force of his intellect and will to convince his colleagues not only that what he wanted was in the best interests of themselves, the Court, the country, humanity, or whatever other goals they might wish to foster, but also that it was morally incumbent upon them to act in the fashion he was proposing.[47]

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44. Rosen, *op cit*, p. 6.

45. Clayton and Gillman (eds.), *op cit*, p. 23.

46. Murphy, *op cit*, p. 40.

47. *Ibid.*, p. 40.

Murphy also has advice that could accurately characterise the response of Justices O'Connor, Kennedy and Souter in the context of Scalia's manner and approach. Murphy states a judge, "might conclude that the only viable way to come near achieving his goal would be to negotiate: to compromise with those who were less intensively opposed to his policies."[48]

Paul Greenberg, writing in *The Washington Times*, recounts a speech Scalia made recently in which he castigated sympathisers of 'Living Constitutionalism.' In quoting Scalia, Greenberg also provides an insight into Scalia's attitude towards those who disagree with him:

> ... the argument of flexibility ... goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. But you would have to be an idiot to believe that. The Constitution is not a living organism, it is a legal document.[49]

The central element of Smith's argument relating directly to this potential explanation is outlined by him in the following manner:

> Legal scholars may examine Justice Scalia's role on the Supreme Court by focusing solely on his strident opinions, but a more comprehensive assessment of Scalia must include analysis of his colleagues' reactions to those opinions and to the other aspects of Scalia's behaviour on the Court.[50]

Smith commences his analysis by exploring Scalia's character and provides the following stern assessment:

> Justice Scalia joined the Supreme Court in 1986 with a reputation as an outspoken conservative. He was known to state his views with an assertiveness and stridency indicative of a man who lacks any self-doubt about the correctness of his views. Although he was also known as a friendly and likeable person, his penchant for stating his views in the strongest possible terms, both before and after becoming an associate justice, created a recipe for friction within the human, interactive decision making processes of the Supreme Court.[51]

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48. *Ibid.*, p. 40.

49. Paul Greenberg, "Constitution: Dead or Alive?" *Washington Times*, 27 February, 2006.

50. Smith, *op cit*, p. 123.

51. *Ibid.*, p. 61.

Rosen concurs and describes Justice Scalia as, "an intellectual pitbull who is more concerned with ideological purity than building coalitions," and who consequently, "found few acolytes on the Court for his doctrinaire judicial philosophy."[52]

Smith locates more specifically those key aspects of Scalia's personality that may have acted as a source of potential conflict amongst some of his colleagues:

> ... Scalia has strongly held views about the proper approach to constitutional and statutory interpretation - views that sometimes clash with those of his usual allies among the Court's conservatives. In addition, the strength of Scalia's belief in the rightness of his views and the professorial style of lecturing his colleagues diminish his ability to participate effectively in the Court's interactive process. If Scalia merely disagreed with his colleagues about specific cases, he might be able to persuade justices about other issues and otherwise perform effectively within the Court's collegial decision-making environment. However, the tone of Scalia's opinions and his style as a participant in the Court's decision making processes have reduced his effectiveness by actually deterring like minded colleagues from joining his opinions.[53]

Next Smith specifies how Scalia's aggressive approach to his less ideologically committed but still relatively conservative colleagues may have impacted on the direction of the Court's general legal methodology. He states:

> ... Scalia aimed his strident language either explicitly or implicitly at his usual allies as well as his usual opponents. It is probably of little consequence if Scalia harshly criticises liberal justices with whom he will seldom agree. When he criticises his fellow conservatives, however, he risks driving a wedge between himself and justices whose votes he will need in future cases that present the possibility of attaining a majority in favour of his preferred position.[54]

In referring back to the importance of 'judicial temperament,' Rosen argues that Scalia's lack of this quality was the main determinant underlying his approach towards his colleagues. He states:

> ... perhaps the main reason that Scalia was never as influential as Rehnquist involved not intellectual inconsistency but judicial temperament. Although his jurisprudential premises were unobjectionable, Scalia seemed, like Thomas Jefferson, to view every disagreement as a form of apostasy. As a result he had no volume knob. Every dissenting opinion predicted the apocalypse and every colleague who disagreed with him was denounced as a politician or a fool.[55]

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52. Rosen, *op cit*, p. 21.

53. Smith, *op cit*, p. 61.

54. *Ibid.*, p. 65.

55 Rosen, *op cit*, p. 182.

Finally, Smith contends that Scalia's abrupt, possibly aggressive, approach towards his colleagues could have provided a strong disincentive for wavering colleagues to join in concurring decisions with him. Scalia's frustration and outward displays of what could be interpreted as contempt or anger is a key violation of one of Murphy's key principles regarding the strategic approach towards judicial behaviour. Smith reminds us:

> By choosing to castigate his colleagues rather than merely express disagreement, Scalia creates risks that the human beings underneath the justices' black judicial robes will take offence and remember the barbs in subsequent cases when they must decide whether or not to agree with Scalia's opinions. In many cases, Scalia launches verbal assaults to wound his colleagues and tarnish their judicial reputations rather than to persuade them and the public of the correctness of his views.[56]

Finally, Rosen explains the fusion between Scalia's judicial temperament and the unyielding nature of his judicial ideology.

> For Scalia, temperament and ideology were intimately connected. He had a powerful need to bind himself in advance to rigid rules, but was so convinced of his own virtue that he demonised all who fell short of the standards he imposed on himself. He increasingly became a maverick and a loner, more interested in stirring up controversy outside the Court than building coalitions inside of it.[57]

Justice Scalia's Dissents

Further evidence of Justice Scalia's attitude and approach within this intra-court setting can be found in the language he uses in his dissenting opinions to describe the legal methodology of his fellow judges. Key aspects of Scalia's personality and approach towards his colleagues in this crucial process are clearly discernible from an overview of some of his dissenting rulings.

In his dissent in the 2003 case, *Lawrence v Texas*, involving the rights of homosexuals in Texas, Scalia argued that the parts of the legal methodology adopted

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56. *Ibid.*, p. 63.

57. Rosen, *op. cit.*, p. 183.

by the majority to overturn Texas's ban on sodomy was, "a massive disruption of the current social order."[58] Scalia expressed his disappointment as to why the majority, including Justices O'Connor, Kennedy and Souter, were so keen to defer to precedent when it came to the abortion case *Planned Parenthood v Casey* rather than risk overturning *Roe v Wade* but not here in this criminal justice case. Scalia states, "To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is."[59] Scalia also criticised O'Connor, Kennedy and Souter and others in the majority for making claims, "unsupported by any citations" and for using, "meaningless ... dangerous dicta."[60] With regards to the majority's ruling that there was no rational basis for the State of Texas to ban sodomy Scalia added dismissively, 'This proposition is so out of accord with our jurisprudence - indeed, with the jurisprudence of *any* society we know - that it requires little discussion."[61] Finally, Scalia condemned the decision by stating that it was, "the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda ..."[62]

In the 2002 case *Alabama v Shelton*, where the Court's majority, including Justices O'Connor and Souter, extended the misdemeanour right to counsel to those

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58. *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting), p. 7.

59. *Ibid.*, p. 7.

60. *Ibid.*, p. 12 and p. 14.

61. *Ibid.*, pp. 14-15.

62. *Ibid.*, p. 18.

cases where there was just the threat of imprisonment rather than continuing to limit it to actual imprisonment, Scalia accused his colleagues with a tinge of sarcasm that its ruling had been "miraculously divined" and that the Court had, "no business offering an advisory opinion on its answer."[63]

Regarding the case *Almendarez-Torres v United States* in 1998, which decided the sentencing practices applying to an immigrant who illegally re-entered the country after having previously been found guilty of a felony, Scalia characterised the approach of the majority, which included O'Connor and Kennedy but surprisingly not Souter, as "the feebleness of the Court's contention" and that its methodology proceeded with "utter lack of logic" and at one point he accused the majority of dragging "a red herring" to achieve its result.[64] Regarding the ramifications of the majority opinion Scalia then stated, "One wonders what state courts, and lower federal courts, are supposed to do with today's mysterious utterances."[65]

In the 2002 case *Atkins v Virginia*, where the majority overturned death sentences for those who were mentally retarded, Scalia took particular aim at the majority's assertion, which included Justices O'Connor, Kennedy and Souter, that there was a "national consensus" forbidding such practices even though many States still carried out such sentences. He subsequently stated, "The Court attempts to bolster its embarrassingly feeble evidence of 'consensus' with the following: It is not so much the number of these States that is significant, but the *consistency* of the direction of

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63. *Alabama v. Shelton*, 535 U.S. 654 (2002) (Scalia, J., dissenting), p. 2 and p. 3

64. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (Scalia, J., dissenting), p. 6, p. 11 & p. 15.

65. *Ibid.*, pp. 15-16.

change."[66] Scalia then accused the majority of, "thrashing about for evidence of consensus ..." leading him to sarcastically invent a prize for the way in which they arrived at their decision. He states, "But the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organisations, members of the so-called 'world community,' and respondents to opinion polls."[67] Finally, Scalia upbraids his colleagues in the majority for their arrogance and their "cavalier" approach in accumulating the evidence to support their decision. Scalia notes:

> "[T]he Constitution," the Court says, "contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Ante*, at 7 (quoting *Coker*, 433 ., at 597) (emphasis added). (The unexpressed reason for this unexpressed "contemplation" of the Constitution is presumably that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today.) The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus.[68]

One of Scalia's shortest dissents and the one containing some of his most animated attacks on his colleagues, including Justices O'Connor, Kennedy and Souter, came in the 1992 case, *Georgia v McCollum et al.* Scalia stated:

> For the reasons given in the *Edmonson* dissents, however, I think that case was wrongly decided. Barely a year later, we witness its reduction to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state. Justice O'Connor demonstrates the sheer inanity of this proposition (in case the mere statement of it does not suffice), and the contrived nature of the Court's justifications. I see no need to add to her discussion, and differ from her views only in that I do not consider *Edmonson* distinguishable in principle - except in the principle that a bad decision should not be followed logically to its illogical conclusion.[69]

Another example of how Scalia's searing dissents can be a reflection of his personality is to be found in the 2000 case *Dickerson v United States* where he

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66. *Atkins v. Virginia*, 536 U.S. 304 (2002) (Scalia, J., dissenting), p. 8.

67. *Ibid.*, p. 9 and p. 11.

68. *Ibid.*, p. 12.

69. *Georgia v. McCollum et al*, 505 U. S. 42 (1992) (Scalia, J., dissenting), p. 1.

accused Justices O'Connor, Kennedy and Souter, of converting *Miranda*, "from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance" and then concluded, "This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people."[70]

In the 1990 case *Maryland v Craig* Scalia attacked the majority opinion, written by Justice O'Connor and supported by Kennedy, by lamenting the direction the Court appeared to be taking. He stated, "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion"[71] and then derisively observes, "The Court supports its anti-textual conclusion by cobbling together scraps of dicta from various cases that have no bearing here."[72]

In the 1999 case *Mitchell, Amanda v United States* Scalia identifies part of the legal methodology used by the majority, which included Justices Kennedy and Souter, as, "the greatest - the most bizarre - inconsistency of all: the combination of the rule that the Court adopts today with the balance of our jurisprudence relating to sentencing in particular."[73] Scalia then went so far as to state that, "Today's opinion states, in as inconspicuous a manner as possible at the very end of its analysis (one imagines that if the statement were delivered orally it would be spoken in a very low

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70. *Dickerson v. United States*, 530 U.S. 428 (2000) (Scalia, J., dissenting), p. 22-23.

71. *Maryland v. Craig*, 497, U.S. 836 (1990) (Scalia, J., dissenting), p. 1.

72. *Ibid.*, p. 1.

73. *Mitchell, Amanda v. United States*, 526 U.S. 314 (1999) (Scalia, J., dissenting), p. 9.

voice, and with the Court's hand over its mouth), that its holding applies only to inferences drawn from silence "in determining facts of the offense."[74]

With respect to cases involving capital punishment, Scalia stated in the 1992 case *Morgan v Illinois* that, "Today, obscured within the fog of confusion that is our annually improvised Eighth Amendment, 'death is different' jurisprudence, the Court strikes a further blow against the People in its campaign against the death penalty."[75] The majority opinion in this case included Justices O'Connor, Kennedy and Souter. In relation to cases like this, Jeffrey Rosen catalogues one incident in a death penalty case illustrating Scalia's approach. Rosen states that Scalia's, "tendency to dominate oral argument with aggressive questions and showy put downs alienated several justices, including Rehnquist, who once shook his finger at Scalia for interrupting Kennedy during a death penalty case."[76]

In the 1996 case *Ornelas et al v United States* (1996) involving the warrantless search of a car containing two kilos of cocaine, Scalia argued that the Court's majority, including Justices O'Connor, Kennedy and Souter who all ruled in favour of the defendants, "does not appear to have the courage of its conclusions" and that the Court's opinion was, "not only wrong but contradictory."[77]

In the 1991 race case regarding jury selection, *Powers v Ohio*, written by Justice Kennedy and supported by Justices O'Connor and Souter, Scalia assessed the majority's support for the defendant in the following manner:

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74. *Ibid.*, p. 10.

75. *Morgan v. Illinois*, 504 U.S. 719 (1992) (Scalia, J., dissenting), p. 1.

76. Rosen, *op cit*, p. 200.

77. *Ornelas v. United States*, 517 U.S. 690 (1996) (Scalia, J., dissenting), p. 1.

> Judging from the Court's opinion, we can expect further, wide-ranging use of the jailhouse key to combat discrimination. Convictions are to be overturned, apparently, whenever "race is implicated in the trial..." – "by casting doubt upon the credibility or dignity of a witness, or . . . upon the standing or due regard of an attorney who appears in the cause," or even by suggesting "an alleged racial motivation of the defendant or a victim." *Ante,* at 11. To me this makes no sense. Lofty aims do not justify every step intended to achieve them. Today's supposed blow against racism, while enormously self-satisfying, is unmeasured and misdirected. If for any reason the State is unable to re-convict Powers for the double murder at issue here, later victims may pay the price for our extravagance.[78]

Although Scalia played a pivotal role in generating adverse reactions from Justices Kennedy, O'Connor and Souter, they naturally may have taken other factors into consideration when arriving at their decisions. As Epstein and Kobylka observed about the Supreme Court, decision making by justices "occurs in a matrix rife with complexity. A stunning and, in some cases, analytically numbing array of forces press contemporaneously on the justices as they work in controversial areas of law."[79]

Smith locates more specifically the practical impact of Scalia's personality on the Rehnquist Court's legal methodology.

> Scalia intentionally refuses to engage in diplomatic behaviour or strategic interactions in order to persuade his colleagues to join his opinions. His rigid, clear sighted view of constitutional law prevents him from considering the possibility of participating in the inevitable compromises that underlie majority opinions produced when justices engage in give and take interactions in order to form stable majorities.[80]

In conclusion, a consequence of Scalia's personality and that of his relationship with colleagues when it came to formulating judicial decisions was, according to Smith, the failure to bring Reagan and Bush appointed judges together to form a solid and united conservative front on the Supreme Court. Smith makes the following observation to this effect:

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78. *Powers v. Ohio*, 499 U.S. 400 (1991) (Scalia, J., dissenting), p. 1.

79. Lee Epstein and Joseph Kobyalka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill, N.C.: The University of North Carolina Press, 1992), p. 310.

80. Smith, *op. cit.*, p. 132.

> Justice Scalia's independent viewpoints and outspokenness adversely affected the efforts by political conservatives to use the Supreme Court to advance key policy interests and thereby reverse liberal judicial policies from the Warren and Burger Court eras ... [81]

Rosen concludes with an analysis of what qualities he believes prove to be the most valuable in influencing the legal methodology of one's judicial colleagues. In emphasising the importance of 'temperament', Rosen states:

> The brilliant academic is less appealing, over time, than the collegial pragmatist. The self centred loner is less effective than the convivial team player ... The narcissist wields judicial power less sure-handedly than the judge who shows personal as well as judicial humility. The loose cannons shoot themselves in the foot, while those who know when to hold their tongues appear more judicious. (On the Court, a justice often achieves more by saying less).[82]

Finally, Rosen provides the following assessment as to why a judge like Justice Scalia (or even judges like Justice Frankfurter or McReynolds) prove to be less effective in convincing their colleagues to join their approach in arriving at a decision than the more moderate consensus building justices. Rosen states:

> The ideological purists are marginalised, while those who understand when not to take each principle to its logical extreme are vindicated by history. Those who view cases in purely philosophical terms are less sure-footed that those who are aware of the cases' practical effects. Those with the common touch win broader support than those who live entirely in abstractions.[83]

Summary

This chapter provides two potential explanations as to why judges on the Supreme Court demonstrated a lesser degree of concordance with the philosophical expectations of their nominating President compared to their similarly appointed colleagues on the Fourth Circuit. The first potential explanation is that the three Reagan and Bush appointed Supreme Court judges with the lowest scores in this data set, Justices O'Connor, Kennedy and Souter, were the products of significant

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81 *Ibid.*, p. 77.

82 Rosen, *op. cit.*, p. 237.

83. *Ibid.*, p. 237.

political compromise at the time of their selection and confirmation. The second potential explanation provided focuses on the intra-court dynamics of the Supreme Court. This more contentious explanation is part of the strategic model of judicial behaviour and it is argued here that the personality and approach of Justice Scalia may have caused varying shifts in the judicial philosophies of Justices O'Connor, Kennedy and Souter thus leading to them adopting more moderate, consensual approaches in the cases that came before them. Consequently, there was a decline in the levels of concordance displayed by each of these three judges with regards to the conservative expectations of their nominating President.

Chapter Seven

CONCLUSION

The opportunity to appoint men and women to lifetime positions throughout the appellate levels of the federal judiciary is one of the most significant and enduring acts a President can make. However, it can be a difficult undertaking for a President to be assured of success when selecting judges who demonstrate concordance with his policy preferences. Within the general context of examining differing degrees of concordance between the executive and judicial branches of American government, this thesis seeks to specifically identify and explain why it was that in criminal justice cases the judges appointed by Presidents Reagan and Bush to the Fourth Circuit displayed greater concordance with the expectations placed on them than their similarly appointed colleagues on the Supreme Court.

While the study of the process of judicial nominations and its outcomes in America is now a broader, more significant area of inquiry due to the recognition of the enduring power and influence of such lifetime appointments throughout the country, this thesis has limited its focus to a comparison between the Fourth Circuit and the Supreme Court. Of the thirteen circuit courts in the federal judiciary, the Fourth Circuit was selected because of its widely acknowledged reputation as the country's leading conservative appellate court, particularly regarding criminal justice matters. Because of this court's willingness to adopt a strongly conservative legal methodology towards criminal justice, the Fourth Circuit provided a model of concordance with the policy preferences of Presidents Reagan and Bush. In many ways, but particularly with regards to criminal justice, the Fourth Circuit was very much a living template of the type of court and the sorts of judges Reagan and Bush

wanted to place throughout the appellate levels of the federal judiciary. The evidence provided in this thesis to show that Presidents Reagan and Bush had such expectations of the judiciary towards criminal justice matters were found in the Republican Party platforms of 1980, 1984 and 1988. Further evidence came from speeches that President Reagan and his colleagues made emphasising a hardline approach to 'law and order' and the importance of 'judicial restraint' as part of a judge's legal methodology. In elevating the Reagan and Bush appointed judges on the Fourth Circuit as the example these Presidents aspired to in their appointments, this thesis contrasts them with those judges these two Presidents appointed to the Supreme Court.

It was therefore necessary to measure just how far apart these two types of Reagan and Bush appointed judges were in their approach towards criminal justice cases. The analysis of 648 legal decisions found that on average the Fourth Circuit judges displayed concordance with their nominating President's expectations in over nine in every ten criminal justice cases. The Supreme Court judges displayed the same degree of concordance in just over seven in every ten criminal justice cases heard during this same period. More specifically, the results showed that every one of the Reagan and Bush appointed Fourth Circuit judges displayed a greater degree of concordance than even the most conservative of the Supreme Court appointments (i.e. Justices Scalia and Thomas).

The key questions, therefore, that were examined here relate to why a disparity existed between these two types of judges appointed by the same two Presidents regarding their approach to criminal justice cases. Why did these particular Supreme Court judges display less concordance with their nominating President's expectations

and conversely why did those Fourth Circuit judges show a much greater adherence? What do these findings tell us about the fragility of judicial selection standards?

Three potential explanations were provided here to answer these questions. The first explanation focused on the stronger concordance measurements found on the Fourth Circuit and was the subject of Chapter Five. It was explained here that the reason why greater concordance was shown amongst the Fourth Circuit appointments was primarily due to the power and influence of the Republican Senators, Strom Thurmond of South Carolina and Jesse Helms of North Carolina. It is clear that both of these men had strong and uncompromising attitudes towards criminal justice. In particular they were both committed advocates of capital punishment and stricter sentencing practices. As previously noted, Senator Thurmond had personally handed down four death sentences whilst briefly serving as a judge on a circuit within South Carolina. The broad judicial philosophy of these two men was also very conservative and this was ascertained by their harsh reactions to the judgements brought down in several leading criminal justice cases and their constant attacks on the Supreme Court, particularly under the leadership of Chief justice Earl Warren. Finally, the generally conservative political ideology of these two Senators, as measured by *Congressional Quarterly*, was also affirmed in this analysis. All of this was important to establish because it was necessary to understand the philosophy and values these two Senators were injecting into the selection and confirmation of candidates for the Fourth Circuit.

Several variables in particular strengthened the ability of these two Senators to influence this appointment process and ensure that hardline, 'law and order' type judges were selected to the circuit covering their respective States. One important

factor was that all of the eleven judges examined were appointed over a twelve year period by a President who belonged to the same political party as both of these two Senators. This supports the findings of Songer and Ginn and Kuersten and Songer who found that 'home state' Senators possessed considerable power over nominees when the President belonged to the same political party.[1] Other aspects to the power these two Senators brought to the process came from the 'blue slip' convention, Senator Thurmond's role as the chairman of the Senate Judiciary Committee when many of the Fourth Circuit appointments were made as well as Thurmond's strong personal relationships with some of the Fourth Circuit nominees examined here. The conclusion reached in this thesis regarding the Fourth Circuit is that the Reagan and Bush appointed judges displayed greater concordance with the expectations of their nominating Presidents on criminal justice matters because of the profound influence of Senator Strom Thurmond and Senator Jesse Helms in each judge's selection.

In explaining why there were lower levels of concordance on the Supreme Court it is necessary to keep in mind that the influence of two Senators is much closer at an appeals court level than when a nomination to the Supreme Court is made where all one hundred Senators suddenly have a potential direct interest. At the Appeals Court level, the usual Senatorial courtesies to 'home state' Senators make a significant difference. With a nomination to the Supreme Court no 'blue slip' conventions apply. The second and third explanations relating to the weaker concordance levels displayed on the Supreme Court were the subject of Chapter Six. The first of these

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1. Donald Songer and M. Humphries Ginn, "Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals," *Political Research Quarterly*, Vol. 55, No. 2 June 2002, p. 302 and Ashlyn Kuersten and Donald Songer, "Presidential Success through Appointments to the United States Court of Appeals," *American Politics Research* Vol 31. No 2, March 2003, p. 109.

two explanations argued that one of the most important reasons for this was because each of the appointments of Justices O'Connor, Kennedy and Souter were borne out of intense political compromise and concession rather than the specific desire to seek strong concordance with the President's policy preferences. To briefly reiterate, it was contended in this thesis that the nomination of Justice O'Connor was the product of an election promise made in 1980 to appoint the first woman to the Supreme Court in order to overcome an electoral rift emerging at the time between female voters and the Republican Party. The nomination of Justice Kennedy was a politically enforced compromise after the spectacular failure of two previous nominations, Justices Robert Bork and Douglas Ginsburg, for the same position. Finally, it was noted that the appointment of Justice Souter was also the product of a decision to sacrifice ideology for the sake of avoiding political damage from any potential controversy. By virtue of being a 'stealth candidate' with a judicial past no one could use against him, Souter was supposed to have been a lesson learnt from the bitterly divisive nomination of Robert Bork. That is, a conservative with the advantage of having no explicit or easily classifiable ideological record to draw partisan condemnation or opposition. As each of these three judges were from the outset the products of political compromise and expediency it may be more easily discernible as to why their judicial records have shown varying degrees of moderation and conciliation rather than a more devoted adherence to conservative judicial outcomes.

The final and possibly most contentious explanation given the secretive nature of the Supreme Court's inner workings focuses on the personality and character of Justice Antonin Scalia. It borrows from the work of Walter Murphy and the strategic voting behaviour of Supreme Court judges and also works by Christopher Smith and

Jeffrey Rosen aimed more specifically at the impact of Justice Scalia's personality and character.[2] This explanation argues that Scalia's attitude towards his colleagues, specifically Justices O'Connor, Kennedy and Souter, caused these justices to more readily consider modifying their positions in important legal decisions. Such reactions may have been a factor in undermining the expected dominance of conservative judicial philosophy associated with the preponderance of Republican appointments to the Supreme Court. The influence of intra court dynamics and the strategic behaviour of justices was a crucial aspect to this explanation. If Scalia's attitude and behaviour towards O'Connor, Kennedy and Souter did cause a more moderate shift or change their vote in key decisions it would not be the first time this had happened in American judicial history. The impact of personalities, like those of Justices McReynold's and Frankfurter for example, have previously been well documented.

As a consequence of these three potential explanations the essential implications from this thesis for the reliability of judicial selection standards requires firstly that a careful consideration of the power and influence of home-state Senators within each Circuit be taken into account. As can be observed in this thesis it is much easier to select very conservative judicial nominees to a Circuit Court if it is accompanied by the endorsement of a powerful, similarly conservative home-state Senator. The second implication requires an objective and detached appreciation of the political dynamics surrounding the original nomination process of a particular judicial nominee. As witnessed with the concordance data of Justices O'Connor, Kennedy

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2. See Walter Murphy, *Elements of Judicial Strategy* (Chicago: The University of Chicago Press, 1964), Christopher Smith, *Justice Antonin Scalia and the Supreme Court's Conservative Movement* (New York: Praeger, 1993), and .Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America* (New York: Henry Holt and Company, 2006).

and Souter in Chapter Four, one cannot expect conservative judges with hard line criminal justice views to act in concordance with a Republican President's policy preferences if that judge was, from the beginning, the product of political expediency or compromise. The final implication from this thesis is that in the end regardless of how confident one can be that the selection of a judicial nominee will exhibit the concordance expected, it can easily be undone by that judge's individual judicial temperament and the manner by which he or she adjusts to the thinking and personality of his or her peers.

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APPENDIX A
U.S. SUPREME COURT OPINIONS IN CRIMINAL JUSTICE CASES BY FIVE REAGAN AND BUSH APPOINTED JUDGES IN 1995

Justice Sandra Day O'Connor

Case: *Tome v United States*, 513 U.S. 150 (1995).
Date: Jan. 10, 1995.
Result: The admissibility of a statement after an alleged motive to fabricate arose was for the Court of Appeals to decide.
Verdict: Against the defendant
Score: 1

Case: *United States v Mezzanato*, 513 U.S. 196 (1995).
Date: Jan. 18, 1995.
Result: The admission of plea statements by an amphetamines dealer was enforceable.
Verdict: Against the defendant
Score: 1

Case: *Harris v Alabama*, 513 U.S. 504 (1995).
Date: Feb. 22, 1995.
Result: The State of Alabama did not need to define the weight a trial judge gave to an advisory jury verdict
Verdict: Against the defendant
Score: 1

Case: *Arizona v Evans*, 514 U.S. 1 (1995).
Date: Mar. 1, 1995.
Result: Any evidence seized through clerical error should not be suppressed.
Verdict: Against the defendant
Score: 1

Case: *United States v Lopez*, 514 U.S. 549 (1995).
Date: Apr. 26, 1995.
Result: The *Gun-Free School Zones Act* exceeded the *Commerce Clause* authority of Congress.
Verdict: For the defendant
Score: 0

Case: *Witte v United States*, 515 U.S. 389 (1995).
Date: Jun. 14, 1995.
Result: While pleading guilty to marijuana charges Witte's further prosecution on cocaine charges did not violate double jeopardy.
Verdict: Against the defendant
Score: 1

Case: *Libretti v United States*, 516 U.S. 29 (1995).
Date: Nov. 7, 1995.
Result: Forfeiture of assets could still occur without a factual basis.
Verdict: Against the defendant
Score: 1

Case: *Bailey v United States*, 516 U.S. 137 (1996).
Date: Dec. 6, 1995.
Result: The possession of a firearm did not necessarily mean the use of a firearm.
Verdict: For the defendant
Score: 0

Justice Antonin Scalia

Case: *Tome v United States*, 513 U.S. 150 (1995).
Date: Jan. 10, 1995.
Result: The admissibility of a statement after an alleged motive to fabricate arose was for the Court of Appeals to decide.
Verdict: Found for defendant (in part)
Score: 0.25

Case: *United States v Mezzanato*, 513 U.S. 196 (1995).
Date: Jan. 18, 1995.
Result: The admission of plea statements by an amphetamines dealer was enforceable.
Verdict: Against the defendant
Score: 1

Case: *Harris v Alabama*, 513 U.S. 504 (1995).
Date: Feb. 22, 1995.
Result: The State of Alabama did not need to define the weight a trial judge gave to an advisory jury verdict.
Verdict: Against the defendant
Score: 1

Case: *Arizona v Evans*, 514 U.S. 1 (1995).
Date: Mar. 1, 1995.
Result: Any evidence seized through clerical error should not be suppressed.
Verdict: Against the defendant
Score: 1

Case: *United States v Lopez*, 514 U.S. 549 (1995).
Date: Apr. 26, 1995.
Result: The *Gun-Free School Zones Act* exceeded the *Commerce Clause* authority of Congress.
Verdict: For the defendant
Score: 0

Case: *Witte v United States*, 515 U.S. 389 (1995).
Date: Jun. 14, 1995.
Result: While pleading guilty to marijuana charges Witte's further prosecution on cocaine charges did not violate double jeopardy.
Verdict: Against the defendant
Score: 1

Case: *Penry v Texas*, 515 U.S. 1304 (1995).
Date: Aug.28, 1995.
Result: An extension of time was refused regarding a 'good cause' standard for a death row inmate.
Verdict: Against the defendant
Score: 1

Case: *Rodriguez v Texas*, 515 U.S. 1307 (1995).
Date: Aug 31, 1995.
Result: An execution date did not interfere with the processing of a petition.
Verdict: Against the defendant
Score: 1

Case: *Libretti v United States*, 516 U.S. 29 (1995).
Date: Nov. 7, 1995.
Result: The forfeiture of assets could still occur without a factual basis.
Verdict: Against the defendant
Score: 1

Case: *Bailey v United States*, 516 U.S. 137 (1996).
Date: Dec. 6, 1995.
Result: The possession of a firearm did not necessarily mean the use of a firearm.
Verdict: For the defendant
Score: 0

Justice Anthony Kennedy

Case: *Tome v United States*, 513 U.S. 150 (1995).
Date: Jan. 10, 1995.
Result: The admissibility of a statement after an alleged motive to fabricate arose was for the Court of Appeals to decide.
Verdict: For the defendant
Score: 0

Case: *United States v Mezzanato*, 513 U.S. 196 (1995).
Date: Jan. 18, 1995.
Result: The admission of plea statements by an amphetamines dealer was enforceable.
Verdict: Against the defendant
Score: 1

Case: *Harris v Alabama*, 513 U.S. 504 (1995).
Date: Feb. 22, 1995.
Result: The State of Alabama did not need to define the weight a trial judge gave to an advisory jury verdict.
Verdict: Against the defendant
Score: 1
Case: *Arizona v Evans*, 514 U.S. 1 (1995).
Date: Mar. 1, 1995.
Result: Any evidence seized through clerical error should not be suppressed.
Verdict: Against the defendant
Score: 1

Case: *United States v Lopez*, 514 U.S. 549 (1995).
Date: Apr. 26, 1995.
Result: The *Gun-Free School Zones Act* exceeded the *Commerce Clause* authority of Congress.
Verdict: For the defendant
Score: 0

Case: *Witte v United States*, 515 U.S. 389 (1995).
Date: Jun. 14, 1995.
Result: While pleading guilty to marijuana charges, Witte's further prosecution on cocaine charges did not violate double jeopardy.
Verdict: Against the defendant
Score: 1

Case: *Libretti v United States*, 516 U.S. 29 (1995).
Date: Nov. 7, 1995.
Result: The forfeiture of assets could still occur without a factual basis.
Verdict: Against the defendant
Score: 1

Case: *Bailey v United States*, 516 U.S. 137 (1996).
Date: Dec. 6, 1995.
Result: The possession of a firearm did not necessarily mean the use of a firearm.
Verdict: For the defendant
Score: 0

Justice David Souter

Case: *Tome v United States*, 513 U.S. 150 (1995).
Date: Jan. 10, 1995.
Result: The admissibility of a statement after an alleged motive to fabricate arose was for the Court of Appeals to decide.
Verdict: For the defendant
Score: 0

Case: *United States v Mezzanato*, 513 U.S. 196 (1995).
Date: Jan. 18, 1995.
Result: The admission of plea statements by an amphetamines dealer was enforceable.
Verdict: For the defendant
Score: 0

Case: *Harris v Alabama*, 513 U.S. 504 (1995).
Date: Feb. 22, 1995.
Result: The State of Alabama did not need to define the weight a trial judge gave to an advisory jury verdict.
Verdict: Against the defendant
Score: 1

Case: *Arizona v Evans*, 514 U.S. 1 (1995).
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Verdict: Against the defendant
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Verdict: Against the defendant
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Date: Jun. 14, 1995.
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Verdict: Against the defendant
Score: 1

Case: *Libretti v United States*, 516 U.S. 29 (1995).
Date: Nov. 7, 1995.
Result: The forfeiture of assets could still occur without a factual basis.
Verdict: Against the defendant
Score: 1

Case: *Bailey v United States*, 516 U.S. 137 (1996).
Date: Dec. 6, 1995.
Result: The possession of a firearm did not necessarily mean the use of a firearm.
Verdict: For the defendant
Score: 0

Justice Clarence Thomas

Case: *Tome v United States*, 513 U.S. 150 (1995).
Date: Jan. 10, 1995.
Result: The admissibility of a statement after an alleged motive to fabricate arose was for the Court of Appeals to decide.
Verdict: Against the defendant
Score: 1

Case: *United States v Mezzanato*, 513 U.S. 196 (1995).
Date: Jan. 18, 1995.
Result: The admission of plea statements by an amphetamines dealer was enforceable.
Verdict: Against the defendant
Score: 1

Case: *United States v Lopez*, 514 U.S. 549 (1995).
Date: Apr. 26, 1995.
Result: The *Gun-Free School Zones Act* exceeded the *Commerce Clause* authority of Congress.
Verdict: For the defendant
Score: 0

Case: *Witte v United States*, 515 U.S. 389 (1995).
Date: Jun. 14, 1995.
Result: While pleading guilty to marijuana charges, Witte's further prosecution on cocaine charges did not violate double jeopardy.
Verdict: Against the defendant
Score: 1

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Date: Nov. 7, 1995.
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Verdict: Against the defendant
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Case: *Harris v Alabama*, 513 U.S. 504 (1995).
Date: Feb. 22, 1995.
Result: The State of Alabama did not need to define the weight a trial judge gave to an advisory jury verdict.
Verdict: Against the defendant
Score: 1

Case: *Bailey v United States*, 516 U.S. 137 (1996).
Date: Dec. 6, 1995.
Result: The possession of a firearm did not necessarily mean the use of a firearm.
Verdict: For the defendant
Score: 0

Case: *Arizona v Evans*, 514 U.S. 1 (1995).
Date: Mar. 1, 1995.
Result: Any evidence seized through clerical error should not be suppressed.
Verdict: Against the defendant
Score: 1

APPENDIX B
U.S. SUPREME COURT OPINIONS IN CRIMINAL JUSTICE CASES BY FIVE REAGAN AND BUSH APPOINTED JUDGES IN 1996

Justice Sandra Day O'Connor

Case: *Bowersox v Williams*, 517 U.S. 345 (1996).
Date: Apr. 9, 1996.
Result: A stay of execution can be vacated when an Appeals Court fails to provide reasons for granting the original stay.
Verdict: Against the defendant
Score: 1

Case: *Carlisle v United States*, 517 U.S. 416 (1996).
Date: Apr. 29, 1996.
Result: A District Court has no authority to grant a petitioner's motion for judgment of acquittal when it is filed one day outside the Rule 29(c) time limit.
Verdict: Against the defendant
Score: 1

Case: *Cooper v Oklahoma*, 517 U.S. 348 (1996).
Date: Apr. 16, 1996.
Result: Because the State of Oklahoma's procedural rule allows the State to try a defendant who is more likely than not incompetent, it violates due process.
Verdict: For the defendant
Score: 0

Case: *Degen v United States*, 517 U.S. 820 (1996).
Date: Jun. 10, 1996.
Result: A District Court may not strike a claimant's filings in a forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution.
Verdict: For the defendant
Score: 0

Justice Antonin Scalia

Case: *Bowersox v Williams*, 517 U.S. 345 (1996).
Date: Apr. 9, 1996.
Result: A stay of execution can be vacated when an Appeals Court fails to provide reasons for granting the original stay.
Verdict: Against the defendant
Score: 1

Case: *Carlisle v United States*, 517 U.S. 416 (1996).
Date: Apr. 29, 1996.
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Verdict: Against the defendant
Score: 1

Case: *Cooper v Oklahoma*, 517 U.S. 348 (1996).
Date: Apr. 16, 1996.
Result: Because the State of Oklahoma's procedural rule allows the State to try a defendant who is more likely than not incompetent, it violates due process.
Verdict: For the defendant
Score: 0

Case: *Degen v United States*, 517 U.S. 820 (1996).
Date: Jun. 10, 1996.
Result: A District Court may not strike a claimant's filings in a forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution.
Verdict: For the defendant
Score: 0

Justice Anthony Kennedy

Case: *Bowersox v Williams*, 517 U.S. 345 (1996).
Date: Apr. 9, 1996.
Result: A stay of execution can be vacated when an Appeals Court fails to provide reasons for granting the original stay.
Verdict: Against the defendant
Score: 1

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Verdict: For the defendant
Score: 0

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Verdict: For the defendant
Score: 0

Case: *Degen v United States*, 517 U.S. 820 (1996).
Date: Jun. 10, 1996.
Result: A District Court may not strike a claimant's filings in a forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution.
Verdict: For the defendant
Score: 0

Justice David Souter

Case: *Bowersox v Williams*, 517 U.S. 345 (1996).
Date: Apr. 9, 1996.
Result: A stay of execution can be vacated when an Appeals Court fails to provide reasons for granting the original stay.
Verdict: For the defendant
Score: 0

Case: *Carlisle v United States*, 517 U.S. 416 (1996).
Date: Apr. 29, 1996.
Result: A District Court has no authority to grant a petitioner's motion for judgment of acquittal filed one day outside the Rule 29(c) time limit.
Verdict: Against the defendant
Score: 1

Case: *Cooper v Oklahoma*, 517 U.S. 348 (1996).
Date: Apr. 16, 1996.
Result: Because the State of Oklahoma's procedural rule allows the State to try a defendant who is more likely than not incompetent, it violates due process.
Verdict: For the defendant
Score: 0

Case: *Degen v United States*, 517 U.S. 820 (1996).
Date: Jun. 10, 1996.
Result: A District Court may not strike a claimant's filings in a forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution.
Verdict: For the defendant
Score: 0

Justice Clarence Thomas

Case: *Bowersox v Williams*, 517 U.S. 345 (1996).
Date: Apr. 9, 1996.
Result: A stay of execution can be vacated when an Appeals Court fails to provide reasons for granting the original stay.
Verdict: Against the defendant
Score: 1

Case: *Carlisle v United States*, 517 U.S. 416 (1996).
Date: Apr. 29, 1996.
Result: A District Court has no authority to grant a petitioner's motion for judgment of acquittal when it is filed one day outside the Rule 29(c) time limit.
Verdict: Against the defendant
Score: 1

Case: *Cooper v Oklahoma*, 517 U.S. 348 (1996).
Date: Apr. 16, 1996.
Result: Because Oklahoma's procedural rule allows the State to try a defendant who is more likely than not incompetent, it violates due process
Verdict: For the defendant
Score: 0

Case: *Degen v United States*, 517 U.S. 820 (1996).
Date: Jun. 10, 1996.
Result: A District Court may not strike a claimant's filings in a forfeiture suit and grant summary judgment against him for failing to appear in a related criminal prosecution
Verdict: For the defendant
Score: 0

APPENDIX C
U.S. SUPREME COURT OPINIONS IN CRIMINAL JUSTICE CASES BY FIVE REAGAN AND BUSH APPOINTED JUDGES IN 1997

Justice Sandra Day O'Connor

Case: *Kansas v Hendricks*, 521 U.S. 346 (1997).
Date: Jun. 23, 1997.
Date: 23/6/97
Result: The definition of "mental abnormality" in the State of Kansas' *Sexually Violent Predator Act* satisfies "substantive" due process requirements.
Verdict: Found against defendant
Score: 1

Case: *Lambrix v Singletary, Secretary, Florida Department of Corrections*, 520 U.S. 518 (1997).
Date: May 12, 1997.
Result: A prisoner whose conviction became final before *Espinosa* is foreclosed from relying on that decision in a federal habeas proceeding.
Verdict: For the defendant
Score: 0

Case: *Lindh v Murphy, Warden*, 521 U.S. 320 (1997).
Date: Jun. 23, 1997.
Result: Since the new provisions of Chapter 153 in the *Antiterrorism and Effective Death Penalty Act* generally apply only to cases filed after the Act became effective, they do not apply to pending non-capital cases such as Lindh's.
Verdict: For the defendant
Score: 0

Case: *Lynce v Mathis, Superintendent, Tomoka Correctional Institution*, 519 U.S. 433 (1997).
Date: Feb. 19, 1997.
Result: A 1992 Florida statute cancelling provisional release credits for prisoners violates the Ex Post Facto Clause
Verdict: For the defendant
Score: 0

Case: *Kalina v Fletcher*, 522 U.S. 118 (1997).
Date: Dec. 10, 1997.
Result: A damages remedy can be created against a prosecutor for making false statements of fact in an affidavit supporting an application for an arrest warrant, since such conduct is not protected by the doctrine of absolute prosecutorial immunity
Verdict: For the defendant
Score: 0

Case: *Maryland v Wilson*, 519 U.S. 408 (1997).
Date: Feb. 19, 1997.
Result: An officer making a traffic stop may order passengers to get out of the car pending completion of the stop.
Verdict: Found against defendant
Score: 1

Case: *McMillian v Monroe County, Alabama*, 520 U.S. 781 (1997).
Date: Jun. 2, 1997.
Result: Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties.
Verdict: Found against defendant
Score: 1

Case: *O'Dell v Netherland, Warden*, 521 U.S. 151 (1997).
Date: Jun. 19, 1997.
Result: Simmons' rule was new and cannot, therefore, be used to disturb a petitioner's death sentence
Verdict: Found against defendant
Score: 1

Case: *Old Chief v United States*, 519 U.S. 172 (1997).
Date: Jan. 7, 1997.
Result: A District Court abuses its discretion under Rule 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection, when the name or nature of the prior offence raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.
Verdict: Found against defendant
Score: 1

Case: *Richards v Wisconsin*, 520 U.S. 385 (1997).
Date: Apr. 28, 1997.
Result: The Fourth Amendment does not permit a blanket exemption to the knock and announce requirement for felony drug investigations.
Verdict: Found against defendant
Score: 1

Case: *Richardson v McKnight*, 521 U.S. 399 (1997).
Date: Jun. 23, 1997.
Result: Prison guards employed by a private firm are not entitled to a qualified immunity from suit by prisoners charging a §1983 violation
Verdict: For the defendant
Score: 0

Case: *Young v Harper*, 520 U.S. 143 (1997).
Date: Mar. 18, 1997.
Result: The State of Oklahoma's Preparole Conditional Supervision Program, as it existed when respondent was released, was equivalent to parole as understood in *Morrissey*.
Verdict: For the defendant
Score: 0

Case: *Bracy v Gramley*, 520 U.S. 899 (1997).
Date: Jun. 9, 1997.
Result: The petitioner made a sufficient factual showing, under Habeas Corpus Rule 6(a), to establish "good cause" for discovery on his claim of actual judicial bias in his case.
Verdict: For the defendant
Score: 0

Justice Antonin Scalia

Case: *Kansas v Hendricks*, 521 U.S. 346 (1997).
Date: Jun. 23, 1997.
Result: The definition of "mental abnormality" in the State of Kansas' *Sexually Violent Predator Act* satisfies "substantive" due process requirements.
Verdict: Found against defendant
Score: 1

Case: *Lambrix v Singletary, Secretary, Florida Department of Corrections*, 520 U.S. 518 (1997).
Date: May 12, 1997.
Result: A prisoner whose conviction became final before *Espinosa* is foreclosed from relying on that decision in a federal habeas proceeding.
Verdict: Found against defendant
Score: 1

Case: *Lindh v Murphy, Warden*, 521 U.S. 320 (1997).
Date: Jun. 23, 1997.
Result: Since the new provisions of Chapter 153 in the *Antiterrorism and Effective Death Penalty Act* generally apply only to cases filed after the Act became effective, they do not apply to pending non-capital cases such as Lindh's.
Verdict: Found against defendant
Score: 1

Case: *Lynce v Mathis, Superintendent, Tomoka Correctional Institution*, 519 U.S. 433 (1997).
Date: Feb. 19, 1997.
Result: A 1992 Florida statute cancelling provisional release credits for prisoners violates the Ex Post Facto Clause.
Verdict: For the defendant
Score: 0

Case: *Kalina v Fletcher*, 522 U.S. 118 (1997).
Date: Dec. 10, 1997.
Result: A damages remedy can be created against a prosecutor for making false statements of fact in an affidavit supporting an application for an arrest warrant, since such conduct is not protected by the doctrine of absolute prosecutorial immunity.
Verdict: For the defendant
Score: 0

Case: *Maryland v Wilson*, 519 U.S. 408 (1997).
Date: Feb. 19, 1997.
Result: An officer making a traffic stop may order passengers to get out of the car pending completion of the stop.
Verdict: Found against defendant
Score: 1

Case: *McMillian v Monroe County, Alabama*, 520 U.S. 781 (1997).
Date: Jun. 2, 1997.
Result: Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties.
Verdict: Found against defendant
Score: 1

Case: *O'Dell v Netherland, Warden*, 521 U.S. 151 (1997).
Date: Jun. 19, 1997.
Result: Simmons' rule was new and cannot, therefore, be used to disturb a petitioner's death sentence
Verdict: Found against defendant
Score: 1

Case: *Old Chief v United States*, 519 U.S. 172 (1997).
Date: Jan. 7, 1997.
Result: A District Court abuses its discretion under Rule 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection, when the name or nature of the prior offence raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.
Verdict: Found against defendant
Score: 1

Case: *Richards v Wisconsin*, 520 U.S. 385 (1997).
Date: Apr. 28, 1997.
Result: The Fourth Amendment does not permit a blanket exemption to the knock and announce requirement for felony drug investigations.
Verdict: Found against defendant
Score: 1

Case: *Richardson v McKnight*, 521 U.S. 399 (1997).
Date: Jun. 23, 1997.
Result: Prison guards employed by a private firm are not entitled to a qualified immunity from suit by prisoners charging a §1983 violation
Verdict: Found against defendant
Score: 1

Case: *Young v Harper*, 520 U.S. 143 (1997).
Date: Mar. 18, 1997.
Result: The State of Oklahoma's Preparole Conditional Supervision Program, as it existed when respondent was released, was equivalent to parole as understood in *Morrissey*.
Verdict: For the defendant
Score: 0

Case: *Bracy v Gramley*, 520 U.S. 899 (1997).
Date: Jun. 9, 1997.
Result: The petitioner made a sufficient factual showing, under Habeas Corpus Rule 6(a), to establish "good cause" for discovery on his claim of actual judicial bias in his case.
Verdict: For the defendant
Score: 0

Justice Anthony Kennedy

Case: *Kansas v Hendricks*, 521 U.S. 346 (1997).
Date: Jun. 23, 1997.
Result: The definition of "mental abnormality" in the State of Kansas' *Sexually Violent Predator Act* satisfies "substantive" due process requirements.
Verdict: Found against defendant
Score: 1

Case: *Lambrix v Singletary, Secretary, Florida Department of Corrections*, 520 U.S. 518 (1997).
Date: May 12, 1997.
Result: A prisoner whose conviction became final before *Espinosa* is foreclosed from relying on that decision in a federal habeas proceeding.
Verdict: Found against defendant
Score: 1

Case: *Lindh v Murphy, Warden*, 521 U.S. 320 (1997).
Date: Jun. 23, 1997.
Result: Since the new provisions of Chapter 153 in the *Antiterrorism and Effective Death Penalty Act* generally apply only to cases filed after the Act became effective, they do not apply to pending non-capital cases such as Lindh's.
Verdict: Found against defendant
Score: 1

Case: *Lynce v Mathis, Superintendent, Tomoka Correctional Institution*, 519 U.S. 433 (1997).
Date: Feb. 19, 1997.
Result: A 1992 Florida statute cancelling provisional release credits for prisoners violates the Ex Post Facto Clause.
Verdict: For the defendant
Score: 0

Case: *Kalina v Fletcher*, 522 U.S. 118 (1997).
Date: Dec. 10, 1997.
Result: A damages remedy can be created against a prosecutor for making false statements of fact in an affidavit supporting an application for an arrest warrant, since such conduct is not protected by the doctrine of absolute prosecutorial immunity.
Verdict: For the defendant
Score: 0

Case: *Maryland v Wilson*, 519 U.S. 408 (1997).
Date: Feb. 19, 1997.
Result: An officer making a traffic stop may order passengers to get out of the car pending completion of the stop.
Verdict: For the defendant
Score: 0

Case: *McMillian v Monroe County, Alabama*, 520 U.S. 781 (1997).
Date: Jun. 2, 1997.
Result: Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties.
Verdict: Found against defendant
Score: 1

Case: *O'Dell v Netherland, Warden*, 521 U.S. 151 (1997).
Date: Jun. 19, 1997.
Result: Simmons' rule was new and cannot, therefore, be used to disturb a petitioner's death sentence.
Verdict: Found against defendant
Score: 1

Case: *Old Chief v United States*, 519 U.S. 172 (1997).
Date: Jan. 7, 1997.
Result: A District Court abuses its discretion under Rule 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection, when the name or nature of the prior offence raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.
Verdict: For the defendant
Score: 0

Case: *Richards v Wisconsin*, 520 U.S. 385 (1997).
Date: Apr. 28, 1997.
Result: The Fourth Amendment does not permit a blanket exemption to the knock and announce requirement for felony drug investigations.
Verdict: Found against defendant
Score: 1

Case: *Richardson v McKnight*, 521 U.S. 399 (1997).
Date: Jun. 23, 1997.
Result: Prison guards employed by a private firm are not entitled to a qualified immunity from suit by prisoners charging a §1983 violation
Verdict: Found against defendant
Score: 1

Case: *Young v Harper*, 520 U.S. 143 (1997).
Date: Mar. 18, 1997.
Result: The State of Oklahoma's Preparole Conditional Supervision Program, as it existed when respondent was released, was equivalent to parole as understood in *Morrissey*.
Verdict: For the defendant
Score: 0

Case: *Bracy v Gramley*, 520 U.S. 899 (1997).
Date: Jun. 9, 1997.
Result: The petitioner made a sufficient factual showing, under Habeas Corpus Rule 6(a), to establish "good cause" for discovery on his claim of actual judicial bias in his case.
Verdict: For the defendant
Score: 0

Justice David Souter

Case: *Kansas v Hendricks*, 521 U.S. 346 (1997).
Date: Jun. 23, 1997.
Result: The definition of "mental abnormality" in the State of Kansas' *Sexually Violent Predator Act* satisfies "substantive" due process requirements.
Verdict: For the defendant
Score: 0

Case: *Lambrix v Singletary, Secretary, Florida Department of Corrections*, 520 U.S. 518 (1997).
Date: May 12, 1997.
Result: A prisoner whose conviction became final before *Espinosa* is foreclosed from relying on that decision in a federal habeas proceeding.
Verdict: Found against defendant
Score: 1

Case: *Lindh v Murphy, Warden*, 521 U.S. 320 (1997).
Date: Jun. 23, 1997.
Result: Since the new provisions of Chapter 153 in the *Antiterrorism and Effective Death Penalty Act* generally apply only to cases filed after the Act became effective, they do not apply to pending non-capital cases such as Lindh's.
Verdict: For the defendant
Score: 0

Case: *Lynce v Mathis, Superintendent, Tomoka Correctional Institution*, 519 U.S. 433 (1997).
Date: Feb. 19, 1997.
Result: A 1992 Florida statute cancelling provisional release credits for prisoners violates the Ex Post Facto Clause.
Verdict: For the defendant
Score: 0

Case: *Kalina v Fletcher*, 522 U.S. 118 (1997).
Date: Dec. 10, 1997.
Result: A damages remedy can be created against a prosecutor for making false statements of fact in an affidavit supporting an application for an arrest warrant, since such conduct is not protected by the doctrine of absolute prosecutorial immunity.
Verdict: For the defendant
Score: 0

Case: *Maryland v Wilson*, 519 U.S. 408 (1997).
Date: Feb. 19, 1997.
Result: An officer making a traffic stop may order passengers to get out of the car pending completion of the stop.
Verdict: Found against defendant
Score: 1

Case: *McMillian v Monroe County, Alabama*, 520 U.S. 781 (1997).
Date: Jun. 2, 1997.
Result: Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties.
Verdict: For the defendant
Score: 0

Case: *O'Dell v Netherland, Warden*, 521 U.S. 151 (1997).
Date: Jun. 19, 1997.
Result: Simmons' rule was new and cannot, therefore, be used to disturb a petitioner's death sentence.
Verdict: For the defendant
Score: 0

Case: *Old Chief v United States*, 519 U.S. 172 (1997).
Date: Jan. 7, 1997.
Result: A District Court abuses its discretion under Rule 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection, when the name or nature of the prior offence raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.
Verdict: For the defendant
Score: 0

Case: *Richards v Wisconsin*, 520 U.S. 385 (1997).
Date: Apr. 28, 1997.
Result: The Fourth Amendment does not permit a blanket exemption to the knock and announce requirement for felony drug investigations.
Verdict: Found against defendant
Score: 1

Case: *Richardson v McKnight*, 521 U.S. 399 (1997).
Date: Jun. 23, 1997.
Result: Prison guards employed by a private firm are not entitled to a qualified immunity from suit by prisoners charging a §1983 violation.
Verdict: For the defendant
Score: 0

Case: *Young v Harper*, 520 U.S. 143 (1997).
Date: Mar. 18, 1997.
Result: The State of Oklahoma's Preparole Conditional Supervision Program, as it existed when respondent was released, was equivalent to parole as understood in *Morrissey*.
Verdict: For the defendant
Score: 0

Case: *Bracy v Gramley*, 520 U.S. 899 (1997).
Date: Jun. 9, 1997.
Result: The petitioner made a sufficient factual showing, under Habeas Corpus Rule 6(a), to establish "good cause" for discovery on his claim of actual judicial bias in his case.
Verdict: For the defendant
Score: 0

Justice Clarence Thomas

Case: *Kansas v Hendricks*, 521 U.S. 346 (1997).
Date: Jun. 23, 1997.
Result: The definition of "mental abnormality" in the State of Kansas' *Sexually Violent Predator Act* satisfies "substantive" due process requirements.
Verdict: Found against defendant
Score: 1

Case: *Lambrix v Singletary, Secretary, Florida Department of Corrections*, 520 U.S. 518 (1997).
Date: May 12, 1997.
Result: A prisoner whose conviction became final before *Espinosa* is foreclosed from relying on that decision in a federal habeas proceeding.
Verdict: Found against defendant
Score: 1

Case: *Lindh v Murphy, Warden*, 521 U.S. 320 (1997).
Date: Jun. 23, 1997.
Result: Since the new provisions of Chapter 153 in the *Antiterrorism and Effective Death Penalty Act* generally apply only to cases filed after the Act became effective, they do not apply to pending non-capital cases such as Lindh's.
Verdict: Found against defendant
Score: 1

Case: *Lynce v Mathis, Superintendent, Tomoka Correctional Institution*, 519 U.S. 433 (1997).
Date: Feb. 19, 1997.
Result: A 1992 Florida statute cancelling provisional release credits for prisoners violates the Ex Post Facto Clause.
Verdict: For the defendant
Score: 0

Case: *Kalina v Fletcher*, 522 U.S. 118 (1997).
Date: Dec. 10, 1997.
Result: A damages remedy can be created against a prosecutor for making false statements of fact in an affidavit supporting an application for an arrest warrant, since such conduct is not protected by the doctrine of absolute prosecutorial immunity.
Verdict: For the defendant
Score: 0

Case: *Maryland v Wilson*, 519 U.S. 408 (1997).
Date: Feb. 19, 1997.
Result: An officer making a traffic stop may order passengers to get out of the car pending completion of the stop.
Verdict: Found against defendant
Score: 1

Case: *McMillian v Monroe County, Alabama*, 520 U.S. 781 (1997).
Date: Jun. 2, 1997.
Result: Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties.
Verdict: Found against defendant
Score: 1

Case: *O'Dell v Netherland, Warden*, 521 U.S. 151 (1997).
Date: Jun. 19, 1997.
Result: Simmons' rule was new and cannot, therefore, be used to disturb a petitioner's death sentence.
Verdict: Found against defendant
Score: 1

Case: *Old Chief v United States*, 519 U.S. 172 (1997).
Date: Jan. 7, 1997.
Result: A District Court abuses its discretion under Rule 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection, when the name or nature of the prior offence raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.
Verdict: Found against defendant
Score: 1

Case: *Richards v Wisconsin*, 520 U.S. 385 (1997).
Date: Apr. 28, 1997.
Result: The Fourth Amendment does not permit a blanket exception to the knock and announce requirement for felony drug investigations.
Verdict: Found against defendant
Score: 1

Case: *Richardson v McKnight*, 521 U.S. 399 (1997).
Date: Jun. 23, 1997.
Result: Prison guards employed by a private firm are not entitled to a qualified immunity from suit by prisoners charging a §1983 violation.
Verdict: Found against defendant
Score: 1

Case: *Young v Harper*, 520 U.S. 143 (1997).
Date: Mar. 18, 1997.
Result: The State of Oklahoma's Preparole Conditional Supervision Program, as it existed when respondent was released, was equivalent to parole as understood in *Morrissey*.
Verdict: For the defendant
Score: 0

Case: *Bracy v Gramley*, 520 U.S. 899 (1997).
Date: Jun. 9, 1997.
Result: The petitioner made a sufficient factual showing, under Habeas Corpus Rule 6(a), to establish "good cause" for discovery on his claim of actual judicial bias in his case.
Verdict: For the defendant
Score: 0

APPENDIX D
U.S. SUPREME COURT OPINIONS IN CRIMINAL JUSTICE CASES BY FIVE REAGAN AND BUSH APPOINTED JUDGES IN 1998

Justice Sandra Day O'Connor

Case: *Stewart v Martinez-Villareal*, 523 U.S. 637 (1998).
Date: May 18, 1998.
Result: For the same reasons that the Supreme Court found it had jurisdiction, it also found that the Ninth Circuit correctly decided the respondent was entitled to a hearing on the merits of his *Ford* claim in the District Court.
Verdict: For the defendant
Score: 0

Case: *Calderon v Thompson*, 523 U.S. 538 (1998).
Date: Apr. 29, 1998.
Result: The Ninth Circuit's recall of its mandate in a capital case was a grave abuse of its discretion.
Verdict: Found against defendant
Score: 1

Case: *Bousley v United States*, 523 U.S. 614 (1998).
Date: May 18, 1998.
Result: Although the petitioner's claim was procedurally defaulted, he was entitled to a hearing on its merits if he made the necessary showing to relieve the default.
Verdict: For the defendant
Score: 0

Case: *Campbell v Louisiana*, 523 U.S. 392 (1998).
Date: Apr. 21, 1998.
Result: A white criminal defendant had the requisite standing to raise equal protection and due process objections to discrimination against black persons in the selection of grand jurors.
Verdict: For the defendant
Score: 0

Case: *Gray v Maryland*, 523 U.S. 185 (1998).
Date: Mar. 9, 1998.
Result: The confession here at issue, which substituted blanks and the word "delete" for Gray's proper name, fell within the class of statements to which Bruton's protective rule applied.
Verdict: For the defendant
Score: 0

Case: *Hohn v United States*, 524 U.S. 236 (1998).
Date: Jun. 15 1998.
Result: Certiorari was granted to determine whether the Supreme Court had jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability. The Court held that it does have jurisdiction.
Verdict: Found against defendant
Score: 1

Case: *Hopkins v Reeves*, 524 U.S. 88 (1998).
Date: Jun. 8, 1998.
Result: *Beck* did not require State trial courts to instruct juries on offences that were not lesser included offences of the charged crime under State law.
Verdict: Found against defendant
Score: 1

Case: *Knowles v Iowa*, 525 U.S. 113 (1998).
Date: Dec. 8, 1998.
Result: The search at issue, authorised as it was by State law, nonetheless violated the Fourth Amendment.
Verdict: For the defendant
Score: 0

Case: *Lewis v United States*, 523 U.S. 155 (1998).
Date: Mar. 9, 1998.
Result: Because the *Federal Assimilative Crimes Act* did not make the State of Louisiana's first-degree murder statute part of federal law, the federal second-degree murder statute, §1111, governed the crime at issue.
Verdict: For the defendant
Score: 0

Justice Antonin Scalia

Case: *Stewart v Martinez-Villareal*, 523 U.S. 637 (1998).
Date: May 18, 1998.
Result: For the same reasons that the Supreme Court found it had jurisdiction, it also found that the Ninth Circuit correctly decided the respondent was entitled to a hearing on the merits of his *Ford* claim in the District Court.
Verdict: Found against defendant
Score: 1

Case: *Calderon v Thompson*, 523 U.S. 538 (1998).
Date: Apr. 29, 1998.
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Verdict: Found against defendant
Score: 1

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Date: May 18, 1998.
Result: Although the petitioner's claim was procedurally defaulted, he was entitled to a hearing on its merits if he made the necessary showing to relieve the default.
Verdict: Found against defendant
Score: 1

Case: *Campbell v Louisiana*, 523 U.S. 392 (1998).
Date: Apr. 21, 1998.
Result: A white criminal defendant had the requisite standing to raise equal protection and due process objections to discrimination against black persons in the selection of grand jurors.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *Gray v Maryland*, 523 U.S. 185 (1998).
Date: Mar. 9, 1998.
Result: The confession here at issue, which substituted blanks and the word "delete" for Gray's proper name, fell within the class of statements to which Bruton's protective rule applied.
Verdict: Found against defendant
Score: 1

Case: *Hohn v United States*, 524 U.S. 236 (1998).
Date: Jun. 15 1998.
Result: Certiorari was granted to determine whether the Supreme Court had jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability. The Court held that it does have jurisdiction.
Verdict: Found against defendant
Score: 1

Case: *Hopkins v Reeves*, 524 U.S. 88 (1998).
Date: Jun. 8, 1998.
Result: *Beck* did not require State trial courts to instruct juries on offences that were not lesser included offences of the charged crime under State law.
Verdict: Found against defendant
Score: 1

Case: *Knowles v Iowa*, 525 U.S. 113 (1998).
Date: Dec. 8, 1998.
Result: The search at issue, authorised as it was by State law, nonetheless violated the Fourth Amendment.
Verdict: For the defendant
Score: 0

Case: *Lewis v United States*, 523 U.S. 155 (1998).
Date: Mar. 9, 1998.
Result: Because the *Federal Assimilative Crimes Act* did not make the State of Louisiana's first-degree murder statute part of federal law, the federal second-degree murder statute, §1111, governed the crime at issue.
Verdict: For the defendant
Score: 0

Justice Anthony Kennedy

Case: *Stewart v Martinez-Villareal*, 523 U.S. 637 (1998).
Date: May 18, 1998.
Result: For the same reasons that the Supreme Court found it had jurisdiction, it also found that the Ninth Circuit correctly decided the respondent was entitled to a hearing on the merits of his *Ford* claim in the District Court.
Verdict: For the defendant
Score: 0

Case: *Calderon v Thompson*, 523 U.S. 538 (1998).
Date: Apr. 29, 1998.
Result: The Ninth Circuit's recall of its mandate in a capital case was a grave abuse of its discretion.
Verdict: Found against defendant
Score: 1

Case: *Bousley v United States*, 523 U.S. 614 (1998).
Date: May 18, 1998.
Result: Although the petitioner's claim was procedurally defaulted, he was entitled to a hearing on its merits if he made the necessary showing to relieve the default.
Verdict: For the defendant
Score: 0

Case: *Campbell v Louisiana*, 523 U.S. 392 (1998).
Date: Apr. 21, 1998.
Result: A white criminal defendant had the requisite standing to raise equal protection and due process objections to discrimination against black persons in the selection of grand jurors.
Verdict: For the defendant
Score: 0

Case: *Gray v Maryland*, 523 U.S. 185 (1998).
Date: Mar. 9, 1998.
Result: The confession here at issue, which substituted blanks and the word "delete" for Gray's proper name, fell within the class of statements to which Bruton's protective rule applied.
Verdict: Found against defendant
Score: 1

Case: *Hohn v United States*, 524 U.S. 236 (1998).
Date: Jun. 15 1998.
Result: Certiorari was granted to determine whether the Supreme Court had jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability. The Court held that it does have jurisdiction.
Verdict: For the defendant
Score: 0

Case: *Hopkins v Reeves*, 524 U.S. 88 (1998).
Date: Jun. 8, 1998.
Result: *Beck* did not require State trial courts to instruct juries on offences that were not lesser included offences of the charged crime under State law.
Verdict: Found against defendant
Score: 1

Case: *Knowles v Iowa*, 525 U.S. 113 (1998).
Date: Dec. 8, 1998.
Result: The search at issue, authorised as it was by State law, nonetheless violated the Fourth Amendment.
Verdict: For the defendant
Score: 0

Case: *Lewis v United States*, 523 U.S. 155 (1998).
Date: Mar. 9, 1998.
Result: Because the *Federal Assimilative Crimes Act* did not make the State of Louisiana's first-degree murder statute part of federal law, the federal second-degree murder statute, §1111, governed the crime at issue.
Verdict: Found against defendant
Score: 1

Justice David Souter

Case: *Stewart v Martinez-Villareal*, 523 U.S. 637 (1998).
Date: May 18, 1998.
Result: For the same reasons that the Supreme Court found it had jurisdiction, it also found that the Ninth Circuit correctly decided the respondent was entitled to a hearing on the merits of his *Ford* claim in the District Court.
Verdict: For the defendant
Score: 0

Case: *Calderon v Thompson*, 523 U.S. 538 (1998).
Date: Apr. 29, 1998.
Result: The Ninth Circuit's recall of its mandate in a capital case was a grave abuse of its discretion.
Verdict: For the defendant
Score: 0

Case: *Bousley v United States*, 523 U.S. 614 (1998).
Date: May 18, 1998.
Result: Although the petitioner's claim was procedurally defaulted, he was entitled to a hearing on its merits if he made the necessary showing to relieve the default.
Verdict: For the defendant
Score: 0

Case: *Campbell v Louisiana*, 523 U.S. 392 (1998).
Date: Apr. 21, 1998.
Result: A white criminal defendant had the requisite standing to raise equal protection and due process objections to discrimination against black persons in the selection of grand jurors.
Verdict: For the defendant
Score: 0

Case: *Gray v Maryland*, 523 U.S. 185 (1998).
Date: Mar. 9, 1998.
Result: The confession here at issue, which substituted blanks and the word "delete" for Gray's proper name, fell within the class of statements to which Bruton's protective rule applied.
Verdict: For the defendant
Score: 0

Case: *Hohn v United States*, 524 U.S. 236 (1998).
Date: Jun. 15 1998.
Result: Certiorari was granted to determine whether the Supreme Court had jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability. The Court held that it does have jurisdiction.
Verdict: For the defendant
Score: 0

Case: *Hopkins v Reeves*, 524 U.S. 88 (1998).
Date: Jun. 8, 1998.
Result: *Beck* did not require State trial courts to instruct juries on offences that were not lesser included offences of the charged crime under State law.
Verdict: Found against defendant
Score: 1

Case: *Knowles v Iowa*, 525 U.S. 113 (1998).
Date: Dec. 8, 1998.
Result: The search at issue, authorised as it was by State law, nonetheless violated the Fourth Amendment.
Verdict: For the defendant
Score: 0

Case: *Lewis v United States*, 523 U.S. 155 (1998).
Date: Mar. 9, 1998.
Result: Because the *Federal Assimilative Crimes Act* did not make the State of Louisiana's first-degree murder statute part of federal law, the federal second-degree murder statute, §1111, governed the crime at issue.
Verdict: For the defendant
Score: 0

Justice Clarence Thomas

Case: *Stewart v Martinez-Villareal*, 523 U.S. 637 (1998).
Date: May 18, 1998.
Result: For the same reasons that the Supreme Court found it had jurisdiction, it also found that the Ninth Circuit correctly decided the respondent was entitled to a hearing on the merits of his *Ford* claim in the District Court.
Verdict: Found against defendant
Score: 1

Case: *Calderon v Thompson*, 523 U.S. 538 (1998).
Date: Apr. 29, 1998.
Result: The Ninth Circuit's recall of its mandate in a capital case was a grave abuse of its discretion.
Verdict: Found against defendant
Score: 1

Case: *Bousley v United States*, 523 U.S. 614 (1998).
Date: May 18, 1998.
Result: Although the petitioner's claim was procedurally defaulted, he was entitled to a hearing on its merits if he made the necessary showing to relieve the default.
Verdict: Found against defendant
Score: 1

Case: *Campbell v Louisiana*, 523 U.S. 392 (1998).
Date: Apr. 21, 1998.
Result: A white criminal defendant had the requisite standing to raise equal protection and due process objections to discrimination against black persons in the selection of grand jurors.
Verdict: Found against defendant (in part)
Score: 0.75

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Date: Mar. 9, 1998.
Result: The confession here at issue, which substituted blanks and the word "delete" for Gray's proper name, fell within the class of statements to which Bruton's protective rule applied.
Verdict: Found against defendant
Score: 1

Case: *Hohn v United States*, 524 U.S. 236 (1998).
Date: Jun. 15 1998.
Result: Certiorari was granted to determine whether the Supreme Court had jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability. The Court held that it does have jurisdiction.
Verdict: Found against defendant
Score: 1

Case: *Hopkins v Reeves*, 524 U.S. 88 (1998).
Date: Jun. 8, 1998.
Result: *Beck* did not require State trial courts to instruct juries on offences that were not lesser included offences of the charged crime under State law.
Verdict: Found against defendant
Score: 1

Case: *Knowles v Iowa*, 525 U.S. 113 (1998).
Date: Dec. 8, 1998.
Result: The search at issue, authorised as it was by State law, nonetheless violated the Fourth Amendment.
Verdict: For the defendant
Score: 0

Case: *Lewis v United States*, 523 U.S. 155 (1998).
Date: Mar. 9, 1998.
Result: Because the *Federal Assimilative Crimes Act* did not make the State of Louisiana's first-degree murder statute part of federal law, the federal second-degree murder statute, §1111, governed the crime at issue.
Verdict: For the defendant
Score: 0

APPENDIX E
U.S. SUPREME COURT OPINIONS IN CRIMINAL JUSTICE CASES BY FIVE REAGAN AND BUSH APPOINTED JUDGES IN 1999

Justice Sandra Day O'Connor

Case: *City of West Covina v Perkins*, 525 U.S. 234 (1999).
Date: Jan. 13, 1999.
Result: When police seized property for a criminal investigation, the Due Process Clause did not require them to provide the owner with notice of state-law remedies for the property's return.
Verdict: Against the defendant
Score: 1

Case: *Holloway v United States*, 526 U.S. 1 (1999).
Date: Mar. 2, 1999.
Result: Section 2119's "with the intent to cause death or serious bodily harm" phrase does not require the Government to prove that the defendant had an unconditional intent to kill or harm in all events, but merely requires proof of an intent to kill or harm if necessary to effect a carjacking.
Verdict: For the defendant
Score: 0

Case: *Peguero v United States*, 526 U.S. 23 (1999).
Date: Mar. 2, 1999.
Result: A District Court's failure to advise a defendant of his right to appeal did not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission.
Verdict: Against the defendant
Score: 1

Case: *Jones v United States*, 526 U.S. 227 (1999).
Date: Mar. 24, 1999.
Result: Section 2119 established that three separate offences by the specification of elements, each of which had to be charged by indictment, proved beyond a reasonable doubt, and submitted to a jury for its verdict.
Verdict: For the defendant
Score: 0

Case: *United States v Rodriguez-Moreno*, 526 U.S. 275 (1999).
Date: Mar. 30, 1999.
Result: A venue in a prosecution for using or carrying a firearm "during and in relation to any crime of violence" in violation of §924(c)(1) was proper in any district where the crime of violence was committed.
Verdict: Against the defendant
Score: 1

Case: *Mitchell v United States*, 526 U.S. 314 (1999).
Date: Apr. 5, 1999.
Result: Within the federal criminal system, a guilty plea did not waive the self-incrimination privilege at sentencing.
Verdict: Against the defendant
Score: 1

Case: *Conn v Gabbert*, 526 U.S. 286 (1999).
Date: Apr. 5, 1999.
Result: A prosecutor did not violate an Attorney's Fourteenth Amendment right to practice his profession by executing a search warrant while the Attorney's client was testifying before a grand jury.
Verdict: Against the defendant
Score: 1

Case: *Wyoming v Houghton*, 526 U.S. 295 (1999).
Date: Apr. 5, 1999.
Result: Police officers with probable cause to search a car, as in this case, can inspect passengers' belongings found in the car that are capable of concealing the object of the search.
Verdict: Against the defendant
Score: 1

Case: *Florida v White*, 526 U.S. 559 (1999).
Date: May 17, 1999.
Result: The Fourth Amendment did not require the police to obtain a warrant before they seized an automobile from a public place when they had probable cause to believe that it was forfeitable contraband.
Verdict: Against the defendant
Score: 1

Case: *Wilson v Layne*, 526 U.S. 603 (1999).
Date: May 24, 1999.
Result: A media "ride-along" in a home violated the Fourth Amendment, but because the state of the law was not clearly established at the time the entry in this case took place, respondent officers were entitled to qualified immunity.
Verdict: Against the defendant
Score: 1

Case: *Richardson v United States*, 526 U.S. 813 (1999).
Date: Jun. 1, 1999.
Result: A jury in a §848 case must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series."
Verdict: For the defendant
Score: 0

Case: *O'Sullivan v Boerckel*, 526 U.S. 838 (1999).
Date: Jun. 7, 1999.
Result: In order to satisfy the exhaustion requirement, a State prisoner had to present his claims to a State supreme court in a petition for discretionary review when that review is part of the State's ordinary appellate review procedure.
Verdict: Against the defendant
Score: 1

Case: *Strickler v Greene*, 527 U.S. 263 (1999).
Date: Jun. 17, 1999.
Result: Although the petitioner demonstrated cause for failing to raise a *Brady* claim, the State of Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to the petitioner.
Verdict: Against the defendant
Score: 1

Case: *Jones, Louis v United States*, 527 U.S. 373 (1999).
Date: Jun. 21, 1999.
Result: The Eighth Amendment did not require a jury be instructed as to the consequences of their failure to agree.
Verdict: Against the defendant
Score: 1

Justice Antonin Scalia

Case: *City of West Covina v Perkins*, 525 U.S. 234 (1999).
Date: Jan. 13, 1999.
Result: When police seized property for a criminal investigation, the Due Process Clause did not require them to provide the owner with notice of state-law remedies for the property's return.
Verdict: Against the defendant
Score: 1

Case: *Holloway v United States*, 526 U.S. 1 (1999).
Date: Mar. 2, 1999.
Result: Section 2119's "with the intent to cause death or serious bodily harm" phrase does not require the Government to prove that the defendant had an unconditional intent to kill or harm in all events, but merely requires proof of an intent to kill or harm if necessary to effect a car-jacking.
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Verdict: Against the defendant
Score: 1

Case: *United States v Rodriguez-Moreno*, 526 U.S. 275 (1999).
Date: Mar. 30, 1999.
Result: A venue in a prosecution for using or carrying a firearm "during and in relation to any crime of violence" in violation of §924(c)(1) was proper in any district where the crime of violence was committed.
Verdict: For the defendant
Score: 0

Case: *Conn v Gabbert*, 526 U.S. 286 (1999).
Date: Apr. 5, 1999.
Result: A prosecutor did not violate an Attorney's Fourteenth Amendment right to practice his profession by executing a search warrant while the Attorney's client was testifying before a grand jury.
Verdict: Against the defendant
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Case: *Florida v White*, 526 U.S. 559 (1999).
Date: May 17, 1999.
Result: The Fourth Amendment did not require the police to obtain a warrant before they seized an automobile from a public place when they had probable cause to believe that it was forfeitable contraband.
Verdict: Against the defendant
Score: 1

Case: *Wilson v Layne*, 526 U.S. 603 (1999).
Date: May 24, 1999.
Result: A media "ride-along" in a home violated the Fourth Amendment, but because the state of the law was not clearly established at the time the entry in this case took place, respondent officers were entitled to qualified immunity.
Verdict: Against the defendant
Score: 1

Case: *Richardson v United States*, 526 U.S. 813 (1999).
Date: Jun. 1, 1999.
Result: A jury in a §848 case must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series."
Verdict: For the defendant
Score: 0

Case: *O'Sullivan v Boerckel*, 526 U.S. 838 (1999).
Date: Jun. 7, 1999.
Result: In order to satisfy the exhaustion requirement, a State prisoner had to present his claims to a State supreme court in a petition for discretionary review when that review is part of the State's ordinary appellate review procedure.
Verdict: Against the defendant
Score: 1

Case: *Strickler v Greene*, 527 U.S. 263 (1999).
Date: Jun. 17, 1999.
Result: Although the petitioner demonstrated cause for failing to raise a *Brady* claim, the State of Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to the petitioner.
Verdict: Against the defendant
Score: 1

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Date: Jun. 21,1999.
Result: The Eighth Amendment did not require a jury be instructed as to the consequences of their failure to agree.
Verdict: Against the defendant
Score: 1

Justice Anthony Kennedy

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Date: Apr. 5, 1999.
Result: A prosecutor did not violate an Attorney's Fourteenth Amendment right to practice his profession by executing a search warrant while the Attorney" client was testifying before a grand jury.
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Date: Mar. 2, 1999.
Result: Section 2119's "with the intent to cause death or serious bodily harm" phrase does not require the Government to prove that the defendant had an unconditional intent to kill or harm in all events, but merely requires proof of an intent to kill or harm if necessary to effect a car-jacking.
Verdict: For the defendant
Score: 0

Case: *Jones, Louis v United States*, 527 U.S. 373 (1999).
Date: Jun. 21,1999.
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Verdict: Against the defendant
Score: 1

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Date: Mar. 24, 1999.
Result: Section 2119 established that three separate offences by the specification of elements, each of which had to be charged by indictment, proved beyond a reasonable doubt, and submitted to a jury for its verdict.
Verdict: For the defendant
Score: 0

Case: *Mitchell v United States*, 526 U.S. 314 (1999).
Date: Apr. 5, 1999.
Result: Within the federal criminal system, a guilty plea did not waive the self-incrimination privilege at sentencing.
Verdict: For the defendant
Score: 0

Case: *O'Sullivan v Boerckel*, 526 U.S. 838 (1999).
Date: Jun. 7, 1999.
Result: In order to satisfy the exhaustion requirement, a State prisoner had to present his claims to a State supreme court in a petition for discretionary review when that review is part of the State's ordinary appellate review procedure.
Verdict: Against the defendant
Score: 1

Case: *Peguero v United States*, 526 U.S. 23 (1999).
Date: Mar. 2, 1999.
Result: A District Court's failure to advise a defendant of his right to appeal did not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission.
Verdict: Against the defendant
Score: 1

Case: *Richardson v United States*, 526 U.S. 813 (1999).
Date: Jun. 1, 1999.
Result: A jury in a §848 case must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series."
Verdict: Against the defendant
Score: 1

Case: *Strickler v Greene*, 527 U.S. 263 (1999).
Date: Jun. 17, 1999.
Result: Although the petitioner demonstrated cause for failing to raise a *Brady* claim, the State of Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to the petitioner.
Verdict: Against the defendant (in part)
Score: 0.75

Case: *United States v Rodriguez-Moreno*, 526 U.S. 275 (1999).
Date: Mar. 30, 1999.
Result: A venue in a prosecution for using or carrying a firearm "during and in relation to any crime of violence" in violation of §924(c)(1) was proper in any district where the crime of violence was committed.
Verdict: Against the defendant
Score: 1

Case: *City of West Covina v Perkins*, 525 U.S. 234 (1999).
Date: Jan. 13, 1999.
Result: When police seized property for a criminal investigation, the Due Process Clause did not require them to provide the owner with notice of state-law remedies for the property's return.
Verdict: Against the defendant
Score: 1

Case: *Wilson v Layne*, 526 U.S. 603 (1999).
Date: May 24, 1999.
Result: A media "ride-along" in a home violated the Fourth Amendment, but because the state of the law was not clearly established at the time the entry in this case took place, respondent officers were entitled to qualified immunity.
Verdict: Against the defendant
Score: 1

Case: *Wyoming v Houghton*, 526 U.S. 295 (1999).
Date: Apr. 5, 1999.
Result: Police officers with probable cause to search a car, as in this case, can inspect passengers' belongings found in the car that are capable of concealing the object of the search.
Verdict: Against the defendant
Score: 1

Justice David Souter

Case: *Conn v Gabbert*, 526 U.S. 286 (1999).
Date: Apr. 5, 1999.
Result: A prosecutor did not violate an Attorney's Fourteenth Amendment right to practice his profession by executing a search warrant while the Attorney's client was testifying before a grand jury.
Verdict: Against the defendant
Score: 1

Case: *Florida v White*, 526 U.S. 559 (1999).
Date: May 17, 1999.
Result: The Fourth Amendment did not require the police to obtain a warrant before they seized an automobile from a public place when they had probable cause to believe that it was forfeitable contraband.
Verdict: Against the defendant
Score: 1

Case: *Holloway v United States*, 526 U.S. 1 (1999).
Date: Mar. 2, 1999.
Result: Section 2119's "with the intent to cause death or serious bodily harm" phrase does not require the Government to prove that the defendant had an unconditional intent to kill or harm in all events, but merely requires proof of an intent to kill or harm if necessary to effect a car-jacking.
Verdict: For the defendant
Score: 0

Case: *Jones, Louis v United States*, 527 U.S. 373 (1999).
Date: Jun. 21, 1999.
Result: The Eighth Amendment did not require a jury be instructed as to the consequences of their failure to agree.
Verdict: For the defendant
Score: 0

Case: *Jones v United States*, 526 U.S. 227 (1999).
Date: Mar. 24, 1999.
Result: Section 2119 established that three separate offences by the specification of elements, each of which had to be charged by indictment, proved beyond a reasonable doubt, and submitted to a jury for its verdict.
Verdict: Against the defendant
Score: 1

Case: *Mitchell v United States*, 526 U.S. 314 (1999).
Date: Apr. 5, 1999.
Result: Within the federal criminal system, a guilty plea did not waive the self-incrimination privilege at sentencing.
Verdict: For the defendant
Score: 0

Case: *O'Sullivan v Boerckel*, 526 U.S. 838 (1999).
Date: Jun. 7, 1999.
Result: In order to satisfy the exhaustion requirement, a State prisoner had to present his claims to a State supreme court in a petition for discretionary review when that review is part of the State's ordinary appellate review procedure.
Verdict: Against the defendant
Score: 1

Case: *Peguero v United States*, 526 U.S. 23 (1999).
Date: Mar. 2, 1999.
Result: A District Court's failure to advise a defendant of his right to appeal did not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission.
Verdict: Against the defendant
Score: 1

Case: *Richardson v United States*, 526 U.S. 813 (1999).
Date: Jun. 1, 1999.
Result: A jury in a §848 case must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series."
Verdict: For the defendant
Score: 0

Case: *Strickler v Greene*, 527 U.S. 263 (1999).
Date: Jun. 17, 1999.
Result: Although the petitioner demonstrated cause for failing to raise a *Brady* claim, the State of Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to the petitioner.
Verdict: Against the defendant (in part)
Score: 0.75

Case: *United States v Rodriguez-Moreno*, 526 U.S. 275 (1999).
Date: Mar. 30, 1999.
Result: A venue in a prosecution for using or carrying a firearm "during and in relation to any crime of violence" in violation of §924(c)(1) was proper in any district where the crime of violence was committed.
Verdict: Against the defendant
Score: 1

Case: *City of West Covina v Perkins*, 525 U.S. 234 (1999).
Date: Jan. 13, 1999.
Result: When police seized property for a criminal investigation, the Due Process Clause did not require them to provide the owner with notice of state-law remedies for the property's return.
Verdict: Against the defendant
Score: 1

Case: *Wilson v Layne*, 526 U.S. 603 (1999).
Date: May 24, 1999.
Result: A media "ride-along" in a home violated the Fourth Amendment, but because the state of the law was not clearly established at the time the entry in this case took place, respondent officers were entitled to qualified immunity.
Verdict: Against the defendant
Score: 1

Case: *Wyoming v Houghton*, 526 U.S. 295 (1999).
Date: Apr. 5, 1999.
Result: Police officers with probable cause to search a car, as in this case, can inspect passengers' belongings found in the car that are capable of concealing the object of the search.
Verdict: For the defendant
Score: 0

Justice Clarence Thomas

Case: *Conn v Gabbert*, 526 U.S. 286 (1999).
Date: Apr. 5, 1999.
Result: A prosecutor did not violate an Attorney's Fourteenth Amendment right to practice his profession by executing a search warrant while the Attorney's client was testifying before a grand jury.
Verdict: Against the defendant
Score: 1

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Date: May 17, 1999.
Result: The Fourth Amendment did not require the police to obtain a warrant before they seized an automobile from a public place when they had probable cause to believe that it was forfeitable contraband.
Verdict: Against the defendant
Score: 1

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Date: Mar. 2, 1999.
Result: Section 2119's "with the intent to cause death or serious bodily harm" phrase does not require the Government to prove that the defendant had an unconditional intent to kill or harm in all events, but merely requires proof of an intent to kill or harm if necessary to effect a car-jacking.
Verdict: Against the defendant
Score: 1

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Score: 1

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Verdict: Against the defendant
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Result: In order to satisfy the exhaustion requirement, a State prisoner had to present his claims to a State supreme court in a petition for discretionary review when that review is part of the State's ordinary appellate review procedure.
Verdict: Against the defendant
Score: 1

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Date: Mar. 2, 1999.
Result: A District Court's failure to advise a defendant of his right to appeal did not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission.
Verdict: Against the defendant
Score: 1

Case: *Richardson v United States*, 526 U.S. 813 (1999).
Date: Jun. 1, 1999.
Result: A jury in a §848 case must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series."
Verdict: For the defendant
Score: 0

Case: *Strickler v Greene*, 527 U.S. 263 (1999).
Date: Jun. 17, 1999.
Result: Although the petitioner demonstrated cause for failing to raise a *Brady* claim, the State of Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to the petitioner.
Verdict: Against the defendant
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Date: Mar. 30, 1999.
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Verdict: Against the defendant
Score: 1

Case: *Wyoming v Houghton*, 526 U.S. 295 (1999).
Date: Apr. 5, 1999.
Result: Police officers with probable cause to search a car, as in this case, can inspect passengers' belongings found in the car that are capable of concealing the object of the search.
Verdict: Against the defendant
Score: 1

APPENDIX F
FOURTH CIRCUIT OPINIONS IN CRIMINAL JUSTICE CASES BY SIX REAGAN AND BUSH APPOINTED JUDGES IN 1995

Justice Paul Niemeyer

Case: *United States v Hamrick,* 43 F.3d 877, 886 (4th Cir.1995).
Date: Jan. 6, 1995
Result: Hamrick's convictions on the grounds that a bomb was neither a "dangerous weapon" under 18 United States Code § 111(b) nor a "destructive device" under 18 United States Code § 924(c)(1) and 26 United States Code § 5861(d)- (f) was reversed and his convictions and sentences were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995).
Date: Jan. 17, 1995
Result: The Supreme Court definitively held that, as applied to most repeat drug offenders, a life sentence was not violative of the Eighth Amendment's prohibition against cruel and unusual punishment.
Verdict: Found against defendant
Score: 1

Case: *United States v Dorsey*, 45 F.3d 809, 814-15 (4th Cir. 1995).
Date: Jan. 18, 1995
Result: Amongst other things, the District Court did not commit a plain error in instructing the jury that a witness is presumed to speak the truth.
Verdict: Found against defendant
Score: 1

Case: *United States v Smith,* 62 F.3d 1415 (4th. Cir. 1995).
Date: Jan. 25, 1995
Result: The errors assigned to numerous aspects of the trial leading to the convictions was rejected and the judgments of the District Court were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Stewart*, 49 F.3d 121, 123. (4th Cir. 1995).
Date: Mar. 10, 1995
Result: Because there exists no basis for holding that a detention awaiting the commencement of a parole revocation hearing amounts to an extension of an original "imprisonment on a sentence" within the meaning of the U.S. Sentencing Guidelines Manual, particularly when parole was not revoked and Stewart was not re-incarcerated, the sentence imposed by the District Court was vacated.
Verdict: Found against defendant
Score: 1

Case: *United States v Ricco*, 52 F.3d 58, 61 (4th Cir. 1995).
Date: Apr. 10, 1995
Result: Although Ricco challenges various trial rulings as well as the sentencing court's determination of the amount of cocaine base attributable to him, as no error was found the judgement against him by the District Court was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Thomas*,
Date: Apr. 20, 1995
Result: The government proved a violation of § 922(g)(1) despite the fact that it did not independently establish that the defendant's civil rights had not been restored at the time of his firearm possession.
Verdict: Found against defendant
Score: 1

Case: *United States v Boyd*, 53 F.3d 631, 637 (4th. Cir. 1995).
Date: May 5, 1995
Result: Boyd's appeal against his conviction on two counts of conspiracy to possess with intent to distribute marijuana and three substantive counts of possession with intent to distribute marijuana were rejected and the District Court's sentences was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Oriakhi*, 57 F.3d 1290, 1303 (4th Cir. 1995).
Date: Jun. 22, 1995
Result: The defendant contended that both searches in the New York area were illegal, that the wiretaps were illegally obtained, and therefore that important evidence obtained from these searches and wiretaps should not have been admitted at trial. Finding his arguments unpersuasive, the Court of Appeals affirmed the sentence of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Fisher*, 58 F.3d 96 (4th Cir. 1995).
Date: Jun. 27, 1995
Result: Defendants contended that "cocaine" and "cocaine base" have the same chemical formula, and because there is an ambiguity in the statute providing different sentences for the two substances, under the rule of lenity they should have been sentenced under the more lenient sentencing provisions involving simply "cocaine." This was rejected by the Court of Appeals and the sentence of the District Court was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Harrison*, 58 F.3d 115, 119 (4th Cir. 1995).
Date: Jun. 30, 1995
Result: The District Court did not abuse its discretion in finding that Harrison should be sentenced at a level commensurate with career offender status.
Verdict: Found against defendant
Score: 1

Case: *United States v Stewart*
Date: Jul. 25, 1995
Result: The District Court imposed Stewart's sentence to run consecutively to a state prison term that Stewart was then serving for two prior rape convictions. Stewart argued that because the District Court declined to apply the precise methodology set forth in the U.S. Sentencing Guidelines Manual, which governed undischarged terms of imprisonment, his sentence had to be vacated. The Court of Appeals disagreed and the District Court's sentence was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995).
Date: Jul. 28, 1995
Result: The District Court did not abuse its discretion in excluding Wilkerson's written statement in the absence of corroborating circumstances clearly indicating the statement's trustworthiness.
Verdict: Found against defendant
Score: 1

Case: *United States v Puckett*, 61 F.3d 1092, 1099 (4th Cir. 1995).
Date: Aug. 4, 1995
Result: Marvin Puckett challenged several aspects of his sentence and Pamela Puckett appealed the District Court's refusal to allow her to withdraw her guilty plea. Finding no error, the Court of Appeals affirmed both convictions and sentences.
Verdict: Found against defendant
Score: 1

Case: *United States v Langley*, 62 F.3d 602. (4th Cir. 1995).
Date: Aug. 14, 1995
Result: Langley argued the District Court's instructions to the jury on the felon in- possession count were erroneous because the jury was not instructed that the government was required to prove that he knew he was a convicted felon and the firearm had travelled in or affected interstate commerce. The Court of Appeals ruled the District Court had properly instructed the jury and affirmed the sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Hines*
Date: Sept. 22, 1995
Result: The *en banc* court voted unanimously to affirm Hines' convictions on all counts except the second count of use of a firearm during a drug trafficking offence. As to that count, the Court of Appeals affirmed the conviction by an equally divided vote.
Verdict: Found against defendant
Score: 1

Case: *United States v Myers*, 66 F.3d 1364, 1371 (4th. Cir. 1995).
Date: Oct. 4, 1995
Result: The Court of Appeals affirmed the District Court's denial of a continuance at Jarmal Myers juvenile transfer hearing and affirmed Bobby Myers sentence, but vacated Jarmal's sentence and remanded it for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Johnson*, 67 F.3d 297 (4th Cir. 1995).
Date: Dec. 6, 1995
Result: The Court of Appeals held that the District Court erred by instructing the jury that the federally insured status of the Arlington Schools Federal Credit Union, an essential element of the crime of armed credit union robbery, had been conclusively established. Furthermore, it was held that the error in this case was not subject to harmless error review. Accordingly, it reversed Johnson's conviction for armed credit union robbery. It also reversed his conviction for use of a firearm during and in relation to a crime of violence. The Court held that it is premised upon the same error which is not subject to harmless error review. The case was remanded for a new trial.
Verdict: Found for defendant
Score: 0

Case: *United States v Hairston*, 71 F.3d 115, 188 (4th Cir. 1995).
Date: Dec. 8, 1995
Result: Because the Court of Appeals concluded that Hairston's 1979 conviction for felony escape from custody under *North Carolina General Statute* § 148- 45(b)(1) "involves conduct that presents a serious potential risk of physical injury to another," the sentence of the District Court was affirmed.
Verdict: Found against defendant
Score: 1

Justice Michael Luttig

Case: *United States v Hamrick,* 43 F.3d 877, 886 (4th Cir.1995).
Date: Jan. 6, 1995
Result: Hamrick's convictions on the grounds that a bomb was neither a "dangerous weapon" under 18 United States Code § 111(b) nor a "destructive device" under 18 United States Code § 924(c)(1) and 26 United States Code § 5861(d)- (f) was reversed and his convictions and sentences was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Wild,* 47. F.3d 669, 675-76 (4th Cir. 1995).
Date: Mar. 2, 1995
Result: The District Court did not abuse its discretion in allowing one juror to take notes. Because the District Court neither made findings nor set forth its reasoning for rejecting Wild's challenge to the *in personam* criminal forfeiture on excessiveness grounds the appellants' convictions were affirmed, but the forfeiture of Wild's house was vacated and remanded for further proceedings.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Hoyte,* 51 F.3d 1239 (4th Cir. 1995).
Date: Apr. 21, 1995
Result: Convictions of conspiracy to distribute and distribution of cocaine base, use of a firearm, and murder were appealed on the basis of numerous trial errors. The Court of Appeal rejected this and affirmed the judgments of conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Johnson*
Date: Apr. 27, 1995
Result: Convictions and sentences for participation in a drug conspiracy and engaging in a continuing criminal enterprise were appealed. The Court of Appeal affirmed the District Court's judgment on all issues except the conspiracy convictions, which were remanded with instructions to vacate.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Davis*
Date: May 8, 1995
Result: The Court of Appeal held that the Chapter 7 policy statements were not binding on the District Court and so it did not engage in an unlawful departure from the U.S. Sentencing Guidelines Manual. Therefore, the District Court was free to exercise its informed discretion to reject the suggested sentence of twelve months and to impose a statutorily-authorized sentence of twenty-four months.
Verdict: Found against defendant
Score: 1

Case: *United States v Singh,* 54 F.3d 1182, 1191 (4th Cir. 1995).
Date: Jun. 1, 1995
Result: On appeal, Dr. Singh challenged both his conviction and the calculation of his sentence. The Court of Appeal concluded that the evidence was sufficient to convict on all counts, and that the District Court properly calculated Dr. Singh's sentence using the gross weight of the controlled substances rather than the weight of their active ingredients. However, because the District Court failed to articulate sufficient factual findings to increase Dr. Singh's base offence level pursuant to the "vulnerable victim" adjustment his case was remanded for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Walton*
Date: Jun. 7, 1995
Result: Walton appealed, claiming that both his convictions were tainted by the introduction of unlawfully-obtained evidence, and that the life sentence on the conspiracy count was the product of an incorrect application of the guidelines. The Court of Appeals found no merit in either argument, and Walton's convictions and sentences were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Fox*
Date: Aug. 2, 1995
Result: Fox pled guilty to driving in violation of a court order and driving while intoxicated in a federal enclave. He appealed the District Court's denial of his motion to dismiss the first count of the indictment. The Court of Appeals held that because Fox was properly indicted, the District Court's judgement was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Dorsey*, 45 F.3d. 809 (4th Cir. 1995).
Date: Aug. 9, 1995
Result: Dorsey appealed his sentence, asserting that the District Court erred in concluding that it lacked the authority to depart on the basis of what he characterised as his "substantial assistance to the judicial system" and in misunderstanding its authority to depart on the basis that his status as a career offender significantly over-represented the likelihood of recidivism. Finding no merit to either claim, the Court of Appeals affirmed as to the first and dismissed as to the second.
Verdict: Found against defendant
Score: 1

Case: *United States v Tanner*
Date: Aug. 11, 1995
Result: Tanner appealed whether the elements of criminal forfeitures were subject to a "preponderance of the evidence" or a "beyond a reasonable doubt" standard of proof. The Court of Appeals found that the preponderance standard governed and was correctly applied by the District Court in this case. The Court also found there was no merit to any of Tanner's challenges to his conviction and sentence and the judgment of the District Court was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Langley*, 62 F.3d 602. (4th Cir. 1995).
Date: Aug. 14, 1995
Result: Langley argued the District Court's instructions to the jury on the felon in possession count were erroneous because the jury was not instructed that the government was required to prove that he knew he was a convicted felon and the firearm had travelled in or affected interstate commerce. The Court of Appeals ruled the District Court had properly instructed the jury and affirmed the sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Letterlough*, 63 F.3d 332, 335-36 (4th. Cir. 1995).
Date: Aug. 28, 1995
Result: The Court of Appeals had to determine whether Vincent Letterlough committed three crimes "on occasions different from one another" under the *Armed Career Criminal Act*. It affirmed the armed career criminal enhancement imposed by the District Court, as long as each charged crime was a "separate and distinct criminal episode."
Verdict: Found against defendant
Score: 1

Case: *United States v Hines*
Date: Sept. 22, 1995
Result: The *en banc* court voted unanimously to affirm Hines' convictions on all counts except the second count of use of a firearm during a drug trafficking offence. As to that count, the Court of Appeals affirmed the conviction by an equally divided vote.
Verdict: Found against defendant
Score: 1

Case: *United States v Foster*, 68 F.3d 86 (4th Cir. 1995).
Date: Oct. 31, 1995
Result: Foster filed a motion to vacate, set aside, or correct his sentence alleging, *inter alia*, ineffective assistance of counsel and that he should not have been sentenced as a career offender under the U.S. Sentencing Guidelines Manual. The District Court issued an order dismissing the motion. Finding no reversible error, the Court of Appeal affirmed the District Court's judgement.
Verdict: Found against defendant
Score: 1

Justice William Wilkins

Case: *United States v Hamrick,* 43 F.3d 877, 886 (4th Cir.1995).
Date: Jan. 6, 1995
Result: Hamrick's convictions on the grounds that a bomb was neither a "dangerous weapon" under 18 United States Code § 111(b) nor a "destructive device" under 18 United States Code § 924(c)(1) and 26 United States Code § 5861(d)- (f) was reversed and his convictions and sentences affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Wild*, 47. F.3d 669, 675-76 (4th Cir. 1995).
Date: Mar. 2, 1995
Result: The District Court did not abuse its discretion in allowing one juror to take notes. Because the District Court neither made findings nor set forth its reasoning for rejecting Wild's challenge to the *in personam* criminal forfeiture on excessiveness grounds the appellants' convictions are affirmed, but the forfeiture of Wild's house was vacated and remanded for further proceedings.
Verdict: Found against defendant
Score: 1

Case: *United States v Hoyte*, 51 F.3d 1239 (4th Cir. 1995).
Date: Apr. 21, 1995
Result: Convictions of conspiracy to distribute and distribution of cocaine base, use of a firearm, and murder were appealed on the basis of numerous trial errors. The Court of Appeal rejected this and affirmed the judgments of conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Milton*, 52 F.3d 78, 81 (4th Cir. 1995).
Date: Apr. 19, 1995
Result: The Court of Appeals held that in a felon - in - possession case such as the District Court must instruct the jury that the government had to prove beyond a reasonable doubt that at the time the defendant possessed the firearm he had a qualifying previous felony conviction, that is a prior conviction for an offence punishable by a term of imprisonment exceeding one year. Accordingly, Milton's argument that the District Court committed reversible error in denying his motion *in limine* was rejected.
Verdict: Found against defendant
Score: 1

Case: *United States v Speed*
Date: May 15, 1995
Result: The Court of Appeals affirmed the District Court's denial of Speed's motion for continuance of sentencing and dismissed the appeal to the extent that Speed argued the District Court imposed his sentence in violation of the law.
Verdict: Found against defendant
Score: 1

Case: *United States v Johnson*
Date: Jun. 13, 1995
Result: Johnson contended that the government transgressed the *Double Jeopardy Clause* of the United States Constitution by prosecuting him a second time for the same offence after a mistrial was declared in his first trial. Johnson also challenged the sufficiency of the government's evidence against him. Finding no error, the Court of Appeals affirmed Johnson's conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Lockhart*, 58 F.3d 86, 88 (4th Cir. 1995).
Date: Jun. 22, 1995
Result: Lockhart alleged that the Government breached the plea agreement, that the District Court failed to comply with *Federal Rule of Criminal Procedure* 32(c)(3)(A), and that his sentence is violative of the Eighth Amendment. In rejecting these appeals the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v David*
Date: Jun. 29, 1995
Result: David contended that the District Court erred in finding as a matter of law that David breached his plea agreement by fleeing the country before his sentencing hearing. Finding no error, the Court of Appeals affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Powers*
Date: Jul. 14, 1995
Result: Powers appealed his conviction for aggravated sexual abuse of a minor, challenging several of the District Court's evidentiary rulings, alleging on appeal that the District Court erred in admitting evidence of Powers' prior bad acts, in excluding evidence of the victim's sexual behavior, and in excluding testimony of Powers' expert witnesses. Finding no error, the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Dorsey*, 45 F.3d. 809 (4th Cir. 1995).
Date: Aug. 9, 1995
Result: Dorsey appealed his sentence, asserting that the District Court erred in concluding that it lacked the authority to depart on the basis of what he characterised as his "substantial assistance to the judicial system" and in misunderstanding its authority to depart on the basis that his status as a career offender significantly over-represented the likelihood of recidivism. Finding no merit to either claim, the Court of Appeals affirmed as to the first and dismissed as to the second.
Verdict: Found against defendant
Score: 1

Case: *United States v Langley*, 62 F.3d 602. (4th Cir. 1995).
Date: Aug. 14, 1995
Result: Langley argued the District Court's instructions to the jury on the felon in-possession count were erroneous because the jury was not instructed that the government was required to prove that he knew he was a convicted felon and the firearm had travelled in or affected interstate commerce. The Court of Appeals ruled the District Court had properly instructed the jury and affirmed the sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Pridgen*, 64 F.3d 147 (4th Cir. 1995).
Date: Aug. 31, 1995
Result: Pridgen appealed a decision of the District Court denying a motion by the Government seeking a reduction in the sentence previously imposed upon him by that court due to his subsequent substantial assistance to authorities. The Court of Appeals dismissed his appeals and affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Hines*
Date: Sept. 22, 1995
Result: The *en banc* court voted unanimously to affirm Hines' convictions on all counts except the second count of use of a firearm during a drug trafficking offence. As to that count, the Court of Appeals affirmed the conviction by an equally divided vote.
Verdict: Found against defendant
Score: 1

Justice Harvie Wilkinson

Case: *United States v Hamrick*, 43 F.3d 877, 886 (4th Cir.1995).
Date: Jan. 6, 1995
Result: Hamrick's convictions on the grounds that a bomb was neither a "dangerous weapon" under 18 United States Code § 111(b) nor a "destructive device" under 18 United States Code § 924(c)(1) and 26 United States Code § 5861(d)- (f) was reversed and his convictions and sentences were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Perrin*, 45 F.3d 869, 873 (4th Cir. 1995).
Date: Jan. 31, 1995
Result: Perrin claimed that his conviction should be reversed, because the police conducted an unconstitutional search of his car. The Court of Appeals found that the officers possessed the requisite degree of suspicion to justify the search, that Perrin was not entitled to an instruction on justification, and that Perrin's voluntary consent assured the constitutionality of the vehicular search. The Court of Appeals affirmed the decision of the District Court in all respects.
Verdict: Found against defendant
Score: 1

Case: *United States v Reavis*, 48 F.3d 763, 767 (4th Cir. 1995).
Date: Feb. 21, 1995
Result: Reavis claimed that the District Court erred in refusing to sever her trial from that of several of her co-conspirators and that her sentence should have been reduced because she was no more than a minor or minimal participant in the drug operation. Thomas argued that his convictions violated the *Speedy Trial Act* and that insufficient evidence existed to convict him on several of the murder and maiming charges. The Court of Appeal found no error to have been committed on any of the grounds suggested by the appellants and the judgements were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Sturgis*, 48 F.3d 784, 787 (4th Cir. 1995).
Date: Feb. 21, 1995
Result: Sturgis, who was HIV positive, bit two correctional officers who were attempting to restrain him during an altercation at the Lorton Reformatory. The Court of Appeals concluded that the evidence was sufficient to establish Sturgis' intent to harm the correctional officers. The jury could reasonably have concluded that Sturgis used his mouth and teeth as a "dangerous weapon" during the incident. The Court of Appeals affirmed Sturgis' conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Al-Talib*, 55 F.3d. 923, 931 (4th Cir. 1995).
Date: May 20, 1995
Result: The appellants complained that the government improperly "manufactured" venue when they were arrested following a sting operation in Virginia. Further, Basher and Munoz made a number of individual challenges to the trial court's rulings on suppression of evidence and its factual findings underlying their respective sentences. Because the Court of Appeals found no error in the proceedings it affirmed the appellants' convictions and sentences.
Verdict: Found against defendant
Score: 1

Case: *United States v Lockhart*, 58 F.3d 86, 88 (4th Cir. 1995).
Date: Jun. 22, 1995
Result: Lockhart alleged that the Government breached the plea agreement, that the District Court failed to comply with *Federal Rule of Criminal Procedure* 32(c)(3)(A), and that his sentence is violative of the Eighth Amendment. In rejecting these appeals the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Stewart*
Date: Jul. 25, 1995
Result: The District Court imposed Stewart's sentence to run consecutively to a state prison term that Stewart was then serving for two prior rape convictions. Stewart argued that because the District Court declined to apply the precise methodology set forth in the U.S. Sentencing Guidelines Manual, which governed undischarged terms of imprisonment, his sentence had to be vacated. The Court of Appeals disagreed and the District Court's sentence was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Gordon*, 61 F.3d 263, 269 (4th Cir. 1995).
Date: Aug. 9, 1995
Result: Gordon pled guilty to aiding and abetting bank larceny and was sentenced to a total of 14 months imprisonment. Gordon raised several challenges to this sentence, arguing that the District Court erred in imposing enhancements to her offence level beyond those listed in her plea agreement, and abused its discretion in refusing to recuse itself at the time of her sentencing hearing. The Court of Appeals found that the District Court neither erred nor violated its duty of impartiality in any way. It rejected the appellant's contentions and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Langley*, 62 F.3d 602. (4th Cir. 1995).
Date: Aug. 14, 1995
Result: Langley argued the District Court's instructions to the jury on the felon in- possession count were erroneous because the jury was not instructed that the government was required to prove that he knew he was a convicted felon and the firearm had travelled in or affected interstate commerce. The Court of Appeals ruled the District Court had properly instructed the jury and affirmed the sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Tanner*
Date: Aug. 11, 1995
Result: Tanner appealed whether the elements of criminal forfeitures are subject to a "preponderance of the evidence" or a "beyond a reasonable doubt" standard of proof. The Court of Appeals found that the preponderance standard governed and was correctly applied by the District Court in this case. The Court also found there was no merit to any of Tanner's challenges to his conviction and sentence and so the judgment of the District Court was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Hines*
Date: Sept. 22, 1995
Result: The *en banc* court voted unanimously to affirm Hines' convictions on all counts except the second count of use of a firearm during a drug trafficking offence. As to that count, the Court of Appeals affirmed the conviction by an equally divided vote.
Verdict: Found against defendant
Score: 1

Justice Karen Williams

Case: *United States v Hamrick,* 43 F.3d 877, 886 (4th Cir.1995).
Date: Jan. 6, 1995
Result: Hamrick's convictions on the grounds that a bomb was neither a "dangerous weapon" under 18 United States Code § 111(b) nor a "destructive device" under 18 United States Code § 924(c)(1) and 26 United States Code § 5861(d)- (f) was reversed and his convictions and sentences were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Sturgis*, 48 F.3d 784, 787 (4th Cir. 1995).
Date: Feb. 21, 1995
Result: Sturgis, who was HIV positive, bit two correctional officers who were attempting to restrain him during an altercation at the Lorton Reformatory. The Court of Appeals concluded that the evidence was sufficient to establish Sturgis' intent to harm the correctional officers. The jury could reasonably have concluded that Sturgis used his mouth and teeth as a "dangerous weapon" during the incident. The Court of Appeals affirmed Sturgis' conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Allen*
Date: Mar. 31, 1995
Result: The Court of Appeals ruled that the District Court properly treated as separate offences Allen's two prior convictions which occurred approximately four months apart, and which were separated by elements of time and place. If the District Court had counted the offences as related rather than separate, Allen's criminal history score would have placed him in a lower criminal history category, reducing his guideline range from 84-105 months to 77-96 months. Finding no error, the Court of Appeals affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Johnson*
Date: Apr. 27, 1995
Result: Convictions and sentences for participation in a drug conspiracy and engaging in a continuing criminal enterprise were appealed. The Court of Appeal affirmed the District Court's judgment on all issues except the conspiracy convictions, which were remanded with instructions to vacate.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Speed*
Date: May 15, 1995
Result: The Court of Appeals affirmed the District Court's denial of Speed's motion for continuance of sentencing and dismissed the appeal to the extent that Speed argued the District Court imposed his sentence in violation of the law.
Verdict: Found against defendant
Score: 1

Case: *United States v Pierson*
Date: May 17, 1995
Result: The Court of Appeals found that a person convicted of possession with intent to distribute more than five grams of cocaine base must be sentenced to a term of imprisonment of not less than five years. It also held that a person convicted of aiding and abetting another in this offence must be sentenced to the same mandatory minimum five year prison term.
Verdict: Found against defendant
Score: 1

Case: *United States v Singh*, 54 F.3d 1182, 1191 (4th Cir. 1995).
Date: Jun. 1, 1995
Result: On appeal, Dr. Singh challenged both his conviction and the calculation of his sentence. The Court of Appeal concluded that the evidence was sufficient to convict on all counts, that and that the District Court properly calculated Dr. Singh's sentence using the gross weight of the controlled substances rather than the weight of their active ingredients. However, because the District Court failed to articulate sufficient factual findings to increase Dr. Singh's base offence level pursuant to the "vulnerable victim" adjustment his case is remanded for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Powers*
Date: Jul. 14, 1995
Result: Powers appealed his conviction for aggravated sexual abuse of a minor, challenging several of the District Court's evidentiary rulings, alleging on appeal that the District Court erred in admitting evidence of Powers' prior bad acts, in excluding evidence of the victim's sexual behaviour, and in excluding testimony of Powers' expert witnesses. Finding no error, the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Gordon*, 61 F.3d 263, 269 (4th Cir. 1995).
Date: Aug. 9, 1995
Result: Gordon pled guilty to aiding and abetting bank larceny and was sentenced to a total of 14 months imprisonment. Gordon raised several challenges to this sentence, arguing that the District Court erred in imposing enhancements to her offence level beyond those listed in her plea agreement, and abused its discretion in refusing to recuse itself at the time of her sentencing hearing. The Court of Appeals found that the District Court neither erred nor violated its duty of impartiality in any way. It rejected the appellant's contentions and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Langley*, 62 F.3d 602. (4th Cir. 1995).
Date: Aug. 14, 1995
Result: Langley argued the District Court's instructions to the jury on the felon in- possession count were erroneous because the jury was not instructed that the government was required to prove that he knew he was a convicted felon and the firearm had travelled in or affected interstate commerce. The Court of Appeals ruled the District Court had properly instructed the jury and affirmed the sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Letterlough*, 63 F.3d 332, 335-36 (4th. Cir. 1995).
Date: Aug. 28, 1995
Result: The Court of Appeals had to determine whether Vincent Letterlough committed three crimes "on occasions different from one another" under the *Armed Career Criminal Act*. It affirmed the armed career criminal enhancement imposed by the District Court, as long as each charged crime was a "separate and distinct criminal episode."
Verdict: Found against defendant
Score: 1

Case: *United States v Pridgen*, 64 F.3d 147 (4th Cir. 1995).
Date: Aug. 31, 1995
Result: Pridgen appealed a decision of the District Court denying a motion by the Government seeking a reduction in the sentence previously imposed upon him by that court due to his subsequent substantial assistance to authorities. The Court of Appeals dismissed his appeals and affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Murray*, 65 F.3d 1161, 1165 (4th Cir. 1995).
Date: Sept. 21, 1995
Result: Murray went to trial, and a jury convicted him of armed bank robbery but acquitted him of the remaining unarmed robbery charges. On appeal, Murray raised several evidentiary issues and also challenged the sentence imposed against him by the District Court. Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Hines*
Date: Sept. 22, 1995
Result: The *en banc* court voted unanimously to affirm Hines' convictions on all counts except the second count of use of a firearm during a drug trafficking offence. As to that count, the Court of Appeals affirmed the conviction by an equally divided vote.
Verdict: Found against defendant
Score: 1

Case: *United States v Torres*
Date: Oct. 4, 1995
Result: Torres was convicted by a jury of possession with intent to distribute cocaine base. On appeal, she challenged only the District Court's denial of her pre-trial motion to suppress evidence that she contended was obtained by an unconstitutional search. Because the Court of Appeals concluded that the challenged evidence should have been suppressed, it vacated the conviction and remanded it for a new trial.
Verdict: Found against defendant
Score: 1

Justice Clyde Hamilton

Case: *United States v Hamrick,* 43 F.3d 877 (4th Cir. 1995).
Date: Jan. 6, 1995
Result: Hamrick's convictions on the grounds that a bomb was neither a "dangerous weapon" under 18 United States Code § 111(b) nor a "destructive device" under 18 United States Code § 924(c)(1) and 26 United States Code § 5861(d)- (f) was reversed and his convictions and sentences were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Wild,* 47 F.3d 669 (4th Cir. 1995).
Date: Mar. 2, 1995
Result: The District Court did not abuse its discretion in allowing one juror to take notes. Because the District Court neither made findings nor set forth its reasoning for rejecting Wild's challenge to the *in personam* criminal forfeiture on excessiveness grounds, the appellants' convictions were affirmed but the forfeiture of Wild's house was vacated and remanded for further proceedings.
Verdict: Found against defendant
Score: 1

Case: *United States v Lewis,* 53 F.3d 29 (4th Cir. 1995).
Date: Apr. 17, 1995
Result: The two principal players in arranging Lewis' car-for-cocaine exchange were government agents, and without Lewis' proposed government-agent instruction, the likelihood the jury convicted Lewis of conspiring with either or both of them was substantially significant. Under these circumstances the Court of Appeals concluded that the error could not have been harmless, even if a harmless error analysis was applied. Consequently, Lewis' conspiracy conviction was reversed
Verdict: For the defendant
Score: 0

Case: *United States v Milton,* 52 F.3d 78 (4th Cir. 1995).
Date: Apr. 19, 1995
Result: The Court of Appeals held that in a felon-in-possession case such as the District Court must instruct the jury that the government must prove beyond a reasonable doubt that at the time the defendant possessed the firearm he had a qualifying previous felony conviction, that is a prior conviction for an offence punishable by a term of imprisonment exceeding one year. Accordingly, Milton's argument that the District Court committed reversible error in denying his motion *in limine* was rejected.
Verdict: Found against defendant
Score: 1

Case: *United States v Boyd,* 53 F.3d 631 (4th. Cir. 1995).
Date: May 5, 1995
Result: Boyd's appeal against his conviction on two counts of conspiracy to possess with intent to distribute and to distribute marijuana and three substantive counts of possession with intent to distribute marijuana were rejected and the District Court's sentences were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Stewart*
Date: Jul. 25, 1995
Result: The District Court imposed Stewart's sentence to run consecutively to a state prison term that Stewart was then serving for two prior rape convictions. Stewart argued that because the District Court declined to apply the precise methodology set forth in the U.S. Sentencing Guidelines Manual, which governed undischarged terms of imprisonment, his sentence must be vacated. The Court of Appeals disagreed and the District Court's sentence was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Langley*, 62 F.3d 602. (4th Cir. 1995).
Date: Aug. 14, 1995
Result: Langley argued the District Court's instructions to the jury on the felon in- possession count were erroneous because the jury was not instructed that the government was required to prove that he knew he was a convicted felon and the firearm had travelled in or affected interstate commerce. The Court of Appeals ruled the District Court had properly instructed the jury and affirmed the sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Letterlough*, 63 F.3d 332, 335-36 (4th. Cir. 1995).
Date: Aug. 28, 1995
Result: The Court of Appeals had to determine whether Vincent Letterlough committed three crimes "on occasions different from one another" under the *Armed Career Criminal Act*. It affirmed the armed career criminal enhancement imposed by the District Court, as long as each charged crime was a "separate and distinct criminal episode."
Verdict: Found against defendant
Score: 1

Case: *United States v Morsley*, 64 F.3d 907, 915 (4th Cir. 1995).
Date: Aug. 31, 1995
Result: Three co-defendants appealed their respective conspiracy to possess with intent to distribute cocaine convictions and related drug and weapons convictions. Despite their many assignments of error, the Court of Appeals found no basis for reversal of those convictions; however, because in sentencing the District Court miscounted the quantity of drugs properly attributable to one of the appellants, the Court of Appeals vacated his sentence and remanded it for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Hines*
Date: Sept. 22, 1995
Result: The *en banc* court voted unanimously to affirm Hines' convictions on all counts except the second count of use of a firearm during a drug trafficking offence. As to that count, the Court of Appeals affirmed the conviction by an equally divided vote.
Verdict: Found against defendant
Score: 1

Case: *United States v Myers*, 66 F.3d 1364, 1371 (4th. Cir. 1995).
Date: Oct. 4, 1995
Result: The Court of Appeals affirmed the District Court's denial of a continuance at Jarmal Myers juvenile transfer hearing and affirmed Bobby Myers sentence, but vacated Jarmal's sentence and remand it for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Tomlinson*, 67 F.3d 508 (4th Cir. 1995).
Date: Oct. 23, 1995
Result: In a case decided while this appeal was pending, the Supreme Court held that, with regard to a related firearms possession statute, such a *mens rea* instruction is required *(Staples)*. On this appeal, the Government conceded that a *Staples* instruction was necessary and that the failure to give it required reversal. On that ground alone, the Court vacated the conviction and remanded it for a new trial.
Verdict: For the defendant
Score: 0

Case: *United States v Foster*, 68 F.3d 86 (4th Cir. 1995).
Date: Oct. 31, 1995
Result: Foster filed a motion to vacate, set aside, or correct his sentence alleging, *inter alia*, ineffective assistance of counsel and that he should not have been sentenced as a career offender under the U.S. Sentencing Guidelines Manual. The District Court issued an order dismissing the motion. Finding no reversible error, the Court of Appeal affirmed the District Court's judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Johnson*, 67 F.3d 297 (4th Cir. 1995).
Date: Dec. 6, 1995
Result: The Court of Appeals held that the District Court erred by instructing the jury that the federally insured status of the ASFCU, an essential element of the crime of armed credit union robbery, had been conclusively established. Furthermore, it was held that the error in this case was not subject to harmless error review. Accordingly, it reversed Johnson's conviction for armed credit union robbery. The Court also reversed his conviction for use of a firearm during and in relation to a crime of violence because it held that it was premised upon the same error which was not subject to harmless error review. The case was remanded for a new trial.
Verdict: For the defendant
Score: 0

Case: *United States v Hairston*, 71 F.3d 115, 188 (4th Cir. 1995).
Date: Dec. 8, 1995
Result: Because the Court of Appeals concluded that Hairston's 1979 conviction for felony escape from custody under North Carolina General Statute § 148- 45(b)(1) "involves conduct that presents a serious potential risk of physical injury to another," the sentence of the District Court was affirmed.
Verdict: Found against defendant
Score: 1

APPENDIX G
FOURTH CIRCUIT OPINIONS IN CRIMINAL JUSTICE CASES BY SIX REAGAN AND BUSH APPOINTED JUDGES IN 1996

Justice Paul Niemeyer

Case: *United States v Fletcher*, 74 F.3d 49, 56 (4th Cir. 1996).
Date: Jan. 29, 1996
Result: On appeal, Fletcher challenged both his conviction and his sentence for cultivating marijuana. The Court of Appeals found no reversible error in the conduct of the trial and affirmed Fletcher's conviction. However, because of recent amendments to the U.S. Sentencing Guidelines Manual, the Court of Appeals remanded the case for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Stoudenmire*, 74 F.3d 60, 63 (4th Cir. 1996).
Date: Jan. 29, 1996
Result: Stoudenmire challenged her conviction, principally contending that her trial did not begin within 70 days of her indictment as required by the *Speedy Trial Act* (STA). The Court of Appeals concluded that the District Court did not err in ruling that Stoudenmire's trial was timely under the STA and found no reversible error. Consequently, her conviction was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Abbas*, 74 F.3d 506, 512 (4th Cir. 1996).
Date: Jan. 31, 1996
Result: In affirming Abbas' conviction, the Court of Appeals held that the District Court properly exercised its discretion in rejecting his motion to reopen his case; that the Drug Enforcement Agency expert testimony was admissible; and that the jury instructions were proper in both form and substance.
Verdict: Found against defendant
Score: 1

Case: *United States v Gullet*, 75 F.3d 941 (4th Cir. 1996).
Date: Feb. 12, 1996
Result: Following a jury trial, Gullett was convicted. The jury found, by way of special interrogatory, that Gullett's conduct was the proximate cause of Masil Lee Hensley's death. Gullett was sentenced to thirty eight years' imprisonment. He appealed his conviction and sentence, both of which the Court of Appeals rejected.
Verdict: Found against defendant
Score: 1

Case: *United States v Littleton*, 76 F.3d 614, 618 (4th Cir. 1996).
Date: Mar. 1, 1996
Result: Littleton appealed her convictions for perjury and obstruction of justice, stemming from allegedly false testimony that she gave at a suppression hearing prior to her son's murder trial. The Court of Appeals reversed the convictions because, with respect to both charges, the government failed to present any proof of one or more essential elements of the offence.
Verdict: Found against defendant
Score: 1

Case: *United States v Wilson*,
Date: Apr. 22, 1996
Result: The case presented the question of whether the trial court appropriately denied Wilson's motion to withdraw his guilty plea, where the appellant claimed that he never possessed the requisite intent for the crime to which he pled guilty. The Court of Appeals ruled there was no abuse of discretion by the District Court and its judgement was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Raffield*
Date: May 6, 1996
Result: Raffield was convicted of drunken driving, refusing to submit to a breath analysis, and driving without a license inside Pisgah National Forest, North Carolina. He contended that the United States has no jurisdiction to bring these charges against him. As the North Carolina Code § 104- 5 and 16 United States Code § 551 grant the United States concurrent jurisdiction over national forest lands located within North Carolina the Court of Appeals affirmed the District Court's exercise of jurisdiction here.
Verdict: Found against defendant
Score: 1

Case: *United States v Roseboro*, 87 F.3d. 642, 645 (4th Cir. 1996).
Date: Jun. 20, 1996
Result: Because the defendants failed to establish that the FBI 302 Report was a "statement" within the meaning of the *Jencks Act*, the Court of Appeals concluded that the District Court was not required to order its production. Accordingly, the Court of Appeals affirmed the sentence of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996).
Date: Jun. 25, 1996
Result: Lattimore, Jr. appealed a decision of the District Court denying his motion to suppress evidence seized during a consent search of his automobile. Because the Court of Appeals could not conclude that the District Court clearly erred in finding that Lattimore's consent to search was freely and voluntarily given, the District Court's decision was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Taylor*, 90 F.3d 903, 909 (4th Cir. 1996).
Date: Jul. 26, 1996
Result: The Taylors principally assert that the District Court erred in denying their motion to suppress the evidence offered by the Government to support the determination that the defendant properties were used or involved in illegal gambling because that evidence was seized as a result of a search that violated their Fourth Amendment rights. The Court of Appeals found the Taylors arguments to be without merit and accordingly, the judgement of the District Court was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v McKinnon*, 92 F.3d 244, 246 (4th Cir. 1996).
Date: Aug. 14, 1996
Result: The Court of Appeals found that the trial court properly admitted Adrian McKinnon's testimony against his brother. Therefore, the District Court's decision to admit the testimony of Adrian McKinnon in Willie McKinnon's bank robbery trial was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Landrum*, 93 F.3d. 122, 124-25 (4th Cir. 1996).
Date: Aug. 16, 1996
Result: Landrum appealed the denial of his motion by challenging the restitution element of his 1987 criminal sentence. To reach the merits of Landrum's motion, the Court of Appeals concluded that the District Court's restitution order was authorized by the former *Federal Probation Act of 1925* and affirmed the decision of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Hall*
Date: Aug. 19, 1996
Result: Hall appealed his convictions on four grounds - that the jury instructions on the *Continuing Criminal Enterprise* count were erroneous, that notes of interviews with government witnesses should have been examined *in camera* by the District judge, that his trial should have been severed from that of his co-defendants, and that the drug amounts attributed to him were over-stated. The Court of Appeals disagreed with each of Hall's contentions and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Letsinger*, 93 F.3d 140, 147-48 (4th Cir. 1996).
Date: Aug. 22, 1996
Result: Letsinger challenged on two grounds the denial of his motion to suppress evidence obtained in connection with his arrest for possession with intent to distribute crack cocaine. First, he argued that his consensual questioning was transformed into a seizure by the movement of the train on which he and his arresting officers were travelling. Secondly, he contended that his bag containing the cocaine which he wished suppressed was seized at the time that the officers announced they were going to seize it, and, at that time, they lacked reasonable suspicion to make such a seizure. The Court of Appeals ultimately rejected both arguments, and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Burgos*, 94 F.3d 849, 858 (4th. Cir. 1996).
Date: Aug. 23, 1996
Result: After considering the totality of the circumstances and viewing the evidence in the light most favorable to the Government, the Court of Appeals concluded that a rational jury certainly could have found substantial evidence beyond a reasonable doubt to convict Burgos and Gobern of conspiracy to possess with intent to distribute cocaine base and to convict Burgos of possession with intent to distribute cocaine base and aiding and abetting. Accordingly, the Court of Appeals affirmed Burgos's and Gobern's conspiracy convictions; likewise, it affirmed Burgos's possession and aiding and abetting conviction.
Verdict: Found against defendants
Score: 1

Case: *United States v Bullock*, 94 F.3d 896, 899 (4th Cir. 1996).
Date: Aug. 30, 1996
Result: In his plea agreement, Bullock reserved for appeal his right to challenge the search and evidentiary rulings made at the suppression hearing. Because the Court of Appeals found Bullock's contentions without merit, his conviction and sentence for possession and conspiracy to distribute cocaine were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996).
Date: Sept. 26, 1996
Result: The appellants contended primarily that the District Court committed reversible error in refusing to ask whether any member of the venire would lend greater credibility to the testimony of law enforcement officers based solely on their status as law enforcement officers. The Court of Appeals rejected the appellants contentions, thereby affirming their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v Rybicki*, 96 F.3d 754, 758 (4th Cir. 1996).
Date: Sept. 26, 1996
Result: The Court of Appeals affirmed Rybicki's convictions for conspiracy and perjury as well as the District Court's refusal, in sentencing him, to enhance his sentence five levels based on the amount of loss to the government. To allow the District Court to consider whether Rybicki's sentence should be enhanced for obstruction of justice, the Court of Appeals vacated his sentence and remanded it for re-sentencing. The Court of Appeals also reversed the District Court's five-level downward departure, concluding that the court had erred in relying on factors that the U.S. Sentencing Guidelines Manual specify were not ordinarily relevant.
Verdict: Found against defendant
Score: 1

Case: *United States v Olvis*, 97 F.3d 739, 743 (4th Cir. 1996).
Date: Oct. 11, 1996
Result: Olvis' and Palmer's demonstration that more than 90 per cent of those indicted in the Norfolk-Newport News area since 1992 for crack cocaine trafficking were black, the District Court ordered discovery into the government's criteria for prosecution. When the government refused, arguing that such discovery was unwarranted, the District Court dismissed the indictment against Olvis and Palmer. The Court of Appeals ruled that because the defendants did not satisfy the "rigorous" standard recently articulated by the Supreme Court to obtain discovery for selective-prosecution claims, the District Court erred in ordering discovery. Accordingly, the Court of Appeals reversed the District Court's dismissal order and remanded with instructions to reinstate the indictment and for further proceedings.
Verdict: Found against defendant
Score: 1

Case: *United States v McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996).
Date: Dec. 4, 1996
Result: Finding no error in McHan's 1992 prosecution, the Court of Appeals affirmed his conviction. But because it concluded that the District Court abused its discretion in departing downward to credit McHan for his discharged sentence and erred in deducting from the amount of McHan's criminal forfeiture both the costs of his drug operations and one-half of his drug partnership's revenues, the Court of Appeals vacated McHan's sentence and remanded his case for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Nelson*, 102 F.3d 1344 (4th Cir. 1996).
Date: Dec. 18, 1996
Result: While the Court of Appeals found that the District Court erred in failing to instruct jurors to refrain from discussing the case, the error in the circumstances of this case did not require the Court of Appeals to order a new trial. As the Court of Appeals found no merit in the other assignments of error the District Court's judgement was affirmed.
Verdict: Found against defendant
Score: 1

Justice Harvie Wilkinson

Case: *United States v Abbas*, 74 F.3d 506, 512 (4th Cir. 1996).
Date: Jan. 31, 1996
Result: In affirming Abbas' conviction, the Court of Appeals held that the District Court properly exercised its discretion in rejecting his motion to reopen his case; that the Drug Enforcement Agency expert testimony was admissible; and that the jury instructions were proper in both form and substance.
Verdict: Found against defendant
Score: 1

Case: *United States v Dickerson*, 77 F.3d 774, 775 (4th Cir. 1996).
Date: Mar. 12, 1996
Result: The United States appealed the sentence of Dickerson imposed by the District Court following his plea of guilty to felony attempted escape from custody. The government contended that the District Court erroneously concluded that Dickerson did not qualify as a career offender under United States Sentencing Commission. Because the Court of Appeals concluded that the crime of felony attempted escape from custody in the abstract, "involves conduct that presents a serious potential risk of physical injury to another," it vacated Dickerson's sentence and remand his case for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Morin*, 80 F.3d 124, 129 (4th Cir. 1996).
Date: Apr. 5, 1996
Result: Morin was convicted of murder-for-hire and sentenced to 21 months imprisonment. Morin contended that because the murder would have taken place outside the United States, it would have violated no federal or state law. The Court of Appeals disagreed ruling that Morin's intended murder would have violated at least one federal law and two Virginia laws.
Verdict: Found against defendant
Score: 1

Case: *United States v Frankson*, 83 F.3d 79, 81 (4th Cir. 1996).
Date: Apr. 29, 1996
Result: Frankson contended that his *Miranda* warnings were too general, that he never formally waived his *Miranda* rights, and that *Miranda* required police to re-advise suspects of their rights when the interrogation does not follow immediately upon the warnings. Finding no merit in these contentions, the Court of Appeals affirmed the admission into evidence of the appellant's statements as well as his convictions for possession with intent to distribute cocaine and marijuana.
Verdict: Found against defendant
Score: 1

Case: *United States v Raffield*
Date: May 6, 1996
Result: Raffield was convicted of drunken driving, refusing to submit to a breath analysis, and driving without a license inside Pisgah National Forest, North Carolina. He contended that the United States has no jurisdiction to bring these charges against him. As the North Carolina Code § 104- 5 and 16 United States Code § 551 grant the United States concurrent jurisdiction over national forest lands located within North Carolina the Court of Appeals affirmed the District Court's exercise of jurisdiction here.
Verdict: Found against defendant
Score: 1

Case: *United States v Rahman*, 83. F.3d 89 (4th Cir. 1996).
Date: May 9, 1996
Result: Rahman appealed these convictions, principally arguing that the District Court erroneously instructed the jury on an element of a § 922(a)(6) offence and that the evidence was insufficient to support his § 922(g)(1) convictions. The Court of Appeals rejected this and affirmed the District Court's sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Hayden*, 85 F.3d 153 (4th Cir. 1996).
Date: May 31, 1996
Result: The defendants appealed their convictions and sentences on various grounds. The Court of Appeals affirmed all convictions and sentences, with the exception of James Hayden's conviction and sentence under 18 United States Code § 924(c) for using or carrying a gun during and in relation to drug trafficking on June 11, 1994. On that conviction, the Court of Appeals reversed.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Ambers*, 85 F.3d 173 (4th Cir. 1996).
Date: Jun. 3, 1996
Result: On appeal, Ambers asserted that the District Court abused its discretion by barring him from discussing the operation of the U.S. Sentencing Guidelines Manual when cross-examining government witnesses. He also challenged his sentence, alleging that he should have received a downward departure under 18 United States Code § 3553(b), and that enhancing his sentence based on a prior conviction violated the *Double Jeopardy Clause*. The Court of Appeals rejected this and affirmed the District Court ruling in all respects.
Verdict: Found against defendant
Score: 1

Case: *United States v Juvenile Male #1*, 86 F.3d 1314 (4th Cir. 1996).
Date: Jun. 11, 1996
Result: Juvenile #1, who was initially charged in federal court with committing acts of juvenile delinquency, appealed the order transferring his case to adult status. The Court of Appeals affirmed the ruling of the District Court and remanded for further proceedings.
Verdict: Found against defendant
Score: 1

Case: *United Sates v Terry*
Date: Jun. 12, 1996
Result: Because they shot at an occupied vehicle (a crime under Virginia law) while in a national forest, Terry and Bishop were convicted for violating the *Assimilative Crimes Act* (ACA), and for using a firearm in connection with a crime of violence. At sentencing the District Court dismissed the latter count as to both defendants on double jeopardy grounds. The government appealed the dismissal of the gun count, and the defendants cross-appealed their sentences on the ACA count. The Court of Appeals reversed the dismissal of the latter count, and ordered that the defendants' convictions on that count be reinstated. It affirmed the District Court's sentencing determinations on the ACA count, except for one matter. Because reinstatement of the convictions on the § 924(c) count would affect how the sentence for the ACA count was calculated, the Court of Appeals vacated the sentences and remanded the case for re-sentencing on both counts.
Verdict: Found against defendant
Score: 1

Case: *United States v Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996).
Date: Jun. 25, 1996
Result: Lattimore, Jr. appealed a decision of the District Court denying his motion to suppress evidence seized during a consent search of his automobile. Because the Court of Appeals could not conclude that the District Court clearly erred in finding that Lattimore's consent to search was freely and voluntarily given, the District Court's decision was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Tipton*, 90 F.3d 861 (4th. Cir. 1996).
Date: Jul. 8, 1996
Result: All were jointly charged with conspiracy to possess with intent to distribute in excess of 50 grams of cocaine base and with engaging in a continuing criminal enterprise. In addition, they were variously charged with capital murders in furtherance of a criminal enterprise, commission of violent crimes in aid of racketeering activity; use of a firearm in relation to a crime of violence or a drug- trafficking offence, and capital murder. Each was sentenced to death on one or more of the capital murder charges on which he was convicted and to various terms of imprisonment on other charges. Each appealed challenging his conviction on various of the charges against him and the sentence(s) of death imposed upon him. Save for the necessity imposed by double jeopardy concerns to vacate their several convictions for drug conspiracy violations, the Court found no error requiring reversal or remand among those assigned by the appellants and it therefore affirmed their respective convictions and sentences in all other respects.
Verdict: Found against defendant
Score: 1

Case: *United States v Williams*
Date: Jul. 11, 1996
Result: Williams appealed two rulings of the District Court. The Court of Appeals affirmed the District Court's decision to admit Williams's statements, but found that it was error to allow the sexual abuse charge to be submitted to the jury. Therefore, it vacated that conviction and remanded it for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996).
Date: Aug. 2, 1996
Result: The Court of Appeals reviewed the District Court's downward departure under the U.S Sentencing Guidelines Manual based on appellee's exposure to civil forfeiture. Because it concluded that exposure to civil forfeiture was not a valid basis for departure under the U.S. Sentencing Guidelines Manual, the Court of Appeals vacated the sentence and remanded it for re-sentencing within the applicable guidelines range.
Verdict: Found against defendant
Score: 1

Case: *United States v Hall*
Date: Aug. 19, 1996
Result: Hall appealed his convictions on four grounds - that the jury instructions on the continuing criminal enterprise (CCE) count were erroneous, that notes of interviews with government witnesses should have been examined *in camera* by the District judge, that his trial should have been severed from that of his co-defendants, and that the drug amounts attributed to him were over-stated. The Court of Appeals disagreed with each of Hall's contentions and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Hawthorne*, 94 F.3d 118 (4th Cir. 1996).
Date: Aug. 21, 1996
Result: Hawthorne's and Smith's convictions for engaging in a conspiracy to distribute crack cocaine were affirmed, as was Hawthorne's conviction for possessing the drug with the intent to distribute it. Hawthorne's and Smith's convictions under 18 United States Code § 924(c)(1) were vacated, as was their sentences, and the case was remanded to the District Court for further proceedings.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Burgos*, 94 F.3d 849, 858 (4th. Cir. 1996).
Date: Aug. 23, 1996
Result: After considering the totality of the circumstances and viewing the evidence in the light most favorable to the Government, the Court of Appeals concluded that a rational jury certainly could have found substantial evidence beyond a reasonable doubt to convict Burgos and Gobern of conspiracy to possess with intent to distribute cocaine base and to convict Burgos of possession with intent to distribute cocaine base and aiding and abetting. Accordingly, the Court of Appeals affirmed Burgos's and Gobern's conspiracy convictions; likewise, it affirmed Burgos's possession and aiding and abetting conviction.
Verdict: Found against defendants
Score: 1

Case: *United States v Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996).
Date: Sept. 26, 1996
Result: The appellants contended primarily that the District Court committed reversible error in refusing to ask whether any member of the venire would lend greater credibility to the testimony of law enforcement officers based solely on their status as law enforcement officers. The Court of Appeals rejected the appellants contentions, thereby affirming their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v Rybicki*, 96 F.3d 754, 758 (4th Cir. 1996).
Date: Sept. 26, 1996
Result: The Court of Appeals affirmed Rybicki's convictions for conspiracy and perjury as well as the District Court's refusal, in sentencing him, to enhance his sentence five levels based on the amount of loss to the government. To allow the District Court to consider whether Rybicki's sentence should be enhanced for obstruction of justice, the Court of Appeals vacated his sentence and remanded it for re-sentencing. The Court of Appeals also reversed the District Court's five-level downward departure, concluding that the court had erred in relying on factors that the U.S. Sentencing Guidelines Manual specify are not ordinarily relevant.
Verdict: Found against defendant
Score: 1

Case: *United States v Wells*, 98 F.3d. 808 (4th Cir. 1996).
Date: Oct. 25, 1996
Result: Wells pled guilty to unlawful possession of a firearm by a convicted felon but maintained that the District Court erred in refusing to suppress the firearm, arguing that the law enforcement agent who seized the weapon during a search of Wells' apartment had no lawful right of access to it and that the incriminating nature of the firearm was not immediately apparent. Wells also contended that Congress exceeded its authority under the *Commerce Clause* in enacting § 922(g). After reviewing Wells' remaining arguments, the Court of Appeals concluded that they were without merit and his sentence and conviction were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Withers*, 100 F.3d 1142 (4th Cir. 1996).
Date: Nov. 19, 1996
Result: The Court of Appeals agreed that the District Court erred both in disregarding the recommended Guidelines range and the statutory minimum. The Court of Appeals therefore affirmed Withers' conviction but vacated and remanded this case for re-sentencing in light of the applicable law.
Verdict: Found against defendant (in part)
Score: 0.75

Justice Clyde Hamilton

Case: *United States v Fletcher*, 74 F.3d 49 (4th Cir. 1996).
Date: Jan. 29, 1996
Result: On appeal, Fletcher challenged both his conviction and his sentence for cultivating marijuana. The Court of Appeals found no reversible error in the conduct of the trial and affirmed Fletcher's conviction. However, because of recent amendments to the U.S. Sentencing Guidelines Manual, the Court of Appeals remanded the case for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v McNamara*, 74 F.3d 515 (4th Cir. 1996).
Date: Feb. 2, 1996
Result: The Court of Appeals rejected the District Court's holding and concluded that McNamara's counsel was neither ineffective for following the controlling circuit law at the time, nor for being unaware that the Supreme Court had granted *certiorari* in *Ratzlaf*. The Court of Appeals reversed the District Court's order, reinstated McNamara's sentence, and remanded the case to the District Court for further consideration
Verdict: Found against defendant
Score: 1

Case: *United States v Gullet*, 75 F.3d 941 (4th Cir. 1996).
Date: Feb. 12, 1996
Result: Following a jury trial, Gullett was convicted. The jury found, by way of special interrogatory, that Gullett's conduct was the proximate cause of Masil Lee Hensley's death. Gullett was sentenced to thirty eight years' imprisonment. He appealed his conviction and sentence which the Court of Appeals rejected.
Verdict: Found against defendant
Score: 1

Case: *United States v Dickerson*, 77 F.3d 774, 775 (4th Cir. 1996).
Date: Mar. 12, 1996
Result: The United States (the government) appealed the sentence of Dickerson imposed by the District Court following his plea of guilty to felony attempted escape from custody. The government contended that the District Court erroneously concluded that Dickerson did not qualify as a career offender under the United States Sentencing Commission. Because the Court of Appeals concluded that the crime of felony attempted escape from custody in the abstract, "involves conduct that presents a serious potential risk of physical injury to another," it vacated Dickerson's sentence and remanded his case for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Holt*, 79 F.3d 14, 17 (4th Cir. 1996).
Date: Mar. 15, 1996
Result: Holt appealed the District Court's judgment of conviction entered upon the jury's verdict finding Holt guilty of being an inmate in possession of a weapon. Holt assigned as error the District Court's refusal to instruct the jury that his possession of a weapon could be justified by self-defense, and the court's failure to accord him a downward adjustment for acceptance of responsibility. Rejecting both contentions, the Court of Appeals affirmed Holt's conviction and sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Morin*, 80 F.3d 124, 129 (4th Cir. 1996).
Date: Apr. 5, 1996
Result: Morin was convicted of murder-for-hire and sentenced to 21 months imprisonment. Morin contended that because the murder would have taken place outside the United States, it would have violated no federal or state law. The Court of Appeals disagreed ruling that Morin's intended murder would have violated at least one federal law and two Virginia laws.
Verdict: Found against defendant
Score: 1

Case: *United States v Wesley*, 81 F.3d 482 (4th Cir. 1996).
Date: Apr. 17, 1996
Result: Wesley argued that the District Court lacked statutory authority to impose supervised release upon revocation of parole. Because, at the sentencing hearing, Wesley did not object to the imposition of supervised release, the Court of Appeals reviewed for plain error the District Court's imposed sentence. Because the sentence was not error at all, and *a fortiori* not plain error, the District Court's decision was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Williams*
Date: Apr. 24, 1996
Result: Williams contended that he was denied his right to counsel of his choice, that the testimony of his wife was erroneously admitted at trial, and that the District Court applied the wrong Guidelines range at sentencing. Because the District Court did not abuse its discretion in disqualifying Williams's chosen counsel and because the admission of Williams's wife's testimony was not plain error, the Court of Appeals affirmed Williams's convictions. It also found that the District Court applied the correct Guidelines range and so affirmed Williams's sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Raffield*
Date: May 6, 1996
Result: Raffield was convicted of drunken driving, refusing to submit to a breath analysis, and driving without a license inside Pisgah National Forest, North Carolina. He contended that the United States has no jurisdiction to bring these charges against him. As the North Carolina Code § 104- 5 and 16 United States Code § 551 grant the United States concurrent jurisdiction over national forest lands located within North Carolina the Court of Appeals affirmed the District Court's exercise of jurisdiction here.
Verdict: Found against defendant
Score: 1

Case: *United States v Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996).
Date: Jun. 25, 1996
Result: Lattimore, Jr. appealed a decision of the District Court denying his motion to suppress evidence seized during a consent search of his automobile. Because the Court of Appeals could not conclude that the District Court clearly erred in finding that Lattimore's consent to search was freely and voluntarily given, the District Court's decision was affirmed.
Verdict: For the defendant
Score: 0

Case: *United States v Trevino*, 89. F.3d 187 (4th Cir. 1996).
Date: Jul. 7, 1996
Result: Trevino appealed his convictions, contending that the District Court erred by denying his motion to disclose the Presentence Investigation Reports (PSRs) of conspiracy members who testified against him. Neither Trevino nor his counsel saw the reports; the District Court examined the PSRs *in camera* prior to announcing its decision. On appeal, the Court of Appeals reviewed the PSRs at issue, and was satisfied that the District Court's ruling was not clearly erroneous therefore affirming its decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Aramony*, 88 F.3d 1369, 1387 (4th. Cir. 1996).
Date: Jul. 17, 1996
Result: On appeal, the appellants challenged their convictions and sentences on numerous fronts. The Court of Appeals affirmed all of the appellants' convictions except the convictions of Aramony and Merlo for engaging in monetary transactions in the proceeds of specified unlawful activity.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996).
Date: Aug. 2, 1996
Result: The Court of Appeals reviewed the District Court's downward departure under the U.S. Sentencing Guidelines Manual based on the appellee's exposure to civil forfeiture. Because it concluded that exposure to civil forfeiture is not a valid basis for departure under the U.S. Sentencing Guidelines Manual, the Court of Appeals vacated the sentence and remanded it for re-sentencing within the applicable guidelines range.
Verdict: Found against defendant
Score: 1

Case: *United States v Hall*
Date: Aug. 19, 1996
Result: Hall appealed his convictions on four grounds- - that the jury instructions on the continuing criminal enterprise (CCE) count were erroneous, that notes of interviews with government witnesses should have been examined *in camera* by the District judge, that his trial should have been severed from that of his co-defendants, and that the drug amounts attributed to him were over-stated. The Court of Appeals disagreed with each of Hall's contentions and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Burgos*, 94 F.3d 849, 858 (4th. Cir. 1996).
Date: Aug. 23, 1996
Result: After considering the totality of the circumstances and viewing the evidence in the light most favorable to the Government, the Court of Appeals concluded that a rational jury certainly could have found substantial evidence beyond a reasonable doubt to convict Burgos and Gobern of conspiracy to possess with intent to distribute cocaine base and to convict Burgos of possession with intent to distribute cocaine base and aiding and abetting. Accordingly, the Court of Appeals affirmed Burgos's and Gobern's conspiracy convictions; likewise, it affirmed Burgos's possession and aiding and abetting conviction.
Verdict: Found against defendants
Score: 1

Case: *United States v Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996).
Date: Sept. 26, 1996
Result: The appellants contended primarily that the District Court committed reversible error in refusing to ask whether any member of the venire would lend greater credibility to the testimony of law enforcement officers based solely on their status as law enforcement officers. The Court of Appeals rejected the appellants contentions, thereby affirming their convictions.
Verdict: For the defendant
Score: 0

Case: *United States v Olvis*, 97 F.3d 739, 743 (4th Cir. 1996).
Date: Oct. 11, 1996
Result: Olvis' and Palmer's demonstration that more than 90 per cent of those indicted in the Norfolk-Newport News area since 1992 for crack cocaine trafficking were black, the District Court ordered discovery into the government's criteria for prosecution. When the government refused, arguing that such discovery was unwarranted, the District Court dismissed the indictment against Olvis and Palmer. The Court of Appeals ruled that because the defendants did not satisfy the "rigorous" standard recently articulated by the Supreme Court to obtain discovery for selective-prosecution claims, the District Court erred in ordering discovery. Accordingly, the Court of Appeals reversed the District Court's dismissal order and remanded with instructions to reinstate the indictment and for further proceedings.
Verdict: Found against defendant
Score: 1

Justice William Wilkins

Case: *United States v Pierce*
Date: Jan. 26, 1996
Result: Pierce contended that his sentence was unlawful because it contained a period of supervised release, a punishment not authorised by the assimilated North Carolina statute. He further argued that even if he could be sentenced to supervised release, the total punishment - the term of imprisonment plus the supervised release- - may not exceed the maximum term of incarceration allowed under state law. The Court of Appeals rejected this and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Stoudenmire*, 74 F.3d 60, 63 (4th Cir. 1996).
Date: Jan. 29, 1996
Result: Stoudenmire challenged her conviction, principally contending that her trial did not begin within 70 days of her indictment as required by the *Speedy Trial Act* (STA). The Court of Appeals concluded that the District Court did not err in ruling that Stoudenmire's trial was timely under the STA and found no reversible error. Consequently, her conviction was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Han*, 74 F.3d 537, 540 (4th Cir. 1996).
Date: Feb. 5, 1996
Result: Han argued that the District Court improperly admitted evidence discovered in a warrantless search of a bag that was in his possession when he was arrested. The District Court found that probable cause existed for the arrest, the search was incident to the arrest, and Han abandoned his privacy interest in the bag. The Court of Appeals agreed and affirmed the sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Baker*, 78 F.3d 135, 138 (4th Cir. 1996).
Date: Mar. 13, 1996
Result: Baker was indicted for possession of a firearm by a convicted felon. Before trial, the District Court granted his motion to suppress the firearm as evidence on the basis that its seizure was the product of an unreasonable search. The Court of Appeals disagreed and reversed the decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Holt*, 79 F.3d 14, 17 (4th Cir. 1996).
Date: Mar. 15, 1996
Result: Holt appealed the District Court's judgment of conviction entered upon the jury's verdict finding Holt guilty of being an inmate in possession of a weapon. Holt assigned as error the District Court's refusal to instruct the jury that his possession of a weapon could be justified by self-defense, and the court's failure to accord him a downward adjustment for acceptance of responsibility. Rejecting both contentions, the Court of Appeals affirmed Holt's conviction and sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Blake*, 81 F.3d 498, 503 (4th. Cir. 1996).
Date: Apr. 18, 1996
Result: Blake challenged his sentence, arguing that the District Court erred by enhancing his offence level based on the vulnerability of his victims and in departing upward from the applicable guideline range. He also challenged the restitution order imposed by the District Court on numerous grounds. The Court of Appeals affirmed the sentence of imprisonment and term of supervised release, but vacated the restitution order and remanded it with instructions.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Frankson*, 83 F.3d 79, 81 (4th Cir. 1996).
Date: Apr. 29, 1996
Result: Frankson contended that his *Miranda* warnings were too general, that he never formally waived his *Miranda* rights, and that *Miranda* requires police to re-advise suspects of their rights when the interrogation does not follow immediately upon the warnings. Finding no merit in these contentions, the Court of Appeals affirmed the admission into evidence of the appellant's statements as well as his convictions for possession with intent to distribute cocaine and marijuana.
Verdict: Found against defendant
Score: 1

Case: *United States v David*
Date: May 6, 1996
Result: In light of *Gaudin*, which is to be applied retroactively to all cases on direct review, the failure to instruct this particular jury on the element of materiality constituted plain error. The Court of Appeals thus vacated David's conviction and remanded the case for a new trial.
Verdict: For the defendant
Score: 0

Case: *United States v Rahman*, 83. F.3d 89 (4th Cir. 1996).
Date: May 9, 1996
Result: Rahman appealed these convictions, principally arguing that the District Court erroneously instructed the jury on an element of a § 922(a)(6) offence and that the evidence was insufficient to support his § 922(g)(1) convictions. The Court of Appeals rejected this and affirmed the District Court's sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Goossens*, 84 F.3d 697 (4th Cir. 1996).
Date: May 28, 1996
Result: In imposing sentence on Goossens for possession of child pornography, the District Court departed downward from the applicable guideline range based on a finding that Goossens suffered from diminished mental capacity that contributed to his offence. The Government appealed the sentence imposed, asserting that the District Court erred in departing downward on that basis. The Court of Appeals agreed and consequently, vacated the sentence imposed by the District Court and remanded it for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996).
Date: Jun. 25, 1996
Result: Lattimore, Jr. appealed a decision of the District Court denying his motion to suppress evidence seized during a consent search of his automobile. Because the Court of Appeals could not conclude that the District Court clearly erred in finding that Lattimore's consent to search was freely and voluntarily given, the District Court's decision was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Cedelle*, 89 F.3d 181 (4th Cir. 1996).
Date: Jul. 11, 1996
Result: Cedelle appealed his conviction of one count of knowingly receiving visual depictions of a person under the age of 18 engaged in sexually explicit conduct. He principally argued that the District Court committed plain error by failing to instruct the jury that the Government had the burden of proving that he knew that the visual depictions he received portrayed minors engaged in sexually explicit conduct. In rejecting this the Court of Appeal affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Taylor*, 90 F.3d 903, 909 (4th Cir. 1996).
Date: Jul. 26, 1996
Result: The Taylors principally asserted that the District Court erred in denying their motion to suppress the evidence offered by the Government to support the determination that the defendant properties were used or involved in illegal gambling because that evidence was seized as a result of a search that violated their Fourth Amendment rights. The Court of Appeals found the Taylor's arguments to be without merit and accordingly, the judgement of the District Court was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Beltran-Ortiz*, 91. F.3d 665, 669 (4th Cir. 1996).
Date: Aug. 7, 1996
Result: The Government acknowledged that it breached Beltran-Ortiz' plea agreement by failing to debrief him, but argued that re-sentencing was unnecessary because he received the benefit of his bargain. The Court of Appeals rejected this argument, vacated Beltran-Ortiz' sentence, and remanded it for re-sentencing.
Verdict: For the defendant
Score: 0

Case: *United States v Burgos*, 94 F.3d 849, 858 (4th. Cir. 1996).
Date: Aug. 23, 1996
Result: After considering the totality of the circumstances and viewing the evidence in the light most favourable to the Government, the Court of Appeals concluded that a rational jury certainly could have found substantial evidence beyond a reasonable doubt to convict Burgos and Gobern of conspiracy to possess with intent to distribute cocaine base and to convict Burgos of possession with intent to distribute cocaine base and aiding and abetting. Accordingly, the Court of Appeals affirmed Burgos's and Gobern's conspiracy convictions; likewise, it affirmed Burgos's possession and aiding and abetting conviction.
Verdict: Found against defendants
Score: 1

Case: *United States v Myers*
Date: Aug. 28, 1996
Result: Myers appealed his conviction of offering drug paraphernalia for sale and selling it. The only question on appeal was the District Court's grant of a *motion in limine* prohibiting him from introducing evidence of a good faith defence to the charge. The Court of Appeals rejected this and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Bacon*, 94 F.3d 158 (4th Cir. 1996).
Date: Aug. 30, 1996
Result: The District Court should have counted Bacon's robbery conviction, as well as his attempted robbery conviction, as predicate offences under the career offender guideline. Sentencing Bacon to a 150 month term of imprisonment as a non-career offender contravened Congress's expressed intention to see career offenders sentenced at or near the maximum term authorised by statute, a life term in Bacon's case
Verdict: Found against defendant
Score: 1

Case: *United States v Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996).
Date: Sept. 26, 1996
Result: The appellants contended primarily that the District Court committed reversible error in refusing to ask whether any member of the venire would lend greater credibility to the testimony of law enforcement officers based solely on their status as law enforcement officers. The Court of Appeals rejected the appellants contentions, thereby affirming their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v Imngren*, 98 F.3d 811, 815-16 (4th Cir. 1996).
Date: Oct. 25, 1996
Result: The District Court dismissed the Driving Under the Influence charges of each defendant, holding that the suspension of their driving privileges for the same offence in a prior proceeding constituted prior punishment under the *Double Jeopardy Clause* of the Fifth Amendment. Finding that the District Court erred, the Court of Appeals reversed its judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Wells*, 98 F.3d. 808 (4th Cir. 1996).
Date: Oct. 25, 1996
Result: Wells pled guilty to unlawful possession of a firearm by a convicted felon but maintained that the District Court erred in refusing to suppress the firearm, arguing that the law enforcement agent who seized the weapon during a search of Wells' apartment had no lawful right of access to it and that the incriminating nature of the firearm was not immediately apparent. Wells also contended that because Congress exceeded its authority under the *Commerce Clause* in enacting § 922(g). After reviewing Wells' remaining arguments, the Court of Appeals concluded that they were without merit and his sentence and conviction were affirmed.
Verdict: Found against defendant
Score: 1

Justice Michael Luttig

Case: *United States v Pierce*
Date: Jan. 26, 1996
Result: Pierce contended that his sentence was unlawful because it contained a period of supervised release, a punishment not authorised by the assimilated North Carolina statute. He further argued that even if he could be sentenced to supervised release, the total punishment - the term of imprisonment plus the supervised release - may not exceed the maximum term of incarceration allowed under state law. The Court of Appeals rejected this and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Han*, 74 F.3d 537, 540 (4th Cir. 1996).
Date: Feb. 5, 1996
Result: Han argued that the District Court improperly admitted evidence discovered in a warrantless search of a bag that was in his possession when he was arrested. The District Court found that probable cause existed for the arrest, the search was incident to the arrest, and Han abandoned his privacy interest in the bag. The Court of Appeals agreed and affirmed the sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Baker*, 78 F.3d 135, 138 (4th Cir. 1996).
Date: Mar. 13, 1996
Result: Baker was indicted for possession of a firearm by a convicted felon. Before trial, the District Court granted his motion to suppress the firearm as evidence on the basis that its seizure was the product of an unreasonable search. The Court of Appeals disagreed and reversed the decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Lancaster*, 78 F.3d 888, 897-901. (4th Cir. 1996).
Date: Mar. 20, 1996
Result: Although the Court of Appeals determined that the District Court abused its discretion in refusing to ask the proposed *voir dire* question, the Court of Appeals concluded that this error did not require reversal because it was cured by the other questions asked during *voir dire*, the District Court's credibility instruction, and the introduction of evidence corroborating the testimony of the Government's chief witness. The Court of Appeals concluded that neither of the appellants' remaining contentions had merit and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Wesley*, 81 F.3d 482 (4th Cir. 1996).
Date: Apr. 17, 1996
Result: Wesley argued that the District Court lacked statutory authority to impose supervised release upon revocation of parole. Because, at the sentencing hearing, Wesley did not object to the imposition of supervised release, the Court of Appeals reviewed for plain error the District Court's imposed sentence. Because the sentence was not error at all, and *a fortiori* not plain error, the District Court's decision was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Blake*, 81 F.3d 498, 503 (4th. Cir. 1996).
Date: Apr. 18, 1996
Result: Blake challenged his sentence, arguing that the District Court erred by enhancing his offence level based on the vulnerability of his victims and in departing upward from the applicable guideline range. He also challenged the restitution order imposed by the District Court on numerous grounds. The Court of Appeals affirmed the sentence of imprisonment and term of supervised release, but vacated the restitution order and remanded it with instructions.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Wilson*,
Date: Apr. 22, 1996
Result: This case presents the question of whether the trial court appropriately denied Wilson's motion to withdraw his guilty plea, where the appellant claimed that he never possessed the requisite intent for the crime to which he pled guilty. The Court of Appeals ruled there was no abuse of discretion by the District Court and its judgement was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Francis*, 82 F.3d 77, 78 (4th Cir. 1996).
Date: Apr. 23, 1996
Result: The sole issue presented by this appeal was whether the prosecution's reference in closing argument to its "uncontradicted" evidence infringed the defendant's Fifth Amendment right against self-incrimination. The Court of Appeals held that it did not, and therefore affirmed the defendant's conviction for assault.
Verdict: Found against defendant
Score: 1

Case: *United States v David*
Date: May 6, 1996
Result: In light of *Gaudin*, which is to be applied retroactively to all cases on direct review, the failure to instruct this particular jury on the element of materiality constituted plain error. The Court of Appeals thus vacated David's conviction and remanded the case for a new trial.
Verdict: For the defendant
Score: 0

Case: *United States v Simmons*
Date: May 20, 1996
Result: The sole question before the court in this case was whether a Molotov cocktail, comprising a glass bottle filled with gasoline and a cloth fuse, is a "destructive device" as that term is defined in 26 United States Code § 5845(f)(1), if the defendant did not physically possess a match or lighter with which to light the device. Concluding that it was, the Court of Appeals affirmed the defendant's conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Wilkerson*, 84 F.3d 692, 695 (4th Cir. 1996).
Date: May 24, 1996
Result: In this appeal, Wilkerson challenged the in-court eyewitness identifications which he claimed were tainted by prior suggestive photographic line-ups and the trial judge's exclusion of exculpatory hearsay statements. Because the admission of the eyewitnesses' in-court identifications was not plainly erroneous and because the trial judge did not abuse his discretion in excluding the hearsay statements, his sentence was affirmed by the Court of Appeals.
Verdict: Found against defendant
Score: 1

Case: *United States v Woodrup*, 86 F.3d 359, 361 (4th Cir. 1996).
Date: Jun. 18, 1996
Result: On this appeal, Woodrup challenged not his bank robbery conviction, but only the 240 month sentence imposed for that offence, as unconstitutional under the *Double Jeopardy Clause* of the Fifth Amendment. He challenged, alternatively, the sufficiency of the evidence supporting his conviction for bank robbery. Finding no merit in either claim, the Court of Appeals affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Roseboro*, 87 F.3d. 642, 645 (4th Cir. 1996).
Date: Jun. 20, 1996
Result: Because the defendants failed to establish that the FBI 302 Report was a "statement" within the meaning of the *Jencks Act*, the Court of Appeals concluded that the District Court was not required to order its production. Accordingly, the Court of Appeals affirmed the sentence of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996).
Date: Jun. 25, 1996
Result: Lattimore, Jr. appealed a decision of the District Court denying his motion to suppress evidence seized during a consent search of his automobile. Because the Court of Appeals could not conclude that the District Court clearly erred in finding that Lattimore's consent to search was freely and voluntarily given, the District Court's decision was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Aramony*, 88 F.3d 1369, 1387 (4th. Cir. 1996).
Date: Jul. 17, 1996
Result: On appeal, the appellants challenged their convictions and sentences on numerous fronts. The Court of Appeals affirmed all of the appellants' convictions except the convictions of Aramony and Merlo for engaging in monetary transactions in the proceeds of specified unlawful activity.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Silvers*, 90 F.3d 395 (4th Cir. 1996).
Date: Jul. 22, 1996
Result: In this appeal the Court of Appeals was asked to determine whether, *inter alia*, a District Court, upon re-sentencing of a defendant, can *sua sponte* reinstate a previously vacated conspiracy conviction. Finding no double jeopardy concerns, and noting that the Supreme Court recently cited to this practice with approval the Court of Appeals affirmed that aspect of the District Court's order. However, the District Court's restructuring of sentences on other counts, in such a way as to reimpose sentences which were fully served, did violate the *Double Jeopardy Clause*; hence, the Court of Appeals vacated the re-sentencing order and remanded the case for imposition of a 15-year sentence for the reinstated conspiracy count.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996).
Date: Aug. 2, 1996
Result: The Court of Appeals reviewed the District Court's downward departure under the U.S. Sentencing Guidelines Manual based on appellee's exposure to civil forfeiture. Because it concluded that exposure to civil forfeiture was not a valid basis for departure under the U.S. Sentencing Guidelines Manual, the Court of Appeals vacated the sentence and remanded it for re-sentencing within the applicable guidelines range.
Verdict: Found against defendant
Score: 1

Case: *United States v Beltran-Ortiz*, 91. F.3d 665, 669 (4th Cir. 1996).
Date: Aug. 7, 1996
Result: The Government acknowledged that it breached Beltran-Ortiz' plea agreement by failing to debrief him, but argued that re-sentencing was unnecessary because he received the benefit of his bargain. The Court of Appeals rejected this argument, vacated Beltran-Ortiz' sentence, and remanded it for re-sentencing.
Verdict: For the defendant
Score: 0

Case: *United States v Letsinger*, 93 F.3d 140, 147-48 (4th Cir. 1996).
Date: Aug. 22, 1996
Result: Letsinger, challenged on two grounds the denial of his motion to suppress evidence obtained in connection with his arrest for possession with intent to distribute crack cocaine. First, he argued that his consensual questioning was transformed into a seizure by the movement of the train on which he and his arresting officers were travelling. Secondly, he contended that his bag containing the cocaine which he wished suppressed was seized at the time that the officers announced they were going to seize it, and, at that time, they lacked reasonable suspicion to make such a seizure. The Court of Appeals ultimately rejected both arguments, and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Burgos*, 94 F.3d 849, 858 (4th. Cir. 1996).
Date: Aug. 23, 1996
Result: After considering the totality of the circumstances and viewing the evidence in the light most favorable to the Government, the Court of Appeals concluded that a rational jury certainly could have found substantial evidence beyond a reasonable doubt to convict Burgos and Gobern of conspiracy to possess with intent to distribute cocaine base and to convict Burgos of possession with intent to distribute cocaine base and aiding and abetting. Accordingly, the Court of Appeals affirmed Burgos's and Gobern's conspiracy convictions; likewise, it affirmed Burgos's possession and aiding and abetting conviction.
Verdict: Found against defendants
Score: 1

Case: *United States v Campbell*
Date: Aug. 23, 1996
Result: Campbell appealed his underlying aggravated felony conviction arguing it occurred in August 1989 and was prior to the effective date, November 29, 1990, of the amendment that expanded the definition of "aggravated felony" to include crimes of violence, and thereby his prior manslaughter conviction. He contended that the amendment changing the definition of aggravated felony, was not retroactive and could not be applied to convictions prior to November 29, 1990. The Court of Appeals found no merit to his position and affirmed his sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996).
Date: Sept. 26, 1996
Result: The appellants contended primarily that the District Court committed reversible error in refusing to ask whether any member of the venire would lend greater credibility to the testimony of law enforcement officers based solely on their status as law enforcement officers. The Court of Appeals rejected the appellants contentions, thereby affirming their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996).
Date: Dec. 4, 1996
Result: Finding no error in McHan's 1992 prosecution, the Court of Appeals affirmed his conviction. But because it concluded that the District Court abused its discretion in departing downward to credit McHan for his discharged sentence and erred in deducting from the amount of McHan's criminal forfeiture both the costs of his drug operations and one-half of his drug partnership's revenues, the Court of Appeals vacated McHan's sentence and remanded his case for re-sentencing.
Verdict: Found against defendant
Score: 1

Justice Karen Williams

Case: *United States v Lancaster*, 78 F.3d 888, 897-901. (4th Cir. 1996).
Date: Mar. 20, 1996
Result: Although the Court of Appeals determined that the District Court abused its discretion in refusing to ask the proposed *voir dire* question, the Court of Appeals concluded that this error did not require reversal because it was cured by the other questions asked during *voir dire*, the District Court's credibility instruction, and the introduction of evidence corroborating the testimony of the Government's chief witness. The Court of Appeals concluded that neither of the appellants' remaining contentions had merit and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Francis*, 82 F.3d 77, 78 (4th Cir. 1996).
Date: Apr. 23, 1996
Result: The sole issue presented by this appeal was whether the prosecution's reference in closing argument to its "uncontradicted" evidence infringed the defendant's Fifth Amendment right against self-incrimination. The Court of Appeals held that it did not, and therefore affirmed the defendant's conviction for assault.
Verdict: Found against defendant
Score: 1

Case: *United States v Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996).
Date: Jun. 25, 1996
Result: Lattimore, Jr. appealed a decision of the District Court denying his motion to suppress evidence seized during a consent search of his automobile. Because the Court of Appeals could not conclude that the District Court clearly erred in finding that Lattimore's consent to search was freely and voluntarily given, the District Court's decision was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Landrum*, 93 F.3d. 122, 124-25 (4th Cir. 1996).
Date: Aug. 16, 1996
Result: Landrum appealed the denial of his motion by challenging the restitution element of his September 1987 criminal sentence. To reach the merits of Landrum's motion, the Court of Appeals concluded that the District Court's restitution order was authorised by the former *Federal Probation Act of 1925* and affirmed the decision of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Hawthorne*, 94 F.3d 118 (4th Cir. 1996).
Date: Aug. 21, 1996
Result: Hawthorne's and Smith's convictions for engaging in a conspiracy to distribute crack cocaine were affirmed, as was Hawthorne's conviction for possessing the drug with the intent to distribute it. Hawthorne's and Smith's convictions under 18 United States Code § 924(c)(1) were vacated, as was their sentences, and the case was remanded to the District Court for further proceedings.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Burgos*, 94 F.3d 849, 858 (4th. Cir. 1996).
Date: Aug. 23, 1996
Result: After considering the totality of the circumstances and viewing the evidence in the light most favourable to the Government, the Court of Appeals concluded that a rational jury certainly could have found substantial evidence beyond a reasonable doubt to convict Burgos and Gobern of conspiracy to possess with intent to distribute cocaine base and to convict Burgos of possession with intent to distribute cocaine base and aiding and abetting. Accordingly, the Court of Appeals affirmed Burgos's and Gobern's conspiracy convictions; likewise, it affirmed Burgos's possession and aiding and abetting conviction.
Verdict: Found against defendants
Score: 1

Case: *United States v Bacon*, 94 F.3d 158 (4th Cir. 1996).
Date: Aug. 30, 1996
Result: The District Court should have counted Bacon's robbery conviction, as well as his attempted robbery conviction, as predicate offences under the career offender guideline. Sentencing Bacon to a 150 month term of imprisonment as a non-career offender contravened Congress's expressed intention to see career offenders sentenced at or near the maximum term authorised by statute, a life term in Bacon's case
Verdict: Found against defendant
Score: 1

Case: *United States v Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996).
Date: Sept. 26, 1996
Result: The appellants contended primarily that the District Court committed reversible error in refusing to ask whether any member of the venire would lend greater credibility to the testimony of law enforcement officers based solely on their status as law enforcement officers. The Court of Appeals rejected the appellants contentions, thereby affirming their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v Imngren*, 98 F.3d 811, 815-16 (4th Cir. 1996).
Date: Oct. 25, 1996
Result: The District Court dismissed the Driving Under the Influence charges of each defendant, holding that the suspension of their driving privileges for the same offence in a prior proceeding constituted prior punishment under the *Double Jeopardy Clause* of the Fifth Amendment. Finding that the District Court erred, the Court of Appeals reversed its judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Wells*, 98 F.3d. 808 (4th Cir. 1996).
Date: Oct. 25, 1996
Result: Wells pled guilty to unlawful possession of a firearm by a convicted felon but maintained that the District Court erred in refusing to suppress the firearm, arguing that the law enforcement agent who seized the weapon during a search of Wells' apartment had no lawful right of access to it and that the incriminating nature of the firearm was not immediately apparent. Wells also contends that because Congress exceeded its authority under the *Commerce Clause* in enacting § 922(g). After reviewing Wells' remaining arguments, the Court of Appeals concluded that they were without merit and his sentence and conviction were affirmed.
Verdict: Found against defendant
Score: 1

APPENDIX H
FOURTH CIRCUIT OPINIONS IN CRIMINAL JUSTICE CASES BY SIX REAGAN AND BUSH APPOINTED JUDGES IN 1997

Justice Paul Niemeyer

Case: *United States v NJB*, 104 F.3d. 630, 634 (4th Cir. 1997).
Date: Jan. 14, 1997
Result: A juvenile defendant - "NJB" - appealed the District Court's order permitting the Government to prosecute him in federal court as an adult. NJB maintained that the District Court lacked jurisdiction to issue its order because of two alleged deficiencies in the Government's certification of his case. In affirming, the Court of Appeals ruled that the District Court properly exercised jurisdiction in this case and did not err in any of its related rulings.
Verdict: Found against defendant
Score: 1

Case: *United States v McMahon*, 104 F.3d 638, 643 (4th Cir. 1997).
Date: Jan. 15, 1997
Result: McMahon, Jr. appealed the District Court's finding that he committed criminal contempt by wilfully violating a sequestration order. The Court of Appeals affirmed this judgement from the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Sprinkle*, 106 F.3d 613, 616-17 (4th Cir. 1997).
Date: Feb. 11, 1997
Result: The Court of Appeals held that although there was no reasonable, articulable suspicion to justify stopping his car, Sprinkle's use of the gun to commit a new, distinct crime after the stop made the gun subject to lawful seizure. It therefore reversed the District Court ruling with instructions to reinstate the indictment.
Verdict: Found against defendant
Score: 1

Case: *United States v Singleton*, 107 F.3d 1091, 1104 (4th Cir. 1997).
Date: Feb. 28, 1997
Result: Because the Court of Appeals found no constitutional right to have advisory counsel during self-representation and no error by the District Court in applying Singleton's acknowledged Sixth Amendment rights, it affirmed his conviction. It did, however, remand for re-sentencing, to permit the court to resolve an open sentencing issue.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Braxton*, 112 F.3d 777, 780 (4th. Cir. 1997).
Date: May 6, 1997
Result: Prior to trial, Braxton moved to suppress the statement he made during his interview with Agent Poynter and Trooper Ballard in connection with firearms violations. The District Court granted Braxton's motion, determining that the statement was involuntary and ordering that it be suppressed. The Court of Appeals held that Braxton's statement was voluntary and that the District Court erred in suppressing it. Accordingly, it reversed the District Court's decision.
Verdict: Against the defendant
Score: 1

Case: *United States v Wilson*, 133 F.3d 251 (4th Cir. 1997).
Date: May 22, 1997
Result: Although the Court of Appeals found adequate support for the finding of the District Court that Wilson failed to carry his burden of proof with respect to his possession of a firearm in connection with the conspiracy, it concluded that the District Court abused its discretion in departing downward from the applicable guideline range because of Wilson's extraordinary family responsibilities. Accordingly, it remanded the case for re-sentencing.
Verdict: Against the defendant
Score: 1

Case: *United States v Barber*, 119 F.3d 276, 280-81 (4th Cir. 1997).
Date: Jul. 14, 1997
Result: The Court of Appeals concluded that the District Court acted within its discretion in departing on the ground that Barber and Hodge robbed the victim in connection with the murder and affirmed by an equally divided court its decision to depart on the basis that the murder was premeditated. However, because the use of a weapon or dangerous instrumentality is an encouraged factor that is taken into account within the heartland of second-degree murder, and because the District Court did not make factual findings concerning the circumstances surrounding the murder or whether the discharge of the firearm at issue was extraordinary enough to remove it from the heartland of situations encompassed within the second-degree murder guideline, it remanded the case to permit the District Court to consider these matters in the first instance.
Verdict: Against the defendant (in part)
Score: 0.75

Case: *United States v Crump*, 120 F.3d. 462, 468 (4th Cir. 1997).
Date: Jul. 23, 1997
Result: Crump was convicted in the District Court of conspiring to possess cocaine base with the intent to deliver it, and, with regard to his possession of an antique shotgun he used to murder a rival drug dealer, of violating 18 United States Code §§ 922(g) and 924(c)(1). The District Court sentenced Crump to life imprisonment plus five years. Crump appealed his convictions and sentence. The Court of Appeals affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v King*
Date: Jul. 24, 1997
Result: King and Hendricks appealed their convictions for various charges relating to their narcotics distribution activities. The Court of Appeals affirmed all of King's convictions and the majority of Hendricks' convictions. However, because the evidence was insufficient to support Hendricks' conviction, predicated upon a firearm that was found in his home, the Court of Appeals reversed that conviction and remanded the case for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Schaefer*, 120 F.3d 505 (4th Cir. 1997).
Date: Aug. 13, 1997
Result: Schaefer appealed his 46 month sentence, arguing that the District Court erred in concluding that it lacked discretion to depart downward from the guideline range. The Court of Appeals affirmed the District Court's decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Carey*
Date: Aug. 18, 1997
Result: The government filed a motion under Federal Rule of Criminal Procedure 35(b) to reduce Carey and Street's sentences, arguing that Rule 35(b) as interpreted in light of the Advisory Committee Note excuses its late filing because the investigation on which Carey and Street cooperated could not have been undertaken in time and that therefore they could not have cooperated within one year of their sentences. The District Court refused to consider the motion relying on the strict language of Rule 35(b) to conclude that considering the motion would be beyond its jurisdiction. The Court of Appeals affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Chen*, 131 F.3d 375, 385 (4th Cir. 1997).
Date: Oct. 31, 1997
Result: This case was to determine whether the convictions and sentences of Chong Chao Chen and Chang Han Chen, members of an alien-smuggling ring, should stand. Both were convicted by a jury of using or carrying a firearm, or aiding and abetting the same, during a crime of violence. On appeal, they contended that their convictions must be vacated because the District Court misinstructed the jury in light of the Supreme Court's decision in *Bailey v. United States*. The Court of Appeals rejected this and affirmed their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v Banks*
Date: Dec. 2, 1997
Result: The District Court departed downward solely because the U.S. Sentencing Guidelines Manual treated crimes involving crack cocaine more harshly than crimes involving like amounts of cocaine powder. The government appealed the District Court's downward departure. The Court of Appeals reversed the District Court's decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Queen*, 132 F.3d 991, 994 (4th Cir. 1997).
Date: Dec. 29, 1997
Result: The primary issue raised in this appeal was whether evidence of the defendant's prior acts of witness tampering were properly admitted under Federal Rule of Evidence 404(b) to prove the element of intent in a later prosecution for a separate act of witness tampering. The Court of Appeals concluded that the District Court did not abuse its discretion in admitting the evidence, and affirmed the judgement.
Verdict: Found against defendant
Score: 1

Justice William Wilkins

Case: *United States v Mitchell*, 104 F.3d 649 (4th Cir. 1997).
Date: Jan. 15, 1997
Result: Mitchell appealed his conviction for using or carrying a firearm during and in relation to a drug trafficking offence arguing that in light of the decision of the Supreme Court in *Bailey v. United States*, the District Court failed to develop an adequate factual record to support his plea of guilty. The Court of Appeals concluded that the evidence developed on the record by the District Court was sufficient to provide a factual basis for Mitchell's guilty plea and accordingly affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Braxton*, 112 F.3d 777 (4th. Cir. 1997).
Date: May 6, 1997
Result: Prior to trial, Braxton moved to suppress the statement he made during his interview with Agent Poynter and Trooper Ballard in connection with firearms violations. The District Court granted Braxton's motion, determining that the statement was involuntary and ordering that it be suppressed. The Court of Appeals held that Braxton's statement was voluntary and that the District Court erred in suppressing it. Accordingly, it reversed the District Court's decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Wilson*, 133 F.3d 251 (4th Cir. 1997).
Date: May 22, 1997
Result: Although the Court of Appeals found adequate support for the finding of the District Court that Wilson failed to carry his burden of proof with respect to his possession of a firearm in connection with the conspiracy, it concluded that the District Court abused its discretion in departing downward from the applicable guideline range because of Wilson's extraordinary family responsibilities. Accordingly, it remanded the case for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Layman*, 116 F.3d 105 (4th Cir. 1997).
Date: Jun. 24, 1997
Result: Because the sentence was imposed on Layman when it was orally pronounced in open court, the District Court lacked authority to alter the sentence absent "arithmetical, technical, or other clear error." And, since the modification of Layman's sentence was not prompted by any such error, the Court vacated the modified sentence and remanded it with instructions to impose the sentence as originally pronounced. Additionally, the Court of Appeals held that the equivalency ratio applied to any offence involving the cultivation of marijuana plants, regardless of whether live plants are actually seized. So, finding no error with respect to Smith's sentence, the Court of Appeals affirmed it.
Verdict: Found against defendant
Score: 1

Case: *United States v Spruill*, 118 F.3d 221 (4th Cir. 1997).
Date: Jul. 1, 1997
Result: Spruill argued that he can be convicted under § 844(e) only if the phone threats he made concerned the use of fire or explosives. The Court of Appeals agreed and because counts two and three of his indictment did not charge this essential element of the offence, it vacated Spruill's convictions on those counts. However, the Court of Appeals affirmed his conviction on count one, rejecting his argument that there was insufficient evidence of a "true" threat. Accordingly, the case was remanded for re-sentencing.
Verdict: For the defendant (in part)
Score: 0.25

Case: *United States v Barber*, 119 F.3d 276 (4th Cir. 1997).
Date: Jul. 14, 1997
Result: The Court of Appeals concluded that the District Court acted within its discretion in departing on the ground that Barber and Hodge robbed the victim in connection with the murder and affirm by an equally divided court its decision to depart on the basis that the murder was premeditated. However, because the use of a weapon or dangerous instrumentality is an encouraged factor that is taken into account within the heartland of second-degree murder, and because the District Court did not make factual findings concerning the circumstances surrounding the murder or whether the discharge of the firearm at issue was extraordinary enough to remove it from the heartland of situations encompassed within the second-degree murder guideline, it remanded the case to permit the District Court to consider these matters in the first instance.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Crump*, 120 F.3d. 462, 468 (4th Cir. 1997).
Date: Jul. 23, 1997
Result: Crump was convicted in the District Court of conspiring to possess cocaine base with the intent to deliver it, and, with regard to his possession of an antique shotgun he used to murder a rival drug dealer, of violating 18 United States Code §§ 922(g) and 924(c)(1). The District Court sentenced Crump to life imprisonment plus five years. Crump appealed his convictions and sentence. The Court of Appeals affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v King*
Date: Jul. 24, 1997
Result: King and Hendricks appealed their convictions for various charges relating to their narcotics distribution activities. The Court of Appeals affirmed all of King's convictions and the majority of Hendricks' convictions. However, because the evidence was insufficient to support Hendricks' conviction, predicated upon a firearm that was found in his home, the Court of Appeals reversed that conviction and remanded the case for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Wildes*, 120 F.3d 468 (4th Cir. 1997).
Date: Jul. 24, 1997
Result: Wildes and Cameron set alight a six-foot tall wooden cross and leaned it against a fence of an African-American family's home. Appellants were subsequently convicted of conspiring against civil rights, interfering by force or threat of force with the occupation of a dwelling because of race, and using fire to commit a federal felony. On appeal, they contended that the District Court erroneously failed to dismiss Count III of the indictment that charged them with the use of fire to commit a felony in violation of § 844(h)(1), on the basis that this statute applies only to the predicate felony of arson. In rejecting this, the Court of Appeals affirmed the judgment as to all counts.
Verdict: Found against defendant
Score: 1

Case: *United States v Schaefer*, 120 F.3d 505 (4th Cir. 1997).
Date: Aug. 13, 1997
Result: Schaefer appealed his 46 month sentence, arguing that the District Court erred in concluding that it lacked discretion to depart downward from the guideline range. The Court of Appeals affirmed the District Court's decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Chen*, 131 F.3d 375, 385 (4th Cir. 1997).
Date: Oct. 31, 1997
Result: This case was to determine whether the convictions and sentences of Chong Chao Chen and Chang Han Chen, members of an alien- smuggling ring, should stand. Both were convicted by a jury of using or carrying a firearm, or aiding and abetting the same, during a crime of violence. On appeal, they contend that their convictions must be vacated because the District Court misinstructed the jury in light of the Supreme Court's decision in *Bailey v. United States*. The Court of Appeals rejected this and affirmed their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v Self*
Date: Dec. 31, 1997
Result: Self appealed the sentence imposed upon him by the District Court following his plea of guilty to being a felon in possession of a firearm. Self principally contended that the District Court erred in enhancing his offence level by two levels pursuant to U.S. Sentencing Guidelines Manual § 3C1.1 (1995) based on a finding that Self obstructed justice by attempting to have witnesses murdered. In rejecting this appeal the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Justice Michael Luttig

Case: *United States v Mitchell*, 104 F.3d 649, 652-54 (4th Cir. 1997).
Date: Jan. 15, 1997
Result: Mitchell appealed his conviction for using or carrying a firearm during and in relation to a drug trafficking offence arguing that in light of the decision of the Supreme Court in *Bailey v. United States*, the District Court failed to develop an adequate factual record to support his plea of guilty. The Court of Appeals concluded that the evidence developed on the record by the District Court was sufficient to provide a factual basis for Mitchell's guilty plea and accordingly affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Stanfield*, 109 F.3d 976, 984 n.5 (4th Cir. 1997).
Date: Mar. 31, 1997
Result: Because Officer Mackel was engaged in a reasonable protective search when he opened Stanfield's passenger door for the limited purpose of determining whether Stanfield was armed and whether there were any other occupants within the vehicle who might pose a danger to him or his partners, and because the cocaine that Stanfield sought to suppress was seen by Officer Mackel in plain view during the conduct of this reasonable search, the District Court's denial of Stanfield's motion to suppress is affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Elie*, 111 F.3d 1135 (4th Cir. 1997).
Date: Apr. 24, 1997
Result: The District Court, in a series of orders, suppressed evidence against Elie as the "tainted fruit" of a *Miranda* violation. The District Court also ruled that the warned and voluntary statements Elie made at the Arlington County Detention Center, in which he identified the firearms seized from his hotel rooms and the firearms dealer that sold him the weapons, did not constitute an "independent source" for admitting any of the challenged evidence. Finding that the "fruit of the poisonous tree" analysis is inapplicable in cases involving mere departures from *Miranda*, the Court of Appeals reversed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Braxton*, 112 F.3d 777, 780 (4th. Cir. 1997).
Date: May 6, 1997
Result: Prior to trial, Braxton moved to suppress the statement he made during his interview with Agent Poynter and Trooper Ballard in connection with firearms violations. The District Court granted Braxton's motion, determining that the statement was involuntary and ordering that it be suppressed. The Court of Appeals held that Braxton's statement was voluntary and that the District Court erred in suppressing it. Accordingly, it reversed the District Court's decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Stotts*, 113 F.3d 493 (4th Cir. 1997).
Date: May 9, 1997
Result: Stotts appealed his conviction on the ground that the District Court erred when it refused to give the self-defence jury instruction that Stotts requested for assaulting a prison guard. He also appealed his sentence on the ground that the District Court erred when it granted the government's motion for a two-level upward sentencing adjustment pursuant to U.S. Sentencing Guidelines Manual. In rejecting this argument the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Verna*
Date: May 14, 1997
Result: Verna appealed from his convictions for possession of a firearm by a convicted felon, 18 United States Code § 922(g), and possession of a firearm not registered in the *National Firearms Registration and Transfer Record*, arising out of his construction of a home-made bomb which he placed in the automobile of his former wife and two children. In rejecting this appeal the Court of Appeals affirmed the decision of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Sanchez*, 118 F.3d 192 (4th Cir. 1997).
Date: Jun. 30, 1997
Result: Sanchez was convicted, following a jury trial, of conspiracy to possess with intent to distribute cocaine. He challenged five rulings of the District Court and sought reversal of his conviction. Finding no prejudicial error among those assigned the Court of Appeals affirmed his conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Barber*, 119 F.3d 276, 280-81 (4th Cir. 1997).
Date: Jul. 14, 1997
Result: The Court of Appeals concluded that the District Court acted within its discretion in departing on the ground that Barber and Hodge robbed the victim in connection with the murder and affirm by an equally divided court its decision to depart on the basis that the murder was premeditated. However, because the use of a weapon or dangerous instrumentality is an encouraged factor that is taken into account within the heartland of second-degree murder, and because the District Court did not make factual findings concerning the circumstances surrounding the murder or whether the discharge of the firearm at issue was extraordinary enough to remove it from the heartland of situations encompassed within the second-degree murder guideline, it remanded the case to permit the District Court to consider these matters in the first instance.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Wildes*, 120 F.3d 468 (4th Cir. 1997).
Date: Jul. 24, 1997
Result: Wildes and Cameron set alight a six-foot tall wooden cross and leaned it against a fence of an African-American family's home. Appellants were subsequently convicted of conspiring against civil rights, interfering by force or threat of force with the occupation of a dwelling because of race, and using fire to commit a federal felony. On appeal, they contended that the District Court erroneously failed to dismiss Count III of the indictment that charged them with the use of fire to commit a felony in violation of § 844(h)(1), on the basis that this statute applies only to the predicate felony of arson. In rejecting this, the Court of Appeals affirmed the judgment as to all counts.
Verdict: Found against defendant
Score: 1

Case: *United States v Phan*, 121 F.3d 149 (4th Cir. 1997).
Date: Jul. 29, 1997
Result: The Court of Appeals stated that no reasonable jury could find that Phan was not predisposed to commit the crime he was charged with. His eager and ready response to Wright's suggestion, combined with the leadership role he assumed, belied any argument that Phan was an unwilling participant. The Court of Appeals found Phan's claim to be meritless and his conviction and the District Court's refusal to submit the issue of entrapment to the jury were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Hudgins*, 120 F.3d. 483 (4th Cir. 1997).
Date: Aug. 5, 1997
Result: Hudgins appealed his convictions on two counts of using or carrying a firearm during and in relation to a drug trafficking offence. Hudgins claimed that the evidence was insufficient to sustain the convictions and, alternatively, that the District Court's erroneous "use" instruction requires *vacatur* of the convictions and remand for a new trial. Finding no error requiring reversal the Court of Appeals affirmed the convictions on both counts.
Verdict: Found against defendant
Score: 1

Case: *United States v Jackson*, 131 F.3d 1105 (4th Cir. 1997).
Date: Sept. 3, 1997
Result: Jackson was found guilty of possessing an unregistered firearm and of possessing the firearm despite a previous felony conviction. The District Court sentenced Jackson under the U.S. Sentencing Guidelines Manual to 262 months imprisonment, to be followed by three years supervised release, and a $100 special assessment. In his appeal Jackson argued that the District Court erroneously admitted two hearsay statements into evidence, erroneously denied his Motion for Judgment of Acquittal on both counts due to the insufficiency of the Government's evidence, erroneously found that he stipulated to his prior felon status, and failed to charge the jury on an essential element of possessing an unregistered firearm. The Court of Appeals found no reversible error and affirmed Jackson's convictions and his sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Chen*, 131 F.3d 375, 385 (4th Cir. 1997).
Date: Oct. 31, 1997
Result: This case was to determine whether the convictions and sentences of Chong Chao Chen and Chang Han Chen, members of an alien-smuggling ring, should stand. Both were convicted by a jury of using or carrying a firearm, or aiding and abetting the same, during a crime of violence. On appeal, they contend that their convictions must be vacated because the District Court misinstructed the jury in light of the Supreme Court's decision in *Bailey v. United States*. The Court of Appeals rejected this and affirmed their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v Wright*, 131. F.3d 1111 (4th Cir. 1997).
Date: Dec. 19, 1997
Result: Wright challenged his conviction and sentence for possession of crack cocaine with intent to distribute. In rejecting his appeal the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Justice Karen Williams

Case: *United States v Dorlouis*, 107 F.3d. 248 (4th Cir. 1997).
Date: Feb. 24, 1997
Result: The five appellants bringing this appeal were convicted by a jury of conspiring to distribute crack cocaine and of related offences. They challenged their convictions on numerous grounds. Because the Court of Appeals concluded that all five appellants were properly arrested, charged and convicted and that their other assignments of error were without merit, the Court of Appeals affirmed their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v Stanfield*, 109 F.3d 976, 984 n.5 (4th Cir. 1997).
Date: Mar. 31, 1997
Result: Because Officer Mackel was engaged in a reasonable protective search when he opened Stanfield's passenger door for the limited purpose of determining whether Stanfield was armed and whether there were any other occupants within the vehicle who might pose a danger to him or his partners, and because the cocaine that Stanfield sought to suppress was seen by Officer Mackel in plain view during the conduct of this reasonable search, the District Court's denial of Stanfield's motion to suppress was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Elie*, 111 F.3d 1135 (4th Cir. 1997).
Date: Apr. 24, 1997
Result: The District Court, in a series of orders, suppressed evidence against Elie as the "tainted fruit" of a *Miranda* violation. The District Court also ruled that the warned and voluntary statements Elie made at the Arlington County Detention Center, in which he identified the firearms seized from his hotel rooms and the firearms dealer that sold him the weapons, did not constitute an "independent source" for admitting any of the challenged evidence. Finding that the "fruit of the poisonous tree" analysis is inapplicable in cases involving mere departures from *Miranda*, the Court of Appeals reversed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Braxton*, 112 F.3d 777, 780 (4th. Cir. 1997).
Date: May 6, 1997
Result: Prior to trial, Braxton moved to suppress the statement he made during his interview with Agent Poynter and Trooper Ballard in connection with firearms violations. The District Court granted Braxton's motion, determining that the statement was involuntary and ordering that it be suppressed. The Court of Appeals held that Braxton's statement was voluntary and that the District Court erred in suppressing it. Accordingly, it reversed the District Court's decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Verna*
Date: May 14, 1997
Result: Verna appealed from his convictions for possession of a firearm by a convicted felon, 18 United States Code S.C.§ 922(g), and possession of a firearm not registered in the *National Firearms Registration and Transfer Record*, arising out of his construction of a home- made bomb which he placed in the automobile of his former wife and two children. In rejecting this appeal the Court of Appeals affirmed the decision of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Barber*, 119 F.3d 276, 280-81 (4th Cir. 1997).
Date: Jul. 14, 1997
Result: The Court of Appeals concluded that the District Court acted within its discretion in departing on the ground that Barber and Hodge robbed the victim in connection with the murder and affirm by an equally divided court its decision to depart on the basis that the murder was premeditated. However, because the use of a weapon or dangerous instrumentality is an encouraged factor that is taken into account within the heartland of second-degree murder, and because the District Court did not make factual findings concerning the circumstances surrounding the murder or whether the discharge of the firearm at issue was extraordinary enough to remove it from the heartland of situations encompassed within the second-degree murder guideline, it remanded the case to permit the District Court to consider these matters in the first instance.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Wildes*, 120 F.3d 468 (4th Cir. 1997).
Date: Jul. 24, 1997
Result: Wildes and Cameron set alight a six-foot tall wooden cross and leaned it against a fence of an African-American family's home. Appellants were subsequently convicted of conspiring against civil rights, interfering by force or threat of force with the occupation of a dwelling because of race, and using fire to commit a federal felony. On appeal, they contended that the District Court erroneously failed to dismiss Count III of the indictment that charged them with the use of fire to commit a felony in violation of § 844(h)(1), on the basis that this statute applies only to the predicate felony of arson. In rejecting this, the Court of Appeals affirmed the judgment as to all counts.
Verdict: Found against defendant
Score: 1

Case: *United States v Jackson*, 131 F.3d 1105 (4th Cir. 1997).
Date: Sept. 3, 1997
Result: Jackson was found guilty of possessing an unregistered firearm and of possessing the firearm despite a previous felony conviction. The District Court sentenced Jackson under the U.S. Sentencing Guidelines Manual to 262 months imprisonment, to be followed by three years supervised release, and a $100 special assessment. In his appeal Jackson argued that the District Court erroneously admitted two hearsay statements into evidence, erroneously denied his Motion for Judgment of Acquittal on both counts due to the insufficiency of the Government's evidence, erroneously found that he stipulated to his prior felon status, and failed to charge the jury on an essential element of possessing an unregistered firearm. The Court of Appeals found no reversible error and affirmed Jackson's convictions and his sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Chen*, 131 F.3d 375, 385 (4th Cir. 1997).
Date: Oct. 31, 1997
Result: This case was to determine whether the convictions and sentences of Chong Chao Chen and Chang Han Chen, members of an alien- smuggling ring, should stand. Both were convicted by a jury of using or carrying a firearm, or aiding and abetting the same, during a crime of violence. On appeal, they contend that their convictions must be vacated because the District Court misinstructed the jury in light of the Supreme Court's decision in *Bailey v. United States*. The Court of Appeals rejected this and affirmed their convictions.
Verdict: Found against defendant
Score: 1

Justice Harvie Wilkinson

Case: *United States v Perkins*, 108 F.3d 512, 518. (4th Cir. 1997).
Date: Mar. 10, 1997
Result: Perkins argued that he should receive a downward departure from the Guidelines range because a sentencing disparity existed between defendants charged with crimes involving cocaine base and defendants charged with crimes involving cocaine powder and because his co-defendants in his case received more lenient sentences. The Court of Appeals rejected Perkins' claims and vacated his unwarranted downward departure. The case was then remanded to the District Court for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Guay*, 108 F.3d 545, 549 (4th Cir. 1997).
Date: Mar. 19, 1997
Result: The jury found each defendant guilty of one count of knowingly, intentionally, and unlawfully possessing with the intent to distribute cocaine, as a principal or as an aider and abettor. The Guays contended that the District Court erred in refusing to suppress their oral and written statements given to law enforcement officials; rejecting their proposed jury instructions; and allowing the prosecution to cross-examine Claude Guay with assertedly prejudicial questions. In rejecting the appeal the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Braxton*, 112 F.3d 777, 780 (4th. Cir. 1997).
Date: May 6, 1997
Result: Prior to trial, Braxton moved to suppress the statement he made during his interview with Agent Poynter and Trooper Ballard in connection with firearms violations. The District Court granted Braxton's motion, determining that the statement was involuntary and ordering that it be suppressed. The Court of Appeals held that Braxton's statement was voluntary and that the District Court erred in suppressing it. Accordingly, it reversed the District Court's decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Howard*, 115 F.3d 1151, 1154-55 (4th Cir. 1997).
Date: Jun. 13, 1997
Result: Howard and others appeal their convictions on several grounds - that Howard's confession should not have been admitted, that Howard's counsel should not have been disqualified, that the judge made prejudicial comments at trial, that a co-conspirator's statement should have been excluded, that the jury should have been given instructions regarding multiple conspiracies, that the government presented insufficient evidence to support Howard and Bacon's convictions, and that Jones' sentence was improperly enhanced. Finding the defendants' contentions to be without merit, the Court of Appeals affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Layman*, 116 F.3d 105, 109 (4th Cir. 1997).
Date: Jun. 24, 1997
Result: Because the sentence was imposed on Layman when it was orally pronounced in open court, the District Court lacked authority to alter the sentence absent "arithmetical, technical, or other clear error." And, since the modification of Layman's sentence was not prompted by any such error, the Court vacated the modified sentence and remanded it with instructions to impose the sentence as originally pronounced. Additionally, the Court of Appeals held that the equivalency ratio applies to any offence involving the cultivation of marijuana plants, regardless of whether live plants are actually seized. So, finding no error with respect to Smith's sentence, the Court of Appeals affirmed it.
Verdict: Found against defendant
Score: 1

Case: *United States v Barber*, 119 F.3d 276, 280-81 (4th Cir. 1997).
Date: Jul. 14, 1997
Result: The Court of Appeals concluded that the District Court acted within its discretion in departing on the ground that Barber and Hodge robbed the victim in connection with the murder and affirm by an equally divided court its decision to depart on the basis that the murder was premeditated. However, because the use of a weapon or dangerous instrumentality is an encouraged factor that is taken into account within the heartland of second-degree murder, and because the District Court did not make factual findings concerning the circumstances surrounding the murder or whether the discharge of the firearm at issue was extraordinary enough to remove it from the heartland of situations encompassed within the second-degree murder guideline, the Court remanded the case to permit the District Court to consider these matters in the first instance.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Jackson*, 131 F.3d 1105 (4th Cir. 1997).
Date: Sept. 3, 1997
Result: Jackson was found guilty of possessing an unregistered firearm and of possessing the firearm despite a previous felony conviction. The District Court sentenced Jackson under the U.S. Sentencing Guidelines Manual to 262 months imprisonment, to be followed by three years supervised release, and a $100 special assessment. In his appeal Jackson argued that the District Court erroneously admitted two hearsay statements into evidence, erroneously denied his Motion for Judgment of Acquittal on both counts due to the insufficiency of the Government's evidence, erroneously found that he stipulated to his prior felon status, and failed to charge the jury on an essential element of possessing an unregistered firearm. The Court of Appeals found no reversible error and affirmed Jackson's convictions and his sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Morin*
Date: Sept. 11, 1997
Result: The Court of Appeals ruled that since a defendant's offence must be found to be non-violent in order to invoke § 5K2.13, and since the facts of the instant case did not support the District Court's determination of non violence, the District Court erred by reducing Morin's sentence pursuant to § 5K2.13. Accordingly, the Court of Appeals vacated Morin's sentence and remanded his case for re-sentencing within the range prescribed by the sentencing guidelines.
Verdict: Found against defendant
Score: 1

Case: *United States v Chen*, 131 F.3d 375, 385 (4th Cir. 1997).
Date: Oct. 31, 1997
Result: This case was to determine whether the convictions and sentences of Chong Chao Chen and Chang Han Chen, members of an alien-smuggling ring, should stand. Both were convicted by a jury of using or carrying a firearm, or aiding and abetting the same, during a crime of violence. On appeal, they contend that their convictions must be vacated because the District Court misinstructed the jury in light of the Supreme Court's decision in *Bailey v. United States*. The Court of Appeals rejected this and affirmed their convictions.
Verdict: Found against defendant
Score: 1

Case: *United States v Harris*
Date: Oct. 29, 1997
Result: Harris pled guilty to possession of a controlled substance with intent to distribute and received a sentence of 50 months imprisonment. Harris challenged the sentence on two grounds. First, he argued that the presence of unloaded firearms at his residence did not warrant a two level increase under the U.S. Sentencing Guidelines Manual and secondly that the calculation of his criminal history category under Section 4A1 of the Guidelines should not have included an earlier fine for selling alcohol to a minor. The Court of Appeals disagreed with both contentions and affirmed the sentence.
Verdict: Found against defendant
Score: 1

Justice Clyde Hamilton

Case: *United States v Stanfield*, 109 F.3d 976, 984 n.5 (4th Cir. 1997).
Date: Mar. 31, 1997
Result: Because Officer Mackel was engaged in a reasonable protective search when he opened Stanfield's passenger door for the limited purpose of determining whether Stanfield was armed and whether there were any other occupants within the vehicle who might pose a danger to him or his partners, and because the cocaine that Stanfield seeks to suppress was seen by Officer Mackel in plain view during the conduct of this reasonable search, the District Court's denial of Stanfield's motion to suppress was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Braxton*, 112 F.3d 777, 780 (4th. Cir. 1997).
Date: May 6, 1997
Result: Prior to trial, Braxton moved to suppress the statement he made during his interview with Agent Poynter and Trooper Ballard in connection with firearms violations. The District Court granted Braxton's motion, determining that the statement was involuntary and ordering that it be suppressed. The Court of Appeals held that Braxton's statement was voluntary and that the District Court erred in suppressing it. Accordingly, it reversed the District Court's decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Verna*
Date: May 14, 1997
Result: Verna appealed from his convictions for possession of a firearm by a convicted felon, 18 United States Code § 922(g), and possession of a firearm not registered in the *National Firearms Registration and Transfer Record*, arising out of his construction of a home-made bomb which he placed in the automobile of his former wife and two children. In rejecting this appeal the Court of Appeals affirmed the decision of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Barber*, 119 F.3d 276, 280-81 (4th Cir. 1997).
Date: Jul. 14, 1997
Result: The Court of Appeals concluded that the District Court acted within its discretion in departing on the ground that Barber and Hodge robbed the victim in connection with the murder and affirm by an equally divided court its decision to depart on the basis that the murder was premeditated. However, because the use of a weapon or dangerous instrumentality is an encouraged factor that is taken into account within the heartland of second-degree murder, and because the District Court did not make factual findings concerning the circumstances surrounding the murder or whether the discharge of the firearm at issue was extraordinary enough to remove it from the heartland of situations encompassed within the second-degree murder guideline, the Court remanded the case to permit the District Court to consider these matters in the first instance.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v King*
Date: Jul. 24, 1997
Result: King and Hendricks appealed their convictions for various charges relating to their narcotics distribution activities. The Court of Appeals affirmed all of King's convictions and the majority of Hendricks' convictions. However, because the evidence was insufficient to support Hendricks' conviction, predicated upon a firearm that was found in his home, the Court of Appeals reversed that conviction and remanded the case for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Ellis*
Date: Aug. 6, 1997
Result: Ellis appealed his convictions for conspiracy and for the lesser included offence of unarmed bank robbery. In rejecting his appeal the Court of Appeals affirmed the sentence delivered by the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Schaefer*, 120 F.3d 505 (4th Cir. 1997).
Date: Aug. 13, 1997
Result: Schaefer appealed his 46 month sentence, arguing that the District Court erred in concluding that it lacked discretion to depart downward from the guideline range. The Court of Appeals affirmed the District Court's decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Morin*
Date: Sept. 11, 1997
Result: The Court of Appeals ruled that since a defendant's offence must be found to be non-violent in order to invoke § 5K2.13, and since the facts of the instant case did not support the District Court's determination of non violence, the District Court erred by reducing Morin's sentence pursuant to § 5K2.13. Accordingly, the Court of Appeals vacated Morin's sentence and remanded his case for re-sentencing within the range prescribed by the U.S. Sentencing Guidelines Manual.
Verdict: Found against defendant
Score: 1

Case: *United States v Chen*, 131 F.3d 375, 385 (4th Cir. 1997).
Date: Oct. 31, 1997
Result: This case was to determine whether the convictions and sentences of Chong Chao Chen and Chang Han Chen, members of an alien-smuggling ring, should stand. Both were convicted by a jury of using or carrying a firearm, or aiding and abetting the same, during a crime of violence. On appeal, they contend that their convictions must be vacated because the District Court misinstructed the jury in light of the Supreme Court's decision in *Bailey v. United States*. The Court of Appeals rejected this and affirmed their convictions.
Verdict: For the defendant
Score: 0

APPENDIX I
FOURTH CIRCUIT OPINIONS IN CRIMINAL JUSTICE CASES BY SIX REAGAN AND BUSH APPOINTED JUDGES IN 1998

Justice Paul Niemeyer

Case: *United States v Kahoe*, 134 F.3d 1230, 1234 (4th Cir. 1998).
Date: Jan. 28, 1998
Result: Kahoe appealed a decision of the District Court denying his petition for relief from his conviction of being a felon in possession of a firearm and ammunition. Kahoe maintained that the District Court erred in concluding that his conviction should not be set aside on the basis that the predicate felony for the 922(g)(1) offence was vacated subsequent to his commission of that offence. The Court of Appeals rejected this and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Martinez*
Date: Feb. 18, 1998
Result: The defendants appeal their convictions for, amongst other things, conspiracy to murder for hire, under *Bailey v. United States*. They also challenged a supplemental jury instruction given by the court and raise various sentencing issues. The Court of Appeals rejected these arguments and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Gray*, 137 F.3d 765, 769 (4th Cir. 1998).
Date: Feb. 25, 1998
Result: Gray's principal argument on appeal was that the District Court improperly admitted confessions obtained from him while he was in custody without probable cause. Rejecting this argument, as well as the others made by Gray, the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Kirksey*, 138 F.3d 120, 124 (4th Cir. 1998).
Date: Mar. 9, 1998
Result: The Court of Appeals ruled that together with the 1980 armed robbery conviction, the 1989, 1990, and 1991 convictions provided the District Court with more than a sufficient basis to sentence Kirksey as a career offender. Accordingly, it affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Sullivan*, 138 F.3d 126 (4th Cir. 1998).
Date: Mar. 9, 1998
Result: The Court of Appeals had to determine whether the defendant's confession, made following a routine traffic stop, and a gun subsequently seized from the defendant's automobile should be suppressed under both the Fourth and Fifth Amendments. The District Court granted the defendant's motion to suppress. On the government's interlocutory appeal, the Court of Appeals reversed and remanded the case for further proceedings.
Verdict: Found against defendant
Score: 1

Case: *United States v Carter*
Date: Mar. 24, 1998
Result: Carter appealed his conviction after a guilty plea. The only issue was the District Court's denial of his motion to suppress evidence of the cocaine found in his suitcase. The Court of Appeals rejected the appeal and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Sampson*, 140 F.3d 585 (4th Cir. 1998).
Date: Apr. 2, 1998
Result: The District Court sentenced Sampson to life imprisonment and Dean to life imprisonment plus five years for various narcotics and firearms offences. Sampson and Dean appealed, asserting several trial and sentencing errors. The Court of Appeals affirmed the convictions and Sampson's sentence; however, it vacated Dean's sentence and remanded it for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Dunford*, 148 F.3d 385 (4th Cir. 1998).
Date: Jul. 2, 1998
Result: Dunford was convicted on fourteen counts for the illegal possession of six firearms and ammunition seized from his house. The fourteen counts included one count for each firearm and one for the ammunition based on Dunford's status as a convicted felon and one count each for the same firearms and ammunition based on Dunford's status as a drug user. The Court of Appeals affirmed in part, reversed in part, and remanded the case for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Fenner*, 147 F.3d 360 (4th Cir. 1998).
Date: Jul. 21, 1998
Result: The Fenners' appealed various drug and firearm convictions and resulting sentences. They principally argued that the District Court erred in concluding that it was not authorized to depart downward from their applicable guideline ranges based on its concern that a literal application of the cross reference in the U.S. Sentencing Guidelines Manual resulted in a sentence that was violative of due process. Finding that the District Court did not err in determining that it lacked authority to depart and concluding that the Fenners' remaining allegations of error lack merit, the Court affirmed the Fenners' convictions and sentences.
Verdict: Found against defendant
Score: 1

Case: *United States v Baker*, 155 F.3d 392 (4th Cir. 1998).
Date: Aug. 27, 1998
Result: Baker was found not guilty only by reason of insanity of mailing a threatening communication. After further psychiatric evaluation and a statutorily required commitment hearing, the District Court granted Baker a conditional release. Baker appealed from the District Court's order, claiming that the District Court lacked statutory authority to place conditions upon his release. The Court of Appeals vacated the District Court's order of conditional release and remanded the case to the District Court for further consideration.
Verdict: Found against defendant
Score: 1

Case: *United States v Coleman*, 158. F.3d 199, 202 (4th Cir. 1998).
Date: Sept. 14, 1998
Result: Coleman appealed the 15-year mandatory minimum sentence of imprisonment imposed by the District Court under the *Armed Career Criminal Act*. He maintained that the District Court erred in concluding that his prior conviction for common-law assault under Maryland law constituted a "violent felony." Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998).
Date: Oct. 30, 1998
Result: The Court of Appeals had to decide whether a passenger in an automobile could lawfully be "patted down" in connection with a lawful traffic stop before a search of the vehicle for suspected drugs. The Court of Appeals held that because the officer had an objectively reasonable suspicion of criminal activity and a legitimate concern about his own safety, he acted lawfully under the Fourth Amendment in "patting down" the passenger.
Verdict: Found against defendant
Score: 1

Case: *United States v Grogins*, 163 F.3d 795, 797 (4th Cir. 1998).
Date: Nov. 16, 1998
Result: The District Court granted Grogins' motion to suppress drug evidence seized at his home on the grounds that the police officers unreasonably failed to knock and announce their presence. The government appealed arguing that the officers had a reasonable suspicion that knocking would have placed them in personal danger. The Court of Appeals agreed and reversed the suppression ruling of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Fuller*, 162 F.3d 256 (4th Cir. 1998).
Date: Nov. 17, 1998
Result: The District Court judge said in court that he believed that Fuller was "acting illegally as a drug dealer." Fuller contended that such a comment and other erroneous jury instructions are reversible error and entitled him to a new trial. The Court of Appeals held that while it did not approve of the practice of a trial judge's expressing an opinion about a defendant's guilt or innocence, in the exceptional circumstances of this case, it affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Redd*, 161 F.3d 793, 797 (4th Cir. 1998).
Date: Dec. 7, 1998
Result: On appeal, argued that the indictment was constructively amended at trial and that the evidence was not sufficient to sustain his convictions. The Court of Appeals rejected this and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Justice William Wilkins

Case: *United States v Hastings*, 134 F.3d 235 (4th Cir. 1998).
Date: Jan. 14, 1998
Result: Phillips appealed his convictions and sentence for using or carrying a firearm during and in relation to a drug trafficking offence; conspiracy to possess with the intent to distribute cocaine and cocaine base; and possession with the intent to distribute cocaine and cocaine base. Because the Court of Appeals concluded that Phillips could not meet the strictures of plain-error review of his claim that the District Court erroneously instructed the jury regarding the meaning of the term "use" under 924(c)(1), and because his remaining challenges lacked merit, the Court of Appeals affirmed the judgment of the District Court.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Kahoe*, 134 F.3d 1230, 1234 (4th Cir. 1998).
Date: Jan. 28, 1998
Result: Kahoe appealed a decision of the District Court denying his petition for relief from his conviction of being a felon in possession of a firearm and ammunition. Kahoe maintained that the District Court erred in concluding that his conviction should not be set aside on the basis that the predicate felony for the 922(g)(1) offence was vacated subsequent to his commission of that offence. The Court of Appeals rejected this and affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Gray*, 137 F.3d 765, 769 (4th Cir. 1998).
Date: Feb. 25, 1998
Result: Gray's principal argument on appeal was that the District Court improperly admitted confessions obtained from him while he was in custody without probable cause. Rejecting this argument, as well as the others made by Gray, the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Carter*
Date: Mar. 24, 1998
Result: Carter appealed his conviction after a guilty plea. The only issue was the District Court's denial of his motion to suppress evidence of the cocaine found in his suitcase. The Court of Appeals rejected the appeal and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v White*
Date: Apr. 6, 1998
Result: Although 17 years old when he committed the offences, White was prosecuted as an adult in federal court after the District judge entered an order pursuant to the *Juvenile Justice and Delinquency Prevention Act*. White appealed, challenging the District Court's jurisdiction under this statute. The Court of Appeals ruled that because the District Court properly exercised jurisdiction, its judgement was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Jarrell*, 147 F.3d 315, 317 (4th Cir. 1998).
Date: Jun. 18, 1998
Result: Jarrell appealed his conviction for conspiracy to possess with the intent to distribute marijuana, arguing primarily that the District Court erred in failing to dismiss the charges against him for a violation of the *Speedy Trial Act*. Finding no reversible error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Swann*, 149 F.3d 271 (4th Cir. 1998).
Date: Jul. 14, 1998
Result: The Court of Appeals ruled that although the searching officer did not testify that he believed the item in Swann's sock to be a weapon when he removed it, a reasonable officer in his circumstances could well have believed that the item was a weapon (specifically, a box cutter with a sharp blade), and therefore the seizure did not exceed the permissible bounds of a *Terry* stop. The Court of Appeals then ruled that its determination rendered it unnecessary and unproductive to address the District Court's alternative holding that the credit card discovery was inevitable.
Verdict: Found against defendant
Score: 1

Case: *United States v Fenner*, 147 F.3d 360 (4th Cir. 1998).
Date: Jul. 21, 1998
Result: The Fenners' appealed various drug and firearm convictions and resulting sentences. They principally argued that the District Court erred in concluding that it was not authorized to depart downward from their applicable guideline ranges based on its concern that a literal application of the cross reference in U.S. Sentencing Guidelines Manual 2K2.1(c)(1)(B) (1995) resulted in a sentence that was violative of due process. Finding that the District Court did not err in determining that it lacked authority to depart and concluding that the Fenners' remaining allegations of error lacked merit, the Court affirmed the Fenners' convictions and sentences.
Verdict: Found against defendant
Score: 1

Case: *United States v Thorne*, 153 F.3d 130 (4th Cir. 1998).
Date: Aug. 10, 1998
Result: Thorne, who pled guilty to conspiracy to distribute cocaine, raised several issues on direct appeal. The Court of Appeals found merit in Thorne's first argument - that the trial court failed to comply with Rule 11 of the Federal Rules of Criminal Procedure by neglecting to inform Thorne of the maximum sentence to which he was subject under the terms of his plea agreement - and therefore need not address his other claims. The Court of Appeals vacated Thorne's guilty plea and sentence and remanded his case for further proceedings in accordance with that opinion.
Verdict: For the defendant
Score: 0

Case: *United States v Williams*
Date: Aug. 27, 1998
Result: Williams appealed an order of the District Court denying his motion to dismiss the indictment against him on double jeopardy grounds. Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Coleman*, 158. F.3d 199, 202 (4th Cir. 1998).
Date: Sept. 14, 1998
Result: Coleman appealed the 15-year mandatory minimum sentence of imprisonment imposed by the District Court under the *Armed Career Criminal Act*. He maintained that the District Court erred in concluding that his prior conviction for common-law assault under Maryland law constituted a "violent felony." Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Grogins*, 163 F.3d 795, 797 (4th Cir. 1998).
Date: Nov. 16, 1998
Result: The District Court granted Grogins' motion to suppress drug evidence seized at his home on the grounds that the police officers unreasonably failed to knock and announce their presence. The government appealed arguing that the officers had a reasonable suspicion that knocking would have placed them in personal danger. The Court of Appeals agreed and reversed the suppression ruling of the District Court.
Verdict: Found against defendant
Score: 1

Justice Harvie Wilkinson

Case: *United States v Love*, 134 F.3d 595 (4th Cir. 1998).
Date: Jan. 20, 1998
Result: Love and Sheppard were convicted of conspiracy to possess with intent to distribute marijuana and cocaine. Love and Sheppard appealed their convictions and sentences on

several grounds. They argued principally that the District Court's method of jury selection violated Federal Rules of Criminal Procedure 24(c) and therefore constituted reversible error. Finding each of the defendants' contentions without merit, the Court of Appeals affirmed the judgment of the District Court.

Verdict: Found against defendant
Score: 1

Case: *United States v Hobbs*, 136 F.3d 384 (4th Cir. 1998).
Date: Feb. 18, 1998
Result: A jury convicted Hobbs of possession of a firearm by a convicted felon. At sentencing, the District Court declined to apply the enhanced sentencing provision of the *Armed Career Criminal Act* ("ACCA"), because it determined that Hobbs' three prior burglaries were not offences "committed on occasions different from one another." Because the evidence was sufficient to support a finding that Hobbs possessed the rifle, his 922(g)(1) conviction was affirmed by the Court of Appeals. However, the District Court's ruling that the three burglaries constituted one criminal episode was reversed. Accordingly, the conviction was affirmed, the sentence was vacated, and the matter remanded so that Hobbs may be sentenced under the ACCA.
Verdict: Found against defendant
Score: 1

Case: *United States v Gray*, 137 F.3d 765, 769 (4th Cir. 1998).
Date: Feb. 25, 1998
Result: Gray's principal argument on appeal was that the District Court improperly admitted confessions obtained from him while he was in custody without probable cause. Rejecting this argument, as well as the others made by Gray, the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Martinez*
Date: Mar. 19, 1998
Result: After Martinez' conviction became final, the Supreme Court held in *Crosby v. United States*, 506 U.S. 255 (1993), that Federal Rules of Criminal Procedure 43 prohibited the trial in absentia of a defendant who is not present at the beginning of trial. Martinez brought a motion for collateral relief claiming Crosby required that his conviction be set aside. The District Court denied relief, holding that under *Teague v. Lane*, Crosby could not be applied retroactively to Martinez's case. Because the Court of Appeals agreed that Crosby announced a new rule within the meaning of *Teague* and therefore could not entitle Martinez to collateral relief, the judgment of the District Court was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Carter*
Date: Mar. 24, 1998
Result: Carter appealed his conviction after a guilty plea. The only issue was the District Court's denial of his motion to suppress evidence of the cocaine found in his suitcase. The Court of Appeals rejected the appeal and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Green*
Date: Apr. 6, 1998
Result: Green contended that his re-indictment violated the *Double Jeopardy Clause* and the contractual and due process rights that arose from his plea agreement. The Court of Appeals held that it had jurisdiction to consider Green's double jeopardy claim and that re-indictment was permissible. The Court of Appeals also held that it did not have appellate jurisdiction over Green's contract and due process claims and dismissed those claims without prejudice.
Verdict: Found against defendant
Score: 1

Case: *United States v Cobb*, 144 F.3d 319 (4th Cir. 1998).
Date: May 18, 1998
Result: Cobb was convicted of carjacking, use of a firearm during a crime of violence and bank fraud. He appealed the District Court's denial of his motion to dismiss the carjacking and firearm counts. He argued that the federal carjacking statute, which also defined the crime of violence for his firearm conviction, exceeded Congress' authority under the *Commerce Clause*. Because the Court of Appeals found the carjacking statute to lie within the bounds of Congress' commerce power, it affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Washington*
Date: Jun. 1, 1998
Result: Washington appealed his sentence, arguing that the District Court impermissibly relied on his statements to a probation officer that were immunised under his plea agreement with the government. The Court of Appeal agreed with Washington and remanded his case for further sentencing proceedings. Davis also raised challenges to his sentence. Finding his contentions without merit, the Court of Appeals affirmed the judgment of the District Court with respect to his sentence.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Van Metre*, 150 F.3d 339 (4th Cir. 1998).
Date: Jul. 10, 1998
Result: At Van Metre's sentencing hearing, the District Court imposed a life sentence upon him for kidnapping and twenty years for solicitation. Van Metre appealed his kidnapping conviction and both of his sentences. The Court of Appeals affirmed Van Metre's conviction and his kidnapping sentence. However, it vacated his sentence for solicitation and remanded the case to the District Court for re-sentencing consistent with this opinion.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Sarihifard*, 155 F.3d 301 (4th Cir. 1998).
Date: Aug. 19, 1998
Result: Sarihifard was convicted after a jury trial in the Eastern District of Virginia of perjury before a grand jury in violation of 18 United States Code 1623(a) and making false statements to a government agency. The trial judge sentenced Sarihifard to twenty-one months in prison pursuant to the federal sentencing guidelines. The Court of Appeals rejected this appeal and affirmed the sentence of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Coleman*, 158. F.3d 199 (4th Cir. 1998).
Date: Sept. 14, 1998
Result: Coleman appealed the 15-year mandatory minimum sentence of imprisonment imposed by the District Court under the *Armed Career Criminal Act*. He maintained that the District Court erred in concluding that his prior conviction for common-law assault under Maryland law constituted a "violent felony." Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Grogins*, 163 F.3d 795 (4th Cir. 1998).
Date: Nov. 16, 1998
Result: The District Court granted Grogins' motion to suppress drug evidence seized at his home on the grounds that the police officers unreasonably failed to knock and announce their presence. The government appealed arguing that the officers had a reasonable suspicion that knocking would have placed them in personal danger. The Court of Appeals agreed and reversed the suppression ruling of the District Court.
Verdict: Found against defendant
Score: 1

Justice Clyde Hamilton

Case: *United States v Love*, 134 F.3d 595 (4th Cir. 1998).
Date: Jan. 20, 1998
Result: Love and Sheppard were convicted of conspiracy to possess with intent to distribute marijuana and cocaine. Love and Sheppard appealed their convictions and sentences on several grounds. They argued principally that the District Court's method of jury selection violated Federal Rules of Criminal Procedure 24(c) and therefore constituted reversible error. Finding each of the defendants' contentions without merit, the Court of Appeals affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Neilssen*, 136 F.3d 965 (4th Cir. 1998).
Date: Feb. 13, 1998
Result: The Court of Appeals upheld the District Court's five-level enhancement to Neilssen's sentence for child pornography but vacated Neilssen's sentence and remanded it for re-sentencing to allow the District Court to revisit the departure issue.
Verdict: Found against defendant
Score: 1

Case: *United States v Gray*, 137 F.3d 765 (4th Cir. 1998).
Date: Feb. 25, 1998
Result: Gray's principal argument on appeal was that the District Court improperly admitted confessions obtained from him while he was in custody without probable cause. Rejecting this argument, as well as the others made by Gray, the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Carter*
Date: Mar. 24, 1998
Result: Carter appealed his conviction after a guilty plea. The only issue was the District Court's denial of his motion to suppress evidence of the cocaine found in his suitcase. The Court of Appeals rejected the appeal and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Jarrell*, 147 F.3d 315, 317 (4th Cir. 1998).
Date: Jun. 18, 1998
Result: Jarrell appealed his conviction for conspiracy to possess with the intent to distribute marijuana, arguing primarily that the District Court erred in failing to dismiss the charges against him for a violation of the *Speedy Trial Act*. Finding no reversible error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Swann*, 149 F.3d 271 (4th Cir. 1998).
Date: Jul. 14, 1998
Result: The Court of Appeals ruled that although the searching officer did not testify that he believed the item in Swann's sock to be a weapon when he removed it, a reasonable officer in his circumstances could well have believed that the item was a weapon (specifically, a box cutter with a sharp blade), and therefore the seizure did not exceed the permissible bounds of a *Terry* stop. The Court of Appeals then ruled that its determination rendered it unnecessary and unproductive to address the District Court's alternative holding that the credit card discovery was inevitable.
Verdict: Found against defendant
Score: 1

Case: *United States v Coleman*, 158. F.3d 199 (4th Cir. 1998).
Date: Sept. 14, 1998
Result: Coleman appealed the 15-year mandatory minimum sentence of imprisonment imposed by the District Court under the *Armed Career Criminal Act*. He maintained that the District Court erred in concluding that his prior conviction for common-law assault under Maryland law constituted a "violent felony." Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Evans*
Date: Oct. 30, 1998
Result: Evans appealed his conviction for escape. The Court of Appeals rejected it and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Lawrence*, 161 F.3d 250 (4th Cir. 1998).
Date: Nov. 19, 1998
Result: Lawrence appealed his conviction and sentencing on one count of attempted bank robbery and a second count of bank larceny. Lawrence raised a number of issues on appeal, the principal of which was an error based on the fact that he voluntarily left the courtroom during the trial, and error regarding the upward departure awarded by the District Court at sentencing. The Court of Appeals confirmed the conviction but vacated the sentence and remanded it for re-sentencing.
Verdict: Found against defendant (in part)
Score: 0.75

Justice Michael Luttig

Case: *United States v Gray*, 137 F.3d 765, 769 (4th Cir. 1998).
Date: Feb. 25, 1998
Result: Gray's principal argument on appeal was that the District Court improperly admitted confessions obtained from him while he was in custody without probable cause. Rejecting this argument, as well as the others made by Gray, the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Grimmond*, 137 F.3d 823 (4th Cir.).
Date: Mar. 6, 1998
Result: Grimmond, in a series of motions, moved to dismiss his indictment because the 35-month delay between his indictment and his arraignment violated his Sixth Amendment right to a speedy trial; exclude evidence of his prior crimes, wrongs, or other bad acts; and quash the jury based upon an alleged violation of Batson. The District Court denied all of Grimmond's motions and he was subsequently convicted by a jury. Grimmond appealed, raising the issues presented in his three unsuccessful motions. Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Carter*
Date: Mar. 24, 1998
Result: Carter appealed his conviction after a guilty plea. The only issue was the District Court's denial of his motion to suppress evidence of the cocaine found in his suitcase. The Court of Appeals rejected the appeal and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v White*
Date: Apr. 6, 1998
Result: Although 17 years old when he committed the offences, White was prosecuted as an adult in federal court after the District judge entered an order pursuant to the *Juvenile Justice and Delinquency Prevention Act.* White appealed, challenging the District Court's jurisdiction under this statute. The Court of Appeals ruled that because the District Court properly exercised jurisdiction, it's judgement was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Terry*
Date: Apr. 22, 1998
Result: Although the District Court relied upon three separate encouraged factors in seeking to justify an upward departure to Terry's sentence, each encouraged factor was either already taken into account in the applicable guideline, not applicable to the facts of this case, or not appropriately applied. Accordingly, the Court of Appeals vacated the sentence imposed and remanded the case for re-sentencing.
Verdict: For the defendant
Score: 0

Case: *United States v Patterson*, 150 F.3d 382 (4th Cir. 1998).
Date: Aug. 4, 1998
Result: Patterson appealed his conviction for bank robbery arguing that the District Court erred in not suppressing the items seized from his Honda; in admitting pager records from the pager seized from the Honda; in refusing to give an eyewitness jury instruction in the manner set forth in *United States v. Holley* and in refusing to define reasonable doubt and prohibiting defence counsel from defining reasonable doubt during closing argument. After considering these arguments the Court of Appeals affirmed the judgment of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Baker*, 155 F.3d 392 (4th Cir. 1998).
Date: Aug. 27, 1998
Result: Baker was found not guilty only by reason of insanity of mailing a threatening communication. After further psychiatric evaluation and a statutorily required commitment hearing, the District Court granted Baker a conditional release. Baker appealed from the District Court's order, claiming that the District Court lacked statutory authority to place conditions upon his release. The Court of Appeals vacated the District Court's order of conditional release and remanded the case to the District Court for further consideration.
Verdict: Found against defendant
Score: 1

Case: *United States v Brown*
Date: Sept. 2, 1998
Result: The Court of Appeals found that the District Court erred in holding an evidentiary hearing on Brown's double jeopardy claim. It therefore reversed the writ of habeas corpus issued by the District Court and remanded the case for the District Court to consider Brown's claim of double jeopardy on the basis of the record as it existed before the District Court held the evidentiary hearing.
Verdict: For the defendant
Score: 0

Case: *United States v Coleman*, 158. F.3d 199 (4th Cir. 1998).
Date: Sept. 14, 1998
Result: Coleman appealed the 15-year mandatory minimum sentence of imprisonment imposed by the District Court under the *Armed Career Criminal Act.* He maintained that the District Court erred in concluding that his prior conviction for common-law assault under Maryland law constituted a "violent felony." Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Fuller*, 162 F.3d 256 (4th Cir. 1998).
Date: Nov. 17, 1998
Result: The District Court judge said in court that he believed that Fuller was "acting illegally as a drug dealer." Fuller contended that such a comment and other erroneous jury instructions were reversible error and entitled him to a new trial. The Court of Appeals held that while it did not approve of the practice of a trial judge's expressing an opinion about a defendant's guilt or innocence, in the exceptional circumstances of this case, it affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Justice Karen Williams

Case: *United States v Gray*, 137 F.3d 765, 769 (4th Cir. 1998).
Date: Feb. 25, 1998
Result: Gray's principal argument on appeal was that the District Court improperly admitted confessions obtained from him while he was in custody without probable cause. Rejecting this argument, as well as the others made by Gray, the Court of Appeals affirmed the judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Johnson*
Date: Mar. 4, 1998
Result: The Court of Appeals found that the proper time for Johnson to have challenged the District Court's drug screening order and the imposition of the fine and costs of court-appointed counsel would have been in the appeal of the judgment of conviction rather than in his appeal of the District Court's revocation order, that the District Court properly imposed consecutive sentences, and that the District Court did not err when it reimposed Johnson's fine and reimbursement obligation. Accordingly, the District Court's judgement was affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Grimmond*, 137 F.3d 823 (4th Cir. 1998).
Date: Mar. 6, 1998
Result: Grimmond, in a series of motions, moved to dismiss his indictment because the 35-month delay between his indictment and his arraignment violated his Sixth Amendment right to a speedy trial; excluded evidence of his prior crimes, wrongs, or other bad acts; and quashed the jury based upon an alleged violation of Batson. The District Court denied all of Grimmond's motions and he was subsequently convicted by a jury. Grimmond appealed, raising the issues presented in his three unsuccessful motions. Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Carter*
Date: Mar. 24, 1998
Result: Carter appealed his conviction after a guilty plea. The only issue was the District Court's denial of his motion to suppress evidence of the cocaine found in his suitcase. The Court of Appeals rejected the appeal and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Terry*
Date: Apr. 22, 1998
Result: Although the District Court relied upon three separate encouraged factors in seeking to justify an upward departure to Terry's sentence, each encouraged factor was either already taken into account in the applicable guideline, not applicable to the facts of this case, or not appropriately applied. Accordingly, the Court of Appeals vacated the sentence imposed and remanded the case for re-sentencing.

Verdict: For the defendant
Score: 0

Case: *United States v Downer*, 143 F.3d 819 (4th Cir.1998).
Date: Apr. 27, 1998
Result: The District Court vacated the 2241(c) conviction because it violated the Ex Post Facto Clause of the Constitution. The court then, at the insistence of the United States, convicted the defendant, without any further trial, of violating 18 United States Code 2244(a)(1) for abusive sexual conduct. The court reasoned that 2244(a)(1) is a lesser included offence of 2241(c) and that the indictment fully set forth its elements. The Court of Appeals concluded that the District Court's action violated the Grand Jury Clause and therefore reversed Downer's conviction.
Verdict: For the defendant
Score: 0

Case: *United States v Van Metre*, 150 F.3d 339 (4th Cir. 1998).
Date: Jul. 10, 1998
Result: At Van Metre's sentencing hearing, the District Court imposed a life sentence upon him for kidnapping and twenty years for solicitation. Van Metre appealed his kidnapping conviction and both of his sentences. The Court of Appeals affirmed Van Metre's conviction and his kidnapping sentence. However, it vacated his sentence for solicitation and remanded the case to the District Court for re-sentencing consistent with this opinion.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Coleman*, 158. F.3d 199, 202 (4th Cir. 1998).
Date: Sept. 14, 1998
Result: Coleman appealed the 15-year mandatory minimum sentence of imprisonment imposed by the District Court under the *Armed Career Criminal Act*. He maintained that the District Court erred in concluding that his prior conviction for common-law assault under Maryland law constituted a "violent felony." Finding no error, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998).
Date: Oct. 30, 1998
Result: The Court of Appeals had to decide whether a passenger in an automobile may lawfully be "patted down" in connection with a lawful traffic stop before a search of the vehicle for suspected drugs. The Court of Appeals held that because the officer had an objectively reasonable suspicion of criminal activity and a legitimate concern about his own safety, he acted lawfully under the Fourth Amendment in "patting down" the passenger.
Verdict: Found against defendant
Score: 1

Case: *United States v Redd*, 161 F.3d 793, 797 (4th Cir. 1998).
Date: Dec. 7, 1998
Result: On appeal, Redd argued that the indictment was constructively amended at trial and that the evidence was not sufficient to sustain his convictions. The Court of Appeals rejected this and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

APPENDIX J
FOURTH CIRCUIT OPINIONS IN CRIMINAL JUSTICE CASES BY SIX REAGAN AND BUSH APPOINTED JUDGES IN 1999

Justice Paul Niemeyer

Case: *United States v Franks*, 183 F.3d 335 (4th Cir. 1999).
Date: Jul. 12, 1999
Result: Franks appealed his sentence, arguing that the District Court erred in determining he made a death threat when he handed the bank teller a note that read: "You don't have to give me all your cash. No dye packs. I have a gun. I have nothing to lose." The Court of Appeals agreed with the District Court that Franks' note was sufficient to cause a reasonable person in the teller's position to fear for her life, and affirmed its judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Mikalajunas*, 186 F.3d 490, 493. (4th Cir. 1999).
Date: Jul. 21, 1999
Result: The United States appealed a decision of the District Court granting relief to Mikalajunas and Largent in the form of reductions in their sentences for second-degree murder. The Court of Appeals held that the District Court correctly determined that Mikalajunas' counsel was not constitutionally ineffective, but that the District Court incorrectly granted relief. Accordingly, the Court of Appeals reversed the decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Feurtado*, 191. F.3d 420, 425 (4th Cir. 1999).
Date: Sept. 3, 1999
Result: The defendants appealed the District Court's denial of their motions filed prior to their guilty pleas, including their motions to dismiss their indictments with prejudice based on prosecutorial misconduct. All of them also challenged their sentences as in violation of the plea agreement. Feurtado and Gerald Booker claimed a violation of the *Speedy Trial Act*. Finally, Glover asserted that the evidence did not support the District Court's finding of the amount of cocaine attributable to him. The Court of Appeals affirmed the judgement of the District Court on all issues except the sentences imposed in violation of the plea agreement, which it remanded to the District Court for either re-sentencing or withdrawal of the guilty pleas
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Richardson*
Date: Sept. 3, 1999
Result: Richardson challenged his convictions for conspiring to distribute cocaine and for possession of cocaine with the intent to distribute, contending that the government's testimony against him was improperly obtained from co-conspirators by offering them leniency, immunity, and promises not to prosecute other crimes, and that the testimony so obtained therefore should have been excluded. The Court of Appeals held that because 201(c)(2) did not apply to the government when acting in accordance with its statutory authority and because it reject Richardson's other assignments of error, it affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Pearce*, 191 F.3d. 488, 498 (4th Cir. 1999).
Date: Sept. 13, 1999
Result: At their sentencings, the government made a motion for a three level downward departure for both defendants based on their substantial assistance. The District Court disregarded the government's recommendation and, claiming a "rare instance" of "total discretion," departed downward 24 levels for Pearce and 20 levels for Chapman. The government appealed, claiming that the District Court abused its discretion by considering irrelevant

factors, by departing to an unreasonable extent, and by failing to provide an adequate statement of reasons. The Court of Appeals agreed reversing the decision and remanding it for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Morgan*, 193 F.3d 252, 258-59 (4th Cir. 1999).
Date: Sept. 21, 1999
Result: Morgan appealed from an order permitting Springfield medical personnel to forcibly treat him with anti-psychotic medication. The Court of Appeals held that Morgan might be entitled to relief from the administrative determination because Springfield medical personnel acceded to his request that a correctional officer serve as his staff representative in the proceeding. In so doing, Springfield medical personnel may have contravened their affirmative obligation to ensure that Morgan was assisted by a staff representative with sufficient education and experience to understand the psychiatric issues involved in the proceeding. Because the record on appeal provided no indication that the correctional officer in question had the requisite credentials, the Court of Appeals vacated the District Court's order and remanded the case for factual findings as to whether he had those credentials and, if not, whether Morgan suffered prejudice in the administrative proceeding as a result.
Verdict: For the defendant
Score: 0

Case: *United States v Mosley*, 200 F.3d 218 (4th Cir. 1999).
Date: Dec. 30, 1999
Result: The Court of Appeals held that the District Court was not required to use Mosley's suggested method in making its decision to impose a concurrent, partially concurrent, or consecutive sentence. The Court of Appeals affirmed Mosley's sentence.
Verdict: Found against defendant
Score: 1

Justice Clyde Hamilton

Case: *United States v Aramony*, 166 F.3d 655, 662 (4th Cir. 1999).
Date: Jan. 28, 1999
Result: The Court of Appeals affirmed the defendants' sentences in all respects except for the District Court's imposition of a $300,000 fine on Aramony and a $30,000 fine on Merlo. Accordingly, the Court of Appeals vacated the fine components of the District Court's respective judgments and remanded for reconsideration its decisions imposing fines on the defendants in accordance with its instructions.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Ward*, 171 F.3d 188, 195 (4th. Cir. 1999).
Date: Mar. 22, 1999
Result: Ward, Gibson, and Cox were indicted following a lengthy investigation by the FBI into a drug distribution enterprise headed by appellant Gibson's father. The appellants in this case raised a litany of issues which the Court of Appeals found no error and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Randall*, 171 F.3d 195, 210 (4th Cir. 1999).
Date: Apr. 5, 1999
Result: The Court of Appeals reversed Gerome and Jeron's convictions on their United States Code 924(c) violations under Count Six, vacate their respective sentences under Count Six, and remand for re-sentencing. The Court of Appeals affirmed the District Court's determination of the amount of crack attributable to Jeron.
Verdict: For the defendant (in part)
Score: 0.25

Case: *United States v Mitchell*
Date: May 20, 1999
Result: After a jury found Mitchell guilty of harbouring and concealing a fugitive, the District Court concluded that the Government had failed to prove that he had engaged in any affirmative act of harbouring and so granted his motion for a judgment of acquittal. Because the Government put forth evidence from which a rational jury could conclude that Mitchell committed an affirmative act of harbouring, the evidence was sufficient to support his conviction. Accordingly, the Court of Appeals reversed the judgment of acquittal and remanded for reinstatement of the verdict and entry of judgment against Mitchell.
Verdict: Found against defendant
Score: 1

Case: *United States v Harris*
Date: Jul. 12, 1999
Result: Harris could not establish either cause for his failure to raise his claim on direct appeal, or, in light of the Supreme Court's recent decision in *Muscarello v. United States*, that he was actually innocent of carrying a firearm. Accordingly, the District Court dismissed his 2255 motion as procedurally barred.
Verdict: Found against defendant
Score: 1

Case: *United States v Brugal*, 185 F.3d 205 (4th Cir. 1999).
Date: Jul. 19, 1999
Result: The government contended that the defendants' actions - i.e. exiting the interstate after apparently noticing drug checkpoint signs as well as other factors - gave the police officers reasonable suspicion to search the vehicle. The defendants argued that each of the factors upon which the government relied was in itself innocent and that the factors when taken together simply did not add up to reasonable suspicion. After reviewing the briefs and the record, the Court of Appeals concluded that the District Court's ruling suppressing the items turned up by the police in such a search was correct.
Verdict: Found against defendant
Score: 1

Case: *United States v Williams*
Date: Aug. 5, 1999
Result: Williams contends that the District Court erred in sentencing him in accordance with the provisions of the *Armed Career Criminal Act* (ACCA), and U.S. Sentencing Guidelines Manual 4B1.4 (1995) because he did not have the three necessary predicate offences. The Court of Appeals held that the District Court properly concluded that Williams had the three prior convictions required for treatment as an armed career criminal and accordingly affirmed its judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Huggins*, 191 F.3d 532, 536 (4th Cir. 1999).
Date: Sept. 15, 1999
Result: Citing alleged insufficiency and inaccuracy of the trial transcript, Huggins moved for a new trial. The District Court denied his motion. Huggins appealed the court's order, arguing that the trial transcripts were so deficient they fatally prejudiced his right to a meaningful appeal. Huggins also challenged the sufficiency of the evidence supporting his conviction and the court's decision to sentence him as a career offender. Finding no reversible error, the Court of Appeals affirmed the District Court's order of conviction and sentencing. It also affirmed the court's denial of Huggins' motion for a new trial.
Verdict: Found against defendant
Score: 1

Case: *United States v Gill*
Date: Oct. 20, 1999
Result: Gill was convicted of stealing or converting government money. She claimed that the government's evidence was insufficient to support her conviction. The Court disagreed. Because there was ample evidence from which a jury could conclude that Gill stole or

converted a "thing of value of the United States." The Court of Appeals in rejecting this, affirmed the conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Wilson*, 198 F.3d 467, 470 (4th Cir. 1999).
Date: Dec. 2, 1999
Result: On appeal, Wilson contended that: (1) the District Court erred in instructing the jury that the intent element of carjacking could be satisfied upon a finding of conditional intent; (2) there was insufficient evidence in the record to support his carjacking conviction; and (3) the District Court erred in sentencing him when it applied a two-level enhancement to his offence level for physical restraint of a person to facilitate commission of a carjacking. Because the Court of Appeals ruled that each of Wilson's contentions lacked merit, it affirmed the sentence of the District Court.
Verdict: Found against defendant
Score: 1

Justice Michael Luttig

Case: *United States v Aramony*, 166 F.3d 655, 662 (4th Cir. 1999).
Date: Jan 28, 1999
Result: The Court of Appeals affirmed the defendants' sentences in all respects except for the District Court's imposition of a $300,000 fine on Aramony and a $30,000 fine on Merlo. Accordingly, the Court of Appeals vacated the fine components of the District Court's respective judgments and remanded for reconsideration its decisions imposing fines on the defendants in accordance with its instructions.
Verdict: Found against defendant (in part)
Score: 0.75

Case: *United States v Ward*, 171 F.3d 188, 195 (4th. Cir. 1999).
Date: Mar. 22, 1999
Result: Ward, Gibson, and Cox were indicted following a lengthy investigation by the Federal Bureau of Investigation into a drug distribution enterprise headed by appellant Gibson's father. The appellants in this case raised a litany of issues in which the Court of Appeals found no error and affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v O'Neal*, 180 F.3d 115121-23. (4th Cir. 1999).
Date: Jun. 2, 1999
Result: O'Neal appealed his federal conviction for unlawful possession of a firearm and his enhanced sentence as an armed career criminal. He contended that the District Court should have granted him a new trial because of jury misconduct and that there were not three predicate convictions to support his enhanced sentence. In rejecting this, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Davis*
Date: Jul. 13, 1999
Result: Davis was charged in federal court, under the *Assimilative Crimes Act*, with failure to stop his car when signalled by a law-enforcement vehicle, in violation of South Carolina law, while on a military base within the special territorial jurisdiction of the United States. He pled guilty and was sentenced to nine years in prison under a provision of the South Carolina law which applies in cases in which "great bodily injury resulted." Because whether great bodily injury resulted was an offence element that was not charged in the indictment, the Court of Appeals vacated Davis's sentence and remanded it for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Armstrong*
Date: Jul. 15, 1999
Result: This case presents the question whether the exclusionary rule applied in federal supervised release revocation hearings. The Court of Appeals ruled that it did not.
Verdict: Found against defendant
Score: 1

Case: *United States v Helem*, 186 F.3d 449, 455 (1999).
Date: Jul. 28, 1999
Result: This case presented the question whether physical violence that occurs before interstate travel begins can satisfy the "in the course or as a result of that conduct" requirement of one of the provisions of the *Violence Against Women Act*. The Court of Appeals found no reversible error was committed and accordingly, Helem's conviction and sentence were affirmed.
Verdict: Found against defendant
Score: 1

Case: *United States v Pillow*, 191 F.3d 403, 406-07 (4th Cir. 1999).
Date: Sept. 7, 1999
Result: The Court of Appeals concluded that 3553(e) allowed for a departure from, not the removal of, a statutorily required minimum sentence. Thus, despite Pillow's contentions to the contrary, he remained subject to a statutorily required minimum sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Jones*
Date: Nov. 10, 1999
Result: Jones appealed from a District Court order denying his motion to dismiss his indictment. In rejecting this appeal the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Wilson*, 198 F.3d 467, 470 (4th Cir. 1999).
Date: Dec. 2, 1999
Result: On appeal, Wilson contended that: (1) the District Court erred in instructing the jury that the intent element of carjacking could be satisfied upon a finding of conditional intent; (2) there was insufficient evidence in the record to support his carjacking conviction; and (3) the District Court erred in sentencing him when it applied a two-level enhancement to his offence level for physical restraint of a person to facilitate commission of a carjacking. Because the Court of Appeals ruled that each of Wilson's contentions lacked merit, it affirmed the sentence of the District Court.
Verdict: Found against defendant
Score: 1

Justice Harvie Wilkinson

Case: *United States v Bostic*, 168 F.3d 718, 721 (4th Cir.1999).
Date: Feb. 17, 1999
Result: Bostic appealed his conviction and sentence. With respect to his conviction, Bostic challenged the District Court's denial of his motion to dismiss an indictment charging him with violations relating to the unlawful possession of a firearm by an individual subject to a domestic violence protective order. Bostic contends the domestic violence protective order in his case did not meet the requirements of Section 922(g)(8)(C). Bostic also raised several constitutional challenges against Section 922(g)(8). With respect to his sentence, Bostic objected to a four-level enhancement he received for use of a firearm in connection with another felony. Finding no merit in Bostic's claims, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Golding*, 168 F.3d 700, 702-04 (4th Cir. 1999).
Date: Feb. 17, 1999
Result: Golding appealed from both the judgment of conviction and the District Court's subsequent denial of his motion for downward departure at sentencing. The Court of Appeals agreed that the actions of the prosecutor were improper and prejudicial. Accordingly, it vacated Golding's conviction and remanded the case for a new trial.
Verdict: For the defendant
Score: 0

Case: *United States v Pitts*, 176 F.3d 239 (4th. Cir.1999).
Date: May 4, 1999
Result: Pitts pled guilty to one count of conspiracy to commit espionage and one count of attempted espionage. Pitts now challenges his sentence. He argued that the convictions for the two offences should have been grouped under the U.S. Sentencing Guidelines Manual. Next, Pitts argued that the District Court erred in departing upward for an extraordinary abuse of trust. Finally, Pitts urged that his post-arrest cooperation with the government warranted a downward departure from the Guidelines range. The Court of Appeals rejected this and affirmed the sentence of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Harris*
Date: Jul. 12, 1999
Result: Harris could not establish either cause for his failure to raise his claim on direct appeal, or, in light of the Supreme Court's recent decision in *Muscarello v. United States*, that he is actually innocent of carrying a firearm. Accordingly, the District Court correctly dismissed his 2255 motion as procedurally barred.
Verdict: Found against defendant
Score: 1

Case: *United States v Richardson*
Date: Sept. 3, 1999
Result: Richardson challenged his convictions for conspiring to distribute cocaine and for possession of cocaine with the intent to distribute, contending that the government's testimony against him was improperly obtained from co-conspirators by offering them leniency, immunity, and promises not to prosecute other crimes, and that the testimony so obtained therefore should have been excluded. The Court of Appeals held that because 201(c)(2) did not apply to the government when acting in accordance with its statutory authority and because it rejected Richardson's other assignments of error, it affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Gill*
Date: Oct. 20, 1999
Result: Gill was convicted of stealing or converting government money. She claimed that the government's evidence was insufficient to support her conviction. The Court disagreed. Because there was ample evidence from which a jury could conclude that Gill stole or converted a "thing of value of the United States." The Court of Appeals in rejecting this, affirmed the conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Turner*
Date: Dec. 2, 1999
Result: On appeal, Turner asserted two errors: first, he claimed that his trial was unfairly prejudiced when the District Court limited his lawyer's cross-examination of a key prosecution witness about her understanding of penalties she faced before she decided to cooperate; and second, he claimed that the District Court committed error in his sentencing by applying a two-point adjustment for his role in the offence. Finding no reversible error the Court of Appeals affirmed Turner's convictions and sentence.
Verdict: Found against defendant
Score: 1

Justice William Wilkins

Case: *United States v Williams*
Date: Mar. 11, 1999
Result: Williams' attempted to subpoena files from the Federal Bureau of Investigation ("FBI") in connection with his prosecution by the State of Maryland for murder, and the state court's subsequent issuance of a show cause order to the FBI for its refusal to comply with the subpoena. After the matter was removed to federal court, the District Court issued an order quashing the state court subpoena and show cause order. Because the state court lacked jurisdiction to compel the FBI to produce its files, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Mikalajunas*, 186 F.3d 490, 493. (4th Cir. 1999).
Date: Jul. 21, 1999
Result: The United States appealed a decision of the District Court granting relief to Mikalajunas and Largent in the form of reductions in their sentences for second-degree murder. The Court of Appeals held that the District Court correctly determined that Mikalajunas' counsel was not constitutionally ineffective, but that the District Court incorrectly granted relief. Accordingly, the Court of Appeals reversed the decision.
Verdict: Found against defendant
Score: 1

Case: *United States v Williams*
Date: Aug. 5, 1999
Result: Williams contends that the District Court erred in sentencing him in accordance with the provisions of the *Armed Career Criminal Act* (ACCA), and U.S. Sentencing Guidelines Manual 4B1.4 (1995) because he did not have the three necessary predicate offences. The Court of Appeals held that the District Court properly concluded that Williams had the three prior convictions required for treatment as an armed career criminal and accordingly affirmed its judgement.
Verdict: Found against defendant
Score: 1

Case: *United States v Pearce*, 191 F.3d. 488, 498 (4th Cir. 1999).
Date: Sept. 13, 1999
Result: At their sentencings, the government made a motion for a three level downward departure for both defendants based on their substantial assistance. The District Court disregarded the government's recommendation and, claiming a "rare instance" of "total discretion," departed downward 24 levels for Pearce and 20 levels for Chapman. The government appealed, claiming that the District Court abused its discretion by considering irrelevant factors, by departing to an unreasonable extent, and by failing to provide an adequate statement of reasons. The Court of Appeals agreed reversing the decision and remanding for re-sentencing.
Verdict: Found against defendant
Score: 1

Case: *United States v Morgan*, 193 F.3d 252, 258-59 (4th Cir. 1999).
Date: Sept. 21, 1999
Result: Morgan appealed from an order permitting Springfield medical personnel to forcibly treat him with anti-psychotic medication. The Court of Appeals held that Morgan might be entitled to relief from the administrative determination because Springfield medical personnel acceded to his request that a correctional officer serve as his staff representative in the proceeding. In so doing, Springfield medical personnel may have contravened their affirmative obligation to ensure that Morgan was assisted by a staff representative with sufficient education and experience to understand the psychiatric issues involved in the proceeding. Because the record on appeal provides no indication that the correctional officer in question had the requisite credentials, the Court of Appeals vacated the District Court's order and remanded the case for factual findings as to whether he had those credentials and, if not, whether Morgan suffered prejudice in the administrative proceeding as a result.

Verdict: For the defendant
Score: 0

Case: *United States v Midgett*, 198 F.3d 143 (4th Cir. 1999).
Date: Nov. 30, 1999
Result: Midgett entered a conditional guilty plea to possession of a firearm by a person previously committed to a mental institution, and was sentenced to thirty-three months imprisonment. He appealed, contending that his previous confinement was not the result of a "commitment." Rejecting this the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Justice Karen Williams

Case: *United States v O'Neal*, 180 F.3d 115121-23 (4th Cir. 1999).
Date: Jun. 2, 1999
Result: O'Neal appealed his federal conviction for unlawful possession of a firearm and his enhanced sentence as an armed career criminal. He contended that the District Court should have granted him a new trial because of jury misconduct and that there were not three predicate convictions to support his enhanced sentence. In rejecting this, the Court of Appeals affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Harris*,
Date: Jul. 12, 1999
Result: Harris could not establish either cause for his failure to raise his claim on direct appeal, or, in light of the Supreme Court's recent decision in *Muscarello v. United States*, that he was actually innocent of carrying a firearm. Accordingly, the District Court correctly dismissed his 2255 motion as procedurally barred.
Verdict: Found against defendant
Score: 1

Case: *United States v Pregent*, 191 F.3d 376 (4th Cir. 1999).
Date: Aug. 10, 1999
Result: The Court of Appeals held that the District Court did not abuse its discretion in denying Pregent's motion because the District Court properly considered both Pregent's conduct and the interest of justice before denying the motion on the basis of Pregent's conduct. Further, even if Pregent's motion were construed as one for habeas relief, the Court of Appeals determined that relief was not available to Pregent because the motion was not filed within the one-year statute of limitations. As a result, it affirmed the judgement of the District Court.
Verdict: Found against defendant
Score: 1

Case: *United States v Pillow*, 191 F.3d 403, 406-07 (4th Cir. 1999).
Date: Sept. 7, 1999
Result: The Court of Appeals concluded that 3553(e) allowed for a departure from, not the removal of, a statutorily required minimum sentence. Thus, despite Pillow's contentions to the contrary, he remained subject to a statutorily required minimum sentence.
Verdict: Found against defendant
Score: 1

Case: *United States v Huggins*, 191 F.3d 532, 536 (4th Cir. 1999).
Date: Sept. 15, 1999
Result: Citing alleged insufficiency and inaccuracy of the trial transcript, Huggins moved for a new trial. The District Court denied his motion. Huggins appealed the court's order, arguing that the trial transcripts were so deficient they fatally prejudiced his right to a meaningful appeal. Huggins also challenged the sufficiency of the evidence supporting his conviction and the court's decision to sentence him as a career offender. Finding no

reversible error, the Court of Appeals affirmed the District Court's order of conviction and sentencing. It also affirmed the court's denial of Huggins' motion for a new trial.
Verdict: Found against defendant
Score: 1

Case: *United States v Damon*, 191 F.3d 561, 564 (4th Cir. 1999).
Date: Sept. 17, 1999
Result: During Damon's hearing on the entry of his guilty plea, he told the District Court that he was under the influence of an antidepressant drug. The court did not make any inquiry about the drug's effect on Damon, but went on to accept his plea. Damon challenged the validity of his plea, arguing that the District Court had a duty to follow up on the drug ingestion issue in order to determine whether he was competent to plead. The Court of Appeals agreed but declined to order that Damon's guilty plea be vacated. Instead, it remanded for the District Court to determine (if it could) whether any drug taken by Damon had the capacity to impair his judgment sufficiently to render him incapable of entering a knowing and voluntary plea.
Verdict: Found against defendant
Score: 1

Case: *United States v Gill*
Date: Oct. 20, 1999
Result: Gill was convicted of stealing or converting government money. She claimed that the government's evidence was insufficient to support her conviction. The Court disagreed. Because there was ample evidence from which a jury could conclude that Gill stole or converted a "thing of value of the United States." The Court of Appeals in rejecting this, affirmed the conviction.
Verdict: Found against defendant
Score: 1

Case: *United States v Mosley*, 200 F.3d 218, 222-25 (4th Cir. 1999).
Date: Dec. 30, 1999
Result: The Court of Appeals held that the District Court was not required to use Mosley's suggested method in making its decision to impose a concurrent, partially concurrent, or consecutive sentence. The Court of Appeals affirmed Mosley's sentence.
Verdict: Found against defendant
Score: 1